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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

REPLY BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This brief is respectfully submitted in reply to the May 14, 2019 brief filed by the government ("Gov't. Br."). With respect to issues in the government's brief to which appellant does not reply, he respectfully relies upon the arguments set forth in his opening brief.

ARGUMENT

POINT I

THE SUGGESTIVE PROCEDURES UTILIZED TO SECURE SUFWAN MURAD'S IDENTIFICATION OF APPELLANT'S PHOTOGRAPH RESULTED IN A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

(Replying to Government's Brief, Point 2)

The government argues that Sufwan Murad's identification of appellant's photograph as depicting Abdullah al-Shami was not suggestive because, 1) Murad's home country interrogators' behavior was non-threatening and 2) he assisted in the creation of a computer sketch that preceded the photo identification. (Gov't Br. 32-33). [redacted]

Murad personally viewed the person he claimed was Abdullah al-Shami on only two occasions. Both occurred in 2009. During both alleged encounters Murad was at least 50 feet away and seated inside an automobile (A102-A103). Murad was never formally introduced to al-Shami and never heard the sound of his voice. (A180).

[redacted].

[redacted] During interrogations [redacted] n early 2011 he was shown additional pictures. On a date he could not recall, he was [redacted] shown G.Ex. 101-B. [redacted] he identified it as depicting al-Shami.[redacted]

[redacted]. [redacted]

> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted]

[1] [redacted]

The District Court based its denial of the motion to suppress on a determination that the viewing in the home country was not suggestive. (A45).

Where, as here, a factual finding is not based upon consideration of the entire record, it is clearly erroneous. *United States v. Ekwunoh*, 12 F.3d 368, 371 (2d Cir. 1993).

the circumstances of the identification in his home country were nonetheless suggestive. He acknowledged seeing Defendant's Exhibit 5 (A484), a black and while version of G.Ex.101-B on multiple occasions. Upon viewing it he told his home country authorities "I have not seen him before". (A162-63, referenced in Gov't Br. 27, n. 6).[2]

Murad's failure to make an identification when shown Defendant's Exhibit 5 is important because it shows that he was shown Defendant's Exhibit 5 before he made his purported identification of G.Ex. 101-B.

[2] As commercially scanned and photocopied in Appellant's Appendix, Defendant's Exhibit 5 (A484) and the other pictures of appellant (A483a, 483b and 483c) are far less clear than the originals introduced at trial. Those originals will be provided to the Court on request.

[redacted] Had he been shown Defendant's Exhibit 5 after making the identification on G.Ex. 101-B he surely would have recognized the latter exhibit as a slightly different version of G.Ex. 101-B. Thus, the inference is inescapable that Murad was shown a version of G.Ex. 101-B – and failed to make an identification – before he ever created the computer sketch and before he ever identified G.Ex. 101-B as al-Shami.

There was not an independent source for the identification. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The government faults appellant for not addressing the *Biggers* factors in his opening brief. (Gov't. Br. 34). However, it is well-settled that it is the government that bears the burden of proving an independent source. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). The government has failed to do so here.

Murad allegedly observed Al-Shami on two occasions. During both he sat inside a car while Al-Shami and Haji Mohammad spoke briefly some 15 meters, or nearly 50 feet, away. (A100-A103). There was no evidence that he had a full view of al-Shami's face. Murad never spoke with al-Shami and was not even close enough to him to hear his voice. (A180).

The government emphasizes Murad's prior description of al-Shami. (Gov't. Br. 28, 35-36). But that "description" primarily concerned hair color, hair length and skin tone. (A105-A106). There was no description of facial characteristics.

Indeed, Murad testified that the "main distinctive idea" about al-Shami was the fact that he appeared to live under better conditions than most (*Id.*). That, of course, has nothing to do with al-Shami's physical characteristics.[3] The sketch, Gov't Exhibit 100 does not, as the government asserts bear "remarkable" similarity to appellant, as asserted by the government. (Gov't. Br. 36). The eyes of the man depicted are quite different from appellant's eyes as depicted in his photographs. (Compare Gov't Ex. 100, A482 with G.Ex. 101-B, A483). [redacted] after he viewed Defendant's Exhibit 5, the black and white version of G.Ex. 101-B in his home country. Thus, any similarity between the sketch and G.Ex. 101-B does not establish an independent source for the identification.

Contrary to the government's argument, little weight should be accorded to Murad's self-serving assertion that he was 100% certain of his identification. (Gov't. Br. 36). Murad was not a disinterested civilian witness. He was a cooperator trying to curry the favor of two governments.[4] Moreover, in the over forty years since *Biggers*, advances in neuroscience have shown that witness *confidence* bears little if any relationship to witness *accuracy*. *See, e.g. People v.*

[3] Moreover, as stated in appellant's opening brief, Murad gave inconsistent descriptions of al-Shami (A105, T. 1365-67).

[4] To curry such favor, Murad had, in 2017, falsely claimed to have actually met al-Shami on five different occasions (T. 1367).

LeGrand, 747 N.Y.S.2d 773 (2007). Finally Murad's claim of "certainty" must be viewed in light of his failure to identify Defendant's Exhibit 5 (A484), a black and white version of G.Ex. 101-B as al-Shami and his failure to identify four other photographs of appellant as the man he allegedly knew as al-Shami.

The final *Biggers* factor, the length of time between the "crime" and the confrontation, weighs heavily in appellant's favor. [redacted] Thus, there was at least a one-year delay between his purported viewing of al-Shami and the photo identification. In *Neil v. Biggers, supra*., the Court described a seven-month delay as a "seriously negative factor". Contrary to the cases cited by the government, the other *Biggers* factors do not outweigh the "seriously negative" effect the lengthy time gap between the "contact" with al-Shami and the photo identification.

For the reasons argued in appellant's opening brief, admission of Murad's identification testimony was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Accordingly, this Court should vacate the judgment of the lower court and remand this case for a new trial.

POINT II

THE COURT'S EVIDENTIARY RULINGS DENIED APPELLANT A FAIR TRIAL.

(Replying to Government Brief, Point 3)

I. Statements Of Maiwand Yar and Ferid Imam

(Replying To Government's Brief, Point 3, Subd. I

The 2007 email from Ferid Imam to his family (G.Ex. 822, A485), the undated letter allegedly from Maiwand to his family (G.Ex. 1201, A486)[5] and the 2009 letter from Maiwand Yar to his family (G.Ex. 1202, A487), were each entirely inadmissible on both relevance and hearsay grounds.

1. Statements Not Admitted For Their Truth

The government does not dispute that appellant al-Farekh had no knowledge of the written statements sent by Yar and Imam to their respective families. And the government has not cited a single case supporting admission of state of mind evidence under the circumstances presented herein, i.e. where a statement evidencing a declarant's state of mind is used to establish a third person's state of mind where the third person was unaware of the statement. Thus, while the statements arguably evidenced Yar's and Imam's states of mind they were not probative of appellant Muhanad Al-Farekh's state of mind.

[5] In appellant's opening brief G.Ex. 1201 was mistakenly identified as an email.

Admission of Yar's nine-page letter was particularly egregious. The letter was drafted in 2009 (A487-A496). The last known contact between Yar and appellant Al-Farekh was two years earlier, in March 2007. (T. 618, 688). There was no evidence that the sentiments expressed by Yar in 2009 were probative of appellant's state of mind in March 2007.

The government asserts for the first time on this appeal that the state of mind evidence was relevant to show appellant's liability under a *Pinkerton* theory.[6] (Gov't Br. 44). That argument fails. There was no evidence that appellant Al-Farekh provided material support to terrorists by furnishing either Yar or Imam to them. According to the government itself, Yar and Imam were self-motivated. They willingly left the United States with the intent of engaging in *jihad*. Appellant Al-Farekh had no role in that decision.

Contrary to the government's argument, admission of the foregoing was not harmless. In its summation, the government emphasized that Yar's 2009 letter "[was] reflective of Muhanad Al-Farekh's mindset when he left Canada in 2007 to travel to Pakistan." (T. 1432). That same argument was repeated during rebuttal when the government argued that the 2009 letter "unambiguous[ly] showed that all three young men left Canada with the intent to engage in *jihad*." (T. 1553).

[6] *Pinkerton v. United States*, 328 U.S. 640 (1946).

2. Statements Admitted for Their Truth

The Government argues that Yar's typed letter and handwritten letter were admissible as either statements against interest or as non-hearsay co-conspirator statements. (Gov't Br. 45-49).[7] The statements fall within neither rule.

a. Purported Statements Against Interest

Under Fed.R.Evid. 804(b)(3) the proffered statement must be sufficiently self-inculpatory to cause a reasonable person in the declarant's shoes to perceive the statement as detrimental to his or her own interest. *United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014). None of Yar's statements satisfied that rule.

Yar's requested that his family pay his debts. (G.Ex. 1201, A486). According to the government that request was against Yar's penal interest because it reflected Yar's intent to risk death by engaging in violence (Gov't Br. 45, citing GA 66-67). That theory, however, was debunked by the government's own witness. Evan Kohlmann testified that according Anwar Al-Awlaki when an individual decides to engage in violent *jihad* "you don't need to get permission from anyone you owe money to. You don't need permission at all." (A383). Thus, if, as the government maintains, Yar was intending to join the *jihad* there was no reason for him to pay off his debts. Indeed, that Yar requested that his

[7] None of Ferid Imam's statements were admitted for their truth.

college tuition be paid is consistent with Ahmed Yar's interpretation of the letter. In his opinion the request evidenced Yar's intent to return to Canada and continue his education:

> Q. You thought by Maiwand asking you to pay off the debts, it meant he wanted to have clear credit?
>
> A. True.
>
> Q. So that when he went back to Canada, he wouldn't have to pay bills?
>
> A. Right.
>
> …
>
> Q. You did not interpret this language [about debts] as meaning that Maiwand was now preparing to die in *jihad*?
>
> A. Right.

(T. 682-683).

That Yar's letter purportedly had a "fatalistic" tone and beseeched his family to pray for him is immaterial. Such a statement would not cause a reasonable person to perceive that those assertions were against his penal interest. *United States v. Gupta*, 747 F.3d at 127.

Contrary to the government's argument, (Gov't. Br. 46, n.13) *United States v. Vegas*, 27 F.3d 773 (2d Cir. 1994) is directly on point. The issue does not turn on whether the declarant is seeking to exculpate anyone. The issue is whether the

statement, when viewed in context, was against the declarant's interest. Yar's musings on the plight of the poor and his stated intention to help them were simply not against his penal interest. It is for that reason that they were inadmissible under the rule.

b. Purported Co-Conspirator Statements

None of the statements contained in Yar's 2009 nine-page letter to his family were admissible under the co-conspirator rule. Statements made to individuals who are not members of the conspiracy are admissible only if they are 1) "factually intertwined" with the charged offenses, *United States v. Stratton*, 779 F.2d 820, 829 (2d Cir. 1985) or 2) designed to help the conspiracy's goals. *United States v. Rivera*, 22 F.3d 430, 436 (2d Cir. 1994).

The government argues that Yar's request that his family satisfy his debts furthered to conspiracy's goals. But as pointed out *supra*., there is no requirement that a Muslim re-pay debts prior to engaging in *jihad* (A383). If anything repayment of Yar's student loan evidenced his intention to return to Canada debt-free (A682-A683).

The government asserts that a "key part" of the alleged conspiracy "was setting an example for others to follow…". (Gov't. Br. p. 49). But the government cites to no evidence that any of the alleged co-conspirators sought to set an example that would lead others to engage in violent *jihad*.

In the nine-page letter Yar lectured his family on what he believed was the proper way to practice Islam. For example, he suggested that the family move to Pakistan and live amongst Muslims. But Yar never suggested, by implication or otherwise, that members of his family engage in violent *jihad*. Indeed, it was his hope that should the family move to Pakistan, he could see them from time to time. (A495).

To the extent that the letter recounted Yar's experiences and ideas they constituted a narrative and were not designed to further the conspiracy's goals. *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964)(a narrative made to a non-co-conspirator does not meet the "in furtherance" requirement).

Admission of the foregoing statements was not harmless (Gov't Br. 50). The government emphasized the statements in summation asserting that the sentiments expressed were appellant's (T. 1431-32, 1553). As argued *supra*., and in appellant's opening brief, the evidence against appellant was not overwhelming. The fingerprint evidence was challenged on chain-of custody grounds and on the ground that the identification itself was not reliable. Murad's identification of appellant's photograph was also not reliable.

Contrary to the government's argument, nothing showed that appellant "embrac[ed] and promot[ed] jihadist propaganda." (Gov't Br. p. 50). As discussed in more detail *infra*., the links to the lectures of al-Awlaki were not sent

to appellant. Rather, they were exchanges between Imam and Yar. The emails appellant sent to his family were unremarkable. On March 12, 2007 appellant wrote that he was looking into universities to attend (A553). Assuming *arguendo* that the May 28, 2007 email (A554) was written by appellant, he simply apologized for not being in touch and expressed hope that his brother was assuming more family responsibilities. There is no discussion of *jihad* at all. While appellant told his father how he might obtain al-Awlaki's lectures, there is no evidence that he agreed with let alone "embraced" the teachings in them. (A551). Appellant's 20 second viewing of "Lee's Life of Lies" does not show that he "embraced" or even supported what was depicted in that hour long video. Given the foregoing, admission of Yar's and Imam's statements denied appellant a fair trial.

II. The Handwritten Letters Were Not Properly Authenticated
(Replying to Gov't Br., Point 3(II)

On September 4, 2015 a USB drive was placed in the hands of former FBI Agent John Dalziel as he stood outside the FBI's Legal Attache Office in Kabul, Afghanistan. Among other data retrieved from the drive were JPEG files containing handwritten letters. The government maintains that those letters were written by appellant.

At trial the government presented no evidence concerning the circumstances of the USB drive's creation or discovery or even the identity of the person who gave it to Dalziel. Notwithstanding the foregoing, the lower court overruled appellant's authenticity objection.

On this appeal, the government argues that the letters were sufficiently authenticated because 1) the letters were signed with the name "Abdullah al-Shami" and Murad identified a photograph of appellant as al-Shami 2) the letters evidenced a concern for security, a purported behavioral characteristic of the person Murad claimed was al-Shami and 3) there were similarities between appellant's known writing and the writing on the letters. (Gov't. Br.52 52). None of the foreign provided the authentication required by Fed.R.Evid. 901(b)(4).

As discussed *supra*., Murad's photo identification, even if admissible, was highly unreliable. Murad briefly viewed al-Shami twice. On both occasions Murad was sitting in an automobile. Al-Shami stood 50 feet away. (A101-A103, A170-A171). His photo identification was made at least one year later. The reliability of that identification was further undercut by the fact that Murad was shown at least four other photographs of appellant and failed to make an identification. (A101, A115, A157, A159-A160, A161).

That the author of the letters expresses concerns about security and al-Shami was allegedly security conscious means nothing. Murad admitted that he never

spoke with al-Shami (A180). Thus, there is no factual basis for his assertion. In any event, there is nothing unusual about persons in a war zone being security conscious. Murad himself was working as the security for Haji Mohammed. (A89,A103). Murad was aware of at least two other people in al-Qaeda named Abdullah al-Shami. Either of them, or others using that same *kunya*, could have authored the letters. Indeed, one of the two additional al-Shamis was Syrian and worked in external operations. (A253). One of the letters states that its author came from the "Abu Bakr Battalion" (T.920). But Murad testified that he told American authorities that the man he claimed was al-Shami was not part of any brigade (A200).

The government's handwriting expert did not opine that the handwriting on the subject letters was appellant's. He stated that appellant "may have" written the non-obliterated English writing on some of the letters. (G.Ex. 702-719, T. 974).

United States v. Al-Moayad, 545 F.3d 139, 173 (2d Cir. 2008), relied upon by the government, is distinguishable. In *Al-Moayad*, there was evidence that the subject mujahideen form was seized by American personnel from an *al-Qaeda* training facility. *Id*. Here there was no evidence whatsoever describing when or where or under what circumstances the flash drive was created or how it came to be in the possession of non-American authorities. The primary purpose of the authentication requirement "in to convince the court that it is improbable that the

original item has been exchanged with another or otherwise tampered with." *United States v. Grant*, 967 F.2d 81, 83 (2d Cir. 1992) quoting *United States v. Howard-Arias,* 679 F.2d 363, 366 (4th Cir. 1982). Here, where there is no evidence describing the circumstances under which the USB drive was created or how it came into the possession of United States' officials, the District Court erred when it found that it was properly authenticated.

III. Professor Vidino's Opinion Evidence Was Inadmissible

(Replying to Government's Brief Point 3 (III)

Professor Lorenzo Vidino opined that there are no variables which would make a person more or less susceptible to becoming radicalized. Professor Vidino was permitted to offer that sweeping opinion notwithstanding that 1) there is no generally accepted definition of the term "radicalization", (A275, A280), (2) his opinion was unsupported by empirical data (A280-A281) and 3) there is no generally accepted method for scientifically reaching that conclusion. (A288).

The government argues that Dr. Vidino's opinion was admissible because he has studied terrorism for many years and written numerous journal articles on the subject (Gov't. Br. 63). But credentials alone do not satisfy Fed.R.Evid. 702. *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). The opinion still must be supported by sufficient data. Glaringly absent from the government's

brief – and Dr. Vidino's *Daubert* hearing testimony - is the data upon which he relied in reaching the opinion he rendered in this case.

Vidino admitted that he did not utilize the scientific method. (A280-A281). He did not set up control groups. And while he acknowledged an error rate he could not quantify it. (A281, A 286).

The only arguable basis for Dr. Vidino's opinion was his claim that he had interviewed 30 *jihadists*. (A285). But the record is bereft of any facts learned from those *jihadists* that would support his opinion. Indeed, there is not even evidence of the questions he posed to these individuals. For example, what were their backgrounds?

Compounding the error was Vidino's admission that there is no accepted definition of the term "radicalization". (A280). Clearly, if there is no accepted definition of who is and who is not a "radical" how can Dr. Vidino come up with an opinion about who is and who is not susceptible to becoming a radical?

The District Court acknowledged some of the foregoing but observed that opinion testimony in the social science realm does not often lend itself to the methodologies present in "hard science". (A292-A293). In this case, however, Vidino was asked to offer an opinion that came very close to hard science, i.e. whether there existed variables, to wit "facts" that would make someone more or less susceptible to becoming radicalized.

The lower court noted that Dr. Vidino's work has been peer reviewed and that he himself has reviewed the work of colleagues in the same field. (A300-A301). But there was no evidence that Vidino's hypothesis about a "terrorist profile" has been peer reviewed, let alone been accepted in the scientific community.

United States v. Farhane, 634 F.3d 127 (2d Cir. 2011), relied upon by the government, is inapposite. In that case, the proffered expert was called to testify generally about Al-Qaeda, including its origins and structure, training camps and specific acts of terrorism attributed to it. The proffered expert had collected data on Al-Qaeda and made a study of that organization's actions. Here Dr. Vidino was called to offer a very specific opinion: whether someone's background is a variable that might lead to radicalization. Contrary to *Farhane* there is no evidence that Dr. Vidino adduced the facts that would support his rendering such an opinion.

Quoting the lower court, the government argues that Vidino's testimony would assist the trier of fact because a jury might "struggle enormously" when presented with evidence that did not mesh with preconceived ideas (Gov't. Br., 62-63). But jurors "struggle" with issues every day. Among the tasks they undertake are credibility determinations, assigning weight to various categories of evidence and applying the law to the facts. That a juror might struggle is not a basis for admitting opinion evidence.

IV. The Lower Court Abused Its Discretion When It Admitted Lectures and Videos and Evan Kohlmann's Summaries of Them

(Replying to Government's Brief, Point 3, V

The government asserts that the lower court's admission of several lectures by the deceased cleric Anwar al-Awlaki and Evan Kohlmann's testimony summarizing them "was highly probative and properly admitted." (Gov't Br. 69). With two possible exceptions discussed *infra*., the lectures and summaries were irrelevant because there was no evidence that appellant listened to and/or viewed them. Their only purpose was to inflame the jury against appellant.

The government asserts that beginning in 2006 appellant, purported co-conspirators Maiwand Yar and Ferid Imam , ""began viewing and exchanging radical jihadist videos and other online content." (Gov't Br. 6). That is not true. The emails containing the al-Awlaki lectures, admitted as G.Ex. 804 and 806, were exchanged between Ferid Imam and Maiwand Yar. Appellant Al-Farekh was not a recipient (A546, A 548).[8] G.Ex. 805 (A547) is an email from Imam to several people including appellant. It contains a link to an Al-Awlaki lecture that is by no means "radical". According to Evan Kohlmann, the lecture is "a description of the various different rituals [in Ramadan], meals and prayers that are associated with the holiday and that are incumbent upon faithful Muslims to perform."

[8] On page 71 of its brief the government quotes from A548 noting that the sender, Yar, states "the lectures we listened to at Omar's place by Anwar Awlaki." The government fails to mention that appellant was not a recipient of that email.

On March 16, 2006, Imam sent an email to nearly a dozen people, including appellant. It contains a link from which one could retrieve the Al-Awlaki lecture "It's a War Against Islam". There is no evidence that appellant Al-Farekh downloaded and/or listened to that lecture. In any event, it too, was not a "radical" lecture. As summarized by Kohlmann, in that lecture Al-Awlaki expressed the not uncommon view that U.S. law enforcement raids on 16 Islamic Centers in the Eastern United States could not be justified as legitimate law enforcement. (A357). Kohlmann pointed to nothing in the lecture that could be construed as promoting violence or illegality (*Id*.). The same can be said for "The Hereafter" the lecture that the government maintains appellant recommended to his father. According to Kohlmann the 22-hour lecture is about "the day of judgment talking about things like hellfire, and paradise and things like that…"(A366). It was not an invitation to engage in *jihad*.

The government states that during the 2016 hajj trip, witness Soufi overheard appellant, Yar and Imam discussing one of al-Awlaki's lectures. According to Soufi appellant expressed "a mixture of excitement and being inquisitive" (Gov't. Br. 6, 71). But the specific lecture, or the portion thereof, is not identified. Moreover, on-cross examination, Soufi retreated from that claim. He admitted that while he might have heard appellant discuss al-Awlaki's ideas he never observed appellant viewing any of al-Awlaki's lectures (T. 560, 569, 575).

Indeed, when questioned by the FBI in 2016, Soufi never stated that appellant listened to or viewed any of al-Awlaki's lectures. (T. 1363).

"Constants on the Path of Jihad", arguably the most radical lecture summarized by Kohlmann, was retrieved from a link provided by Maiwand Yar to Ferid Imam. Once again,, appellant Al-Farekh was not a recipient of that email. (G.Ex. 804; A546). Nevertheless the lecture itself was separately admitted, also over objection, G.Ex. 1011. In testimony that no doubt prejudiced appellant, Kohlmann opined that according to al-Awlaki, a Muslim is "obliged" to engage in violent *jihad* even in the absence of a command or a particular location (A376). Two excerpts from that lecture were later played for the jury.

The government maintains that the "purpose of admitting summaries of [al-Awlaki's] lectures was to prove that Al-Farekh shared the sentiments expressed in the lectures." (Gov't Br. 74). But if there was no proof that appellant al-Farekh listened to or viewed any of al-Awlaki's lectures about *jihad*, there is no basis to conclude he agreed with them. *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994). (An inference cannot be based upon speculation or surmise). In any event, one does not agree with everything that one reads, listens to, or even recommends to others.

Appellant's alleged viewing of a few seconds of the video "Lee's Life of Lies" must be viewed in context. Appellant is initially seen at a computer where

he apparently had just viewed a comic video. The video then cuts to a male cooking. Appellant calls one man to the computer. When the opening credits to "Lee's Life of Lies" appears, appellant states in substance "watch this" to which his friend say words to the effect of "oh you're going to jail." Both laugh and the screen is turned off.

There is no evidence that appellant watched the nearly hour-long video. Thus, contrary to the government's argument the video was not probative of anything. Yet it was severely prejudicial. The government closed its case with a summary of a lecture calling for violent *jihad* (Constants on the Path of Jihad) and a video showing United States service personnel killed in action. The Court permitted the prosecution to do this notwithstanding that there was no evidence that appellant listed to and/or subscribed to the views expressed. This Court should reverse the judgment of conviction and order a new trial.

V. Whether Considered Separately or Cumulatively, the Evidentiary Errors Cannot Be Deemed Harmless.

For the reasons stated *supra*., and in appellant's opening brief, the evidentiary errors cannot be deemed harmless under *Kotteakos v. United States*, 328 U.S. 750 (1946).[9] However, should this Court find that the errors, when

[9] As argued in appellant's opening brief the introduction of Sufwan Murad's identification testimony (Appellant's Brief, Point II, preclusion of the Mayfield fingerprint report (Appellant's Brief, Point V) [redacted] (Appellant's Brief , Point VIII) were of

considered individually, do not warrant reversal under either *Kotteakos* or *Chapman*, the judgment should nonetheless be reversed.

"The cumulative effect of a trial court's errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction." *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008) citing *Taylor v. Kentucky*, 436 U.S. 487, n.15 (1978). *See also United States v. Gugielmini*, 384 F.2d 602, 607 (2d Cir. 1967) (holding that "the total effect of the errors we have found was to cast such a serious doubt on the fairness of the trial that the convictions must be reversed."). That is the case here as the cumulative effect of evidentiary and other errors deprived appellant Al-Farekh a fair trial. Virtually every part of the government's case against him is infected with error – the fingerprint and DNA hair evidence, Murad's identification testimony, the purported co-conspirator evidence and the admission of the inflammatory lectures and videos. This Court should reverse the judgment of conviction and order a new trial.

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constitutional dimension and evaluated under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967).

POINT III

APPELLANT WAS DENIED A FAIR AND IMPARTIAL JURY WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION FOR A MISTRIAL.

(Replying to Gov't Brief, Point 4)

Juror Number 4, the subject of appellant's mistrial motion, knew that there had been inappropriate contact between appellant's father and fellow Jurors 2, 3, 11 and 12. Those jurors told the court that appellant's father made statements from which it could be inferred that he had not seen his son, appellant Muhanad Al-Farekh in nearly ten years. Those statements dovetailed with the government's theory of the case, i.e. that appellant left Canada in March 2007 intending to engage in *jihad* and by late 2007, had cut off all contact with his family.

In its brief, the government suggests that Juror 4 was not involved at all and was instead referring to an earlier, contact involving only Juror 12 (Gov't. Br. 93-94). The government's claim, raised for the first time on appeal, is a red herring. At trial, the prosecution did not question the fact that Juror 4 was referring to the elevator ride taken by appellant's father and the four jurors listed above. When opposing appellant's mistrial motion the government argued

> I think the record is clear that Juror Number 4 had a contact, to the extent he has some kind of vague sense that there may have been some kind of contact…

(A439). Nor did the Court question that Juror Number 4 was referencing the contact involving the four jurors. It denied the mistrial motion on the ground that any prejudice was "speculative". (A439). This Court should not re-visit the issue.

Citing *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011) and *Remmer v. United States*, 347 U.S. 227 (1954), the government acknowledges that there is a presumption of prejudice when a juror is exposed to extra-judicial evidence, (Gov't. Br. 91). But relying on *United States v. Cox*, 324 F.3d 77 (2d Cir. 2003) they argue that a mistrial can be granted "only when the court finds actual prejudice to the defendant." (Gov't. Br., 92, citing *Cox* at 86). That is not the law. *Cox* involved a claim that jurors engaged in premature deliberations. It did not involve allegation that the jury was exposed to extra-judicial evidence. In the latter situation, the presumption of prejudice required by *Remmer* and *Farhane* applies.

The *Remmer* presumption can be rebutted only upon a showing that the extra-judicial contact was harmless. *Farhane*, 634 F.3d at 168-69. That is not the case here. Appellant's father told the four jurors that he had not seen his son, appellant Muhanad Al-Farekh in ten years. As stated *supra*., that statement corroborated the government's theory in the case. While Juror Number 4 was not present when that statement was made, at least one juror told him that there had been an inappropriate contact. He then saw that all four jurors with whom there

had been contact were excused. This had to have an effect on his ability to render a fair and impartial verdict.

Juror 4's assertion that he could be fair was insufficient to rebut the *Remmer* presumption. After all, Jurors 2, 3, 11 and 12, who were in the elevator also said that they could be fair and they were nonetheless excused, albeit on consent.

The cases cited by the government do not compel a different finding. *Romance v. Brandt*, 391 Fed.Appx. 89, 91 (2d Cir. 2010) and *Sher v. Stoughton*, 666 F.2d 791, 794-95 (2d Cir. 1981) were proceedings pursuant to 28 U.S.C. § 2254 where this Court gave deference to the findings of the state court. That deference does not apply here. In *United States v. Hilliard*, 701 F.2d 1052, 1054 (2d Cir. 1983), the extrajudicial evidence was deemed harmless as it had nothing to do with the facts of the case. Here, the statements were inextricably linked to the government's proof.

The District Court's refusal to declare a mistrial was an abuse of discretion. This Court should reverse the judgment of conviction and order a new trial.

CONCLUSION

WHEREFORE, for all the foregoing reasons this Court should issue an order vacating the judgment and remanding for a new trial or, alternatively for a *de novo* resentencing.

Dated: June 24, 2019

Respectfully submitted,

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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 in compliance with this Court's length requirements in that it is 5862 words as calculated by Microsoft Word

/s/ Robert J. Boyle
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