No. 11-30342

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PIROUZ SEDAGHATY,

Defendant-Appellant.

Appeal from the United States District Court

for the District of Oregon

APPELLANT'S OPENING BRIEF

Steven T. Wax
Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Lawrence Matasar
621 SW Morrison Street
Suite 1025
Portland, Oregon 97205
(503) 222-9830

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

DOCKETED CASES

FEDERAL STATUTES AND RULES

UNITED STATES SENTENCING GUIDELINES

STATEMENT OF JURISDICTION

The district court entered its judgment imposing sentence in this criminal case on November 22, 2011. ER[1]-Vol.1@8-14. This judgment was then amended on November 30, 2011. ER-Vol.1@1-7. Mr. Seda timely filed his notice of appeal on December 1, 2011, within the fourteen days required by Rule 4(b) of the Federal Rules of Appellate Procedure. ER-Vol.2@399. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291.

---

[1] "CR" refers to the Clerk's Record; "ER" refers to the Excerpts of Record, immediately followed by volume number and page number(s);"SER" refers to the Sealed Excerpts of Record; and "COA DKT" refers to this Court's docket in this case; "CER" refers to the Classified Excerpts of Record. Pursuant to discussion with the court security officer, the CER is referred to in this unclassified brief but no classified information is included. Appellant is referred as Mr. Seda or Pete Seda, his Americanized name.

STATEMENT OF ISSUES

1. Whether the government's violation of its discovery obligations by failing to disclose payments and an offer of payment to a key witness requires a new trial;

2. Whether the government's appeals to religious and racial prejudices and use of inflammatory evidence of guilt by association and the preclusion of exhibits that would have countered the government's presentation deprived Mr. Seda of a fair trial;

3. Whether the government's argument that it had followed the "money trail" coupled with rulings precluding Mr. Seda from rebutting that allegation deprived Mr. Seda of a fair trial;

4. Whether much of the government's evidence was the product of computer searches and seizures that exceeded the scope of the magistrate judge's explicit limitation of seizures to financial documents in violation of the Fourth Amendment;

5. Whether the district court's handling of classified matters deprived Mr. Seda of due process and the effective assistance of counsel; and

6. Whether the district court incorrectly calculated the advisory guidelines.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the judgment reflecting the conviction and sentencing following a jury trial before the Honorable Michael R. Hogan, United States District Judge for the District of Oregon, at which Mr. Seda was found guilty of conspiring to defraud the United States and filing a false tax return in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7206(1). ER-Vol.1@1-14.

Course of Proceedings

On February 17, 2005, the government filed an indictment charging Mr. Seda, Soliman al-Buthe, and the Al-Haramain Islamic Foundation, Inc.[2] in count one for conspiracy to defraud the United States by filing a false tax return and by failing to report currency and in count two for filing a false tax return. CR 1. The government filed a redacted indictment on September 21, 2005, reflecting dismissal of Al-Haramain as a party. ER-Vol.14@3636.

On August 15, 2007, Mr. Seda voluntarily returned to the United States to face the charges. CR 24. He was initially detained but, after multiple pleadings and hearings, was released on conditions on November 30, 2007 (CR 28, 29, 31,

[2] Al-Haramain Ashland is hereafter referred to as AHIF-A; Al-Haramain Saudi Arabia as AHIF-S.

33, 37, 38, 39, 40, 42, 44, 47, 63, 64, 65, 66, 67). Mr. al-Buthe, who resides in Saudi Arabia, never appeared.

Litigation in this case was voluminous, with more than 600 docket entries over a four year period. This Course of Proceedings sets out those parts of the record pertinent to this appeal.

Discovery was litigated throughout the case. Of most relevance are the pleadings addressing classified information. CR 53, 90, 93, 99, 102; ER-Vol.1A@395; CR 235, 365, 565-66; ER-Vol.1@231. The case included six government filings under the Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA). ER-Vol.13@3565,3610-15; ER-Vol.12@3328-29,3332-33,3147-50; *see generally* ER-Vol.2@428-37.

The court held at least eight ex parte proceedings with the government. CR 217, 218; ER-Vol.12@3330-31; ER-Vol.2@436-37; CER@51-52. Through the litigation in this Court regarding a motion to complete the record, the government revealed that there was another proceeding on March 17, 2009, in Washington, D.C. COA DKT 24-2. This was likely another ex parte proceeding.

The trial court denied all defense requests to participate in the CIPA process other than permitting the filing of an ex parte submission on the defense theory. CR 134, 135, 126, 127, 138, 144, 145; ER-Vol.13@3497-3505; CER@54-98 (CR

154-defense submission); CR 164, 172, 173, 174; ER-Vol.1A@369; CR 224. The court ordered the government to turn over only two pieces of classified information, one as a non-classified summary. ER-Vol.1A@393[3],309[4],286.

In addition to the government's CIPA filings, Mr. Seda filed three CIPA notices. CR 194; ER-Vol.13@3445-46; ER-Vol.12@3334-35;3173-82. These related to material the defense had caused to be placed in a government Secure Classified Information Facility (SCIF). ER-Vol.1A@398; *see also* ER-Vol.14@3622. This material was the subject of a court order that prohibited, and continues to prohibit, the defense from using or discussing the content of the material in any way, including in pleadings and with each other. CR 103; ER-Vol.1A@398. Mr. Seda sought reconsideration of that order at least six times without success, including through mandamus in this Court. CR 105, 106; ER-Vol.1A@397,377,372; CR 135, 136; ER-Vol.13@3461,3480; CR 164 at fn 1; CR 365; ER-Vol.1A@368,350-51,332; ER-Vol.1@56. *In re Pirouz Sedaghaty*, No. 09-73924 Dkt. Entry 1-3 (9th Cir. Dec. 14, 2009); *see generally* ER-Vol.2@428-37.

---

[3] Unclassified Summary found at ER-Vol.5@1299.

[4] *See* CER@12.

Mr. Seda moved to suppress the fruits of a search conducted at the AHIF-A Prayer House in February, 2004. The government opposed the motion, resulting in further pleadings and two evidentiary hearings. CR 181, 182, 183, 192, 196; ER-Vol.12@3336-38; ER-Vol.13@3339-44; CR 205, 213, 225, 228, 230, 231, 234, 235, 242, 246, 282, 284, 302, 310, 311; ER-Vol.12@3192-3241,3185-91; CR 317, 365, 565. The court denied the motion to suppress. ER-Vol.1A@285.

Mr. Seda sought, and was denied, two bills of particulars, one seeking specification of the alleged mistakes in the tax return. CR 201, 250, 374; ER-Vol.1A@332,336; ER-Vol.1@251.

The government utilized its diplomatic and legal resources to obtain evidence from Saudi Arabia, Egypt, and Russia. *See, e.g.,* ER-Vol.12@3116; ER-Vol.4@1086; ER-Vol.12@3320. The government refused Mr. Seda's requests to utilize its resources to assist him in obtaining evidence from the same countries. Mr. Seda sought on multiple occasions to have the court order the government to do so or issue Letters Rogatory. The court granted only one such request. CR 238, 244, 245, 247; ER-Vol.2@428-37; ER-Vol.12@3294-3315; CR 251; ER-Vol.1A@348; CR 262, 267; ER-Vol.12@3249-53,3276-81; CR 271, 272, 274; ER-Vol.1@258-61,257; CR 287.

As trial approached, Mr. Seda filed a number of motions addressed to voir dire, including a request for a questionnaire and proposed voir dire questions that included substantial sections on religion and prejudice, increased peremptory challenges, and attorney participation in voir dire. CR 367-372, 376. The court granted two additional peremptory challenges for each party but denied the questionnaire and Mr. Seda's proposed questions, asking the prospective jurors only one question about religion. ER-Vol.1@250;Vol.5@1334. During the voir dire, the court denied several challenges for cause. ER-Vol.1@130.

Both parties filed challenges to the other's experts under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). CR 329, 344, 363, 375, 381, 393. An evidentiary hearing at which the experts testified was held. CR 380; CER@33-52. The court's ruling purported to limit the scope of the government's expert's testimony. ER-Vol.1@238.

Both parties filed challenges to many of the exhibits proposed by the other side. CR 334, 335, 336, 341, 343, 348, 361, 365, 377, 385, 390, 397, 398, 401, 402, 403, 412, 415, 417. After extensive briefing and argument, the court ruled, allowing nearly all of the government exhibits and limiting Mr. Seda. ER-Vol.1@255,244-48, 179-221; *see also* CR 420, 421, 427, 434.

Trial commenced on August 30, 2010. ER-Vol.6@1440. On September 1, 2010, after the first full day of testimony, juror number one was excused after she complimented one of the government witnesses. ER-Vol.7@1840. The government advised the court that other jurors had complimented its courtroom paralegal. The court denied the defense request to question those jurors. ER-Vol.7@1846.

During the course of the trial, both parties presented additional evidentiary issues. *See, e.g.,* ER-Vol.6@1568,1603; ER-Vol.7@1881,1882,1889,1911; ER-Vol.8@2207; ER-Vol.9@2295,2302,2311,2312,2315,2318,2367,2398; ER-Vol.9@2405-06, 2410-11, 2414, 2438, 2446,2449,2480,2491,2495-96,2406-08; ER-Vol.-11@2811,2844-58; ER-Vol-7@1682,1698; CR 447. On September 8, 2010, the jury heard closing arguments. ER-Vol.11@2888-3030. On September 9, 2010, the jury returned a verdict finding Mr. Seda guilty of both counts of the Indictment but with a specification related to the tax aspect of the conspiracy count only. ER-Vol.1@78. The government moved to remand Mr. Seda to custody. The district court granted the motion and initially set sentencing for November 23, 2010. ER-Vol.1@86.

On September 23, 2010, Mr. Seda filed a motion for a new trial and a motion for a judgment of acquittal. CR 477, 478.

Prior to the sentencing hearing, both parties filed sentencing memoranda. CR 496, 498, 504, 505. On November 23, 2010, the district court held a sentencing hearing but did not impose sentence on that day. CR 509.

On December 22, 2010, the government informally informed the defense that the FBI case agent had promised, prior to trial, a government fact witness, Barbara Cabral, money to be paid after trial. ER-Vol.3@642. The parties contacted the district court that day. *See* CR 513. On January 6, 2011, the government provided Mr. Seda many pages of previously undisclosed discovery. ER-Vol.3@638-41. In addition, the government informed the defense that the witness's husband, Richard Cabral (deceased at the time of trial), had been paid a total of $14,500 prior to trial. ER-Vol.3@643.

Mr. Seda filed a supplemental motion for new trial and motions for discovery, a release from custody, and for an order preserving government data and documents regarding the supplemental motion for new trial. CR 517-520, 524. On January 19, 2011, the district court held a hearing and ordered Mr. Seda released from custody pending litigation of the motion for new trial. CR 525, 526.

Extensive litigation followed regarding the supplemental motion for new trial, the discovery motion, and a motion to dismiss. CR 530, 536, 537, 540. On March 1, 2011, the district court held a hearing on Mr. Seda's Post-Trial Motion

for Discovery. CR 542. After the government submitted documents with a summary index to the district court for in camera review (*see* CR 541), the district court denied discovery, but did disclose an e-mail exchange between one of the prosecutors and the case agents regarding the fact witness that had been provided to the court ex parte. ER-Vol.1@76-77. After further briefing and argument, an evidentiary hearing was held on June 7, 2011. ER-Vol.2@438-541; ER-Vol.2@542-626. On August 10, 2011, the district court denied the motions for a new trial and to dismiss. ER-Vol.1@64.

On September 27, 2011, the district court sentenced Mr. Seda to 33 months in prison, rejecting the government's claim that the Guidelines terrorism enhancement applied, but applying other enhancements. ER-Vol. 1 at 23-24, 28-29; SER@66. This appeal followed.

Custody Status

At Mr. Seda's first appearance on August 15, 2007, after returning to the United States to face the charges, he was taken into custody. CR 24. He was released on conditions on November 30, 2007. CR 66. On September 9, 2010, after the jury verdict, Mr. Seda was taken into custody. ER-Vol.1@86. Mr. Seda was again released from custody on January 21, 2011, pending resolution of post-trial motions. CR 525. After this Court denied his motion for release pending

appeal, Mr. Seda voluntarily surrendered to the custody of the United States Bureau of Prisons at Littleton, Colorado with a projected release date of November 21, 2013.

STATEMENT OF FACTS

THE ESSENCE OF THE CHARGES

The government charged that Mr. Seda reported on AHIF-A's year 2000 tax return that a donation that had been received in Ashland, Oregon from an Egyptian philanthropist, Dr. Mahmoud El-Fiki, was used to purchase a prayer house in Springfield, Missouri, and that Mr. Seda falsified the tax return to cover up the fact that he intended the money to go to Chechen mujahideen fighting the Russians during the second Russian-Chechen war of the 1990s. ER-Vol.14@3644-51. In order to meet its burden, the government was required to establish three predicates to consideration of Mr. Seda's intent: were mistakes made on the tax return; if so, were they material; and, if material mistakes were made, who made them – Mr. Seda's accountant Tom Wilcox, or Mr. Seda. Notwithstanding government statements that this is not a terrorism case (ER-Vol.6@1449), the trial was replete with evidence about terrorism and radical Islam that ranged far beyond any reasonable bounds and prevented fair consideration of the elements of the crimes charged.

THE ORIGIN OF AHIF-A

Pete Seda came to Oregon from Iran in 1976. He went to college, became a naturalized citizen, worked for the United States Forest Service, started and ran a successful arborist business, and became a prominent member of the Southern Oregon Muslim and peace communities. ER-Vol.10@2657-63,2555-59. Mr. Seda was a spokesperson for moderate Islam throughout his time in Ashland. Whenever something involving Islam or the Middle East was in the news, Pete Seda was sought out for comment. As Ashland Rabbi David Zaslow, an interfaith colleague of Mr. Seda's, told the jury:

> [Pete Seda] was ecumenical in the sense of pluralism and really promoting the pluralistic ideal of the United States or what I believe in as well.

ER-Vol.9@2436. In addition to his public persona regarding Islam and the Middle East, Mr. Seda became a fixture in the Ashland community for involvement in civic affairs, particularly when it involved trees or other environmental issues. *See* ER-Vol.4@974; ER-Vol.5@1254-60.

In the late 1980s, Mr. Seda opened his home as a center for Islamic prayer in Southern Oregon. ER-Vol.10@2666. At the same time, he and several of his friends, including trial witness David Rodgers, set up what they called the Qur'an Foundation, an organization that was active both in Southern Oregon and

nationally. ER-Vol.10@2668-70. The Foundation engaged in outreach and provided interested people with the Qur'an and other religious books. Mr. Seda funded the organization with his own money. ER-Vol.10@2669.

In the late 1990s, Mr. Rodgers moved to Saudi Arabia where he met another man interested in the environment, Soliman al-Buthe, the co-defendant in the instant indictment. ER-Vol.10@2663-64, 2674-76. Mr. al-Buthe was in charge of landscaping for the General Department of Parks and Beautification of the Municipality of Riyadh, Saudi Arabia. ER-Vol.10@2676. Mr. al-Buthe worked for AHIF-S, a charity that had offices in more than fifty countries and was headquartered in Riyadh. AHIF-S was connected to the government and the Saudi Royal Family through members who served on a governmental committee overseeing charitable activity. ER-Vol.9@2497-98.

Eventually, Mr. Rodgers introduced Mr. al-Buthe and Mr. Seda. ER-Vol.10@2676. In 1997, through that relationship, a branch of Al-Haramain was established in Mr. Seda's hometown of Ashland, Oregon. ER-Vol.14@3640. Mr. Seda registered AHIF-A with the state of Oregon in October 1997, and AHIF-S became the primary funding source. *Id.*; ER-Vol.7@1860.

The new charity continued much of the work of the Qur'an Foundation, distributing literature and gathering and donating money for humanitarian

purposes at home and abroad. AHIF-S provided most of the literature that was provided by AHIF-A, including an edition of the Noble Qur'an that included an appendix entitled the Call to Jihad. ER-Vol.10@2671-72. Mr. Seda did not like the appendix and worked with Mr. Rodgers, eventually successfully, to have AHIF-S send a different version. ER-Vol.10@2671-72; ER-Vol.10@2703-04. The government referred repeatedly to the anti-Semitic and jihadist aspects of the appendix during the trial. ER-Vol.7@1867-76; ER-Vol.9@2445-49,2561; ER-Vol.10@2704-06,2654.

Early on, the Qur'an Foundation began receiving requests for literature about Islam from prisoners across the United States. Mr. Seda began sending Qur'ans and other texts. ER-Vol.10@2669-74. After AHIF-S began funding his new organization in Ashland, the number of books sent to prisoners increased substantially; many included the Call to Jihad appendix. ER-Vol.10@2671-74. Some prisons screened the material before it was permitted to go to the inmates. ER-Vol.7@1927-28.

In late 1997, AHIF-S provided Mr. Seda with money to purchase a prayer house in Ashland. ER-Vol.7@1854-55. While Mr. Seda was the main force in AHIF-A, he continued to work full-time running his arborist business. Because Mr. Seda was working elsewhere much of the time, much of the staff work was

handled by people who attended services at the Prayer House working as volunteers and by several paid employees. ER-Vol.7@1859,1811.

Mr. Seda also retained the services of accountants and legal counsel. He engaged accountant Tom Wilcox, a former IRS agent, at the end of 1999. ER-Vol.8@2018,2022. Mr. Wilcox was hired not only to do the books, but also to train AHIF-A staff, set up and ensure the reliability of a new accounting system, and be responsible for the accounting work. ER-Vol.8@2081.

There was conflicting testimony at trial about the effect of AHIF-S's involvement in Ashland. Some said AHIF-A became more rigid; others disagreed. ER-Vol.7@1818; ER-Vol.10@2537-38. Both before and after involvement of AHIF-S in Ashland, Mr. Seda frequently lectured at local schools and invited the schools – boys and girls together – to come to the tent he set up at the Prayer House to hold outreach meetings. ER-Vol.10@2540,2550-51. This was contrary to AHIF-S's wishes. ER-Vol.7@1864-65. Similarly, rather than allowing only conservative speakers to present at Friday prayers, Mr. Seda permitted any member of the community to serve as the evening's speaker. ER-Vol.10@2536. While men and women prayed separately, as is the custom in many Mosques, after the prayer, the separating curtain was removed. ER-Vol.10@2537.

CHECHNYA AND HUMANITARIAN RELIEF

Chechnya is a part of Russia in the Caucasus Mountains, most of whose citizens are Muslim. ER-Vol.6@1653-54. After the fall of the Soviet empire in 1990, the Chechens sought independence. ER-Vol.6@1655. The ensuing civil war culminated in an agreement in 1995 that provided Chechnya a great deal of autonomy. ER-Vol.6@1656.

While the Chechen struggle against the tsars, Soviets, and Russians was primarily nationalistic, in the mid-1990s the fighting took on an Islamist aspect. Non-Chechen fighters began to arrive and train in Chechnya and neighboring Russian republics. Some of the fighters, Chechen and non-Chechen, were called mujahideen. ER-Vol.6@1656-59.

One training center set up in the town of Serzhenyurt was called the Kavkaz Institute. ER-Vol.7@1664-66. Funding for the Institute allegedly came from a number of Islamic charities, including AHIF-S. ER-Vol.7@1715. Training at Kavkaz included traditional military skills, terrorist-type activities, and religious and other non-violent subjects. ER-Vol.7@1665.

The peace agreement of the mid-1990s did not last and war broke out again in late 1999. ER-Vol.7@1670. Russia fought back with a vengeance, killing thousands of civilians, virtually leveling the Chechen capital of Grozny, and, in

1999-2000, creating tens of thousands of refugees. ER-Vol.4@1061. The Russian actions were met with condemnation from the United States and countries around the world. *Id*.; ER-Vol.11@2803-4.

Mr. Seda and AHIF-S shared the world-wide concern about the plight of the primarily Muslim people of Chechnya who were being victimized by the Russians. ER-Vol.9@2492-93; ER-Vol.11@2803-04. There was a great deal of discussion about the situation in Chechnya on Muslim websites, including some that were receiving information directly from mujahideen fighters in Chechnya. AHIF-S and some of its employees provided information about the situation in Chechnya on its website and in email form through computer mailing lists commonly known as listservs. ER-Vol.9@2307; ER-Vol.7@1710-11.

When the government searched the AHIF-A offices years later, many emails and websites with information on Chechnya were found on the organization's computers. ER-Vol.9@2298-99,2304-06. The emails and other material on the computers became a focus of the government's case. They included calls for jihad, fatwas about fighting the Russians, and information about sending support to the mujahideen. ER-Vol.7@1680-83,1695; *see, e.g.,* ER-Vol.4@887,896,901, 908,912, 935 (Gov't Exs. SW-12, SW-14, SW-16, SW-30, SW-33, SW-51). With the exception of several emails that Mr. Seda forwarded to Mr. al-Buthe, one

speaking of the urgent need for humanitarian aid in Chechnya, there was no evidence what, if any, of the other material Mr. Seda even read. ER-Vol.6@1592-95,1623-24; *see e.g.* ER-Vol.4@886A (Gov't Ex. SW-11).

Late in 1999, AHIF-S began a campaign to solicit donations for aid to the people of Chechnya. ER-Vol.7@1714-15; ER-Vol.9@2306-09; ER-Vol.4@874-75 (Gov't Ex. SW-5). It was disputed at trial whether this aid was for humanitarian purposes or to fund the mujahideen fighters. The efforts of AHIF-S to provide aid in Chechnya were coordinated through the Saudi government and an entity it created called the Saudi Joint Relief Committee (SJRC). ER-Vol.11@2813-14. The SJRC operated under an agreement entered into by the Saudi and Russian governments. ER-Vol.11@2813-14; ER-Vol.5@1174 (Rej. Def. Ex. 725(c)); *see also* CR 380 at 79.

In late 1999, AHIF-A began its own campaign to solicit donations for aid to the people of Chechnya. It received a $36,000 donation from the Islamic Society of North America and several smaller donations. ER-Vol.9@2373-74; ER-Vol.11@2977; ER-Vol.4@976A-M (Def. Exs. 1004-15).

THE DONATION FROM DR. EL-FIKI AND ITS TRANSFER TO SAUDI ARABIA

In January 2000, Dr. El-Fiki contacted AHIF-S about donating money for Chechen relief. ER-Vol.11@2811-13,2815. He knew that AHIF-S was working

with a "committee." ER-Vol.4@964; ER-Vol.11@2813-14. The documentation introduced at trial revealed that Dr. El-Fiki wanted his donation to provide humanitarian aid to "muslim brothers in Chychnia." ER-Vol.4@966. *See also* - Vol.11@2816-20. AHIF-S confirmed that the money he donated would go to the "poor," "orphans," and "refugees." ER-Vol.4@965 (Def. Ex. 670). The doctor, who had funds in London, wanted to donate through a bank there but was told AHIF-S had none. Instead, AHIF-S gave him the option of sending the money to its account in Riyadh or its account in Ashland. ER-Vol.4@965. There is no indication Dr. El-Fiki knew there was a separate branch or entity of Al-Haramain in the United States. The doctor chose the American account and $149,985 was received at the bank in Ashland on February 24, 2000. ER-Vol.9@2325-26.

When Dr. El Fiki's money arrived, Mr. Seda stepped up his pre-existing efforts to go to Chechnya to deliver aid personally and contacted a number of organizations. *See, e.g.,* ER-Vol.10@2717. He enlisted the aid of several people in his efforts. He had previously asked former employee Daveed Gartenstein-Ross to assist in contacting the Russian Federation in an effort to obtain permission to lead an aid convoy to Grozny. ER-Vol.7@1893-95.

Mr. Seda was not successful in his efforts to lead an aid convoy to Chechnya and in March, Soliman al-Buthe traveled to the United States and to

Ashland. ER-Vol.8@1993-94. Email traffic that was introduced at trial indicated that Mr. al-Buthe was going to bring the next six-month budget with him when he came in March 2000. ER-Vol.4@971-73. However, he did not.

While in Ashland, Mr. al-Buthe and Mr. Seda went to Mr. Seda's Bank of America branch in Ashland and purchased $130,000 in travelers checks and a $21,000 cashier's check in Mr. al-Buthe's name. ER-Vol.8@1960-66,1968-70. The branch manager, Debra Ingram, with whom Mr. Seda had done business for years, described the purchase at trial. ER-Vol.8@1960-69. There was some dispute about the amount of travelers checks Mr. Seda originally sought, but there was no question that he and Mr. al-Buthe, who was wearing traditional Saudi robes, acted openly, without disguise or pretense. ER-Vol.8@1979-82.

Several days later, Mr. al-Buthe and Mr. Seda prepared a document memorializing that Mr. al-Buthe was taking responsibility for Dr. El-Fiki's donation and the donations received by AHIF-A and taking money back to Saudi Arabia. Two drafts were prepared, one reflected that he was taking responsibility for approximately $188,465.80, the other, $186,644.70. ER-Vol.4@849,851 (Govt. Ex. AHIF-2 and AHIF-3). Both were later provided to the government by Mr. Seda's lawyers in response to a subpoena. The government introduced them

into evidence at trial, arguing that they were fraudulently created years later. ER-Vol.9@2355-59; ER-Vol.11@2912,3020-21.

To refute the government's characterization of AHIF-2 and 3, Mr. Seda obtained information from Mr. Sui, a person who witnessed the signing of the agreement on March 12, 2000. ER-Vol.11@3057-70. He was unsuccessful, however, in producing Sui for trial. ER-Vol.1@141-48; ER-Vol.6@1634; ER-Vol.5@1310.

When he left the United States on March 12, 2000, Mr. al-Buthe did not declare any money with the United States Customs Service. ER-Vol.8@1994,2001-03; ER-Vol.4@831-32. Contrary to the practice for arriving passengers, no forms are provided passengers leaving the United States for doing so. ER-Vol.8@2002. Mr. al-Buthe had filled out customs forms at least nine times between 1997 and 2000, when he entered the United States with cash and travelers checks for the operation of AHIF-A, although he never filled out a form when leaving. ER-Vol.8@1999; ER-Vol.4@962,832.

After his return to Saudi Arabia, Mr. al-Buthe cashed the travelers checks and deposited the cashier's check in his account at the Al Rajhi Bank. ER-Vol.9@2334-37. Mr. Seda proffered receipts showing that he then deposited approximately $187,000 with AHIF-S, the full amount reflected in the agreement

with Mr. Seda, but then not admitted in evidence before the jury. ER-Vol.9@2366-67,2394-98; ER-Vol.4@1091-94 (Rej. Def. Exs. 704-Al Haramain Islamic Foundation receipt No. 262740; 705-Al Haramain Islamic Foundation receipt No. 263867).

Much of the trial evidence about the money revolved around the government's testimony and argument that it had followed the "money trail" through records of Mr. al-Buthe's account it had obtained from the Al Rajhi Bank in Riyadh, Saudi Arabia. ER-Vol.9@2329; ER-Vol.11@2904-05. Those, and other records, showed Mr. al-Buthe cashing the travelers checks and depositing the cashier's check into his account. ER-Vol.9@2334-37. The records the government obtained showed the $21,000 leaving the account piecemeal, not in one lump sum. ER-Vol.9@2338-39. Mr. Seda had other records, proffered exhibits 704 and 705, showing that all of the money for which Mr. al-Buthe was responsible had been deposited with AHIF-S. ER-Vol.9@2394-98. These receipts had the AHIF-S Al Rajhi Chechen fund bank account number (#9889) on them. ER-Vol.4@1091-94 (Rej. Def. Exs. 704/705). This is the same bank account referenced on the January 2000 Al Haramain advertisement for Chechen relief. ER-Vol.4@874-75 (Gov't. Ex. SW-5). The government did not seek to obtain that bank account. ER-Vol.9@2366.

The government successfully fought the admission of the receipts, arguing that they were not genuine, in part because they were for an amount greater than the monies taken to AHIF-S by al-Buthe, including the donation from Dr. El-Fiki. ER-Vo.9@2368; ER-Vol.12@3285-87; ER-Vol.1@93. Mr. Seda presented evidence of the other money he had raised for Chechen relief. ER-Vol.9@2373-75.

PURCHASE OF THE SPRINGFIELD PRAYER HOUSE

Several months after Mr. al-Buthe left the United States without reporting more than $151,000, he returned to this country with approximately $300,000 in travelers checks and declared that money on a CMIR form. ER-Vol.4@960-61. That money was then used by AHIF-A and Mr. Seda in June 2000, as part of the purchase price for a prayer house in Springfield, Missouri. The cost of the building was approximately $380,000. ER-Vol.4@871. It is the incorrect statement on AHIF's year 2000 tax return that the Springfield prayer house cost $461,000, and the government's contention that Dr. El-Fiki's money was accounted for in the purchase price that underlie the government's charges. ER-Vol.14@3646-56.

PREPARATION OF THE AHIF-A YEAR 2000 TAX RETURN, THE TAX ISSUES, AND ACCOUNTANT WILCOX'S CREDIBILITY

Tom Wilcox, AHIF-A's accountant, began work on the year 1999 and 2000 tax returns in the spring of 2001. ER-Vol.8@2042-43. He had instructed the staff at AHIF-A to use the QuickBooks accounting program. ER-Vol.8@2044-45. Both the AHIF-A staff and Wilcox entered data into QuickBooks, the staff entering data during April and May 2000 and Wilcox in May, June, and September. ER-Vol.10@2757-58. In September, Wilcox made numerous final entries, adjusted some items, and eventually transposed the information from QuickBooks onto AHIF-A's tax return. ER-Vol.8@2049-57.

The tax return contains a number of mistakes, including on line 57a, which overstated the value of the Springfield Prayer House by approximately $80,000, only a portion of Dr. El-Fiki's donation. ER-Vol.4@856-869,963. The mistake stems from inclusion of incorrect information on what became known during the investigation and trial as the "Springfield Building Schedule."[5] *See* ER-Vol.4@963.

[5] "Schedule" is a QuickBooks term for a form listing all transactions for a given category. Thus, the Springfield Building Schedule should only have included items related to the purchase and upkeep of the Springfield Prayer House.

The other mistakes charged involved lines 1 and 22 on the tax return. The government specifically charged that line 1, which reflected incoming donations to AHIF-A, was understated because it did not include part of Dr. El-Fiki's donation, namely the $21,000 eventually negotiated into a cashier's check made out to Mr. al-Buthe. ER-Vol.14@3650,3653. The government further charged that line 22, which accounted for outgoing donations made by AHIF-A, was understated because it failed to include the $130,000 in travelers checks that Mr. al-Buthe took to Saudi Arabia. ER-Vol.14@3650,3653. Who was responsible for and the relevance and materiality of the mistakes were hotly contested at trial and at sentencing.

At trial, the government relied on a Seattle-based supervisory IRS agent, Gregory Wooten, to discuss the materiality of purported errors on the tax return. ER-Vol.8@2222. He testified that the IRS would have wanted to know about the correct value of the Springfield Prayer House and the $151,000 Mr. al-Buthe took to Saudi Arabia. ER-Vol.9@2263-64,2269.

Mr. Seda relied on the expert testimony of Marcus Owens, the attorney who had been the head of the Internal Revenue Service Exempt Organizations Division in the relevant time. ER-Vol.10@2575-76. Mr. Owens offered the jury the opinion that there was no mistake on the return that was material to the I.R.S. ER-

Vol.10@2589,2596. His opinion was based on several facts. First, Dr. El-Fiki had made the donation to AHIF-S so that, under the tax law, neither the donation or its disbursement should have been included on lines 1 or 22 of the tax return of AHIF-A, a different organization. ER-Vol.10@2592-93. Second, the value of the Springfield Prayer House was not material to the decision on AHIF-A's tax exempt status. ER-Vol.10@2595-96. Third, nothing on lines 1, 22, or 57a called for any information about Chechnya because Dr. El-Fiki's money was not a donation to, or distribution from, AHIF-A, and Line 57a related only to fixed assets. ER-Vol.10@2589,2594-95. In the end, the government's expert agreed with much of Mr. Owens' assessment. ER-Vol.9@2280-83.

Mr. Wilcox's account of his work and the input he received from Mr. Seda and AHIF-A changed significantly over the years, particularly concerning a key document in the case – the Springfield Building Schedule. When first questioned by I.R.S. agent Colleen Anderson about the return in 2003, Mr. Wilcox was adamant that Mr. Seda prepared the Springfield Building Schedule and handed it to him. ER-Vol.8@2174. In other words, according to Wilcox, Mr. Seda incorrectly categorized in QuickBooks part of Dr. El-Fiki's donation as related to the Springfield purchase and Wilcox merely transferred those incorrect numbers to the tax return. During the grand jury presentation in 2005, Agent Anderson

testified to that version of events with the prosecutor showing her a form that he called the Springfield Building Schedule and adducing the testimony that Wilcox had told her he had been given the schedule by Mr. Seda. ER-Vol.9@2382.

Years later, when defense counsel retained an expert, Jeff Cone, to look at the accounting computer data, the expert discovered that the metadata established that the building schedule was prepared on Wilcox's computer. ER-Vol.10@2765-68. However, Wilcox continued to state that Mr. Seda had given him the Springfield Building Schedule in a May 2009 defense interview (attended by the IRS case agent). ER-Vol.8@2178-79.

By August of 2009, the IRS case agent realized that the testimony on which the government had built its case, that Mr. Seda had prepared the Springfield Building Schedule and then handed it to Wilcox, was simply not true. She re-interviewed Wilcox, who changed his story and said that he had entered the items on the Springfield Building Schedule. ER-Vol.8@2181-82. When he testified at trial, Wilcox admitted he did not provide the IRS with accurate information about the creation of the schedule until 2009. ER-Vol.8@2135-36. After years of blaming Mr. Seda, Wilcox admitted that he had created the schedule. ER-Vol.8@2181-82. This was only one of many accounting and memory errors Wilcox admitted to at trial.

For many years, Wilcox fundamentally mischaracterized his role in preparing the AHIF-A tax returns. As late as 2009, Wilcox was adamant that he did not enter a single item into AHIF-A's QuickBooks accounting program. ER-Vol.8@2178-79. Under cross-examination, however, Wilcox admitted that he had actually entered hundreds of items into QuickBooks on AHIF-A's behalf. ER-Vol.8@2179-81. The Springfield Building Schedule was just one example.

Wilcox had significant memory lapses about Springfield and Chechnya. He denied knowledge of the Springfield property prior to September 2001. ER-Vol.8@2124-25. There were, however, notes in his file from February 2001 about the purchase and about employees there. ER-Vol.8@2125-29. He denied that Mr. Seda had ever discussed Chechnya with him, but there were letters in his file showing that Mr. Seda had. ER-Vol.8@2207-08,2217-18.

Wilcox also admitted at trial numerous instances in which Mr. Seda provided him correct tax information that Wilcox nonetheless transformed into errors on the tax return. Some of these errors were on the exact lines at issue in the case. For example, Wilcox conceded that Line 1 was overstated by $18,634.78 entirely as a result of his error. AHIF-A had received a refund from a lawyer for that amount and faxed Wilcox a clear statement to that effect. Wilcox ignored the

information and treated the money as an incoming donation to the organization, putting it on Line 1 of the tax return. ER-Vol.8@2167-69.

The defense also elicited an example of Mr. Seda following Wilcox's advice and accounting practices to his disadvantage despite receiving notices from the IRS that Wilcox was mistaken. Specifically, Wilcox repeatedly had AHIF-A pay federal unemployment taxes despite the fact that as a non-profit entity, AHIF-A was exempt from the tax. Mr. Seda would pay the tax, and then receive a letter from the IRS telling him to stop paying and providing a refund. Mr. Seda merely forwarded the information to Wilcox, who apparently ignored it and repeatedly caused AHIF-A to keep paying. ER-Vol.8@2143-45. Wilcox admitted that Mr. Seda relied on his incorrect advice, "[Mr. Seda] followed your wishes, you did something that was incorrect, and he doesn't know, he just signs the paper?" Wilcox responded: "That's correct." ER-Vol.8@2144.

MR. SEDA'S LIFE, HUMANITARIAN EFFORTS, AND COMMUNICATIONS WITH THE GOVERNMENT AFTER SEPTEMBER 11, 2001

From 2001 to 2003, Mr. Seda continued his arborist business and his involvement in civic life in Southern Oregon. He offered to assist the government in its post-September 11 efforts and was active in community presentations aimed at healing the wounds of 9/11. In the next year, he continued his efforts to

personally deliver humanitarian aid in several regions, devoting a great deal of energy to an aid convoy to the West Bank in Israel, working with both the United States and Israeli governments. The jury was not permitted to learn of many of these efforts. ER Vol.1@208; ER-Vol.5@1229,1234,1247,1252-53 (Rej. Def. Exs. 831, 833, 840, 866, 867).

During the winter of 2003, Mr. Seda moved back to the Middle East where he lived and worked for four years. Later in 2003, Summer Rife, who Mr. Seda married in 2005, joined him overseas. After the government served a subpoena on AHIF-A in June 2003, Mr. Seda retained counsel who eventually succeeded in negotiating his return to the United States to face the charges. CR 44 at 102; CR 44-1.

THE INVESTIGATION

Inception of the Investigation and Subpoenas

Precisely when the investigation of Mr. Seda and AHIF-A began is not clear. The government interviewed Mr. Seda days after the attacks of September 11, 2001. ER-Vol.10@2651-52. Shortly after that, the government served subpoenas on banks for his financial records. *See, e.g.,* ER-Vol.9@2362-63. In June 2003, after hearing Mr. Wilcox's account (later recanted) that Mr. Seda prepared the Springfield Building Schedule, the United States Attorney

served subpoenas on the AHIF-A offices for numerous documents. ER-Vol.9@2352-53. Through counsel, Mr. Seda cooperated, and over the ensuing months, thousands of documents were provided. These included AHIF-2 and 3, one originating in Ashland and one in Saudi Arabia. ER-Vol.4@1091-94.

The Search Warrant

In February 2004, the government sought and obtained a search warrant for more documents and the AHIF-A computers. This search was cabined by the issuing magistrate for financial records only. ER-Vol.13@3524,3527-29. The government first engaged Richard Smith, then years later, Jeremy Christianson, as computer forensic experts to search the computers. ER-Vol.13@3386-88; ER-Vol.12@3329A-D. Thousands of emails, letters, articles, and web pages were recovered and reviewed. Many of the emails, letters, articles, and web pages were sent to Al-Haramain from a variety of listservs. *See, e.g.,* ER-Vol.4@895 (Gov't Ex. SW-13). Many related to the horrific conditions and war in Chechnya. ER-Vol.9@2383-85. Others sought support for the mujahideen. ER-Vol.4@935-37 (Gov't Ex. SW-51). Others sought support for refugees in many places, including Chechnya. *See, e.g.,* ER-Vol.9@2385-87; ER-Vol.4@874-75 (Gov't Ex. SW-5). Others detailed Mr. Seda's business and civic life. *See, e.g.,* ER-Vol.5@1213,1225-26,1227-28,1230-33 (Rej. Def. Exs. 824, 826, 830, 832).

The government eventually introduced and relied on numerous documents derived from the computers at trial, including reports that appeared to have originated in Chechnya and others that originated in Saudi Arabia. *See, e.g.,* ER-Vol.4@887-94,895-904,908-11,935-37. Some sought money for Chechnya, some for the mujahideen. A few related to the donation by Dr. El-Fiki. ER-Vol.4@905-06,964-67. Very few were written by Mr. Seda.

Interviews and Witness Payments

In addition to the subpoenas and search of the material obtained and seized from AHIF-A, government agents interviewed numerous people in Southern Oregon about Mr. Seda, including Barbara Cabral, and her husband Richard. The Cabrals were Muslims who had attended prayer with Mr. Seda. In 2004, Richard was "opened" by the FBI as a (cooperating witness) informant and, over the next three years was paid $14,500 by the FBI. ER-Vol.3@643,660-62. Barbara was also interviewed and provided information numerous times, including on March 21, 2005, when the FBI delivered $5,000 in cash to Richard. ER-Vol.3@643,649. Richard died in 2008, but Barbara was eventually called as a witness at trial. ER-Vol.7@1804.

These payments became relevant to this appeal when they were disclosed for the first time after the trial along with the disclosure that the FBI case agent

had told Barbara before her testimony that he would attempt to get her money after the trial. ER-Vol.3@638-39,642.

The Interview of Dr. El-Fiki

Just before the indictment was returned, government agents traveled to Egypt in an effort to interview Dr. El-Fiki. ER-Vol.4@1086-90 (Rej. Def. Ex. 678). An interview was conducted by Egyptian authorities with FBI agents observing via closed circuit television. *Id.* The government apparently did not have a recording of the interview. Dr. El-Fiki described his philanthropic activity generally and his desire to help refugees in Chechnya. ER-Vol.4@1086. He explained why and how he donated money for Chechen relief through AHIF-A. He said that he "asked [his] bank in London to make a transaction to [AHIF's] USA account, using the details [] provided in an earlier email, as Zakat[6] in order to participate in [AHIF's] nobel support to [the] Muslim brothers in Chychnia." ER-Vol.4@966,1087. Dr. El-Fiki was not available to either side for trial. Defense efforts to introduce the FBI 302 report of the interview were rejected. ER-Vol.1@183; *see also* ER-Vol.9@2405-08. The government introduced several emails regarding his donation, and the defense introduced several more. ER-

[6] Zakat, charitable giving, is one of the five pillars of Islam.

Vol.9@2320,2276-78; ER-Vol.4@905-06,964-67 (Gov't Ex. 22; Def. Ex. 669-671).

The Russian Evidence

After Mr. Seda's return to the United States, the government stepped up its efforts to trace Dr. El-Fiki's donation and obtain some proof that Mr. Seda had actually sought to and been successful in getting money to Chechnya and the mujahideen. In 2008, the trial prosecutors utilized the diplomatic resources of the government, including the Letter Rogatory process, and traveled to Moscow to meet with agents of the Russian FSB (Federal Security Service), the successor to the KGB. ER-Vol.13@3473; CR 225 at 2-3. The United States gave the Russians the computer hard drives taken from AHIF-A during the search. ER-Vol.13@3426. These included personal information about Mr. Seda, his wife, and children, all United States citizens. CR 205 at 2-3. The government received documents purportedly taken by the Russians from the Kavkaz Institute purporting to show AHIF-S funding and information regarding overheard conversations between Chechen mujahideen and Al-Haramain personnel. *See* CR 496-2. The government received no information about Mr. Seda, Dr. El-Fiki, or Dr. El-Fiki's money. CR 510 at 93.

No Russians were called as witnesses at trial and no Russian documents were used directly. At sentencing, one of the FSB agents testified by video

hookup from Lubyanka and a number of documents were received as sentencing exhibits. *See* CR 510 at 18-20, 28-30, 34-35, 39; CR 496-2.

Al Rajhi Bank Records

Before trial, the government utilized its diplomatic resources to subpoena personal bank records of the co-defendant, Soliman al-Buthe, from the Al Rajhi Bank in Saudi Arabia. ER-Vol.9@2332-33. These records were introduced at trial to support the government's argument that al-Buthe took $21,000 of Dr. El-Fiki's donation for his own use. ER-Vol.9@2334-39,2342-44.

At least since 2004, the case agents were in possession of a list of AHIF-S bank accounts at the Al Rajhi Bank in Saudi Arabia which included an account for Chechen relief – the #9889 account. ER-Vol.9@2365. At least since 2005, the government was also in possession of copies of Mr. al-Buthe's receipts of the deposit showing the same Al Rajhi Bank account number. ER-Vol.9@2366-68,2395-98. The government did not, however, seek to obtain records from the same Al Rajhi Bank for *any* AHIF-S accounts. ER-Vol.9@2368. In addition, the government resisted all but one of Mr. Seda's efforts to obtain evidence from overseas. CR 272 at 1-2.

DISCOVERY, CIPA, CLASSIFIED DISCOVERY ISSUES, AND THE INTERVIEW OF SAMI AL SANAAD

While there were numerous discovery disputes during the litigation, on appeal, Mr. Seda only pursues his concerns about the handling of classified material. Mr. Seda demonstrated a strong likelihood that there was a wealth of exculpatory classified information that should have been made available to the court in its CIPA reviews and that should have been disclosed to Mr. Seda. CR 138; CER@3-7,22-32,39-44,48-51,54-73. However, the district court only ordered the government to provide one unclassified summary and one set of classified materials. ER-Vol.1A@392-94,309-11; ER-Vol.5@1299 (withdrawn Def. Ex. 730); CER@12.

While Mr. Seda cannot know how much classified material exists regarding himself, AHIF-A, Mr. al-Buthe, and AHIF-S, he does know that some exists. In March 2009, the government produced an unclassified summary of classified information from several people, including Sami Al Sanaad. The statement said that money obtained from "Al-Buthe from Al-Haramain USA" was delivered in Chechnya "destined for needy Chechen families." ER-Vol.5@1299. The court refused defense requests for the underlying documents that would have enabled Mr. Seda to discredit the government's theory that his intent was to fund the mujahideen. ER-Vol.1@140-42; ER-Vol.12@3074-75. As a result, the defense

was forced to withdraw the unclassified summary and was unable to utilize it at trial. Later, the government, over defense objections, relied on it at sentencing. ER-Vol.3@786-87; ER-Vol.5@1299.

During the spring of 2010, the government and the Al Rajhi Bank engaged in litigation over the government's subpoena for Mr. al-Buthe's bank records. CR 253. During the litigation, government counsel responded to a question in a manner that suggested that they were already in possession of the records. "If we had records that we could use in court at the trial, we wouldn't have gone through this process." ER-Vol.12@3280. Shortly after this hearing, the trial court entered a protective order and members of the defense team flew to Washington, D.C., to review materials that had been provided pursuant to the protective order. Later in the spring, the trial court traveled to Washington, D.C. and reviewed the government's CIPA filings. ER-Vol.12@3170-71. No further material was disclosed to Mr. Seda.

The likelihood that the scope of classified material that should exist in this case is broad was spelled out by Ret. Col. W. Patrick Lang. *See* Classified Brief at 1-9; CER@3-9,21-32,37-43,46-51. Col. Lang is the former head of Human Intelligence for the United States Department of Defense. Prior to assuming those duties as a civilian in 1992, Col. Lang had served in various capacities in the

intelligence world, focusing on the Middle East. His duties included personal briefings of President Reagan and later of the first President Bush during the Gulf War. Col. Lang continues to consult for the United States government on national security matters. He went as far as he could to explain to the trial court the massive extent of the government's interest in AHIF-S since the late 1990s, the likelihood that Mr. Seda and AHIF-A had been the subject of intensive scrutiny since then as well, and the likelihood of the existence of exculpatory information about Mr. Seda. *See* CER@3-9,21-32,37-43,46-51.

In addition to disputes about the discovery provided by the government, this appeal involves a claim related to classified material Mr. Seda caused to be placed in a government SCIF. In the early stages of the case, defense counsel became aware they may have been in possession of important classified material[7] and arranged to secure the material in a government SCIF with an agreement that the government would not have access without notice, consent, or court order. ER-Vol.2@421-24,403-08,400-02; *In re Pirouz Sedaghaty*, No. 09-73924, Dkt. Entry 1-3 at 47 (Sealed Ex. 3 to petition for writ of mandamus (9th Cir. Dec. 14, 2009)).[8]

---

[7] Because of the May 16, 2008, order at issue herein, counsel cannot discuss the contents of the material in question.

[8] Belatedly, the government offered a somewhat more limited account of the agreement. ER-Vol.2@415-18. The attorney who negotiated the agreement

Counsel for the defendant considered that the material belonged to the defense and was necessary for the representation of their client. *Id.*

Thereafter, defense counsel contacted the court security officer for access to the material for purposes of preparing the defense, including motions to suppress. Shortly after that contact, on May 16, 2008, the district court, *sua sponte*, issued an extraordinary order prohibiting any use or discussion about the material's contents under any circumstances. ER-Vol.1A@398.

PRE-TRIAL MOTIONS

The extensive pre-trial motions are outlined in the Course of Proceedings. As relevant, the facts are set out above and in the Argument.

Pre-trial, the district court ruled that nearly all of the exhibits the government proffered would be admissible. ER-Vol.1@244-48. It excluded many of the proposed defense exhibits. ER-Vol.1@179-218. While the court ruled that the testimony of the government's proposed terrorism expert, Evan Kohlmann, would be somewhat limited, the reality at trial was that he was given virtual free

---

for Mr. Seda and his investigator countered the government's declaration. ER-Vol.2@403-08,400-02. Counsel submitted photographs of the envelope he gave to the government and quoted from his contemporaneous notes, both of which reflected his understanding of the scope of the agreement. ER-Vol.2@410,412,414.

reign to discuss, and thereby link Mr. Seda to, a variety of unrelated terrorist acts. ER-Vol.1@238; *see e.g.,* ER-Vol.6@1644-59; ER-Vol.7@1664-73.

TRIAL

Opening statements began on August 30, 2011. Recognizing that the core of the case involved the mistakes on the tax return, the government stated that this is not a case involving terrorism charges. ER-Vol.6@1449. However, in its efforts to prove that Mr. Seda had acted wilfully in making the mistakes on the tax return, terrorism, radical Islam, and the mujahideen fighters in the Russian-Chechen war became the focus of much of the government's case.

Starting with its opening statement, the government utilized exhibits and rhetoric that Mr. Seda argued were unduly inflammatory and irrelevant, including a 3 x 4 foot chart with five photographs on it placing Mr. Seda with his co-defendant, Soliman al-Buthe, a shadowy cutout of one of AHIF-S's accountants, Abdul Qaadir, and Chechen mujahideen commander Khattab, someone Mr. Seda had never met or corresponded with. ER-Vol.5@1309.

The government began the trial with two law enforcement witnesses through whom they introduced the numerous emails, websites, and videos that had been seized during the search of the Ashland Prayer House and the computers. *See, e.g.,* ER-Vol.6@1551,1576,1585-86,1599-1600. These included photos of

dead Russians (Gov't Ex. SW-8), videos of fighters from the first Chechen war (Gov't Ex. SW-1), and numerous emails sent out on listservs providing updates on the Russian-Chechen war in late 1999 and 2000 (*e.g.* Gov't Ex. SW-14). *See, e.g.,* ER-Vol.4@876,872,896.

The government then presented its "terrorism expert," Kohlmann. ER-Vol.6@1638. He provided some background on the Russian/Chechen war. Kohlmann was shown many of the emails and other material that had been seized from the computers. They included calls for jihad, fatwas about fighting the Russians, and information about sending support to the mujahideen. ER-Vol.7@1680-96. There is one document that Mr. Seda clearly sent, a portion of a lengthy message from the mujahideen that spoke of the urgent need for humanitarian aid in Chechnyan. ER-Vol.6@1592-95. Other emails that were forwarded support the mujahideen fighters in their struggle against Russia. ER-Vol.4@913,951 (Gov't Exs. SW-36 and SW-39).

Kohlmann's testimony ranged far afield and included references to Osama bin Laden and other notorious terrorists with whom Mr. Seda had no connection, financing of terrorist activities by Islamic charities that had nothing to do with Chechnya or AHIF-S, and introduction of videos about the Kavkaz Institute he

had obtained online that Mr. Seda had never had in his possession or viewed. ER-Vol.7@1667-68,1698-99; ER-Vol.4@955-59 (Gov't Ex. EK-7).

Immediately following Kohlmann, the government called one witness who had attended the prayer services in Ashland – Barbara Cabral. She described meetings by a group of "sisters" who organized a jewelry sale to raise money for Chechen humanitarian relief and for the mujahideen during 1999-2000. ER-Vol.7@1821-24. She also described going on Hajj with Mr. Seda and other members of the Southern Oregon community in March 1999. ER-Vol.7@1813. Cabral said that at the end of the pilgrimage, before leaving Saudi Arabia, Mr. Seda requested that they give him money that had been advanced by the Saudis for services during the trip but had not been spent so he could send it to Chechnya for both humanitarian purposes and the mujahideen. ER-Vol.7@1817-18.

As Cabral left the witness stand and walked past the jury, juror number one complimented her on her testimony. ER-Vol.7@1840. The following day, this matter was brought to the court's attention by the government (whose table in the courtroom was closest to the jury) in conjunction with the information that some other juror or jurors had complimented the government's courtroom paralegal. ER-Vol.7@1840-41. The court granted Mr. Seda's request to replace juror number one with one of the alternates. ER-Vol.7@1846. It refused, however, to

inquire further into what was said to other jurors or on the other reported juror conduct. ER-Vol.7@1843,1846.

The government called one witness, Daveed Gartenstein-Ross, who worked at AHIF-A for a little less than one year. ER-Vol.7@1854. Gartenstein-Ross described the prisoner project, distribution of the Qur'an with the call to Jihad, the presence of anti-Semitic speakers, efforts to send money to Kosovo, and efforts to set up an aid convoy to Russia. ER-Vol.7@1865,1868-70,1884-85,1889,1893.

The other government witnesses were Debra Ingram, the Ashland Bank of America officer who had worked with Mr. Seda and Mr. al-Buthe, a representative of the customs service to introduce CMIR documents related to the alleged scheme to defraud the Customs Service, Wilcox, Wooten, and IRS Agent Anderson. Anderson described her efforts to follow the money, introduced the Al Rajhi Bank records and again discussed the inflammatory emails previously discussed with Christianson and Kohlmann. Their testimony has been described above.

Mr. Seda called twelve witnesses, including three experts. In addition to Col. Lang and Dr. Long, he called Marcus Owens, the former head of the Charitable Tax Section of the Internal Revenue Service who testified about the tax laws and why there were no material mistakes on the year 2000 AHIF-A return.

Col. Lang and Dr. Long provided more detail of the world-wide condemnation of Russia for its actions in Chechnya. ER-Vol.9@2491-93; ER-Vol.11@2803-04. Both men described the Saudi government's involvement with charities based in that country and the control it had over their activities. ER-Vol.9@2494; ER-Vol.11@2814. Col. Lang explained that the Saudi government would not permit AHIF-S to fund Chechen mujahideen through a donation from an Egyptian philanthropist and AHIF-A. ER-Vol.9@2501-02. Lang and Long testified about the Russian/Saudi agreement of 1999 through which the Saudi Joint Relief Committee (SJRC) was established and authorized to provide humanitarian aid in Chechnya. ER-Vol.7@2498; ER-Vol.11@2814. Both men testified about the role of AHIF-S in the SJRC. ER-Vol.9@2498-99; ER-Vol.11@2814. The district court did not, however, allow introduction of copies of the agreements that Mr. Seda had obtained. ER-Vol.1@201. While both experts were prepared to testify that Rejected Defense Exhibits 704 and 705 appeared genuine, the district court did not permit either expert to do so. ER-Vol.1@125-26,112-14.

Mr. Seda was able to present the jury with information about his life, involvement in community affairs, and life at the Ashland Prayer House through his long-time friend, David Rodgers, several local Ashland residents with whom he had been involved in peace activities, including Rabbi David Zaslow, Lutheran

Minister Caren Caldwell, and local high school teacher Bill Gabriel, and several regular attendees at the Prayer house, including Nabil Taha. ER-Vol.9@2432-35; ER-Vol.10@2539-41,2547-49,2556-59,2667-71.

While Mr. Seda was able to present some evidence about his civic and humanitarian work and views of Islam, the district court did not permit him to introduce the wealth of letters, articles, emails, and the book he had written about Islam that would have countered the myriad exhibits the government was permitted to present that portrayed him as a fundamentalist supporter of terrorism. *See, e.g.,* ER-Vol.5@1194-1253,1261-74; *see generally* ER-Vol.4@1030-60.

In closing, both prosecutors argued about anti-Semitism and fundamentalist rhetoric, and referred to Osama bin Laden. ER-Vol.11@2891-92,2914,2992-93,2998. In rebuttal argument, the prosecutor called "the Noble Qur'an" "the defendant," vilified it as "junk," and threw it in the courtroom onto the table that sat in front of the jury. ER-Vol.11@2992; SER@70-71,73.

The jury convicted Mr. Seda on both counts, answering a special interrogatory on count one that convicted him of a false statement on the tax return but not for failing to report the removal of currency from the United States. ER-Vol.1@78.

POST-TRIAL MOTIONS TO DISMISS AND FOR A NEW TRIAL

Prior to sentencing, Mr. Seda filed an extensive motion for a new trial, arguing that he was prejudiced by the prosecution's appeals to prejudice and urging the court to reconsider the fairness of its evidentiary rulings. CR 477. The court heard argument on the motions on November 23, 2010, the same day that it heard argument on and took sentencing testimony. CR 510. At the conclusion of the hearing, the court took all matters under advisement. ER-Vol.4@818.

Before the court ruled on the new trial motion and sentencing issues, the government revealed that the FBI case agent had told Barbara Cabral, before trial, that he would try to get her payment after the trial. ER-Vol.3@638-39,642. The government also revealed that it had paid Richard Cabral $14,500, including $5,000 during a joint interview with Richard and Barbara. ER-Vol.3@643. It also reported that Barbara stated that she considered the payments to Richard had "satisfied any monetary consideration that might have been due for her and Richard's help, and she still feels that way." ER-Vol.3@646. Mr. Seda moved for dismissal and, in the alternative, supplemented his new trial motion based on the government's payments, offer of payment, and failure to disclose either set of facts. CR 517, 538.

The trial prosecutors, agents, and Cabral each filed declarations describing their respective knowledge of the payments and offer of payment and the pre-trial decisions that were made not to make the disclosures. ER-Vol.3@651-721. Mr. Seda sought a hearing and discovery of the documents that the prosecutors and government agents had reviewed prior to preparing their declarations. CR 539 at 15-21 of 37. The court denied discovery but eventually took testimony on the dismissal motion on June 7, 2011, from IRS Agent Anderson and FBI Agents Dave and Shawna Carroll. ER-Vol.1@75; ER-Vol.2@438; CR 552, 554. It refused, however, to permit Mr. Seda to question either trial prosecutor.

Agent Carroll confirmed what was apparent in the declarations the agents and prosecutors had filed. In January and March 2009, he had his complete files on the Cabrals present for prosecution team meetings, including the notes of payment records; he knew of the payments he had made; and the team made a decision not to disclose the payments because, at that time, they did not intend to call Barbara and Richard had died. ER-Vol.2@449-54. Agent Anderson confirmed what was in an email exchange dated April 14, 2010, that she had with AUSA Cardani and Agent Carroll. ER-Vol.2@530,540; ER-Vol.2@555-56. In that email she asked the prosecutor whether she should produce the notes of interviews of Cabral now that she was included on the witness list, and the

prosecutor said, "Yes on reports. No on notes." ER-Vol.1@77. Anderson knew that the court had ordered production of agent notes; the prosecution had previously produced notes; the prosecution produced more notes after April 14, 2010. ER-Vol.2@538,541,542,550-56.

On August 11, 2011, the court issued a written opinion denying the motions to dismiss and for a new trial. ER-Vol.1@64.

SENTENCING

The government advocated for, and Mr. Seda opposed, a number of enhancements under the advisory Sentencing Guidelines. CR 496, 498. These included tax loss (U.S.S.G. §2T1.1), sophisticated concealment (U.S.S.G. §2T1.1(b)(2)), obstruction of justice (U.S.S.G. §3C1.1), and the terrorism enhancement (U.S.S.G. §3A1.4).

During the sentencing process, the court heard from several more members of the Southern Oregon community about Mr. Seda's good life and peaceable nature. ER-Vol.4@1002-29. The parties also presented further argument and evidence from their experts about the tax aspects of the case, disagreeing over whether there was any tax loss. CR 510 at 99-131; ER-Vol.4@983-1000. The government presented testimony via video hook-up from FSB Agent Ignatchenko. CR 510 at 4, 20, 46. He described his understanding of AHIF-S's activities in

Chechnya and described intercepted calls between representatives of AHIF-S and the Chechen mujahideen. CR 510 at 25-26, 36-38. Ignatchenko said, however, that the tapes of the calls had been destroyed. CR 510 at 86-88. He had never heard of Pete Seda or Dr. El-Fiki. CR 510 at 93.

Ten months later, after denying the motions for dismissal and a new trial, the court returned to sentencing. It denied the terrorism enhancement. ER-Vol.1@23-24. It did, however, apply enhancements for tax loss, obstruction of justice, and sophisticated concealment. ER-Vol.1@22-23. The court found an advisory guideline range of 27 to 33 months and imposed sentence at the top of that range. ER-Vol.1@28-9.

SUMMARY OF ARGUMENT

The core of this case involves alleged mistakes on a charitable tax return. The jury was presented differing opinions on the questions of whether the tax return included any mistakes, and, if so, whether they were material, by the expert witnesses Wooten and Owens. The jury was required to assess the credibility of accountant Wilcox and to decide what to make of the significant changes in his story in order to resolve the question of who was responsible for any mistakes it found existed on the return. The jury's consideration of every aspect of the case was, however, overwhelmed and distorted by the inflammatory and prejudicial

evidence of Mr. Seda's alleged extreme views and guilt by association that the government presented in its effort to establish wilfulness. And, its consideration was rendered incomplete and unfair by the government's failure to turn over exculpatory material in pre-trial discovery.

The government alleged that Mr. Seda wilfully made mistakes on the tax return to cover up the fact that he wanted to provide money to the mujahideen fighting the Russians in Chechnya. Only one witness, Barbara Cabral, provided direct testimony that Mr. Seda sought to do so. Her testimony that Mr. Seda asked all the members of the Ashland Prayer House who went on Hajj together to Saudi Arabia in the spring of 1999 to give him $200 that was left over at the end of the trip so that he could send it to the mujahideen in Chechnya was the only direct evidence of alleged action by Mr. Seda supporting the Chechen mujahideen. Mr. Seda had little to cross-examine Cabral with and, when she left the witness stand, a juror complimented her on her testimony.

The cross-examination of Cabral should have taken a very different course. The government had failed to disclose pre-trial core impeachment evidence: the fact that it had offered to pay Cabral money, a payment to be made only after trial, and that it had paid her husband $14,500 for information he provided, including $5,000 in cash during a joint interview when Cabral was also providing

information to the government agents. When it belatedly made the disclosures, the government conceded that the material should have been disclosed pre-trial. Post-trial hearings revealed that the prosecution team made decisions not to disclose the impeaching evidence on multiple occasions. Both Cabral's testimony and the impeaching evidence were central, not cumulative. The reasons why the discovery violation requires a new trial are set out in Point I.

The trial was replete with "foul blows" appealing to emotion and prejudice. These appeals culminated in the government's rebuttal argument when the prosecutor threw the Qur'an, called it "junk," and went so far as to call the Qur'an the "defendant." Those actions followed a trial replete with efforts to link Mr. Seda to fundamentalist Islam and alleged terrorists he never associated with, including multiple references to Osama bin Laden, witnesses being asked to read anti-Semitic statements over and over again, reference to genital mutilation, and admission of inflammatory emails and websites with minimal proof that Mr. Seda ever read or accessed them. The government's evidence included mujahideen videos brought to the trial by the government's "terrorism expert" that were never in the Ashland Prayer House or seen by Mr. Seda. In the face of the pervasive evidence that crossed any permissible bounds, Mr. Seda was precluded from

effectively rebutting the inflammatory material by the court's evidentiary rulings. The unfair prejudice that resulted is described in Point II.

The fairness of the trial was further undermined by the government's evidence and arguments about the "money trail" and the court's refusal to permit Mr. Seda to present contrary evidence. The government alleged that Mr. al-Buthe pocketed $21,000 of Dr. El-Fiki's donation and that Mr. Seda and Mr. al-Buthe fabricated two documents (exhibits AHIF-2 and 3) reflecting Mr. al-Buthe's responsibility for about $187,000 of money donated to AHIF-A for Chechen relief. It presented evidence and argued at length that it "followed the money trail" which "dried up" in Mr. al-Buthe's bank account. Its evidence included records of Mr. al-Buthe's bank account that it had obtained from the Al Rajhi bank in Saudi Arabia. Evidence about the total amount of money and the $21,000 was central to the government's proof about the alleged scheme.

The government agent and prosecutors were permitted to speculate, with no evidentiary basis, that exhibits AHIF-2 and 3 were phony, manufactured years after Mr. al-Buthe took Dr. El-Fiki's donation and the Chechen relief money gathered by AHIF-A to Saudi Arabia. The unfairness of this argument was underscored by the fact that as early as 2004 the government was in possession of receipts (rejected exhibits 704 and 705) showing that Mr. al-Buthe had deposited

all of the money for which he was responsible with AHIF-S. The receipts showed that the money was designated for the AHIF-S Chechnya account at the Al Rajhi Bank (#9889). Yet, the government did nothing to follow the money trail to that account. Even when it subpoenaed records from the Al Rajhi Bank for Mr. al-Buthe's account, it did not subpoena account #9889.

Although the government agent and prosecutors were permitted to speculate that AHIF-2 and 3 were fabrications, Mr. Seda was precluded from showing rejected exhibits 704 and 705 with the Al-Rajhi account number to Agent Anderson to rebut her claim that she had followed the money trail. He was also precluded from having his expert witnesses authenticate the receipts.

Then, when Mr. Seda sought to obtain authentication of the receipts from Saudi Arabia, the government stood in his way, opposing his request for a Letter Rogatory. The government also stood in his way when he sought assistance in obtaining Dr. El-Fiki's testimony from Egypt. The resulting distortion of the fact finding process violated the principles set out in *United States v. Westerdahl*, 945 F.2d 1083 (9th Cir. 1991).

The manner in which the evidentiary rulings on exhibits AHIF-2 and 3 and rejected exhibits 704 and 705 and the ruling on the *Westerdahl* issue deprived Mr. Seda of a fair trial are set out in Point III.

Much of the skewing of the fact-finding process by the government's use of inflammatory evidence should not have been possible because the evidence was obtained as a result of an unlawful search. The magistrate judge who issued the warrant under which the government's computer-derived evidence was obtained did not incorporate the affidavit that was filed in support of the warrant into the warrant and permitted search only for specified business and accounting records. The magistrate used language in the warrant to guard against general rummaging and required the government to seek additional warrants if its initial forensic examination of computers it seized caused it to believe that the scope of the warrant should be expanded. In executing the warrant, the agents went far afield, looking for and seizing evidence from websites and emails that could in no manner be confused with the types of records for which authorization was provided. It did so without seeking additional authorization as required in the warrant. The reasons why the searches and seizures violated Mr. Seda's rights under the Fourth Amendment are set out in Point IV.

The district court's rulings on a series of issues related to classified evidence set the table for an unfair trial long before the jury was called. At the outset of the case, counsel for Mr. Seda became aware that they were in possession of material that was likely classified. They contacted the government and

arranged for delivery of this defense material to a government SCIF with an agreement that the government would have no access to it. Several months later, when counsel sought to utilize the material in Mr. Seda's defense, the court, *sua sponte*, issued an unprecedented gag order that prohibited counsel from discussing it among themselves or with Mr. Seda or from using it in any manner in motions or at trial. This order violated Mr. Seda's fundamental Fifth and Sixth Amendment rights. It precluded him from effectively arguing for classified discovery from the government and that the decision to seek a search warrant was tainted by prior unlawful governmental action.

In addition to knowledge of the material they caused to be placed in the SCIF, the defense believed that the government was in possession of a substantial amount of exculpatory classified material. They presented the district court with declarations and testimony from the former head of Human Intelligence for the Department of Defense. Counsel, who held security clearances, also objected to the district court's refusal to permit them to participate more fully in the CIPA process. The district court reviewed the government's classified material and ordered production to the defense of only one piece of classified evidence and one unclassified summary. Mr. Seda believes the court was overly deferential to the government. This Court will be required to review the classified evidence.

The district court permitted the government to provide Mr. Seda with an unclassified summary of a statement attributed to Sami Al Sanaad. The summary recited the highly exculpatory information that money from AHIF-A was used for humanitarian purposes in Chechnya. However, the summary also contained information from other persons and editorializations which prevented Mr. Seda from presenting the exculpatory evidence to the jury. The violation of Due Process and the right to counsel in the handling of the classified evidence are discussed in Point V.

The final issues raised on the appeal relate to sentencing. While it rejected the terrorism enhancement, the district court imposed sentence based on legally incorrect applications of the tax loss, obstruction, and sophisticated concealment guidelines. The tax loss finding was error because it required proof that Mr. Seda sent Dr. El-Fiki's donation to Chechnya, an assertion the court found unproven in rejecting the terrorism enhancement. The loss finding was also error because an excess benefit tax can be imposed only if there is an economic benefit. Here there was none. The obstruction enhancement was based on the speculation that AHIF-2 and AHIF-3 were fabricated in 2004 in the absence of any such proof. The sophisticated concealment enhancement was inapplicable because all of Mr.

Seda's actions were straightforward and in the open. The sentencing errors are argued in Point VI.

ARGUMENT

POINT I
THE GOVERNMENT'S VIOLATION OF ITS DISCOVERY OBLIGATIONS BY FAILING TO DISCLOSE PAYMENTS AND AN OFFER OF PAYMENT TO A KEY WITNESS REQUIRES A NEW TRIAL

The central element of the prosecution's case was that Mr. Seda falsified his tax returns in order to hide his attempt to provide money to the Chechen mujahideen. Over nine years of investigation, only one witness – Barbara Cabral – directly linked Mr. Seda with attempting to raise money for the Chechen mujahideen. ER-Vol.7@1817-18. That witness so impacted the jury that one juror complimented her testimony and was excused by the court. ER-Vol.7@1840-43,1846. The government's failure to disclose pre-trial monetary inducements that would have impeached this key witness, who was otherwise unimpeached, fatally distorted the case and requires a new trial.

A. Standard Of Review

This court reviews de novo the district court's rulings under *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Steinberg*, 99 F.3d 1486, 1489 (9th Cir. 1996); *United States v. Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995).

B. The Prosecution Team Withheld Core Impeachment Evidence.

In his pre-trial discovery motions, Mr. Seda sought all impeachment material, including payments to witnesses and all agent notes. CR 53, 90. The government acknowledged its obligations to provide impeachment information. CR 100. The district court ordered production of exculpatory material and agent notes. ER-Vol.2@360. Prior to trial, the government provided impeachment material on a number of witnesses and agent notes of a number of witness interviews. ER-Vol.3@686-718; *see* ER-Vol.3@727-28.

Months after the trial, after intervention by the United States Attorney (ER-Vol.3@720,676,659,682-83), the government informed the defense that it had failed to comply with its pre-trial discovery obligations. The post-trial disclosures revealed that the government failed to disclose the fact of substantial payments and promise of payment to Richard and Barbara Cabral. The government belatedly provided Mr. Seda nearly 60 pages of discovery related to Barbara Cabral that should have been provided prior to trial. ER-Vol.3@723,638-41. *See also* ER-Vol.3@629.

The new discovery revealed that over a multi-year period beginning shortly after September 11, 2001, FBI Agents David and Shawna Carroll and IRS Agent Colleen Anderson interviewed Barbara and Richard Cabral numerous times. It

included reports and handwritten notes of at least 14 interviews with the Cabrals that involved Barbara Cabral. ER-Vol.3@641,644-46. The new discovery included Agent Carrolls's handwritten notes of a joint interview on March 21, 2005, in which Barbara provided information about Mr. Seda and government agents made a cash payment of $5,000 to Richard. ER-Vol.3@649; *see also* ER-Vol.3@656,658. The agent's typed report did not disclose the payments, nor were the actual payment records provided. ER-Vol.3@647-48. When questioned about the payments after the trial, Barbara Cabral stated that she "has always felt the money Richard received from Carroll satisfied any monetary consideration that might have been due for *her* and Richard's help . . . ." (Emphasis added). ER-Vol.3@646.

The new disclosures revealed a plan for post-trial payment. Sometime after April 19, 2010, but before trial, Agent Carroll

> commented to [Barbara] Cabral in words to the effect that he would attempt to get her something after the trial. Writer's meaning was . . . that he would attempt to provide her with a payment of U.S. currency after the conclusion of the trial . . . .
>
> On October 4, 2010, Cabral was advised by this writer of efforts to provide her with a $7,500 payment.

ER-Vol.3@642. Cabral stated she did not recall this conversation when questioned by the FBI after trial. ER-Vol.3@645. At the post-trial hearing, David

Carroll testified that Cabral had not asked for money, but that he had brought it up in a conversation in which they were talking about her medical problems. ER-Vol.2@507-09; *see also* ER-Vol.3@642,654. Carroll stated that his offer to pay Barbara was based on his assessment of the value of her testimony and his feeling that she had suffered stress as a result of her role in the investigation and was dealing with medical problems. ER-Vol.2@506-10,514.

After trial, the government also advised Mr. Seda for the first time that Barbara Cabral had a personal relationship with Agent Carroll and his wife. *See* ER-Vol.3@644. Cabral considered them "good friends," and the relationship was close enough that Cabral would greet them with hugs when she encountered them in the store where she worked and invited the Carrolls to her wedding after Richard's death in 2008. The Carrolls did not attend, but Barbara Cabral teased them about still owing her a wedding present. *Id*. At the post-trial hearing on this matter, Carroll acknowledged that Barbara viewed him and his wife as friends and had invited them to her wedding. ER-Vol.2@507.

C. The Discovery Violation Requires A New Trial.

1. A new trial is required for unintentional withholding of evidence where these is a reasonable probability of a different result.

The defense is entitled to disclosure of any promises, inducements, deals, or payments to any witness. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *see generally, Brady v. Maryland*, 373 U.S. 83 (1963). When the government has withheld information, a new trial is required when it is material, that is, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Silva v. Brown*, 416 F.3d 980, 985 (9th Cir. 2005) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)). "A reasonable probability does not mean that the 'defendant would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine [] confidence in the outcome of the trial.'" *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) (quoting *Kyles*, 514 U.S. at 434).

Unintentional concealment of *Brady* material warrants a new trial because "inadvertent non-disclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999). Intentional failure to disclose *Brady* material "may be regarded as an admission

that performance would injure the government's case . . ." *United States v. Gerard*, 491 F.2d 1300,1302 (9th Cir. 1974). While not necessary to analysis of materiality, the degree of government culpability can tip the scales if the analysis is close. *Id* at 1302-03.

2. The withheld evidence was material and not cumulative.

The withheld evidence was "material" because the payments, offers of payments, Cabral's view of the money paid to her husband, and her relationship with the FBI agents are classic impeachment evidence going to bias and to a motive to lie to curry favor with the government. *See Banks v. Dretke*, 540 U.S. 668, 671(2004) (that paid informant status is material is "beyond debate"); *United States v. Kohring*, 637 F.3d 895, 910 (9th Cir. 2011) (the court recognized that relationship between the witness and FBI Special Agent could be impeaching but there the jury was well aware that the agent was working closely with witness and evidence would be "merely cumulative").

The withheld evidence here was not cumulative. The defense had no prior knowledge of the payments, offer of payment, or personal relationship. The defense had no other basis to attack Cabral's credibility. The government conceded, and the district court found that the impeaching evidence on Cabral should have been disclosed. ER-Vol.3@629,638-39; ER-Vol.1@61.

3. Cabral's testimony was material.

The trial was hotly contested in all respects, including whether Mr. Seda intended to fund the Chechen mujahideen. The government's evidence of Mr. Seda's intent and actions – his desire to fund Chechen mujahideen as opposed to provide humanitarian relief in Chechnya – was almost entirely circumstantial. As stated by the district court, Cabral's testimony "was really the only direct evidence of defendant's desire to fund the mujahideen." ER-Vol.1@63. Cabral testified that at the end of a Hajj in Saudi Arabia in March 1999

> We were approached by Pete to give him the money because he said since they took care of us, and that it would also help send blankets and food and help the mujahideen in Chechnya.

ER-Vol.7@1817-18.

The prosecutors recognized the materiality of Cabral's testimony. Pre-trial, the government opposed Mr. Seda's motion to exclude Cabral's testimony regarding the Hajj on the ground that it was "critical state of mind, and motive, opportunity evidence." ER-Vol.1@138-39. Both prosecutors relied on Cabral in their closing and rebuttal arguments. In the initial closing argument, the prosecutor described Cabral's testimony about the money and the Hajj:

> When they went on the Hajj, the pilgrimage to Mecca, Barbara Cabral who testified before you was told that when she got her money back from the Saudi government because they were so well taken care of

> by al-Haramain, that the defendant went to her and said, can we get that money for the mujahideen in Chechnya?

ER-Vol.11@2892. On rebuttal, the prosecutor reiterated the testimony, then emphasized the lack of impeachment.

> Barbara Cabral tells you she went to the Hajj with Mr. Sedaghaty, big international flight, a big pilgrimage, sponsored by who? al-Haramain.
>
> On the way out of the country, Mr. Seda says let's give our money to the mujahideen. No mention of that from Mr. Wax. Why is that?

ER-Vol.11@2994. The closing arguments underscore the centrality of Cabral's testimony – especially in unimpeached form – to the government's case.

The government also stressed the role of Cabral's testimony on the wilfulness issue in response to the first new trial motion – filed before the discovery violations were revealed. The government argued that Cabral's testimony was "clearly probative of the defendant's knowledge, intent, and motive in acting as he did." ER-Vol.5@1301-02,1303,1307-08. These admissions fully support Mr. Seda's claim.

In contrast to cases in which disclosures have not led to reversal, the information withheld from the defense here was central, not collateral; unique, not cumulative. The government's case was not overwhelming and the prosecutors relied on the witness's testimony in opening and closing. *See Horton v. Mayle*,

408 F.3d 570, 578-79 (9th Cir. 2005); *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005) (suppressed evidence "is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case"); *United States v. Gil*, 297 F.3d 93, 103 (2d Cir. 2002) ("where the evidence against the defendant is ample or overwhelming, the withheld *Brady* material is less likely to be material than if the evidence of guilt is thin."); *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009) (*Brady* violation where prosecutor relied on witness's truthfulness); *Kyles*, 514 U.S. at 444-45 (concluding that evidence tending to impeach the reliability of the testimony of key eyewitness testimony was material); *United States v. Shaffer*, 789 F.2d 682, 689-91 (9th Cir. 1986) (affirming grant of new trial where failure to disclose impeachment evidence regarding key government witnesses undermined confidence in trial outcome).

The facts here stand in stark contrast to those in cases such as *Strickler v. Greene*, 527 U.S. 263, 290-94 (1999), *United States v. Collins*, 551 F.3d 914, 924-25 (9th Cir. 2009), *United States v. Inzunza*, 638 F.3d 1006, 1021 (9th Cir. 2011), or *United States v. Howell*, 231 F.3d 615, 626-27 (9th Cir. 2000), in which the non-disclosed evidence was either cumulative, insignificant, or related to a witness who did not provide significant testimony.

While a new trial is required based on the impact on Cabral's testimony alone, the materiality of the withheld information goes beyond its importance in cross-examination of Cabral. It is also relevant to the efforts throughout the trial to demonstrate that the government investigation was biased.

4. The district court's denial of the motion for dismissal or a new trial because it believed Cabral's testimony was collateral and immaterial ignores the facts of the case and its own ruling on the importance of evidence about funding the mujahideen that the court permitted the jury to hear.

Although this court determines de novo whether the *Brady* violation requires a new trial, the district court's opinion is fundamentally flawed and does not support its ruling. While it acknowledged that Cabral's was the only direct evidence about Mr. Seda's desire to fund the mujahideen (ER-Vol.1@63), the court concluded that a new trial was not warranted because:

> While the government made great significance of the terrorist aspect of the case and presented a great deal of evidence and argument about the Mujahideen in Chechnya, it was collateral to the charges the jury had to consider.
>
> • • •
>
> But Cabral's testimony was immaterial to the jury's convictions on the charges presented because it did not matter where the money fraudulently reported on the tax return actually went and because of other significant evidence regarding willfulness.

ER-Vol.1@62-63. In contrast, in admitting voluminous computer evidence regarding Chechen fighting and mujahideen, the court found the probative value of the evidence on "the willfulness of defendant's alleged actions" outweighed any prejudice and

> was significantly probative not only of intent in the government's case in chief, but as to the defense of the peaceful nature of the defendant . . .

ER-Vol.1@47-48,50,53. These statements are irreconcilably inconsistent. They are, moreover, inconsistent with the trial record.

The central element of the prosecution's theory was that Mr. Seda falsified his tax returns in order to hide his attempt to provide money to the Chechen mujahideen, ER-Vol.14@3645, 3650. While the trial was replete with testimony and evidence about the Chechen mujahideen and terrorism, it was general, related to AHIF-S, or based on emails sent to Mr. Seda or websites found on his computer. Cabral was the only witness who directly linked Mr. Seda not just with the Chechen mujahideen but with *fund-raising* for the Chechen mujahideen, exactly the kind of conduct the government alleged was being concealed on the tax returns. ER-Vol.7@1817-18,1820-25. Cabral's testimony was central, not collateral; unique, not cumulative.

The district court's statement that Cabral's testimony was immaterial because it did not matter where the money Mr. Seda gathered actually went (ER-Vol.1@63) ignores the fact that the government's case was *not* based on proof that Dr. El-Fiki's donation was sent to Chechnya. Its focus at trial was on Mr. Seda's intent – the issue to which Cabral's testimony was directed. ER-Vol.6@1449-50.

5. The government's decisions not to disclose the *Brady* material are relevant to the materiality analysis and support a new trial.

Here, as in *Gerard*, 491 F.2d at 1302-03, the government's conduct is relevant to the materiality analysis. The district court found the non-disclosures here "inadvertent." ER-Vol.1@58. However, the record reveals that the government made clear decisions not to disclose the impeaching evidence.

On March 17, 2010, the government placed Barbara Cabral on its list of trial witnesses. ER-Vol.12@3243. On April 14, 2010, Agent Anderson addressed an email to Agent Carroll and AUSA Cardani telling Carroll, "I need all of Barbara Cabral's interviews and we may need the notes also."[9] The email asked "Chris, since Barbara is listed as a case in chief witness, do you want me to add all of her interviews to the next batch of discovery? Do I have to include notes with the

[9] This email was deleted from his computer by the trial prosecutor and had to be recovered from unallocated space when it was provided to the court in March 2011. ER-Vol.1@76.

discovery?" ER-Vol.1@77. Mr. Cardani responded: "Yes on reports. *No on notes.*" *Id*. (emphasis added).

When the withheld discovery was produced after trial it revealed that at the time Mr. Cardani issued his directive not to turn over the notes, the FBI files included a typed FD-302 report of a joint interview of Richard and Barbara Cabral on March 21, 2005 that *did not* include the reference to the payment that was made that day. ER-Vol.3@647-48. However, the handwritten notes in the file *did* include the fact of the $5,000 payment and that "Barbara" was present. ER-Vol.3@649-50.

The failure to provide Mr. Seda notice of Agent Dave Carroll's offer to pay Barbara Cabral was also deliberate. Sometime between April and September 2010, Carroll told Cabral that he intended to get her something after the trial. ER-Vol.2@489-90; ER-Vol.3@654. AUSA Gorder learned of this offer after one of the trial preparation interviews he and Carroll had with Cabral in the summer of 2010 when, knowing of the payments that had been made directly to Richard, Gorder asked Carroll if Barbara had been paid. ER-Vol.3@673-74. When Carroll said no, Gorder's response was to "caution[] him not to do so before" trial. ER-Vol.3@675-76. *See also* ER-Vol.2@506. Gorder's response contrasts starkly with that of the United States Attorney. He understood that it was the type of

information that needed to be disclosed and directed its immediate disclosure to the defense when he learned of it. ER-Vol.3@719-20.

Conclusion

There is a reasonable likelihood that availability of the withheld information would have had a dramatic impact on the impeachment of Ms. Cabral. Cabral was a difficult witness. She was local, had left Islam, and presented well. Armed with evidence of the payments, the offer of payment, and the relationship with the agents, the tenor of the cross-examination would have been entirely different because the defense would have had clear evidence of payments to support a claim of bias.[10] As in *Kohring*, 637 F.3d at 905, the powerful evidence of bias "would have added an entirely new dimension to the jury's assessment of [Cabral]." Paraphrasing *Kohring*:

> Indeed, had the evidence of [the payment and offer of payment to Cabral] been disclosed, 'there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment' regarding [Cabral's] testimony against [Seda].

637 F.3d at 906 (citations omitted).

---

[10] The government has acknowledged that Cabral suffered medical issues due to the stress that she was under because of her involvement in the government's case against Mr. Seda. ER-Vol.3@642. The stress and medical issues were tied to the promise of payment by Agent Carroll. ER-Vol.2@507-09; ER-Vol.3@654. As in *Silva*, information regarding the stress and resulting medical issues could have been used by the defense to call into question Cabral's competency and credibility as a government witness. 416 F.3d at 987-88.

POINT II

THE GOVERNMENT'S APPEALS TO RELIGIOUS AND RACIAL PREJUDICES AND USE OF INFLAMMATORY EVIDENCE OF GUILT BY ASSOCIATION AND THE PRECLUSION OF EXHIBITS THAT WOULD HAVE COUNTERED THE GOVERNMENT'S PRESENTATION DEPRIVED MR. SEDA OF A FAIR TRIAL

In rebuttal closing, the prosecutor told the jury,

> The Noble Qur'an is the defendant

ER-Vol.11@2992. This argument epitomized the manner in which the government crossed the line from landing "fair blows" to "foul blows," presenting testimony and exhibits throughout the trial that were inflammatory, appealed to prejudice, and were of minimal probative value. *See Berger v. United States*, 295 U.S. 78, 88 (1935). The true picture of Mr. Seda was then distorted when the district court prevented him from rebutting some of the most inflammatory evidence. *See United States v. Waters*, 627 F.3d 345, 355-56 (9th Cir. 2010). The inflammatory evidence about terrorism and religion overshadowed the trial, preventing fair and dispassionate consideration of each of the four basic questions presented to the jury.

A. Standard Of Review.

Evidentiary rulings are reviewed for an abuse of discretion; interpretations of the Federal Rules of Evidence are reviewed de novo. *Waters*, 627 F.3d at 351-52. De novo review is also used to determine whether a district court's evidentiary rulings violated a defendant's constitutional rights. *Id*. at 352. Denial of a motion for a new trial is generally reviewed for abuse of discretion. *United States v. Pelisament*, 641 F.3d 399, 408 (9th Cir. 2011).

Pretrial, Mr. Seda raised numerous objections to the government's proposed exhibits. CR 336, 377, 402. He also more generally objected to the inflammatory nature of much of the government's proposed case. CR 336, 341, 377, 385, 401, 402, 417, 420, 427. To the extent any specific objections were not made at trial, they were covered by the pretrial objections. *United States v. Kellington*, 217 F.3d 1084, 1097 n.15 (9th Cir. 2000); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986).

The prosecutorial comments in its rebuttal closing are reviewed for plain error. *United States v. Sanchez,* 659 F.3d 1252, 1256 (9th Cir. 2011).

B. The Government's Derogatory Portrayal Of Islam In Closing Appealed To The Jury's Religious, Racial, Or Ethnic Prejudices and Violated Mr. Sedaghaty's Right To A Fair Trial.

In its opening statement, the government framed the religious issues in the case in the following way:

> This trial is not about the religion of Islam. This case will involve religious aspects to it to tell you what the defendant's mindset was when he engaged in these transactions because we will show you that al-Haramain subscribed to a very strident form of Islam that promoted acts of violence in the name of religion, jihad, violent jihad, aggressive "kill people" jihad.

ER-Vol.6@1464. Unfortunately, the government did put Islam on trial. This reached its zenith in the rebuttal closing where the prosecutor started by holding up the Noble Qur'an and saying

> The Noble Qur'an is the defendant. After he started working for Al-Haramain, sending to U.S. prisons around this country, in the thousands, 10 to 15,000 prisoners, violent people serving time, getting junk like this from Al-Haramain saying jihad is an obligation for Muslims. Talk about people prone to suggestion. Prisoners.

ER-Vol.11@2992.

During this argument, and again later during his closing (ER-Vol.11@3027), the prosecutor waived the Qur'an around and then tossed it down on the table directly in front of the jury. The first time he threw the Qur'an was immediately after he referred to it as "junk." SER@70,73. After he threw it

down, he picked up the Islamic Guidelines For Individual And Social Reform. The podium from which the prosecutor was speaking was approximately four to five feet from the table. He was standing behind the podium when he threw the book. In the district court, the government acknowledged that the prosecutor's tone was "forceful." ER-Vol.5@1305.

These actions went far beyond any permissible argument about Mr. Seda's state of mind. Indeed, calling the Noble Qur'an "the defendant" trenches on First Amendment rights and shifted the jury's focus from Mr. Seda and his actions to his religion. Whatever an individual's views of the Qur'an, even one that contains the jihad appendix, it is the holy book of one of the world's major religions. Moreover, The Noble Qur'an was the official Qur'an of the Kingdom of Saudi Arabia, one of the United States' closest allies in 2000. Labeling the holy book of Islam the defendant, and throwing it onto the table, encouraged the jurors to act on emotion and profoundly disrespected the defendant's religion. SER@70-71.

The government's anti-Qur'an argument falls directly within the holding of *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000). There, this Court noted that while most of the government's argument about the Sikh religion was relevant, "a not insignificant portion of the prosecutor's closing arguments highlighted the relevant testimony in a way that went beyond merely providing evidence of motive

and intent . . . and that invited the jury to give in to their prejudices and buy into the various stereotypes that the prosecutor was promoting." *Bains*, 204 F.3d at 974. "[A]ppeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." *United States v. Nobari*, 574 F.3d 1065,1073 (9th Cir. 2009) (quoting *United States v. Cabrera*, 222 F.3d 590, 594(9th Cir. 2000)). Such prosecutorial conduct "violates a criminal defendant's due process and equal protection rights." *Bains*, 204 F.3d at 974.

The question in this appeal is not whether the prosecutor had a bad motive but, rather, the objective question of whether his actions and comments "may have encouraged the jury" to act on prejudice. *Nobari*, 574 F.3d at 1075. When a statement gives rise to several inferences, some of which are permissible and others not, the harmful references are impermissible. *Bains*, 204 F.3d at 975.

The prosecutor's statements were prejudicial. They occurred at the conclusion of a trial replete with testimony about radical Islam, a subject that was sufficiently unsettling that a number of potential jurors stated that they could not fairly judge a case involving such evidence. ER-Vol.6@1416-17,1419,1423. The likelihood of harm from the closing is greater than might otherwise have been the case because it occurred at a time of strong anti-Islamic sentiment in this country

when major media outlets were covering stories about the burning of the Qur'an. ER-Vol.5@1316. As the Supreme Court said in *Viereck v. United States*, 318 U.S. 236, 247 (1943), about appeals to passion during World War II:

> At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection.

C. The Government's Portrayal Of Mr. Seda As A Fundamentalist Muslim And Its Reliance On Guilt By Association Deprived Mr. Seda Of A Fair Trial.

"[E]vidence linking a defendant to terrorism in a trial in which he is not charged with terrorism is likely to cause undue prejudice." *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008). Improper use of terrorism is similar to that condemned in organized crime and gang prosecutions. *See United States v. Love*, 534 F.2d 87, 88 (6th Cir. 1976) ("[R]eversal is required because the prosecutor intentionally and for no proper purpose injected into the trial the spectre of organized crime and the Mafia."); *Kennedy v. Lockyer*, 379 F.3d 1041, 1055-56 (9th Cir. 2004) (evidence of gang membership cannot be introduced to prove intent or culpability; such evidence creates the impermissible and

prejudicial risk of "guilt by association," as well as the risk that the jury will equate gang membership with the charged crimes).

As stated in *Nobari*, a "prosecutor[] 'may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.'" 574 F.3d at 1076 (quoting *United States v. Koon,* 34 F.3d 1416,1443 (9th Cir. 1994) (quoting *United States v. Monaghan,* 741 F.2d 1434.1441 (D.C. Cir. 1984)), *rev'd in part on other grounds*, 518 U.S. 81 (1996); *see United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999) ("Prosecutors may not make comments calculated to arouse the passions or prejudices of the jury." (citing *Viereck*, 318 U.S. at 247-48)); *see also Viereck*, 318 U.S. at 247-48 (even though objection was untimely, argument required reversal). Even when evidence has some probative value, it should be excluded if its introduction will be unduly prejudicial. *Waters*, 627 F.3d at 354-57.

The district court overruled repeated defense objections based on the clearly established law thereby permitting the government to condemn Mr. Seda through impermissible guilt by association and fears of terrorism. These fears were then

heightened by the government's portrayal of Mr. Seda as an anti-Semite who practiced an extreme brand of Islam that supported violence.

1. Argument and evidence of guilt by association.

In its opening statement, the government told the jury that it was "not accusing Mr. Sedaghaty for being a terrorist," ER-Vol.6@1449, but then mentioned "mujahideen" 29 times and "jihad" 22 times. ER-Vol.6@1444-85.

In addition, in its opening, the prosecution introduced the jury to a photo montage on a large posterboard that it referred to repeatedly throughout the trial. ER-Vol.6@1451; ER-Vol.8@1966; ER-Vol.7@1885-86,1703; ER-Vol.9@2306-07. The montage included Mr. Seda, an inflammatory photo of Soliman al-Buthe, the co-defendant; AHIF-S employee Abdul Qaadir; and Commander Ul-Khattab, the notorious leader of the Chechen mujahideen who Mr. Seda never met or corresponded with. It also included a non-photo silhouette of the AHIF-S accountant, Mr. Al Shoumar. ER-Vol.5@1309.

In introducing Khattab the prosecutor said:

> Another name. Khattab. **He made the chart**.
>
> Khattab's over here. And you'll hear that at the time of these events, this was the big cheese in Chechnya. This was the leader of the mujahideen. The commander issuing all the instructions for the Islamic fighters. He was calling all the shots.

ER-Vol.6@1475 (emphasis added). But, Khattab "made the chart" because the government put him on it. Contrary to its argument pre-trial that "stuff is confusing" and that the chart would be "helpful," (ER-Vol.1@150-51), the government's choice of chart members appears to have had little to do with eliminating confusion. Rather, it was to insinuate that Mr. Seda, who had never met or interacted with Khattab, was, like the others on the chart, a nefarious character. The chart's use demonstrated the government's approach of guilt by association. ER-Vol.5@1309. *Cf. Kennedy v. Lockyer*, 379 F.3d at 1055-56 (evidence of gang membership cannot be introduced to prove intent or culpability; such evidence creates the risk of guilt by association) (citing cases).

The government then injected a great deal of testimony of guilt by association through its terrorism consultant, Kohlmann. For example, Kohlmann testified about Faisal Shahzad, an individual who had recently attempted to detonate a bomb in Times Square. ER-Vol.6@1651. He provided summaries of various charities in the United States that provided funds to mujahideen. ER-Vol.7@1698-99. He referred to Hamas and the Muslim Brotherhood. ER-Vol.7@1727.

Kohlmann injected Osama bin Laden, the person who United States citizens most closely identify with Islamic terrorism, into the trial, asserting a relationship

between Khattab, whose photo on the chart was inches from Mr. Seda's, and bin Laden. ER-Vol.6@1658. He linked AHIF-S to bin Laden describing Wail Jalaidan, the man the Saudi government placed as head of the Saudi Joint Relief Committee (SJRC) as an "old friend" of bin Laden's. ER-Vol.7@1707. Jalaidan had fought with bin Laden in Afghanistan – when the United States was funding the anti-Soviet mujahideen. ER-Vol.7@1707-09.

Once the specter of bin Laden was raised, the government pushed it forward. It cross-examined Colonel Lang about bin Laden and Jalaidan. ER-Vol.10@2524. The language used by the government to describe bin Laden's relationship with Jalaidan (with no testimony that Mr. Seda had ever had contact with either man) morphed as the trial went on. On August 31, 2010, the government described Jalaidan as an "old friend" of bin Laden's. ER-Vol.7@1707-09. On September 3, 2010, it described Jalaidan as a "good friend," and then on September 8, 2010, it described him as a "best friend." ER-Vol.10@2524; ER-Vol.11@2914. The references to bin Laden were particularly offensive because Mr. Seda abhors him. ER-Vol.5@1247 (Rej. Def. Ex. 840).

Kohlmann's discussion of Khattab included detail about the activities of the Kavkaz Institute, a foundation Khattab established in 1992. ER-Vol.7@1665. Kohlmann described the Institute as an academy that taught Chechen Muslims

about Islam as well as combat. ER-Vol.7@1665-66. The government was permitted to show the jury a portion of a propaganda video regarding the Kavkaz Institute that Kohlmann downloaded from the internet. ER-Vol.7@1667-68; ER-Vol.4@955 (Gov't. Ex. EK-7). The video was highly inflammatory, portraying Islamic militants engaging in military training and violent combat. The video did not come from the Ashland Prayer House and Kohlmann had no knowledge whether Mr. Seda had ever seen it. ER-Vol.7@1667-68.

Kohlmann did not provide any independent information or insight regarding AHIF-A, Dr. El-Fiki, Mr. al-Buthe, or any monies specific to this case. Neither Kohlmann nor any other witness offered a link between Mr. Seda and any of the other alleged terrorists or organizations or their activities. There was, however, a clear danger that the jury would draw an inference that if some Islamic charities as individuals funded mujahideen or engaged in criminal acts that Mr. Seda and AHIF-A did as well. *See Kennedy v. Lockyer*, 379 F.3d at 1055-56 (condemning guilt by association).

The government summarized its shotgun terrorism accusations against Mr. Seda in closing.

> Why are records so important? Because this kind of stuff once it's out there, it can disappear into the Never Never Land of terrorism. This is how wars are fought. The mujahideen are not sponsored by

> countries. It's not like Russia who pays its soldiers with rubles, government money. It's not like the American Army being paid with dollars. The mujahideen are freelance fighters that go around the globe to promote their terrible version of a religion that has very peaceful elements of it, but their version of hatred, of killing people that don't believe in their religion, they have all these crazy views about women. This is how they do their stuff. Cash. And once cash is released into the mainstream, it's gone.

ER-Vol.11@2997-98. This was a direct and improper appeal to fear and invitation to the jury to act to stop terrorism. *See Sanchez*, 659 F.3d at 1256; *Vierek*, 318 U.S. at 247-48; *Nobari*, 574 F.3d at 1076.

2. Appeals to fear and anti-Semitism.

The government elicited highly prejudicial testimony from Gartenstein-Ross about activities in the prayer house that had no bearing on any of the issues in the case. During direct examination, the government dramatically asked Gartenstein-Ross about genital mutilation – an inflammatory subject that was probative of no issue. ER-Vol.7@1881-82. It elicited that Gartenstein-Ross was reprimanded for objecting to the practice in response to an e-mail inquiry. ER-Vol.7@1881-82. Mr. Seda objected and the court sustained the objection. But the government continued. ER-Vol.7@1882. While Mr. Seda was able to mitigate the damage somewhat when Gartenstein-Ross acknowledged that the reprimand was from

AHIF-A employee David Hafer, not Mr. Seda, and that when Mr. Seda learned of the issue he was "conciliatory," the damage had been done. ER-Vol.7@1882.

In closing, instead of arguing from the evidence his witness had given, the prosecutor misstated the evidence: "When Mr. Gartenstein answered an inquiry about Islam one day in an email, he was reprimanded by the defendant." ER-Vol.11@2894. Defense counsel's objection was overruled. ER-Vol.11@2894. The prosecutor went on to say, based on his mistaken view of the evidence, "you can only conclude that there was something rotten on the inside of al-Haramain in Ashland, Oregon." ER-Vol.11@2895. This line of questioning and argument crossed any permissible bounds. *Cf. United States v. Merino-Balderrama,* 146 F.3d 758, 762-63 (9th Cir. 1998) (discussing unfair prejudice arising from showing inflammatory film of graphic sexual acts of children).

The government spent a great deal of time with Gartenstein-Ross eliciting testimony about the prisoner project. He testified that 15,000 Qur'ans were mailed out, most including the Jihad appendix. ER-Vol.7@1870-71. Additionally, a thousand copies of the Islamic Guidelines were mailed. ER-Vol.7@1874-75. There was no legitimate point for this questioning; rather it instilled fear that Mr. Seda was seeking to radicalize a captive criminal audience. In closing the prosecution argued this theme:

> 10 to 15,000 prisoners, violent people serving time, getting junk like this from Al-Haramain saying jihad is an obligation for Muslims. Talk about people prone to suggestion. Prisoners.

ER-Vol.11@2992.

Use of the Qur'an and Islamic Guidelines, however, went beyond the prisoner project. Both books were shown repeatedly to both prosecution and defense witnesses with the prosecutors sometimes reading inflammatory portions aloud. ER-Vol.7@1867-76; ER-Vol.9@2445-49,2561; ER-Vol.10@2704-06,2654. For example, despite the fact that one of Mr. Seda's interfaith peace partners, Rabbi Zaslow, had never seen the Islamic Guidelines book, the prosecutor read four anti-Semitic passages to him. These highly inflammatory passages included admonitions to reject Jews and Christians and to "fight the Jews and kill them." ER-Vol.9@2446-49. The government's effort to portray Mr. Seda as anti-Semitic included its asking several witnesses about a speaker at the Ashland Prayer House who made anti-Semitic comments. ER-Vol.7@1818-19; ER-Vol.7@1853; ER-Vol.10@2544,2699-2700.

All of this testimony was highly objectionable. None had substantial, if any, probative value. The repeated questioning had no place in the trial. *See United States v. Geise,* 597 F.2d 1170, 1185 (9th Cir. 1979) (in many cases evidence of reading habits and political views inadmissible).

3. Obsession with violence and Chechnya.

The government used the exhibits it selected from the AHIF-A computers and other material provided by Kohlmann to present a picture of Mr. Seda obsessed with violence in Chechnya. Many of the exhibits were read to the jury repeatedly, by the government case agent (ER-Vol.9@2306-25), their computer expert (ER-Vol.6@1591-1600), Kohlmann (ER-Vol.7@1673-87), and Gartenstein-Ross (ER-Vol.7@1886-1888). These included:

- photos of dead Russian soldiers, ER-Vol.4 at 876-86,901-04 (Gov't Ex. SW-8, 16); ER-Vol.6@1599-1600; ER-Vol.10@2516; ER-Vol.7@1692-93; ER-Vol.9@2311-12,2316-17;
- reports of fighting by mujahideen in Chechnya, ER-Vol.4@912,918,919,933,935,938,939 (Gov't Exs. SW-33, 37, 40, 44, 51, 52, 56); ER-Vol.7@1695-97;
- videos of the Russian-Chechen war in 1994 replete with martial music, soldiers training, and Chechen nationalists, ER-Vol.4@872-73 (Gov't Exs. SW-1 and SW-1a); ER-Vol.7@1700-06;
- highly inflammatory portions of a video Kohlmann provided to the U.S. government that depicted mujahideen training in Chechnya, ER-Vol.7@1667-68; ER-Vol.4@955-59 (Gov't Ex. EK7) (demonstrative only and translation).

The repeated showing of the exhibits, particularly the inflammatory photos, only served to appeal to the jury's passions. *See Ferrier v. Duckworth*, 902 F.2d

545, 548-49 (7th Cir. 1990) (inexcusable to admit irrelevant photo to influence the jury against the defendant).

D. The Trial Court's Exclusion Of Evidence That Mr. Seda Is A Moderate Muslim Prevented Him From Rebutting The Unfair And Skewed Presentation In Violation Of His Right To A Fair Trial And This Court's Directive In *Waters*.

In an effort to combat the fundamentalist and anti-Semitic picture the government portrayed, Mr. Seda offered a series of writings in which he opposed violence. *See, e.g.,* ER-Vol.5@1193,1202-04,1207,1208,1209,1210,1212,1214, 1234,1235,1237,1239,1240,1241,1245,1246 (Rej. Def. Exs. 809, 811, 812, 812(A), 815, 815(A), 820(B), 820(C), 822, 825,833, 833(A), 834, 835, 835(A), 836(B), 838, and 839); ER-Vol.1@209; *see* CR 432. The jury was provided evidence that the videos the government introduced that had been seized in the Ashland Prayer House were part of a large collection of videos found during the search. *See* ER-Vol.4@975-76 (Def. Ex. 1002). Most were copies made from commercial newscasts and shows such as the History Channel. *Id*. Mr. Seda proffered two representational video compilations; the compilations were not, however, received. ER-Vol.1@94.

Mr. Seda offered a full length pamphlet on his view of Islam, *Islam Is*, in which he expressed a tolerant, peaceful, and open view of Islam. ER-

Vol.5@1261-74 (Rej. Def. Ex. 990). At least one defense witness, a rabbi, testified that he had reviewed *Islam Is* and edited it. ER-Vol.9@2438,2447. There was sufficient foundation for the admission. These proffers were rejected by the trial court. ER-Vol.1@90. While several witnesses were permitted to describe their experiences with Mr. Seda, his inability to provide the jury with his writings was devastating.

Once the government raised the spectre of bin Laden and attempted to draw links from bin Laden to Mr. Seda, it was critical for Mr. Seda to be able to establish that he abhors bin Laden and his view of Islam. Mr. Seda proffered numerous exhibits establishing that after September 11, 2001, he offered to assist the United States Government in its fight against bin Laden and Al Qaeda. ER-Vol.5@1196,1206,1241,1243,1246,1247,1248, 1249,1251 (Rej. Def. Exs. 810(B), 813(A), 836(B), 836(C), 839, 840, 840(A),840(B), 840(C)); ER-Vol.1@208-09. He was not, however, permitted to present these exhibits to the jury.

With respect to the prisoner project, Rodgers and Gartenstein-Ross agreed about several aspects of the program, including the requests from prisoners and involvement of prison chaplains (ER-Vol.7@1866,1927-28; ER-Vol.10@2689-91,2703-06,2708-09) but disagreed about others. During his testimony, Mr. Rodgers reviewed several letters from chaplains. ER-Vol.10@2690; ER-

Vol.5@1275-1292 (Rej. Def. Exs. 1054-1063). The court agreed that "[Al Haramain] clearly got letters from chaplains" but refused to receive the letters as evidence. ER-Vol.1@92.

Mr. Seda, like the defendant in *Waters*, was vilified by the government and had his religion and core values attacked. *Waters*, 627 F.3d at 356. Like Waters, he proffered significant documentary evidence to rebut and correct the distorted picture that the government was permitted to present. *Id.* at 357. Like Waters, he was able to submit some rebuttal. But, like Waters, the district court's rulings did not permit him to effectively defend himself. *Id.*

E. Conclusion.

Consideration of the evidence would have been a close question in an impartial setting. The jury heard conflicting views from the experts on the existence of errors and materiality. ER-Vol.9@2263-64,2269; ER-Vol.10@2592-96. Wilcox's direct and cross-examination revealed several significant shifts, particularly regarding the critical Springfield Building Schedule, and he admitted making mistakes when Mr. Seda provided accurate information. *See supra* at 28-29. But, this was not an impartial setting. It was, rather, one, as described above, fraught with appeals to prejudice and emotion and in which the danger from such appeals was great. *See Viereck, supra.*

The emotional overlay of terrorism, bin Laden, throwing of the Qur'an, and anti-Semitism fell on fertile ground, skewing the jury's consideration of the tax questions in an improper manner. Here, as in *Waters*, the government's exhibits, augmented by its arguments, created a significant danger that the jurors felt Mr. Seda possessed a "repugnant and self-absorbed embrace of destruction [that] is likely to have swayed jurors' emotions, leading them to convict [the defendant] not because of the facts before them but because []he represented a threat to their own values." *Waters*, 627 F.3d at 356. A new trial is required.

POINT III

MR. SEDA WAS DEPRIVED OF A FAIR TRIAL WHEN THE GOVERNMENT WAS PERMITTED TO ARGUE THAT IT HAD FOLLOWED THE "MONEY TRAIL" BUT MR. SEDA WAS PRECLUDED FROM REBUTTING THAT ALLEGATION

Mr. Seda was denied a fair trial when the district court permitted the government to introduce and speculate about exhibits AHIF-2 and AHIF-3 yet prevented Mr. Seda from adequately rebutting the government's allegations regarding the money trail by excluding proffered defense exhibits 704 and 705 that related directly to the issue of the ultimate disposition of Dr. El-Fiki's donation. The fact-finding process was further distorted by the government's use of its superior diplomatic and legal power to obtain evidence in foreign countries

related to the money trail while opposing Mr. Seda's efforts to gather exculpatory evidence in the same locations.

A. Standard Of Review.

This Court reviews a district court's evidentiary rulings for an abuse of discretion and its interpretation of the Federal Rules of Evidence de novo. *Waters*, 627 F.3d at 351-52. Whether a district court's evidentiary rulings in a criminal trial violated a defendant's constitutional rights is reviewed de novo. *Id*. The question of whether refusal to compel use immunity is error – an analogous situation to the events discussed below – is a mixed question of law and fact reviewed de novo. *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008).

B. The District Court's Rulings Admitting Government Exhibits AHIF-2 And AHIF-3 And Excluding Defense Exhibits 704 And 705 Deprived Mr. Seda Of A Fair Trial Because They Prevented Him From Rebutting The Claim That The Government Had Assiduously Followed The Money Trail.

1. The government's theory regarding Dr. El-Fiki's donation.

To link Mr. Seda to funding the Chechen mujahideen and to cast doubt on the legitimacy of Dr. El-Fiki's donation and its disposition, the government emphasized its efforts to "trace the disposition of this money" and that tracing

financial transactions, especially overseas, is "exceedingly difficult." ER-Vol.6@1460-62. It argued that Mr. al-Buthe pocketed $21,000. ER-Vol.11@2904.

Agent Anderson testified at length about the steps she took tracking the travelers checks and the cashier's check to the Al Rajhi Bank in Saudi Arabia. ER-Vol.9@2329-39. She testified that her tracing of Dr. El-Fiki's donation revealed that, after Mr. al-Buthe flew from the U.S. to Saudi Arabia with $130,000 in travelers checks and a $21,000 cashier's check, he deposited the $21,000 in his personal bank account and cashed the $130,000 in travelers checks. ER-Vol.9@2337-39; *see also* ER-Vol.12@3288-91. When asked by the prosecutor whether she attempted to "trace further" the proceeds of the travelers check and the cashier's check, the agent explained that she

> employed, at first, diplomatic means to try and get these bank records . . . [a]nd after that didn't work, I ended up issuing a subpoena to the Al-Rajhi Banking Investment Bank.

ER-Vol.9@2332-33. The government then introduced, through the agent, the Al Rajhi Bank records on the travelers checks and Mr. al-Buthe's bank account, which showed a deposit of $21,000 on April 8, 2000. ER-Vol.9@2334,2338.

The prosecutors relied heavily on the "money trail" theme during closing. The disposition of those funds was crucial to the government's case because the

$21,000 was the basis of the error alleged on line 1 on the tax return, and the $130,000 was the basis of the error alleged on line 22. With respect to the travelers checks, Mr. Gorder argued that after the government traced them to the Al Rajhi Bank, the "trail dries up." ER-Vol.11@2904. As far as the $21,000, Mr. Gorder stated that after it was deposited in Mr. al-Buthe's account:

> "There's nothing that indicates its going to Chechnya. Nothing that indicates it's going to the Saudi Joint Relief Committee. Nothing that indicates it's going to al-Haramain. Looks like it's spent for normal personal expenses.

ER-Vol.11@2904. He ended his argument by imploring the jury to "follow the money. If you do, you'll return guilty verdicts." ER-Vol.11@2922.

2. The district court improperly admitted two government exhibits and excluded two defense exhibits.

Four proffered exhibits shed light on the ultimate disposition of Dr. El-Fiki's donation and the validity of the government's argument that it had followed the money trail. The government offered AHIF-2 and AHIF-3, which appeared to be two receipts stating that Mr. Seda had turned over all Chechen relief donations received by AHIF-A to Mr. al-Buthe. The total amount on each document differed slightly, with one showing roughly $186,000 in donations and the other $188,000. ER-Vol.4@849,851 (Gov't Exs. AHIF-2 and AHIF-3).

Mr. Seda offered defense exhibits 704 and 705, which appeared to be official receipts from AHIF-S showing that Mr. al-Buthe had deposited roughly $187,000 into AHIF-S's account for deposit into Al Rajhi Bank account #9889, the AHIF-S account designated, inter alia, to receive donations for Chechen relief. ER-Vol.4@1091-94 (Rej. Def. Exs. 704-05). All four documents had been provided to the government as early as 2004 by attorneys representing Mr. Seda, Mr. al-Buthe, or AHIF-A. The district court improperly admitted the government's exhibits and excluded the defense's exhibits.

The government used AHIF-2 and 3 with five different witnesses. ER-Vol.6@1606-07; ER-Vol.8@2074; ER-Vol.9@2260-62,2355-59; ER-Vol.10@2618-22. The testimony and argument speculated that the documents were fraudulent and prepared after the investigation into al-Haramain became known. ER-Vol.9@2357-59. In rebuttal argument, for example, the prosecutor emphasized that "when we caught them," the receipts were produced. ER-Vol.11@3019. He went on to speculate, "What's going on in the defendant's mind now when the jig is up . . . . They are both bogus . . . ." ER-Vol.11@3020.

Mr. Seda disputed the admissibility of AHIF-2 and 3 because none of the government witnesses could provide a proper foundation. *See* Fed. R. Evid. 901; CR 401 at 4, ER-Vol.12@3093-95. No witness who was shown the exhibits had

any knowledge about their origin. None knew whether one was a draft, whether one or both were prepared in 2000, or whether one or both were prepared years later. All the testimony was, therefore, highly improper speculation that included the prosecutor's vouching for himself and his case agent. *Byrd v. Collins*, 209 F.3d 486, 546 (6th Cir. 2000) ("Similar to prosecutorial vouching for witness credibility, such [factual] speculation places the government's prestige behind uncorroborated putative facts that have not survived the rigor of substantiation."). The fact that the witnesses had no basis other than speculation that the documents were false completely undermined the district court's belief that they were admissible as admissions. *Lin v. Gonzales*, 434 F.3d 1158, 1165 (9th Cir. 2006) (stating that immigration judge's "speculation that a document is unreliable merely because other documents from the same region have been forged in the past can hardly be regarded as substantial evidence"); *Cf. Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (affirming the exclusion of the *ipse dixit* testimony of plaintiff's expert that was not based upon objective, verifiable evidence).

The prejudice to Mr. Seda was exacerbated by the district court's refusal to admit defense exhibits 704 and 705. As early as 2004, the government knew that Mr. Seda had evidence that Mr. al-Buthe deposited the entire donation from

Dr. El-Fiki, and the other money he had collected for Chechen relief, into the AHIF-S office in Riyadh and that the deposit was earmarked for account #9889 in the Al-Rajhi bank. ER-Vol.4@1091-94 (Rej. Def. Exs. 704-705); ER-Vol.9@2366-67; ER-Vol.12@3285-86. At least as early as 2004, when Kohlmann gave the government a list of 13 AHIF-S bank accounts at the Al Rajhi Bank, the government knew that account # 9889 existed and that it was designated to receive money donated, inter alia, for Chechen relief. ER-Vol.4@969 (Def. Ex. 731); ER-Vol.9@2365-66; ER-Vol.12@3154-55. Despite its possession of the receipts and the bank account number, the government made no effort to follow the "money trail" to the bank or to AHIF-S.[11]

Mr. Seda offered exhibits 704 and 705 for two distinct reasons and on two distinct bases. First, he offered them as substantive evidence that Mr. al-Buthe deposited the full amount of Dr. El-Fiki's donation with AHIF-S. ER-Vol.11@2838. Second, he offered them to establish incompleteness and bias in the government investigation because it was in possession of critical evidence that rebutted its theory but made no effort to obtain or authenticate those records. CR 477 at 5; ER-Vol.9@2367-68,2394-98.

---

[11] *See* Classified Brief at 8-9, 10-12.

Notwithstanding the fact that Agent Anderson testified at length about her extensive efforts to trace the money from Dr. El-Fiki's donation, Mr. Seda was precluded from having Agent Anderson describe and identify proposed defense exhibits 704 and 705 and from showing them to the jury. ER-Vol.9@2328-39,2342-44,2367-68.[12] As a result, he could not demonstrate to the jury that relevant records were in the agent's possession and explain – with proof – exactly what the government had failed to seek. ER-Vol.9@2394-96. Instead, the government was able to ignore the import of the proffered exhibits and argue that Mr. Seda falsified receipts or records of what happened with Dr. El-Fiki's donation. ER-Vol.11@3019-21.

3. The court's rulings on AHIF-2 and 3 and 704-705 deprived Mr. Seda of a fair trial.

The rulings on AHIF-2 and 3 and 704 and 705 violated the Fifth and Sixth Amendments. "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal

[12] Mr. Seda's expert witness, Col. Lang, testified that certain documents looked authentic but, again, the defense was precluded from showing the jury what Col. Lang was talking about. ER-Vol.1@124-26,109-14. This information will be augmented in the Classified Brief.

quotation marks and citation omitted). "[A]ttack[ing] the reliability of [an] investigation" is an important defense tactic. *Kyles*, 514 U.S. at 446.

This is not a situation in which the defense sought to challenge the government investigation in a vacuum. Rather, the government took great pains to explain to the jury the extent of its efforts. ER-Vol.9@2328-39,2342-44. This vouching came very close to an impermissible line. *United States v. Hermanek*, 289 F.3d 1076, 1099 (9th Cir. 2002) (finding vouching when the prosecutor "conveyed to the jury a message that [the] prosecutor[] personally believed . . . in the integrity and good faith of the investigation.") (internal quotation marks and citation omitted). "The jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the agents'] testimony which provided 'a crucial link in the proof'" in this case. *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)).

Had Mr. Seda been able to obtain and admit the relevant evidence, he would have shown that Dr. El-Fiki's entire donation was deposited in AHIF-S's account for Chechen relief. In the context of a substantial effort to prove the extent of its investigation, the limit on Mr. Seda's efforts to prove a major hole in the government's investigation violated his Fifth and Sixth Amendment rights.

C. The Fact-Finding Process Was Distorted When The Government Utilized Its Diplomatic And Other Resources To Obtain Evidence From Foreign Countries But Opposed Mr. Seda's Request For A Letter Rogatory For Records From Saudi Arabia And Testimony From Egypt.

Mr. Seda's efforts to rebut the government's charges were hampered not only by evidentiary rulings, but also by his inability to fully investigate the case. Many key documents and people were located overseas, and a criminal defendant in the U.S. cannot produce such witnesses and evidence without the assistance of the government or the court.

The Letter Rogatory process is available to tribunals in the United States as a method for obtaining evidence in foreign countries or as a means of requesting the assistance of foreign authorities in investigating a case pending in this country. *See* 28 U.S.C. § 1781(a)(2). Letters Rogatory may be issued by United States District Courts on behalf of defendants in criminal cases in order to secure in-court testimony. *See* 28 U.S.C. § 1781(a)(2); *United States v. Staples,* 256 F.2d 290, 292 (9th Cir. 1958). Combined with Fed. R. Civ. P. 28(b), Fed. R. Crim. P. 15 authorizes a court to issue Letters Rogatory to a foreign citizen to be deposed. *See* CR 247 at 9-12. Mutual Legal Assistance Treaties (MLAT) allow the United States to obtain witnesses and evidence to further its investigations and prosecutions in criminal cases. MLATs are generally available to the government

but not to a defendant. *See*, *e.g.*, *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001), *see* ER-Vol.12@3320. 31 U.S.C. § 5318 authorizes the government, but not the defense, to issue subpoenas for certain bank records.

Pre-trial, Mr. Seda sought evidence from Saudi Arabia and Egypt through the Letter Rogatory and MLAT processes. He also urged the government to utilize its powers to assist him where he had no authority to act and asked the court to direct it to do so under the authority of *Westerdahl*, *supra*. Mr. Seda sought, inter alia, certification of authenticity related to numerous documents from Saudi Arabia including exhibits 704 and 705 and a series of exhibits (713-729) related to the SJRC and the agreement between Russia and Saudi Arabia, as well as the testimony of Dr. El-Fiki and those around him involved in the donation – either through live trial testimony or deposition. ER-Vol.4@1086-1099; ER-Vol.5@1100-1192 (Proposed Def. Exs. 678, 704-707(c) and SJRC and El-Fiki, 713-729(B)); *see* CR 238, 267; CR 247 at 4, 247-2 at 4, 247-3 at 2-10, 271. The government opposed these requests and the court adopted the government's position. CR 244, 262, 274; ER-Vol.1A@337,258-61,[13]257. The government's

[13] The government did not object to the defense's Letter Rogatory request for the testimony of Mr. Sami Al Sanaad, and one was issued but the Saudi government never responded.

and court's negative responses prevented Mr. Seda from accessing exculpatory evidence, distorting the fact-finding process.

The four exhibits discussed above – AHIF-2, AHIF-3, 704 and 705 – and the bank records related to them are at the core of the unjust power imbalance between Mr. Seda and the U.S. government.[14] The government utilized its authority under 31 U.S.C. § 5318 to issue administrative subpoenas to the Al Rajhi Bank in Saudi Arabia for Mr. al-Buthe's records. ER-Vol.12@3116-46; *see* CR 253, 277, 333. Those bank records were utilized by the government as a central part of its "follow the trail" evidence. ER-Vol.1@139; ER-Vol.9@2334-39,2342-44; ER-Vol.11@2904-05. Mr. Seda requested assistance from the government to obtain authenticated copies of exhibits 704 and 705 to counter the government theory and establish that Mr. al-Buthe had deposited all the funds into AHIF-S's Chechen relief account. The defense also sought additional authenticated documents from Saudi Arabia that described the activities of the SJRC and would have shown that Russia had approved the Saudi organization's efforts to route Islamic charitable donations to Chechnya. CR 271.[15] However, while the court

---

[14] Additional points are made in the Classified Brief at 12-13.

[15] Although not relied upon at trial, the government used its MLAT and Letter Rogatory power to obtain evidence from the Russian Federation that was heavily relied upon at sentencing. *See* ER-Vol.12@3320-22.

granted Mr. Seda's motion, it was limited to only Mr. Al Sanad; the court did not grant the motion as to the receipts or their related documents. These other documents would have countered the government's attack on the SJRC.

The government also used its superior position to gain access to one of the most central figures in the case – Dr. El-Fiki. In 2005, FBI and IRS agents met with members of the Egyptian security service, coordinated questions to be asked of Dr. El-Fiki, and then observed the interview. ER-Vol.4@1086-90. CR 244 at 2. Mr. Seda, in turn, sought a Letter Rogatory to depose Dr. El-Fiki because, while he would cooperate with Egyptian authorities, who cooperated with the prosecution's request, Dr. El-Fiki would not meet with defense investigators.

While district courts are given broad discretion in the Letter Rogatory process, they are directed to inquire into the materiality of the testimony sought and the unavailability at trial of the witnesses sought to be deposed. *See United States v. Trout,* 633 F. Supp. 150, 151 (N.D. Cal. 1985); *United States v. Jefferson*, 594 F. Supp. 2d 655, 664 (E.D. Va. 2009). Here, exceptional circumstances existed requiring that Dr. El-Fiki be deposed. His testimony would have been highly exculpatory on the central issue in the case establishing that his donation was for humanitarian purposes and that there was nothing sinister about the donation, the manner in which it was made, or its routing. This contradicts the

arguments the government made regarding the donation. ER-Vol.9@2293-96. There were, moreover, no alternative witnesses.

With respect to the use of the MLAT and 31 U.S.C. § 5318, while there is no law directly on point regarding the government's use of the treaty or other diplomatic or legal processes available solely for its use to procure witnesses and evidence from overseas while it refuses to assist the defense in the same manner, direct and analogous authority from this Court fully supports the orders Mr. Seda sought. In *Westerdahl*, 945 F.2d at 1086-87, the government granted immunity to one of its witnesses but refused a defense request to exercise its authority to grant immunity to a defense witness. The court held that permitting the government to utilize its executive power in this manner distorted the fact-finding process and reversed Mr. Westerdahl's conviction. *Id.* at 1087.

The principle articulated in *Westerdahl* has been reiterated in a number of cases, most recently in *Straub*, 538 F.3d at 1156-65. There, this Court reiterated that the government's refusal to grant immunity to a defense witness denies the defendant a fair trial when

> (1) the defense witness's testimony was relevant, and (2) either (a) the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process; or (b) the prosecution granted immunity to a government witness in order to obtain that witness's

> testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government's witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial.

Straub, 538 F.3d at 1162.

In both the immunity and diplomatic contexts, the Executive branch is generally perceived as exercising exclusive authority and full discretion. *Straub*, 538 F.3d at 1156 (citing *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir. 1976)). The fundamental due process and counsel rights for a criminal defendant are also the same in both settings. Thus, the principles articulated in *Westerdahl* and *Straub* are equally applicable in the diplomatic context as they are in the immunity context. As a result, what is normally purely a government prerogative is cabined by the requirements of the Fifth and Sixth Amendments.

The *Westerdahl* and *Straub* criteria are met here. The evidence Mr. Seda sought to obtain is indisputably relevant, goes directly to the core aspects of the indictment, and is directly contradictory of the government's evidence. The distortion of the fact-finding process and the government's disregard of its obligation to do justice, *see Berger*, 295 U.S. at 88, is highlighted by its argument against issuing a Letter Rogatory for Dr. El-Fiki;

> Regarding the exculpatory nature of Mr. El Fiki's conduct, it's true that his conduct is the central aspect of the – forms one of the building blocks of the indictment. It is his money that we're talking about in the indictment, that is true. So his conduct, his statements, are certainly relevant from an evidentiary standpoint. And if he were an American citizen or if he were here, he'd probably end up on both our witness lists.

ER-Vol.12@3302. Notwithstanding that recognition, the prosecutor objected, arguing that because Dr. El-Fiki did not know Mr. Seda, his good motives would not be exculpatory. ER-Vol.12@3302-03. Then, at trial, knowing that Dr. El-Fiki could not be produced to contradict its assertions, the government argued that Dr. El-Fiki's routing of his donation to Ashland was highly suspicious. ER-Vol.9@2293-94.

Additionally, the exculpatory information Mr. Seda sought from Saudi Arabia went to the heart of the government's theories that AHIF-S was funding mujahideen in Chechnya and that Mr. Seda and Mr. al-Buthe conspired to have Mr. al-Buthe take $21,000 for his own use. It would have refuted the arguments the government made from the Al Rajhi Bank records the government obtained utilizing 31 U.S.C. § 5318. Because government objections to introduction of the critical Saudi documents were sustained under Fed. R. Evid. 801 and 802 (ER-Vol.1@126,112,93), Mr. Seda sought authenticated copies. They were essential to his defense.

The government's use of its authority to obtain evidence from overseas and its and the court's refusal to allow Mr. Seda to do so distorted the fact-finding process to the point of depriving Mr. Seda of a fair trial.

POINT IV

MUCH OF THE GOVERNMENT'S EVIDENCE WAS THE PRODUCT OF COMPUTER SEARCHES AND SEIZURES THAT EXCEEDED THE SCOPE OF THE MAGISTRATE JUDGE'S EXPLICIT LIMITATION OF SEIZURES TO FINANCIAL DOCUMENTS IN VIOLATION OF THE FOURTH AMENDMENT

The issuing magistrate judge limited the scope of authorized search and seizure in the warrant. He authorized search only for financial-type records. He did not incorporate the affidavit into the warrant.

Recognizing that it is necessary to engage in forensic review of a computer, the magistrate imposed two additional limitations. First, he confined the authorized seizures from computer searches with the words "limited to the following," then listed only financial type records. Second, the magistrate judge stated that the government was required to return any items beyond the financial records "unless further authorization is obtained from the Court." The government failed to respect either limitation, seizing and presenting to the jury a plethora of emails and other communications, screen shots, and web pages unrelated to financial transactions without ever seeking a warrant for the further invasion of

privacy rights. In doing so, the government violated the Fourth Amendment's prohibition on general searches and concomitant requirement of particularity, requiring the suppression of all evidence derived from the unlawful investigative activities.

A. Standard Of Review.

This Court reviews de novo the scope of the searches and seizures authorized by a warrant and whether executing officers exceeded that authorization. *United States v. McLaughlin*, 851 F.2d 283, 286 (9th Cir. 1988); *see Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004) (providing plenary review regarding the scope of the investigative activity authorized by a warrant). Whether an affidavit is included within a warrant appears to be subject to de novo review. *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997).

B. The Magistrate Judge Narrowly Limited The Scope Of Material To Be Seized From The Computers In The Absence Of Further Judicial Authorization.

The magistrate judge carefully followed the instructions and concerns regarding searches of business records that were set out in *United States v. Tamura*, 694 F.2d 591, 595-96 (9th Cir. 1982), and later reaffirmed in the context of computer searches in *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1171 (9th Cir. 2010) (hereinafter CDT) (*en banc*). In *CDT*, the Court

approved as "venerable precedent" *United States v. Tamura*, which required that warrants "specifically enumerate items," 694 F.2d at 595-95, that may be seized and called upon law enforcement to hold items "pending approval by a magistrate of a further search." *CDT*, 621 F.3d at 1167, 1169 (quoting *Tamura*, 694 F.2d at 596).

The search warrant in the present case explicitly included both of the limitations discussed in *Tamura* and *CDT*: "limited to" financial records, and no other seizures "unless further authorization is obtained from this Court." It fully satisfied the particularity requirement of the Fourth Amendment whose purpose of is to prevent general searches, "prevent exploratory rummaging," and to limit the discretion of law enforcement officers. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927).

The warrant did not incorporate the affidavit. As a general proposition, "[t]he Fourth Amendment, by its terms, requires particularity in the warrant, not in the supporting documents." *Groh*, 540 U.S. at 557. A warrant may be construed with reference to the affidavit used to obtain it only if the affidavit accompanies the warrant and "the warrant uses suitable words of reference which incorporates the affidavit therein." *United States v. McGrew,* 122 F.3d 847,849 (9th Cir. 1997)

(quoting *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982)). Suitable words of reference are seen in cases such as *United States v. Towne*, 997 F.2d 537, 539 (9th Cir. 1993) (in the place in the warrant where a description would appear, the warrant said "See Attachment B," which was the affidavit) and *In re Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F,2d 1317, 1319 (9th Cir. 1981) (warrants commanded seizure of "above specified property as described in the affidavits attached to the search warrant").

The warrant here did not incorporate the affidavit. On the contrary, the plain language of the warrant demonstrates that the magistrate judge explicitly rejected broader searches and seizures, expressly incorporating only two attachments. The first attachment described the home to be searched for the computer. The second described the items whose seizure was authorized and contained the specific "limited to" financial and tax records language. ER-Vol.13@3527. Moreover, it included the direction to seek further authorization from the magistrate judge if the agents wanted to seize any other items. At the one place where the warrant mentions the affidavit, it does not incorporate it and, immediately after the reference, includes a specific limitation that describes records and correspondence referring solely to tax related documents. ER-Vol.13@3524. As in *Groh*, "in this case the warrant did not incorporate other

documents by reference," and, therefore, rendered the seizures beyond the scope of its actual authorization in violation of the requirements of the Fourth Amendment. 540 U.S. at 558.

The district court's failure to suppress was based on a simple error: the court assumed that the affidavit in support of the search warrant was incorporated into it. ER-Vol.1A@269-76. It was not. There were no "suitable words of reference." Thus, on its face, the warrant limited the scope of the search to the items it described. ER-Vol.13@3524,3526-29; *see United States v. Hotal*, 143 F.3d 1223,1227 (9th Cir. 1997) ("[O]ur past holdings on particularity have always turned on the language contained in the warrant . . . .").

C. By Seizing Computer Material Beyond The Warrant's Authorization, The Agents Violated The Fourth Amendment, Requiring Reversal Of The Conviction.

In contrast to the warrant's express limitations, the agents executed the warrant without any restriction on the material to be seized. In addition to tax and accounting records, with no further judicial authorization, the government seized material that obviously does not qualify as financial records. As in *CDT*, the government agents ignored the warrant's restrictions, demonstrating callous disregard for constitutionally protected privacy rights. 621 F.3d 1169-70. For example, IRS Agent Smith provided a report – written two weeks after the

suppression hearing – admitting that after his search in 2004, he provided the case agent with a compact disc with "numerous photos of Chechen war and battle scenes" taken off Mr. Seda's computer. ER-Vol.12@3329A-C. This seizure went far beyond a forensic examination that could have lead to a new warrant application.

The items seized by Smith and given to Anderson were then used to obtain the indictment. ER-Vol.12@3329A-B; ER-Vol.3@718; ER-Vol.14@3639. And this was only the beginning. Agents Christianson and Anderson later created and utilized a list of search terms that were almost exclusively related to the war in Chechnya, mujahideen, and Islamic charities. CR 197 (Received exhibits SH-1, SH-2, SH-2A); *see also, e.g.*, ER-Vol.13@3380-87. By the time of trial, the government's evidence consisted of significant amounts of non-financial material seized from the computers including emails, websites, photographs, and news articles that the government contended established Mr. Seda's link to terrorism. All of these more intense searches and subsequent seizures were conducted by the government without obtaining the judicial authorization required by the warrant.

All direct and derivative evidence from the unlawful seizures must be suppressed. *Wong Sun v. United States,* 371 U.S. 471, 484 (1963).[16]

Suppression in this case requires reversal. If the motion had been granted, the tide of prejudicial material that so distorted the fact-finding process would not have been before the jury. The massive prejudice and the distortion of the trial preclude the government from showing, in this weak case for factual guilt, that the constitutional error was harmless beyond a reasonable doubt.

POINT V

THE DISTRICT COURT'S HANDLING OF CLASSIFIED MATTERS DEPRIVED MR. SEDA OF DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL

The classified issues in this case involve two categories: the material Mr. Seda caused to be placed in the SCIF and material that was in the government's possession. The district court's denial of access to his material and unprecedented order preventing any discussion about the content of the material prevented fair litigation of the motions for discovery of classified information, the motion to suppress, and trial defenses.

---

[16] Given the government's flagrant disregard of the warrant's constraints, the Court should order the suppression of all evidence seized under the warrant. *United States v. Foster*, 100 F.3d 846, 849-50 (10th Cir. 1996); *United States v. Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985).

Mr. Seda filed multiple discovery motions seeking classified information. The government filed six notices under CIPA § 4. None contained any information about their subject matter. The district court entered protective orders on each of the government's notices, denying Mr. Seda access to any information in four of the orders, providing an unclassified summary in response to one, and a limited amount of classified material in response to another. Mr. Seda's counsel and defense expert, Col. Lang, who hold security clearances, unsuccessfully sought to participate in the CIPA process to assist the court in assessing the completeness of the government's submissions and identify *Brady* material.

Mr. Seda challenged the fairness of the unclassified summary and argued that the provision of the classified material was incomplete and also revealed the existence of other classified information. *See* Classified Brief at 1-10; CER@3-9,21-32,37-43,46-51,54-70.

The district court's rulings deprived Mr. Seda of a fair trial and the effective assistance of counsel.

A. Standard Of Review.

The district court's issuance of the gag order is of constitutional dimension requiring de novo review. *Cf. United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991) ("Whether appellants' Sixth Amendment rights were violated is a

question of law and is reviewed de novo."). The completeness of the government's CIPA filings and the court's rulings on defense participation in the CIPA process and rulings on disclosure are reviewed de novo. *See Brady, supra; cf. United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (questions on CIPA interpretation are reviewed de novo). The district court's decisions concerning disclosure are reviewed for abuse of discretion. *See United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008).

B. The District Court's Unprecedented Order Prohibiting Defense Counsel, The Defense Team, And Their Client From Discussing Or Using Material That The Defense Had Provided To A Court Security Officer Violated Mr. Seda's Constitutional Rights.

On May 16, 2008, the district court issued an extraordinary order prohibiting defense counsel, the defense team, and their client from discussing material that the defense had provided to a Court Security Officer. ER-Vol.1A@398. The district court further barred the defense team from "generating any work product, regardless of its form or characteristics, referring to the contents of the document." ER-Vol.1A@398.[17] The Order restricts counsel beyond any

[17] The entire order reads:

> The court is aware of communications between defense counsel and the court security specialist regarding a sealed document that is in her custody. At this time, no discussion among defense counsel or any members of the

conventional discovery order regulating a party's pre-trial access to information by imposing a wholesale prohibition of any discussion among counsel, and between counsel and their client, and between counsel and the court about critical information to which they have already had access.

1. Proceedings in district court on the gag order.

In the winter of 2008, counsel for Mr. Seda in the instant case (Matasar and Wax) became aware that they were in possession of what may have been classified material. They took appropriate steps to safeguard and control access to the material by advising Assistant United States Attorney Gorder about the issue and negotiating an agreement to have it secured in a government SCIF. ER-Vol.2@419-24,403-14,400-02. They then delivered it to a Court security officer, who in turn authorized them to transmit it to a SCIF in Washington, D.C. *Id*.

The potentially classified material was contained on an electronic medium intermingled with unquestionably unclassified defense work product. ER-

---

> defense team regarding the contents of the document is permitted. Access to and procedures for viewing, discussing, recreating, etc., the document have yet to be litigated. Until such time as the court has heard the matter and issued a protective order, if necessary, in conformance with national security, defense counsel and/or any member of the defense team shall not discuss the document with anyone or generate any work product, regardless of its form or characteristics, referring to the contents of the document.

ER-Vol.1A@398.

Vol.2@405-06. The agreement Mr. Seda reached with the government regarding the material's transportation to and placement in a SCIF acknowledged this fact and prevented the government from having any access to it. ER-Vol.2@405-06,401-02,422. Mr. Seda's counsel delivered the material to the SCIF with the express statement that they were delivering defense material and intended to use it in defense of Mr. Seda. ER-Vol.2@405-06.

The district court's order was issued in response to counsel seeking guidance from the court security officer on procedures for communicating with Mr. Seda and each other regarding the contents and potential use of their material for pretrial and trial preparation and litigation. *See In re Pirouz Sedaghaty*, No. 09-73924, Dkt. Entry 1-3@47 (9th Cir. Dec. 14, 2009).

Mr. Seda sought reconsideration of the order at least six times. CR 105, 106, 135, 136; ER-Vol.1A@350-51; ER-Vol.13@3461,3480-84; CR 164 at fn 1; CR 365. He sought a protective order allowing access to and use of the material. CR 105, 106, 194. He filed Notice of Intent to Use Classified Information under CIPA § 5. ER-Vol.13@3445. The district court denied all of his requests. ER-Vol.1A@397,377-86,372,368,351,332; *see generally* ER-Vol.2@428-37. Mr. Seda also sought mandamus in this Court. *In re Pirouz Sedaghaty,* No. 09-73924, Dkt. Entry 1-3 (9th Cir. Dec. 14, 2009); *see also* CR 396. His petition was denied,

the Court concluding that the issue could be addressed on appeal. *In re Pirouz Sedaghaty*, No. 09-73924, Dkt. Entry 22 (9th Cir. May 12, 2010); *see* CR 396.

2. The gag order violates Mr. Seda's rights to present a defense, compulsory process, and effective assistance of counsel.

The court's order placing a total embargo on any discussion by counsel and the defendant or mention of the material in pleadings appears to be unprecedented. It effectively denied Mr. Seda the right to litigate regarding material information of which he and security-cleared counsel were already aware that would have materially advanced development of pretrial motions and the merits of the defense.

Court orders that fetter the right of a criminal defendant to communicate freely with counsel cannot stand absent compelling reasons and, even then, will be sustained only if they are drawn as narrowly as possible. *Geders v. United States*, 425 U.S. 80, 91 (1976). The defendant in a criminal case "requires the guiding hand of counsel at every step in the proceedings against him." *Martinez v. Ryan,* 132 S.Ct. 1309, 1317 (2012) (quoting *Powell v. Alabama,* 287 U.S. 45, 69 (1932)). While the unconstitutional order in *Geders* involved only overnight interference in communication between attorney and client, the order here has no temporal limit and also bars communication with the court.

The May 16, 2008 Order violated Mr. Seda's rights to present a defense and compulsory process and continues to violate his rights to present his claims in this court. *Holmes*, 547 U.S. at 324; *Crane*, 476 U.S. at 690. Depriving him of that opportunity, let alone the opportunity to discuss the material, or to have his counsel utilize it, runs contrary to all concepts of due process in our system of justice.

3. The district court violated CIPA and Fed. R. Crim. P. 16 when it failed to enter the protective order sought by Mr. Seda.

Mr. Seda sought access to the material in the SCIF under CIPA and through a protective order. Pursuant to CIPA and Fed. R. Crim. P. 16, Mr. Seda sought a protective order that would permit necessary discussion of his material under conditions of time, place and circumstance that would safeguard the material's classified status. CR 105, 106; 136, 164 n.1, 194. The court never acted on this request. As a result, Mr. Seda was prevented from articulating his claims below and continues to be hamstrung in this court.

Pursuant to the requirement of § 5 of CIPA, he filed notice that he expected to disclose classified information in connection with pre-trial and trial proceedings. ER-Vol.13@3445; ER-Vol.12@3334,3173. The district court refused to modify the blanket ban on communication. ER-

Vol.1A@397,377,372,368,351,332. Mr. Seda was entitled to a hearing under the statute. The court's continuation of the gag order without holding a hearing violated the statute. The gag order prevents Mr. Seda from fully articulating to this Court the harm he continues to suffer.

4. This Court should order the district court to complete the record.

The appellate record in this case is incomplete. Based on counsel's presence at certain proceedings that then continued between the court and government alone, we are aware that the docket sheet does not include a number of proceedings. Nor does it include entries for the occasions on which the court conducted business in Washington, D.C. As revealed in the email received from government counsel on February 13, 2012, that is part of the record on this appeal, there was at least one proceeding that was tape-recorded but is not reflected in the docket. *See* COA Dkt. 24-2.

Mr. Seda sought, but was denied completion of the record in the district court. ER-Vol.2@425-437; ER-Vol.1@16. He then moved this Court to order completion of the record. A panel of the Court denied that motion with leave to raise it before the merits panel. COA Dkt. 28.

Completion of the record is essential to two aspects of this appeal. The first relates to the agreement Mr. Seda entered into with the government before delivering the defense material to the SCIF. The second relates to the obligation this Court has to review all of the classified material the government submitted to the district court ex parte.

The agreement Mr. Seda reached with the government before delivering material to the SCIF prohibited the government from having access to it. ER-Vol.2@419-24,403-14,400-02. In its opinion on August 10, 2011, the district court stated that it had reviewed the material that Mr. Seda had caused to be placed in the SCIF. ER-Vol.1@56. In the email dated February 13, 2012, the government advised that a tape-recorded proceeding occurred in Washington, D.C. *See* COA Dkt. 24-2. If government attorneys or agents participated in whatever review the district court made of the material Mr. Seda caused to be placed in the SCIF, the agreement under which Mr. Seda delivered the material was breached and Mr. Seda is entitled to a remedy. He cannot properly frame the issue for this Court without a record that includes all proceedings conducted in his case. Whatever the scope of the state secrets privilege under which ex parte proceedings are held involving classified material, it cannot include denial to a defendant of knowledge that proceedings have taken place.

The second reason why the record should be ordered completed involves the obligation this Court has to review the classified material to determine whether the government provided the district court all the material it should have and whether Mr. Seda was provided all exculpatory material. In the absence of a record of all of the ex parte proceedings, Mr. Seda cannot request that the district court make available to this Court all material it must review. In the absence of a record, this Court cannot know what to request. As this Court recently stated, the Court and Mr. Seda, "shouldn't have to live at the mercy of the local prosecutor." *United States v. Nosal*, No. 10-10038, 2012 WL 1176119, at *6 (9th Cir. April 10, 2012).

C. The District Court's Handling Of The Unclassified Summary Of The Statement Of Sami Al Sanad Deprived Mr. Seda Of A Fair Trial.

In response to one of the government's ex parte filings under CIPA, the court authorized the government, pursuant to CIPA § 4, to provide Mr. Seda an unclassified summary of some classified information. Order, ER-Vol.1A@393; ER-Vol.5@1299 (unclassified summary). The summary included the highly exculpatory reference to the money at issue being "destined for needy Chechen families." ER-Vol.5@1299. That comment was, however, limited by the word "claimed" and placed at the end of a paragraph that included other editorializations and inculpatory material:

> The U.S. Government obtained information that Sami 'Abd Al 'Aziz Al-Sanad worked during 2000 and 2001 for the Al-Haramain organization and was responsible for providing currency supplied by Al-Haramain, including the currency obtained by codefendant Soliman Al-Buthe from Al-Haramain USA, to a representative of Muhammad Al-Sayf, aka Abu Umar, to be smuggled into Chechnya. Al-Sanad has claimed that the monies he provided to Al-Sayf's representative were destined for needy Chechen families.

ER-Vol.5@1299. The district court denied Mr. Seda's requests for production of the underlying material so that he could present evidence of the legitimacy of Mr. Seda's and AHIF-A's activities. ER-Vol.12@3074-75; ER-Vol.1@140-41,202.

The obligation to produce exculpatory material includes classified evidence. *See United States v. Mejia*, 448 F.3d 436, 455 n.15 (D.C. Cir. 2006) (quoting H.R. Rep. No. 96-831, pt. 1, at 27 (1980) that CIPA § 4 "is not intended to affect the discovery rights of a defendant"); *United States v. Pickard*, 236 F. Supp. 2d 1204, 1209 (D. Kan. 2002) ("CIPA does not create any new right of or limits on discovery . . . .").

Assuming the accuracy of the information in the unclassified summary, it contains a mix of information including the highly exculpatory statement regarding the use to which money was to be put in Chechnya. If Mr. Seda had been able to generate witnesses to present to the jury, the testimony would have defeated the government's allegation regarding the purpose of the alleged

misstatement on the tax return. The unclassified summary was, however, unusable by the defense in the form in which it was provided.

The summary is infected with multiple problems. First is the use of the word "claimed" in describing the most exculpatory aspect – the use of the money for humanitarian relief. ER-Vol.5@1299. That is clearly an editorialization by the government. The editorialization vitiated the usefulness of the summary.

More generally, the summary paragraph states that the United States government "obtained information." The paragraph does not, however, say from where the information was obtained. Was it obtained through interrogation of Mr. Al-Sanad? Interrogation of some other individual? Or, alternatively, was it obtained through electronic or other eavesdropping? If so, is there a tape recording or other record of the statement? The answers to these questions, with specific information that Mr. Seda could act on, was essential to his ability to prepare a defense.

The paragraph further states that the money Al-Sanad was involved with was "obtained by co-defendant Soliman Al-Buthe from Al-Haramain USA." ER-Vol.5@1299. If there is a direct link between money obtained from AHIF-A through Soliman Al-Buthe that was destined for needy Chechens, it is highly

exculpatory and material to the defense, and Mr. Seda needed to be in a position to obtain the witnesses who could provide that information to the jury.

The unclassified summary states that Al-Sanad provided the currency to a "representative" of Muhammad Al-Sayf a/k/a Abu 'Umar. The unclassified summary does not, however, state who that representative is. That representative is apparently the percipient witness to the legitimate distribution of what is allegedly money that relates to the counts in the indictment. If that is the case, the government was obligated to place Mr. Seda in a position to contact that representative and attempt to present him to the jury.

CIPA § 4 permits substitution of an unclassified summary but only if it would "provide the defendant with substantially the same ability to make his defense as would disclosure of the classified information." *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004) (quoting CIPA § 6(c)(1)); *United States v. Libby,* 467 F. Supp. 2d 20, 24-26 (D.D.C. 2006). As stated in *United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998), substitutions may not "omit[]" information "that might [be] helpful to [the] defense." The Supreme Court has long recognized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410

U.S. 284, 302(1973); *see also Washington v. Texas*, 388 U.S. 14,19 (1967) ("[T]he right to present a defense . . . is a fundamental element of due process.").

The content of the Sanad summary went directly to one of the key components of the government's case. It was not sufficient to allow Mr. Seda to "make his defense." If the government did not want to disclose the underlying information, its only alternative on information so central to its charges was to dismiss the indictment. *Jencks v. United States*, 353 U.S. 657, 672 (1957).

D. The CIPA Filings Violated Mr. Seda's Rights.

The "state secrets" privilege, which underlies CIPA, was first fully articulated by the Supreme Court in *Reynolds v. United States,* 345 U.S. 1, 10-11 (1945), a civil case, in which the Court held that the government could refuse to disclose evidence on the ground that disclosure would reveal military secrets that could harm the national interest. But criminal cases are different.

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the government is not the moving party, but is a defendant only on terms to which it has consented.

Reynolds, 345 U.S. at 12. The privilege to withhold classified information in a criminal case, as with other governmental privileges, is limited. Ultimately, "[t]he

burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Jencks*, 353 U.S. at 672. *See United States v. Nixon*, 418 U.S. 683,712 (1974) ("[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of the law and gravely impair the basic function of the courts.").

CIPA contemplates ex parte proceedings. While sanctioning in camera ex parte and in camera review of classified material in *Alderman v. United States*, 394 U.S. 165,183-84 (1969), the Supreme Court emphasized the importance of adversarial proceedings in our system of justice. *See also Martinez v. Ryan*, 132 S. Ct. at 1317. *Alderman* reiterated that the government may be put to a choice of proceeding with disclosure or dismissing a case. 394 U.S. at 184. With respect to the importance of disclosure, the Supreme Court articulated the difficulty trial judges face in understanding the importance of a "chance remark" or reference to a "neutral" person or event, that would have "special significance to one who knows the more intimate facts . . . ." *Id*. at 182.

CIPA was enacted following the decisions in *Reynolds, Jencks*, and *Nixon*, which make clear that the existence of classified evidence cannot trump a defendant's rights. The courts that have construed the statute have, however, given nearly total deference to the Executive. In so doing, they have undermined the holdings in the earlier cases and the principle that the Constitution guarantees a defendant in a criminal case a "meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324(quotation omitted).

Under the doctrine of constitutional avoidance, CIPA must be construed under the facts of this case to avoid limitations on a defendant's rights. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Utilizing such a construction, the ex parte CIPA proceedings were inadequate to protect Mr. Seda's rights.

At the very least, a proper construction of the statute would permit Mr. Seda's security-cleared counsel and expert witness to participate in the CIPA process. In order to gain access to classified information, two criteria must be met: a person must pass a security screen and have a "need to know." Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). In order to protect a criminal defendant's rights, counsel should be presumed to have a need to know. In the al-Haramain civil litigation, this Court recently recognized that disclosure of

classified information to a security-cleared counsel, "does not implicate national security. . . because, by definition, he or she has the appropriate security clearance." *Al-Haramain Islamic Found., Inc. v. U.S. Dep't. of the Treasury*, No. 10-35032, 2012 WL 603979, at *13 (9th Cir. Feb. 27, 2012) (footnote omitted). The executive and judiciary's failure to construe CIPA in this manner threatens our adversary system of justice. *See Martinez v. Ryan*, 132 S. Ct. at 1317. *But see United States v. Ott*, 827 F.2d 473 (9th Cir. 1987). The fact that 4.2 million people have been given security clearances and access to classified information strongly suggests that the harm to national security from allowing defense counsel with clearances to participate in the CIPA process will be non-existent. *See* Greg Miller, *How Many Security Clearances Have Been Issued? Nearly Enough For Everyone In The Washington Area,* THE WASHINGTON POST (Sept. 20, 2011, 12:50 p.m.).

1. The CIPA notices were inadequate.

The government's CIPA notices provided Mr. Seda no information other than that something had been filed under seal with the court. ER-Vol.13@3610-15; ER-Vol.12@3332-33,3328-29,3147-48. The government did not inform him what had been provided to the court: whether, for example, it had provided the court with actual classified documents it believed it must disclose, a pleading

stating that it did not believe any classified material that must be disclosed existed, or a pleading addressing other subjects related to classified information and CIPA. The notices alone were inadequate and undermined our adversary system.

2. The numerous ex parte proceedings violated Mr. Seda's rights.

Four times during trial the court held closed sessions with the attorneys for both parties, as well as having the government case agents present. After three of these sessions, counsel for the defense were excused and the court met with the government attorneys. ER-Vol.2@436-37. On each of these occasions, at least one of the case agents was also present. There was no notice served on the defense regarding the need for the government to communicate with the court ex parte, as required under CIPA. It remains unclear from the record what prompted the closed sessions, and counsel is unaware of anything said in the closed sessions for which he was present that would have necessitated government meetings with the Court ex parte, especially where defense counsel have proper security clearances. It is counsel's understanding that these ex parte sessions were held on the record. The manner in which these sessions were held violated CIPA and necessitates a new trial.

E. This Court's De Novo Review Of The Undisclosed Material Should Be Particularly Rigorous Given The Strong Record That Exculpatory Material Was Not Produced.

1. Standard Of Review.

This Court provides plenary review of classified material submitted to the district court. CIPA § 4; *see Dumeisi*, 424 F.3d at 578 (after reviewing the classified evidence the appellate court found that the district court did not abuse its discretion).

2. Mr. Seda made a compelling showing that a wealth of exculpatory classified information should have been made available for review and disclosed to the defense.

In reviewing the record and ex parte material in this case, Mr. Seda urges this Court to focus on two distinct issues: first, did the government provide all the material that should have been in its possession and was it responsive to Mr. Seda's discovery requests; second, did the district court properly assess the material it was given to review. In making these assessments, Col. Lang's perspective is essential.

While Col. Lang, the former head of Human Intelligence for the Department of Defense, was not given access to the classified material, he provided several declarations about the type of material that the district court should have received

based on his thirty years of service to his country as an active intelligence officer at the highest levels and his ongoing work for the government as a contractor on matters of national security. *See* Classified Brief at 2-5; CER@3-9,17-32. We do not believe that Col. Lang's assessments were given adequate weight by the district court.

The public record reveals that AHIF-A was subjected to extended unlawful surveillance. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008). The fact of unlawful surveillance is relevant in three respects. First, it vitiates whatever presumption of regularity might otherwise exist in the government's actions. *See Hartman v. Moore*, 547 U.S. 250, 265 (2006); *United States v. Enterprises, Inc.*, 498 U.S. 292, 301 (1991). Second, the fact of the unlawful surveillance is critical to Mr. Seda's effort to move against the fruits of the government's investigation under *Murray v. United States*, 487 U.S. 533, 542-43 (1988) (suppression required if agents' decision to seek warrant "prompted" by prior illegal action). Third, Mr. Seda believes that any communications intercepted would include significant exculpatory information.

In terms of the scope of material that should be available for this Court's review, it should be extensive. In addition to the fruits of the unlawful surveillance, it should include a wealth of information dating to the 1990s.

The existing public record establishes that:

- the government has been interested in and investigating AHIF-S since the 1990s, ER-Vol.13@3566-67;
- the government began investigating AHIF-A and Mr. Seda no later than September 2001, ER-Vol.13@3607-09;
- the government engaged in unlawful surveillance against AHIF-A at least as early as 2003, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1198 (N.D. Cal. 2010);
- the criminal investigation in Oregon was coordinated with, at least, the OFAC investigation in Washington, D.C., ER-Vol.13@3584.

See Col. Lang's classified declaration. CER@3-9.

The likelihood of exculpatory information existing in the classified record is great. The government should have provided the court with a wealth of documents, transcripts, e-mail records, and records of surveillance dating back to the 1990s. Many of them should be exculpatory. *See* Classified Brief at 1-10.

F. Classified Brief On Classified Material.

See Classified Brief at 1-9; CER@13-32.

G. If the Decision To Seek The Search Warrant Of The Ashland Prayer House Was Prompted By Prior Unlawful Activity, The Fruits Of The Search Must Be Suppressed.

If the fruits of unlawful activity "prompt" a decision to seek a warrant, the warrant is tainted. *Murray,* 487 U.S. at 542. This is true whether or not fruits of

the prior illegal activity are incorporated into the warrant affidavit. *Id.* at 543; *accord United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999). The likelihood is great that the decision to seek the warrant for the AHIF-A premises in February 2004 was prompted by prior unlawful activity. All Mr. Seda can do is urge this Court to review the classified material for information that would shift the burden to the government to establish that its search activity in February 2004 was not prompted by its prior unlawful action because the district court denied his efforts to develop evidence of the fact, timing, and extent of Mr. Seda's and AHIF-A's victimization by the government through its illegal surveillance. ER-Vol.13@3445-46; ER-Vol.12@3334-35; ER-Vol.1@242.

Notwithstanding the district court's refusal to permit him to develop essential facts, the public record set out *In re Nat'l Sec. Telecomm. Records Litig.*, 700 F. Supp. 2d 1182, and the record Mr. Seda made on the extent of surveillance of AHIF-S and AHIF-A provide strong support for his claim. CR 310, 311; *see also* CR 53, 90, 106, 134, 136, 138, 140, 154, 164, 165, 172, 173, 174, 181, 182, 183, 194, 196, 200, 205, 213, 224, 230, 231, 233, 234, 235, 284, 302; *see* Classified Brief at 1-5 and CER@3-9,22,27-28,60-69.

While the unlawful surveillance discussed in the civil action involved communications between AHIF-A board member and co-defendant in this case,

Soliman al-Buthe, with his U.S. lawyers, Wendell Belew and Asim Ghafor, AHIF-A board member and defendant in this case, Mr. Seda, was also represented at that time by a U.S. lawyer, Lawrence Matasar, with whom Mr. Seda was in communication. In 2003 and 2004, Mr. Seda was residing in the Middle East.

The facts set out in the civil case are strong evidence of a *Murray* violation because they include:

- the statement that President Bush authorized (outside of the FISA process) interception of international communications in the fall of 2001. The Treasury Department created "Operation Green Quest," to track financing of terrorist activities in October 2001. Among its targets were the foreign branches of Al-Haramain. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d at 1199.

- In April 2002, the FBI created a terrorist financing section which "acquired, analyzed and disseminated data and information, including telecommunications data from a variety of sources. . . . " *Id*. at 1200.

- The FBI took over the investigation of Al-Haramain Islamic Foundation "pertaining to terrorist financing." *Id*. at 1200.

The type of surveillance described above took place prior to the execution of the search warrant of AHIF-A's offices. *Id*. Based on this information, the government should have been required to prove that its decision to seek the search warrant at AHIF-A in 2004 was not prompted by the prior illegal action. *Wong Sun*, 371 at 484. Dismissal or removal for full litigation is required.

POINT VI

THE DISTRICT COURT INCORRECTLY CALCULATED THE ADVISORY GUIDELINES

The thirty-three-month sentence in this case was based on the year 2000 edition of the United States Sentencing Guidelines. The presentence report calculated the advisory guideline range as follows:

Base offense level, 2T1.1	6
Tax loss of $80,980, 2T4.1(F)	8
Sophisticated concealment, 2T1.1(b)(2)	2
Terrorism enhancement, 3A1.4(a)	16
Obstruction of Justice, 3C1.1	2
Total offense level	34

SER 15-16. The government argued for all four enhancements. CR 496 at 2-19. The district court rejected the terrorism enhancement but applied the other three, achieving a total offense level of 18 with an advisory range of 27-33 months in criminal history category I. ER -Vol.1@22-24. It applied the tax loss using a clear and convincing standard and the other two losses using a preponderance standard. ER-Vol.1@24. None of the enhancements is applicable.

A. Standard Of Review.

A sentence is reviewable for procedural and substantive error. Procedural error, including whether the sentencing guidelines were correctly calculated, is

reviewed de novo. *United States v. Espinoza-Baza*, 647 F.3d 1182, 1193 (9th Cir. 2011).

B. There Was No Tax Loss In This Case.

1. There was no tax loss as a matter of fact.

The government presented two theories of tax loss at sentencing. Under its primary theory, which was set forth in its sentencing memorandum and testified to by Mr. Wooten, the government assumed that Mr. Seda misappropriated the $150,000 donation and channeled it to the Chechen mujahideen, contrary to Dr. El-Fiki's wishes. ER-Vol.3@740-41; ER-Vol.5@1295-96. In the government's view, this would constitute an "excess benefit transaction" under 26 U.S.C. § 4958 and Mr. Seda would be subject to tax totaling $80,980. ER-Vol.3@740-45. Under this theory, the loss had three components. ER-Vol.3@743. Each, however, was predicated on the "assumption" that Mr. Seda sent Dr. El-Fiki's donation to the mujahideen. ER-Vol.5@1295-96.

The government's alternate theory, presented for the first time at the sentencing hearing, was based on a significant change in its assumptions – namely, that Mr. Seda did not misappropriate the donation because it was Dr. El-Fiki's intent to fund the mujahideen. ER-Vol.3@745,748. Under this theory, AHIF-A's exempt status would theoretically be revoked because it funded acts of violence,

and the organization would be responsible for paying taxes as an ordinary corporation. ER-Vol.3@745-47. The resultant tax loss, while not directly owed by Mr. Seda personally, would far exceed the $80,980 loss proposed under the government's primary theory.

The district court adopted the government's primary theory and found a $80,980 loss by clear and convincing evidence. ER-Vol.1@22. That finding was fatally undermined, however, by the court's additional conclusion in rejecting the terrorism enhancement, that the government had failed "to prove a link between the defendant and the money being used for terrorist activities." ER-Vol.1@23. That finding eliminated one of the factual bases that the government argued was a necessary predicate for the tax loss under either theory – that Dr. El-Fiki's donation was used by the Chechen mujahideen. ER-Vol.5@1295-96. Because the district court specifically rejected that allegation as unproven, the government failed to prove that Mr. Seda"misappropriated" Dr. El-Fiki's donation under the first theory and/or that he acted contrary to AHIF-A's exempt status under the second theory.

2. There was no tax loss as a matter of law.

The tax loss was incorrectly applied for a reason independent of the factual issue that was resolved against the government. An excess benefit tax is only

proper if a "disqualified person" such as Mr. Seda receives an "economic benefit." 26 U.S.C. § 4958. The regulations make clear that an "economic benefit" must be something objectively measurable, such as the sale of property for less than fair market value or the payment of compensation not earned. Treas. Reg. § 53.4958-4(a)(1); ER-Vol.4@987. While the government attempted to argue that the diversion of Dr. El-Fiki's donation to a purpose other than the one he specified would qualify as an "economic benefit" (ER-Vol.3@749-51), its expert eventually backed partially away from that position. ER-Vol.3@782-53.

The initial proposed theory was that Mr. Seda essentially embezzled Dr. El-Fiki's donation and then used it for his own personal purposes. Under that theory, what Mr. Seda did with the money would be irrelevant in terms of the "personal purposes" to which he applied it. If Mr. Seda was liable for a tax loss due to his alleged embezzlement of $150,000 – which would be the basis of his economic benefit – it would make no difference whether he then used the money to fund the mujahideen or for some benign purpose such as buying a new house. However, Mr. Wooten conceded that had the money simply gone to another charity, even if this was contrary to the donor's intent, the tax loss theory would not apply. ER-Vol.3@752-53.

As Mr. Owens explained more clearly why Mr. Seda did not receive any economic benefit, even under the assumption that he wrongfully diverted Dr. El-Fiki's donation to the mujahideen. At most, he would have received a psychological benefit from channeling the money to a more desired purpose. A mere psychological benefit, however, does not lead to tax liability. As Mr. Owens testified at the sentencing hearing, "Under the federal tax law, there is no tax recognition of that benefit." ER-Vol.3@761.

Mr. Owen's opinion was based on his 25 years of service in the Exempt Organization Division of the IRS, including 10 years as the Director of that division. ER-Vol.4@984. In fact, the statute at issue, § 4958, was enacted during the period that Mr. Owens served as the head of the Exempt Organizations Division. ER-Vol.4@984. He testified that while efforts were made when he was the Director to change the tax code so that private benefit transactions could be taxed in a manner along the lines discussed by the government, the Treasury "adamantly refused to go forward" with the proposals that had been made and that Congress also declined to impose such a tax. ER-Vol.3@766.

Mr. Owens did state that Mr. Seda could be subject to some tax loss under the government's theory. With regard to the alleged excess benefit from the $21,000 check allegedly misappropriated by Mr. al-Buthe, Mr. Owens stated that

if there was sufficient proof that Mr. al-Buthe personally benefitted from the check, and if there was sufficient proof that Mr. Seda knowingly arranged and approved the transfer to Mr. al-Buthe for his own use, then the IRS could assess a "manager's tax" under 26 U.S.C. § 4958 against Mr. Seda in the maximum amount of $2,100. However, even then, because this amount did not personally benefit Mr. Seda, it would not affect his personal income tax. ER-Vol.4@998-99.

C. There Was No Sophisticated Concealment.

The district court applied the two-level enhancement pursuant to U.S.S.G. §2T1.1(b)(2) for sophisticated concealment. ER-Vol.1@23. It based its conclusion on the use of travelers checks and a cashier's check. ER-Vol.1@23. Contrary to the district court's conclusion, the facts show that the transactions in this case were not complex, intricate, or concealed.

Mr. Seda and Mr. al-Buthe used Mr. Seda's Ashland branch of the Bank of America and dealt with Mr. Seda's banker while Mr. al-Buthe was wearing his Saudi clothing. On the Saudi end, Mr. al-Buthe used his own bank to cash the travelers checks and deposit the cashier's check. When requested, the bank and AHIF-S provided records.

There was no effort to conceal this transaction from the accountant. Mr. Wilcox was provided copies of both checks used to purchase the financial

instruments, and copies of the charity's bank records containing the transaction. ER-Vol.8@2050,2053,2059. When Mr. Wilcox provided the IRS subpoenaed documents, Mr. Seda paid for them and was in touch with Mr. Wilcox. ER-Vol.4@979; ER-Vol.8@2186. Contrary to obstruction or concealment, Mr. Seda directed Mr. Wilcox to be open in the investigation and directed his lawyers to be over-compliant in producing subpoenaed AHIF records. ER-Vol.4@979.

In addition, the objective facts are that Mr. Seda discussed Chechnya with Mr. Wilcox. Mr. Wilcox eventually admitted that at trial. ER-Vol.8@2217-18. His records also show he was told about the purchase of a property for around $400,000 as early as February 2001. ER-Vol.8@2125-29.

The facts here are no more supportive of the sophisticated concealment enhancement than those founding wanting in *United States v. Montano*, 250 F.3d 709 (9th Cir. 2001). *Montano* involved the "sophisticated concealment" language of U.S.S.G. §2T3.1(b)(1) for smuggling. *Id*. at 712. There, the Court quoted the commentary which required "especially complex or especially intricate offense conduct," the same language used in note 4 to §2T1.1. *Id*. at 714. There, as here, money was deposited in a bank, withdrawn, and then carried across an international border. *Id*. at 711. As the Court noted there, the scheme was

"neither many sided nor complex" and whatever activities occurred, "were all inherent in the activity of smuggling." *Id*. at 715.

D. There Was No Obstruction Of Justice.

The district court applied a two-level increase for obstruction of justice pursuant to U.S.S.G. §3C1.1. ER-Vol.1@22. The recommendation for this enhancement in the pre-sentence report was based entirely on unsubstantiated opinion about AHIF-2 and 3. SER 11. Whether or not a government agent believes the documents are fraudulent, such belief is not evidence. It cannot form the basis for an upward adjustment in the guideline calculation. *See United States v. Showalter*, 569 F.3d 1150, 1159-60 (9th Cir. 2009) (when defendant raises objections to the PSR at sentencing, government bears the burden of proof and the court may not simply rely on factual statements in the PSR).

There are, moreover, several affirmative pieces of evidence on the question of the creation of the two contracts. First is the investigation memorandum of one of the signers of the document, Mr. Sui. ER-Vol.11@3057-72; *see also* CR 498 at 33-35. While Mr. Sui was not available for trial, the existence of his statement as recorded by the defense investigator undermines the reliability of the case agent's opinion.

The other relevant evidence on the subject are exhibits 704 and 705. While the district court did not admit them at trial, they are sufficiently reliable to be used at sentencing. The dollar amounts reflected in AHIF-2 and 3 – $186,000 and $188,000 – are very close to the dollar amount reflected in the Al-Haramain receipts. Col. Lang testified that, in his opinion, the receipts were authentic. ER-Vol.8@2507-08. Moreover, the government failed to subpoena the relevant Al Rajhi Bank records. Under these facts, it failed to prove by even a preponderance of the evidence that Mr. Seda obstructed justice.

CONCLUSION

The investigation of Mr. Seda and AHIF-A was long and intense. It included unlawful government activity. Mr. Seda and his counsel were subjected to an unprecedented gag order that precluded effective representation and presentation of a full defense. The fruits of the investigation yielded one set of charges based on a mistake on the AHIF-A year 2000 charitable tax return. The indictment was returned based on a statement about the origin of that mistake that the accountant who prepared the return later recanted. The evidence at trial strayed far afield from the charges and clouded the jury's consideration of the core tax issues with a substantial volume of prejudicial information. Much of that information was the fruit of a search that exceeded the scope of a search warrant

that had been carefully tailored to limit the government's intrusion into Mr. Seda's and AHIF-S's activities. Mr. Seda was prevented from effectively rebutting the government's improper efforts to paint him in a negative light based on his religious and political views. After the trial, it was revealed that the government had withheld critical impeaching material. The sentence that was imposed was based on legally incorrect interpretations of the advisory guidelines.

For all of the reasons set out herein, the judgment should be set aside and the indictment dismissed. In the alternative, the judgment should be set aside and the case remanded for a new trial. In the alternative, the case should be remanded and the suppression hearing reopened and the record completed.

Respectfully submitted on May 3, 2012.

/s/ Steven T. Wax
Steven T. Wax
Attorney for Defendant-Appellant

/s/ Michelle Sweet
Michelle Sweet
Research & Writing Attorney

/s/ Lawrence Matasar
Lawrence Matasar
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	CA No. 11-30342
	)	
v.	)	
	)	
PIROUZ SEDAGHATY,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF RELATED CASES

I, Steven T. Wax, undersigned counsel of record for defendant-appellant, Pirouz Sedaghaty, state pursuant to the Ninth Circuit Rule 28-2.6, that I know of no other cases that should be deemed related.

DATED: May 3, 2012.

/s/ Steven T. Wax
Steven T. Wax
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	CA No.11-30342
	)	
v.	)	
	)	
PIROUZ SEDAGHATY,	)	
	)	
Defendant-Appellant.	)	

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(a)(4)

Pursuant to Fed. R. App. P. 32(a)(4), I certify that the Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 30,680 words. The Classified Brief is proportionately spaced, has a typeface of 14 points or more and contains 2,998 words.

DATED this 3rd day of May, 2012.

/s/ Steven T. Wax
Steven T. Wax
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2012, I electronically filed the foregoing *Appellant's Opening Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Sandra L. Showard
Sandra L. Showard