No. 14-30217

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Portland Division

OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The District Court's jurisdiction over the underlying criminal prosecution was conferred by 18 U.S.C. § 3231. This Court has jurisdiction over the direct appeal of the conviction and sentence imposed pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. This appeal is timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure because the District Court entered judgment on October 6, 2014, and Mr. Mohamud filed his notice of appeal on October 14, 2014.

STATEMENT OF ISSUES

I. Under controlling Supreme Court authority, did the government's extensive intrusion into and influence over the teenaged defendant's life constitute entrapment as a matter of law and violate due process?

II. Did the prosecutor's closing argument violate due process by negating and misstating the legal standard for the defense of entrapment?

III. Did the trial court's failure to provide adequate jury instructions on the theory of the defense violate the defendant's right to a fair trial?

IV. Did the government and trial court's withholding of classified evidence and information impermissibly skew the fact-finding process, violating Mr. Mohamud's rights to confront his accusers, due process of law, and effective assistance of counsel?

V. Did the trial court's misconstruction of the hearsay rule and errorneous evidentiary rulings violate the confrontation clause and the right to a fair trial?

VI. Did the trial court's refusal to rule on the constitutionality of the government's non-FISA seizures, searches, and interrogations violate the Fourth and Fifth Amendments, the right to confrontation, and the right to present a complete defense?

VII. Because the government violated the statute requiring pretrial notice of warrantless FISA Amendments Act electronic surveillance, should the government have been barred from using the products of such surveillance or, in the alternative, should the case be remanded for a determination of the facts based on evidence and an adversarial hearing?

VIII. Did the warrantless retention and searches of the content of Mr. Mohamud's electronic communications violate the FISA Amendments Act and the Constitution, requiring suppression of the resulting evidence?

IX. Did the trial court's handling of classified materials deprive Mr. Mohamud of due process of law and the effective assistance of counsel?

X. In the alternative to reversal and remand for a new trial, should the sentence imposed in this case be vacated because the government's recommendation involved an improper basis and because the sentencing involved procedural errors?

STATEMENT OF THE CASE

Nature of the Case

This is Mohamed Mohamud's direct appeal after a jury convicted him of attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(2)(A). For this offense, the Honorable Garr M. King, Senior District Judge for the District of Oregon, sentenced him to serve 30 years in prison.

On November 26, 2010, Mr. Mohamud, then 19 years old, pushed the buttons of a cellphone, twice, believing he would detonate a massive bomb during the Christmas tree lighting at Portland's Pioneer Courthouse Square. The bomb was a fake, conceived and created by the FBI, and was the culmination of a sophisticated, targeted sting operation that the FBI had purposely tailored to Mr. Mohamud. The defense at trial was entrapment: the government had induced this teenager to attempt a crime he had not previously planned or tried to commit. Before the undercover agents contacted Mr. Mohamud, he had never researched how to build a bomb, had neither the knowledge nor the wherewithal to construct a bomb, and had never expressed an interest in detonating a bomb in the United States. This appeal involves whether the extraordinary measures taken by the government exceeded the limits on government generation of criminal activity and whether the complete theory of the defense was fairly presented to the jury.

From the outset of the proceedings, the parties litigated issues regarding pretrial discovery and *Brady* material. The government refused to turn over classified or otherwise-protected information that was necessary to present Mr. Mohamud's entrapment defense and to permit him to confront the government's witnesses and evidence against him. Rather, the government selectively determined which classified materials Mr. Mohamud would be permitted to know about, barring him access to evidence necessary to support his theory of the case. At trial, the misinterpretation of the state-of-mind exception to the hearsay rules allowed government agents to testify free from meaningful cross-examination while excluding relevant defense evidence. Prejudicial testimony was admitted that was never subjected to confrontation of the declarant. This appeal involves whether the effect of trial errors, separately and cumulatively, was an unfair trial, skewed from the outset toward conviction.

Following the trial, the government belatedly acknowledged that it had used the FISA Amendments Act (FAA) to conduct warrantless surveillance, and failed to provide the requisite statutory pretrial notice of its reliance on this evidence. As matters of first impression, this appeal addresses whether the district court failed to remedy constitutional violations of notice and rights to privacy in electronic communications. Mr. Mohamud seeks reversal and dismissal of his conviction and

sentence, and, in the alternative, remand for a new trial, supplemental briefing and hearings on the constitutional violations, and resentencing.

Course of Proceedings

This case has stretched out for nearly five years. Hundreds of pleadings were filed, and the proceedings resulted in thousands of transcript pages. The parties litigated pretrial motions from Mr. Mohamud's initial appearance on November 29, 2010, until the three-week trial, which commenced on January 10, 2013, and concluded with the jury's verdict on January 30, 2013. At the government's request, sentencing was delayed until November 19, 2013, when the government notified the court and defense that it had engaged in warrantless electronic surveillance under the provisions of the FAA. The district court denied motions to dismiss and to suppress derivative evidence based on the Fourth and Fifth Amendment and statutory violations. Mr. Mohamud was sentenced on June 24, 2014, and the court entered judgment on October 6, 2014. The defense filed a timely notice of appeal on October 14, 2014. ER 236.[1]

The proceedings before the district court are summarized below within the context of the issues raised on appeal. The trial court's rulings are the first volume

[1] References to "ER" refers to the Excerpts of Record; references to "SER" refers to the Sealed Excerpts of Record.

of the Excerpts of Record and the documents and transcripts related to each issue are gathered in the volumes that follow.

I. Entrapment as a matter of law: In the trial memorandum, the defense set out the grounds for acquittal based on entrapment as a matter of law or, in the alternative, dismissal for violation of due process. ER 1966-74, 2074-88. The motion was denied at the close of the government's case. ER 124-26. The defense filed a post-trial motion for acquittal, which was denied. ER 132-38, 2848-51, 2872-81.

II. Prosecution closing argument: The defense objected during the prosecutor's closing argument but was overruled. ER 6258-59. The misconduct was raised again in the post-trial motion for a new trial, which was denied. ER 131, 142-44, 2856-57, 2885-87, 2903-04.

III. Theory of defense instructions: Prior to trial, the defense submitted jury instructions on the defense theory and briefed the grounds for providing the instructions. ER 2041-44, 2097-100, 2169-70, 2211-18. The trial judge rejected the instructions and overruled defense objections to the instructions given by the court. ER 2425-32, 6105. Before the court responded to a juror's note, the defense objected to the response, then moved for a mistrial (ER 2787-90), then for a new trial (ER 2853-56, 2883-85, 2901-03). The court denied the motions. ER 138-42. In denying instruction on the First Amendment, the trial court also barred the defense from

mentioning the First Amendment in front of the jury (ER 2373-79), which was also raised and denied in the post-trial motion for a new trial (ER 159-61, 2870-71, 2897-99).

IV. Non-FISA seizures, searches, and interrogation: The defense filed a pretrial motion to suppress for violation of the Fourth and Fifth Amendments in connection with the non-FISA seizure and search of the defendant's personal computer and federal involvement in an interrogation. ER 595-634. Over objection, the trial court indicated it would only address the question of independent source, without first determining whether Mr. Mohamud's constitutional rights had been violated. ER 635-46. The defense also asked for a ruling on whether constitutional violations occurred (1) in the context of the need for a ruling as a trial fact, (2) as a fact predicate to the motion to dismiss for violation of due process, and (3) after the post-trial notice of warrantless electronic surveillance. ER 2011-13, 2118-19, 3172-73. The trial court denied all motions for a ruling on the constitutionality of the non-FISA investigations. ER 2, 67-90, 180-82; SER 1-3.

V. Withholding of classified evidence: During pretrial proceedings, the defense objected to the failure to provide the names of and other information regarding undercover operatives, the selective declassification of helpful information in electronic communications, information regarding Amro Al-Ali, and

the adequacy of substitute evidence required under *Brady v. Maryland*, 373 U.S. 83 (1963), and provided through the Classified Information Procedures Act (CIPA). ER 1300-83, 1460-1537, 1631-50, 1660, 1672-92, 1716-32, 1743, 1752-76, 1779-93; SER 4-69, 173-92. The issues were also raised in the post-trial motions for a new trial. ER 2861-65, 2868-70, 2892-94, 2896-97. The trial court denied defense access to classified evidence. ER 44-66, 91-99, 122-24, 127, 152-54, 158-59, 180-82; SER 272-74.

VI. Violation of hearsay and confrontation rights: In its pretrial submissions, the defense objected to and moved to exclude potential hearsay. ER 2145-48, 2291-97, 2347-48, 2458-60, 2483-86. The defense objected to the trial court's interpretation and application of evidentiary rules related to state of mind during trial. The issues were also raised in the post-trial motions for a new trial. ER 2857-59, 2865-68, 2887-89, 2894-96. The trial court ruled against the defendant's objections. ER 114-16, 120-21, 128-30, 144-46, 156-58.

VII. Violation of pretrial FAA notice requirement: Post-trial, the defense moved to dismiss or suppress evidence based on a violation of the statutory requirement of pretrial notice of the use of evidence derived from FAA surveillance. ER 3083-102, 3176-93, 3312-25. After a hearing, the trial court issued an opinion denying relief. ER 175-80.

VIII. Suppression under the FAA: The defense filed post-trial motions for access to classified material and to suppress based on the unconstitutionality of both the secondary searches and the FAA's overall program for warrantless electronic surveillance. ER 2910-3082, 3103-66, 3203-303, 3330-401. After a hearing, the trial court issued an opinion denying discovery and relief on the merits. ER 162-227.

IX. Classified material review: The defense filed motions and objections regarding the district court's refusal to provide defense counsel access to documents. ER 48, 448-49; 479-81, 517, 631-32, 1306, 1342, 1639, 1676, 1690, 1729-32; SER 4-6, 45-69, 181-92, 249-54. The filings and objections specified, under seal and sometimes ex parte, why classified material should be reviewed and produced, either in its entirety or under alternative means of production under CIPA. The trial court denied access to classified material. ER 3-23, 25-40, 127, 154-56.

X. Sentencing issues: The parties filed public sentencing briefs and presented oral argument at sentencing. ER 3456-599, 3606-93. The presentence report also included specific defense objections to the draft report. SER 381-460. The parties also submitted sealed material. SER 358-69, 373-80, 461-73. The trial court provided a statement at sentencing and a non-public statement of reasons. ER 228-35, 3634-93; SER 474.

Custody Status

Mr. Mohamud is serving the 30-year sentence imposed in this case at FCI Victorville with a projected release date of January 26, 2037.

STATEMENT OF FACTS

1. Mohamed's Background And Upbringing: Mohamed Osman Mohamud was born in war-torn and impoverished Somalia on August 11, 1991. ER 5815-16, 5829, 5983. His father, Osman Mohamed Barre, emigrated to the United States as a refugee in 1993, and Mohamed and his mother, Mariam, followed about a year later. ER 5816-17. Although "malnourished" and "suffering," mother and son were "happy" to be in the United States. ER 5817. The family was "grateful to America" for taking them in, and the parents worked hard to create a new life for their family, which would eventually expand to include a daughter and another son. ER 5817-18, 5825. As his father would tell the FBI, "We're proud to be American." ER 5833.

From the time of his arrival in the United States until his early teen years, Mohamed was an ordinary immigrant youngster. *See*, *e.g.*, ER 5820, 5961-62. He read Harry Potter books, attended local public schools, and quickly learned English. ER 5820, 5828. He was a Lakers fan. ER 5820. He had a diverse group of friends and was well-liked by his peers. ER 5828-29, 5969. His family attended the local mosque, where they socialized with others in the Muslim community. ER 5821.

During his sophomore year in high school, Mohamed won an award for a poem he wrote about the reasons he loved Oregon. ER 5828-29; *see* Ex. 5; Def. Ex. 1007a. Childhood friends and former teachers described Mohamed as "goofy," "fun-loving," "very friendly," and "a great kid." ER 5961-63, 5972, 5975.

As a teenager, Mohamed experienced what his father described as a normal teenage "identity crisis" about his religion and culture. ER 5820. Unbeknownst to his father, Mohamed began researching religion on the internet. ER 4406, 5841. He encountered pro-jihadi websites and became very familiar with the extremist language of that internet community. ER 4407.

2. Association With Amro Al-Ali: Through the local mosque in Portland, Mohamed became acquainted with Amro Al-Ali, an 18-year-old college student from Saudi Arabia, who came to Portland in January 2008 to study. ER 4119-20, 5821. Al-Ali had a valid student visa and flew into and out of the United States without incident. ER 4119-20. Al-Ali left Portland on June 29, 2008. ER 4120. He had not been arrested, designated, or charged with any terrorism-related activity at the time he left, and the government presented no evidence at trial of any terrorist writings, statements, or activities of Al-Ali in the United States. ER 4120.

Mohamed maintained sporadic email contact with Al-Ali after he left Oregon. The government collected at least some of the emails, none of which refer to

terrorism or al-Qaeda. Ex. 224. The emails cover religious subjects and include information from Al-Ali about an Islamic school, Dar ul-Hadith, in Yemen. ER 5711-12. A government expert testified that this school was founded by a Muslim cleric who supported jihad. *Id*. This information is not stated in the emails. In August 2009, Mohamed told his father about the school in Yemen and expressed a desire to go there. ER 5830-38.

Before trial, the government characterized Al-Ali as "key" to its case against Mohamed. ER 2352. In its opening statement, the government referred to Al-Ali as an "al-Qaeda recruiter" and presented him as one of the "known al-Qaeda terrorists" connected to Mohamed that demonstrated Mohamed's predisposition. ER 3950, 3955. Over defense objection, numerous government witnesses characterized Al-Ali as a "terrorist," relying on hearsay from an Interpol notice that purportedly stated Al-Ali was an al-Qaeda recruiter. ER 4027, 4232, 5010-11, 5289.

3. Trip To London: In December 2008, Mohamed and his family traveled to London. ER 5822-23. At the airport, Mohamed was stopped and questioned by security. ER 5822. He was angry and later wrote in an email that he had been racially profiled, blaming the "evil Zionist-crusader lobbyists who control the world." ER 5262. He called on Allah to bring his fighters against these unbelievers. ER 5262. In

London, Mohamed created a new email account, truthbespoken@google.com, which he used to write to Al-Ali, others he met online, and friends. ER 5264, 5278.

4. On-Line Contact With Samir Khan: One of the online contacts Mohamed made in 2009 was with Samir Khan, an American citizen living in North Carolina. ER 4047-48. Mr. Khan openly administered an extremist jihadi website and published an online magazine, Jihad Recollections. ER 4048. From February to August 2009, Mohamed, then 17 years old, exchanged over 150 emails with Mr. Khan. ER 4096-97; Ex. 223. In his emails he pretended to be a college student (he was in high school) and claimed to work making magazines. ER 4100. He sought advice about personal relationships with his family and friends, and about Islamic law. ER 4098, 4102. At Mr. Khan's suggestion, Mohamed chose a pen name to use for future writing: Ibn al-Mubarak, a noted poet. ER 4101.

Mohamed wrote four articles for Jihad Recollections between February and June 2009. Ex. 232. The articles provided advice on staying in shape in order to prepare for jihad and on staying mentally fit for the frontier; praised As-Sahab as a media outlet for al-Qaeda; and analyzed Europe's potential vulnerability to a jihadi attack. ER 4116-18, 5282, 5936. Several articles had inflammatory content that Mr. Khan removed before publishing. ER 5269-70, 5277-78. For example, Mohamed suggested including pictures of the twin towers in one article, and, in another, he

praised overseas fighters who shot down an American helicopter, then "finished off" the soldiers. ER 5277-78.

Mohamed also edited articles written by others and suggested content. He approved Jihad Recollections's "stance" as supporting Osama Bin Laden, and, in an email, described the magazine as "officially an American al-Qaeda magazine, laugh out loud." ER 5276. But on August 15, 2009, Mohamed emailed Mr. Khan to say he would not write for the upcoming edition, and that he "was going through a lot of things." ER 4118. That was the last communication between Mohamed – who had just turned 18 years old four days earlier – and Mr. Khan. ER 4118.

During the trial, the government repeatedly referred to Mr. Khan as a "terrorist" and described Mohamed as being in contact with this "terrorist." ER 3950, 3953, 3956, 5127, 6061, 6228. Yet Mr. Khan was living openly in the United States during the entire period of their communication, and the government presented no evidence that he had been accused of any terrorist activities, ER 4133-34, or done anything more than exercise his First Amendment right to publish controversial political expressions. ER 4108-09.

Mr. Khan flew out of the United States, apparently not on any No-Fly list, sometime after Mohamed ceased communicating with him. ER 4133-34. He later joined a Yemeni-based terrorist organization, Al-Qaeda in the Arabian Peninsula

(AQAP), and became a media propagandist for them. ER 5704-05. About a year after Mohamed's arrest, Mr. Khan was killed by an American drone that was targeting another AQAP member. ER 5704.

5. Other On-Line Contacts: Mohamed also sometimes wrote posts on the web-site "Dawn of the Ummah (DWTU)" and other similar internet sites. ER 5786-89. A government expert characterized this forum as one that supported jihad. ER 5789. In June 2009, Mohamed posted about creating a list of people who had "offended Allah." ER 5793. The list was intended to be like the FBI most wanted list; he wrote, "I'll put a disclaimer on it, but anyone can do with it whatever they please." ER 5794-96. The government expert testified that posting on such forums was indicative of a person trying to "self-recruit," ER 5781, but the defense expert explained that such vitriol was common "nasty trash talk" being done by many on Islamic websites and was not a predictor of future violence. ER 6118.

6. His Father Calls The FBI When Mohamed Plans To Leave The U.S.: On August 31, 2009, the same day that Al-Ali emailed Mohamed information about the religious school, Mohamed called his father, Osman Barre, to say he was leaving the country. ER 5830. Mr. Barre felt his son was "too young and immature" and asked him to wait. *Id*. When Mr. Barre and his wife discovered that Mohamed had taken his passport, they panicked. ER 5989-90. They had heard stories about Somali youth

being "brainwashed," returning to Somalia, and dying in the fighting there. ER 5990, 5831. When they could not reach Mohamed on his phone, Mr. Barre called the FBI and asked them to help stop his son from leaving the country. *Id*. The FBI asked to meet with Mr. Barre.

In the meantime, Mrs. Barre made contact with Mohamed, picked him up at a local school playground, scolded him, and brought him home. ER 5990-92. He did not have a ticket or visa, and returned his passport to his parents. ER 5832. Mr. Barre met with FBI Special Agent DeLong, as agreed. ER 5832-33. When the agent explained he was from the Joint Terrorism Task Force, Mr. Barre was taken aback and told SA DeLong his family had nothing to hide and were nothing but grateful to America for taking in the family. ER 5833-34. Mr. Barre provided information about Mohamed, and he later forwarded to SA DeLong the email from Mohamed about the school in Yemen. ER 5834, 5837.[2] The email enabled the Portland FBI to tie Mohamed to an ongoing FBI investigation of Samir Khan. ER 5122-23.

SA DeLong told Mr. Barre, "[t]here's nothing we can do" to stop Mohamed from going abroad, given that Mohamed was an adult. ER 5835, 5119. Mr. Barre

[2] Mr. Barre did not know that Mohamed had altered the email by removing Al-Ali's email address and forwarding it away from his own truthbespoken email account. ER 5287-88.

responded that Mohamed "might be an adult, but he's still a child and immature." ER 5835.[3] The FBI did not tell the Barres about Mohamed's earlier online contacts with extremists. ER 5123. At trial, Mr. Barre expressed frustration about that omission, stating that, if he had been told, he would have contacted counselors and elders in the Muslim and Somali communities who could have steered Mohamed away from extremist viewpoints. ER 5838-39.

That night, Mohamed told his parents his actions were just talk and "it's a fluke" and that he "was not going anywhere." ER 5835. Mohamed said he had thought about going to school in Yemen to learn Arabic and about Islam, and that he had heard about the school from a college kid named Amro he had met at the local mosque. ER 5835-37. Mr. Barre responded:

> I left my home country because of violence. I brought you here to give you a life of prosperity, and we are here, and you are going to be here with us and go to college, and we were going to support you to do that.

ER 5836. Mr. Barre told Mohamed that if he wanted to go abroad to learn Arabic and about Islam, he could do so with the family's support after he finished school in the United States and was "mature enough" to "know wrong or right." ER 5838. The

[3] An FBI source at a local mosque confirmed this view of Mohamed, telling the FBI he was "looking for guidance" and "easily influenced." ER 4092.

family agreed that Mohamed would enroll in Oregon State University (OSU) and pursue a degree in engineering. *Id*.

7. Mohamed Starts His Freshman Year At OSU: In September 2009, Mohamed moved to the OSU campus in Corvallis. His freshman roommate, Luis Martinez, and a number of his other friends from school testified at trial. They described him as a "really fun guy to be around," ER 6089, and an outgoing, friendly, and social student. ER 5542, 5555-58, 5862. His friends included individuals from a wide variety of ethnic and religious backgrounds. ER 6089. During his freshman year, Mohamed began binge-drinking and using marijuana. ER 4151. Although he was socially involved in many activities, including the African Students Association, ER 5862, online he sometimes expressed feelings of loneliness or being lost. Def. Ex. 1002.

8. FBI Surveillance In The Fall Of 2009: Unbeknownst to Mohamed, the FBI went with him to college. They conducted physical surveillance, including videotaping Mohamed with his friends at the college cafeteria. ER 5143-45; Def. Ex. 1016. They also conducted extensive electronic surveillance. ER 4074, 5126. The case agent at the time, SA DeLong, felt that Mohamed's communications did not have "the same radical speak that he had espoused early on, when he was communicating with Samir Khan." ER 5127. On October 27, 2009, SA DeLong

emailed his supervisors: "for the most part he has left behind his radical thinking." ER 5135-36.

On November 16, 2009, SA DeLong wrote an email describing Mohamed as a "pretty manipulable, conflicted kid." ER 5150. The agent had reviewed the Jihad Recollections articles and viewed them as representing the "hard ruling Islamic life," but he did not see the same mindset reflected in Mohamed's communications now that he had started college. ER 5150-51.

9. Lack of Communication Among Regional FBI Offices: Because Mohamed was attending college in Corvallis, the Portland FBI transferred his case to Eugene, where a new case agent, Chris Henderson, took over. ER 5148-49.[4] There appeared to be a lack of communication among the various FBI offices involved. For example, Special Agent Dodd testified at trial that he received authorization from SA DeLong to begin an online undercover investigation of Mohamed, ER 5178, but SA DeLong could not recall anything about that. ER 5131, 5133. Working out of Portland, SA Dodd began an undercover operation against Mohamed (the "Bill Smith" emails), just as the case was transferred to Eugene. ER 5183. Similarly, Special Agent Chan from San Francisco – who would later be the handler for one of the undercover

[4] Agent Henderson did not testify at trial. He was with the FBI for less than three years and left the FBI while Mohamed's case was still ongoing. ER 5149.

operatives – testified that he had authorization, in November 2009, to start online covert contact with Mohamed. ER 5008. His operative twice attempted contact but was "unsuccessful," in that Mohamed did not respond. ER 5009. SA Chan did not know about the FBI's other online covert activity until after Mohamed's arrest.

10. The "Bill Smith" Emails Begin on November 9, 2009: The first "Bill Smith" email was sent November 9th. It read:

> Brother, I saw – I saw a post you wrote a while back in the Google group. I think it was called the hijrah group. I wanted to talk some to you. I'm here in the West, as well, but here I am one of the only Muslims around. I want to get more involved in the fight for the Ummah. I want to help rid the occupiers from Palestine. I don't even know if I have the right email for you. Please respond if I do. Salam alaikum.

Ex. 226-01; ER 5185. "Bill Smith" was a paid FBI contractor under the supervision of SA Dodd. ER 5179.[5] Mohamed responded the next day that he did not "fully understand" the question but invited Bill Smith to ask more. Ex. 226-02. He did not reciprocate or say that he, too, wanted to be involved in the "fight for the Ummah." ER 5218-19.

[5] Bill Smith did not testify at trial, and SA Dodd was permitted, over defense objection, to testify about what was intended by the emails. ER 5191; 5196.

11. Mohamed Expresses Confusion on November 12, 2009: On November 12, 2009, Mohamed sought advice from a Muslim website. He voiced confusion about his religion and his drinking, and about people who sent him unwanted internet links:

> i wanted to ask some advise as i felt ashamed to ask anyone else in person. I love your website so i decided it was safe to ask you for such advice in such times as ours.
>
> i swear by Allah i have become so lost. And i want so badly to be in a muslim land. I keep telling myself that if I lived in a muslim land I would become so pious. But i know that what I need to do is fear Allah and do so over here. Being in University and living on campus hasn't helped me too much either. I have fallen in to so many things (ie alcohol and women). My roommate is a muslim but he has nothing but bad effect on me. I want so badly to fear Allah and practice my deen. Advise me and support me in these tough times brother, and i ask that you not include links as everyone seems to do so whenever i ask deen related things. All i need is some soft words to help my heart and supporting advice.

Def. Ex. 1002.

12. More Bill Smith Emails Between November 12, 2009, And May 13, 2010: Mohamed did not receive a response to his plea for "soft words," but, one day later, he did receive another email from Bill Smith:

> Salam alaikum, brother. There are a few Muslims here in eastern Idaho where I am. I want to find other brothers that think like I do. I want to help bring about our Ummah here in the West. I see in the news that other brothers are trying to fight. I want to, as well. What can I do? Do you know who I can talk to? Can you help? I want to get more involved.

Ex. 224-03; ER 5187-88. "In the news" at the time of this email was the Fort Hood shooting by a Muslim officer. ER 5225. At the time he authorized this email, SA Dodd had no evidence that Mohamed had ever planned to commit an act of violence in the United States. ER 5227.

The Bill Smith emails continued to suggest violence in the West to Mohamed. In an email on November 14th, Bill Smith stated he was "frustrated" and wanted to "fulfill my purpose and help with what is to come." ER 5190. He hoped to get more people in the West preoccupied with problems, so that "our brothers" in Palestine will have a "quickened victory." ER 5190; Ex. 226-05. When Mohamed responded to these emails, he sometimes gave advice about security and cautioned about spies. ER 5190.

In an email on December 1st to Mohamed, Bill Smith wrote of bringing "the fight to the West." ER 5197; Ex. 226-12. Mohamed did not respond to that email. On January 1, 2010, having not heard from Mohamed in over a month, Bill Smith sent another email suggesting violence in the West:

> Salam alaikum. What's going on lately, brother? I've been busy. I haven't heard from you lately. It looks like there's been some action against the West in the last few weeks. I sometimes wonder who's getting these guys set up. I can't tell you how easy it should be to bring any community here in the West to its knees. I think these guys are making things way too complicated. Anyway, I'll talk to you later.

ER 5199. SA Dodd claimed at trial that the reference to recent "action against the West" was vague and not intended to refer to the recent underwear bomber plot on an airliner. ER 5251-52. Agent Dodd also claimed that "bringing a community to its knees" could mean "kneeling in supplication" and therefore was not a direct reference to violence. ER 5200.

From November 2009 to May 2010, Mohamed and Bill Smith exchanged 42 email communications. Def. Ex. 1001 at 1-13. Mohamed never offered to help Bill Smith commit acts of violence and never supported Smith's thinly veiled calls for violence. *Id*. Bill Smith stopped emailing when the FBI started its next phase of investigation, the undercover covert action by agents "Youssef" and "Hussein."

13. Email From Al-Ali on December 3, 2009: During the time of the Bill Smith emails, Mohamed also received an email that appeared to be from his former Portland associate, Amro Al-Ali:

> salamz bro it's me Amro, I made it 2 OMRA, [praise be to god] if u wanna come, theres a bro that will contact u about the proper paperwork u need 2 come . . . I cant go online 4 a while, I hope 2 see u soon abu abdallah.

Ex. 224-12. Mohamed responded: "Yes, that would be wonderful, just tell me what I need to do [God willing]. always wanted to see the ka'bah." Ex. 224-13. A responsive email on December 12, 2009, provided a Hotmail email account and

password, with the message, "hey check this e-mail." ER 4036. A few minutes later, another email was sent, instructing Mohamed to contact "abdulhadi." ER 4037.

Based on the IP addresses, the FBI concluded both of Al-Ali's emails were sent from the northwest frontier region of Pakistan. ER 4036-37. Mohamed would not have known this, however. ER 2346.[6] Over the next months, Mohamed tried to respond to the email, but was unsuccessful. ER 4042-45. At the same time, he also was making plans to pay his spring semester tuition at OSU. Def. Ex. 1055.

14. The FBI Reacts To The Interpol Notice, Spam Email, and The "Beau Stuart" Email: Agents testified they were alarmed by several events in the winter of 2009 and spring of 2010. First, they obtained an Interpol Red Notice concerning Al-Ali, dated October 18, 2009. ER 4026-27. The Interpol notice contained assertions of an unnamed declarant based on unknown sources that:

> Al-Ali was known to be connected to a fugitive wanted by Saudi Arabian authorities who is an expert in manufacturing explosives and in facilitating the movement of extremists inside Saudi Arabia. He also helped Al Qaeda division in Yemen and other countries by providing them with foreign fighters to carry out terrorist attacks against western and tourist interests.

[6] During his later recorded conversations with the undercover agents, Mohamed continued to express his belief that Al-Ali was in Yemen. ER 4803.

Ex. 80; SER 206. The meaning and accuracy of the notice was contested at trial. Numerous government agents testified that the notice "affected" their decision-making or actions. ER 4027, 5011.

The FBI also was concerned about emails to Mohamed in the spring of 2010. ER 4075-76. The emails referred to electronics, and Mohamed responded as if they were a message for him from Al-Ali or an associate. ER 4078. FBI analysts later determined they were spam emails. ER 4077-79.

The FBI also professed alarm about email correspondence between Mohamed and a friend, Beau Stuart, in January 2010. ER 4078. Mr. Stuart, the son of an FBI agent, had converted to Islam and moved to Saudi Arabia to teach. ER 4134-37. Mr. Stuart and Mohamed exchanged numerous emails about traveling abroad, living in a Muslim land, and other benign topics. ER 5391-92. Mr. Stuart also counseled Mohamed, encouraging him to stay in school and do as well as possible. ER 5394-95. On January 24, 2010, after Mr. Stuart had written a long email about his experiences in Saudi Arabia, which concluded with his statement that he was heading to the holy city of Mecca, Mohamed responded:

> Oh, nice. Make lots of dua [prayer] for me. Make dua that I will be one to open Al Quds and make dua that I will be a martyr in the highest chambers of paradise.

ER 5390-96; Def. Ex. 1053. The trial court initially sustained the government's hearsay objections to the context of the correspondence that led to Mohamed's statement. ER 4137-38, 4703-04.

The FBI agents believed Mohamed's "martyr" reference meant he was thinking of taking his own life, as in becoming a suicide bomber. ER 4078, 4094. At the trial, both expert and lay witnesses testified that Mohamed's response was a common phrase that reflected a larger principle in Islam; namely, that to die as a martyr for the sake of one's religion is the most noble death. ER 5870. Dr. Sageman, a renowned terrorism expert, explained that the phrase is like a greeting or salutation from a hadith or proverb and was not concerning. ER 6163.

15. The FBI Receives "The Green Light To Target" Mohamed: SA Trousas testified that the sting was set up in response to this developing evidence:

> We set up the undercover operation because of his communication with Al-Ali, Samir Khan, the e-mails that he sent out to different e-mails out there, and also the statements he made to Beau Stuart that he wanted to kill himself.

ER 4078. On June 7, 2010, SA Trousas contacted SA Chan in San Francisco to tell him, "we got the green light to target Mohamed Mohamud utilizing your [undercover operative]." ER 4091. They planned on "using everything we have on him." ER 4091.

What they "had" on Mohamed was the data from their electronic surveillance. ER 4074. They crafted the profile for Youssef based on what they knew of Mohamed. ER 5035. They knew he was vulnerable to manipulation, that he was studying engineering, that he was religious, that he was shy around authority figures, and that he seemed to crave respect. ER 5035, 5031-32. They designed Youssef's persona to build rapport with Mohamed. ER 5045.

16. Thwarted Trip To Alaska On June 14, 2010: Meanwhile, that spring, Mohamed had been planning his summer employment with his roommate, Luis Martinez. ER 5546. Mr. Martinez's father worked in Alaska and agreed to arrange employment for the boys at a cannery or on a fishing boat. *Id*. Mohamed's father approved of the plan because he thought it would help his son mature and keep him busy. ER 5845. After Mohamed emailed him with Luis Martinez's ticket information (Def. Ex. 1011A), Mr. Barre purchased his son's plane ticket to Alaska. ER 5844. Despite Mohamed's later claim to the undercover agents, at the time the Alaska trip was planned, Mohamed never discussed trying to meet people after Alaska or trying to travel to Yemen from Alaska. ER 5547.

Mohamed's parents brought him to the airport on June 14, 2010, but he was not permitted to fly. ER 5846. Mohamed and his father were upset that he had apparently been placed on the No-Fly list and felt this was profiling. ER 5847-49.

The FBI sent two agents to interview Mohamed and his family. ER 4191-93. Afterwards, Mohamed went home and immediately drafted up a new "To Do" list, which included "Find a job," "Work till September," get his parents to help pay for food and rent, and "you might have to take less classes" at OSU. Def. Ex. 1012a, 1012b. He called his roommate and expressed his disappointment that he could not come. ER 5567-68. Nine days later, another targeted FBI contact began.

17. New Targeted Undercover Operation Begins With Emails: Beginning on June 23, 2010, the FBI sent a new series of emails to Mohamed. The first email instructed Mohamed to open a hushmail account. ER 4053. An agent, later identified as "Youssef," then emailed Mohamed:

> Wa alaikoom salem, hamdullah, I am good, brother. Thank you for asking. I'm sorry for the delay in our communication. We've been on the move. Jazakallah khairan for responding so soon. Are you still able to help the brothers? In sha'allah, I'll hear from you soon. Salem, Youssef.

ER 4054-55. Mohamed responded that he could not help the brothers because he could no longer travel. ER 4056. He did not ask for more contact, instead stating, "I will contact you when I am able to travel." *Id*. Youssef responded anyway, suggesting he could do something locally – "Allah (SWT) I'm sure has good reason for you to stay where you are" – and asking to meet in person. ER 4409.

About two weeks later, when Mohamed had still not responded, Youssef sent him a follow-up email. ER 5046. Another week passed before Mohamed responded and agreed to meet with Youssef. ER 5046-47. SA Chan, who helped draft the emails, acknowledged that the FBI did not want to take "no" for an answer at that point. ER 5044. Their purpose was to set up the face-to-face meeting, and they wanted to "keep going" until they accomplished that. ER 5044.

The email from Youssef emphasized that his position "needs to stay private" and mentioned needing to avoid the "eyes and ears" of the unbelievers. ER 5050. Mohamed responded in kind, worrying whether Youssef was a "spy" and saying he would have some questions for Youssef. ER 5052. The agent responded with praise for Mohamed for thinking about security. ER 5053. As SA Chan acknowledged, Mohamed did the "same thing that we did," and then they praised him for it. ER 5054. Defense experts Dr. Moghaddam and Dr. Cauffman later testified that modelling behavior can powerfully influence a person, especially a young person. ER 5907-10, 6042-45.

18. Youssef And The First Undercover Meeting (unrecorded): On July 30, 2010, the first face-to-face meeting between Mohamed and the undercover operative Youssef occurred, but it was not recorded. ER 5015. According to Special Agent Galindo, the battery was accidently drained the night before. ER 5502-03. By the

time anyone reported the recording failure to SA Chan, who had listened to part of the meeting by a transmitter, ER 5018, he had already destroyed his notes. ER 5040. Only SA Chan's written report remained as a record of what occurred.[7]

SA Chan could not hear the first ten minutes of the meeting between Mohamed and Youssef, when they were walking to the hotel where Chan was stationed. ER 5065-66. For his report, SA Chan relied on Youssef to tell him what had occurred, and he chose the highlights. *Id*. SA Chan did not report anything Youssef said during the walk; he only reported what Youssef claimed Mohamed said. ER 4838. And what Youssef reported was "small talk" – that Mohamed was a student at OSU, and that Mohamed "discussed his childhood travels in Somalia and Kenya." ER 4839, 5066-67. Youssef agreed on cross-examination that, because Mohamed came to the United States when he was three years old, his "discussion" of these early travels was "probably not very lengthy." ER 4839.

When confronted with surveillance photos from the ten-minute walk that show Youssef with his mouth open, Youssef admitted that he had also been talking

[7] In looking at his other reports from the case and comparing them to recordings, SA Chan acknowledged that his reports are just summaries and did not always include facts that later seemed relevant. ER 5056-58, 5064. In addition, SA Chan's reports might attribute acts to Mohamed when actually the agent directed the action. ER 5056. Some of his other reports had factual errors, which could be detected when compared with the recording. ER 5060-62.

during the walk. ER 4839-41. The photos also capture Youssef making a particular motion with his hand and arm, ER 4842-43, a motion the jury viewed in videos of Youssef when he was being emphatic or giving directions. ER 4744, 4750, 4843.

Youssef could not remember everything he said during this ten-minute walk. ER 4843. He did remember, however, that he told Mohamed he was from the "council," a religious entity, and he was interviewing people in Canada and the United States for a project that would be paid for by the council, using the Arabic word for council, "ihataa." ER 4245, 4837-38, 4844. He told Mohamed he was one of seven people being assessed. ER 4844. Youssef testified that making this an assessment or interview, rather than just a meeting, gave a different color to the encounter. ER 4846. He acknowledged that SA Chan's report of the encounter did not mention this fact. ER 4846. He could not recall what else he said during the ten-minute walk. ER 4843-45. He denied that he threatened Mohamed, although the FBI had discussed this tactic in a planning email. ER 4836.

When Mohamed was told he was being assessed, and was asked what he had done to be a good Muslim, Mohamed talked about his earlier writing. ER 4845. Youssef then raised the topic of travel. Mohamed said he was unable to travel, and Youssef responded that it would be difficult for him to support the cause overseas because he could not fly. ER 4845. According to SA Chan, Youssef said: "it's pretty

obvious that you can't go overseas, so, you know, what can you do for the cause? What do you want to do for the cause right now?" ER 5021. Youssef did not offer to help Mohamed go overseas with a fake passport (as the FBI later did, ER 4809). Instead, Youssef took travelling overseas away as an option. ER 5021.

At this point, the FBI already knew that what Mohamed wanted previously was to go overseas. He had written about guarding the "frontier;" he had tried to go to Yemen to study; he had written about longing to live in a Muslim land; he had emailed Al-Ali saying he wanted to go to Yemen. ER 4214, 5277, 5393; Def. Ex. 1002; Ex. 224-12.

Youssef recalled Mohamed's response was that he "initially" wanted to wage war, but he then had a dream about something else. ER 4251. When Youssef asked Mohamed a second time what he would do for the cause, Mohamed, who had been told he was being compared to seven people, said "anything." ER 4252. Youssef then offered Mohamed five options of what he could do *in the United States*: praying, going to school to learn something that would help the cause, raising money, becoming operational, or becoming a martyr. ER 4253. Mohamed picked "operational." *Id*.

Whether Youssef encouraged or suggested ideas to Mohamed was not recorded.[8] SA Chan acknowledged that, whenever Youssef spoke in Arabic, SA Chan had to rely on Youssef to remember and report accurately, because SA Chan did not speak Arabic. ER 5070. What Youssef remembered was that, after he asked Mohamed to explain what "operational" meant to him, Mohamed stated, "I want to be like the brothers, get a car, put explosives in it." ER 4852-53. Youssef recalled that he offered to find someone to help with explosives, and directed Mohamed to "do some research on targets in Portland." ER 4854. At the next meeting, which was recorded, Youssef interrupted Mohamed and prevented him from disclosing what they had discussed at the first, unrecorded meeting. ER 4854-56. He told Mohamed what they previously discussed "was private." ER 4855. Youssef had already mentioned to Mohamed the site that later became the target, Pioneer Square, in a phone call right before they first met. ER 5078. The reason for the phone call was to

[8] Other conversations between Youssef and Mohamed were recorded. Youssef offered Mohamed "options" but acknowledged that he also intentionally steered Mohamed toward a specific option. When offering Mohamed the option of making a martyr video, for example, Youssef agreed he had his "finger on the scale" and was trying to influence Mohamed to make the video. ER 4435-36. Even after Mohamed had changed his mind and did not want to make the video, Youssef influenced him and brought him back around. ER 4437-38. He agreed it was "very easy" to influence Mohamed. ER 4438. Similarly, at the meeting in September, Youssef wanted to influence Mohamed to choose the "best option." ER 4815.

confirm their meeting location (chosen by the FBI), which was near Pioneer Square. ER 5077.

19. Youssef, Hussein, And The Second Undercover Meeting: The FBI organized a second meeting with Mohamed on August 19, 2010, this time with two undercover operatives. The construct for this meeting was that Youssef and Mohamed would need to "sell" their idea to "Hussein," who was presented as an explosives expert. ER 4268. As Youssef explained it: "I'm supposed to be selling Mohamed as a potential martyr to the explosives expert so that the explosives expert will agree or disagree to move forward with creating a bomb for us." *Id*. Youssef flattered Mohamed as he introduced him to Hussein, calling Mohamed a "jewel in the rough." ER 4287. He explained at trial that this was a necessary part of the sale:

> Because I'm sticking to the role that I'm playing. Hussein is, for all intents and purposes, interviewing us. He's not here to grant us an explosive device. We have to convince him – I have to convince him that Mohamed was the right person for this particular job.

Id. Youssef acknowledged that putting a 19-year-old boy in a situation where he had to prove himself created a risk that the boy would exaggerate. ER 4826.

The day before the second meeting took place, Youssef called Mohamed. ER 4267. Youssef recalled that the brief call was about "logistics," *id*., but the call was not recorded. ER 4767-68. In later recorded pre-meeting communications, Youssef sometimes coached Mohamed. For example, on August 21, 2010, he told Mohamed

by email that the council would "want to know what the plan is, when you started thinking about it, and why you feel it's justified." ER 4831; Ex. 92.

At trial, Youssef and Hussein both recounted what they recalled from the meeting. ER 4267-4309, 4499-4508, 4597-4640. Both the government and defense also played portions of the video from the meeting.[9] Over defense objection, the agents were permitted to interpret for the jury what Mohamed was thinking during the meeting.

Youssef reviewed the video and audio of the meeting and recalled that Mohamed had favorably referred to the Mumbai terrorist attack. ER 4281. Youssef asked Mohamed to read a poem he had written about martyrs, and he did. ER 4282. They discussed religion. ER 4283. Mohamed asked Hussein for explosives and revealed his target was Pioneer Square. ER 4501, 4597. Youssef wanted to be sure Mohamed understood that the bombing would be real, that there would be kids there. ER 4285. Mohamed had indicated a willingness to use a bomb, *id.*, and had discussed a rationale behind the attacks, ER 4287. Youssef wanted to be sure it felt real, asking Mohamed what was "in his heart." ER 4288.

[9] The trial transcript does not include the words heard in the courtroom as the video played. The presentence report summarizes Mohamed's post-contact inflammatory statements. SER 402-09.

Youssef told Mohamed that he could leave any time, that there would be no shame. ER 4290. At one point, he stood over Mohamed, telling him to "look me in the eyes." ER 4291. He wanted to scare Mohamed, to make him realize the gravity of what he was saying. *Id*. Youssef said his words had no effect. *Id*. They drove to Pioneer Square and looked at the place the truck would be driven. ER 4293. Youssef ended the meeting believing that Mohamed was serious. ER 4308-09.

Hussein explained at trial that he did not know many facts about Mohamed before the meeting. ER 4599-4602. He had not met with Youssef before. ER 4600. He was unaware of the substance of the unrecorded meeting, at which picking a target was discussed. ER 4597-98. After the meeting ended, Hussein was inadvertently recorded saying," It's almost too good to be true." ER 4647.

Hussein described the meeting as starting with a meal and small talk. ER 4498-99. He wanted Mohamed to like him and to build rapport. ER 4499. He recalled that Mohamed said that, when he was fifteen years old, he had a dream about being part of the mujahideen. ER 4500 When Hussein asked how he could help, Mohamed used the Arabic word for explosives and said he needed a car or a truck. ER 4501. After that, Mohamed described the plan to use a bomb at Pioneer Square. ER 4597.

Hussein recalled that Mohamed talked about religion and specifically spoke about martyrs and committing a jihadi act. ER 4504. Hussein gave Mohamed

"positive feedback" when he talked about martyrs, explaining that he was playing his role. *Id*. At least two or three times, he told Mohamed that he did not have to do this and there would be no shame if he walked away. ER 4504-06. He claimed he wanted to give Mohamed an out, but also to test him to see if he was determined. ER 4506. After they walked the area at Pioneer Square, Hussein recalled that he informed Mohamed that he would have to consult with others and that it "wasn't up to him" to decide. ER 4507-08. His goal was to have Mohamed "go out and think about it," knowing that Hussein would leave it to "higher ups." ER 4508.

On cross-examination, Hussein recalled that, during this meeting, they asked Mohamed to explain how long he had been "thinking of this," to which Mohamed gave varied responses. Mohamed asked if they meant how long he had his faith. ER 4611-12. The question was repeated, and Mohamed again talked about religion. ER 4612-13. When asked again, Mohamed said he had been thinking of this since he saw Youssef and they had a talk. ER 4632-33. When asked what he would have done if he had never met the agents, Mohamed said that one of his plans was to go to Yemen, and he had been saving money for an apartment there. ER 4639-40. He wanted to study, find the "right people," and learn Arabic. ER 4639-40, 4802.

Hussein and Youssef praised Mohamed during this meeting. ER 4618, 4621, 4637. Mohamed discussed United States losses in Afghanistan and how Muslim

civilians were being killed. ER 4621. Hussein added they were killed "like dogs." ER 4622. Mohamed discussed the humiliation of Muslims around the world. ER 4621. Hussein expressed strong feelings of closeness with Mohamed, even in this first meeting, using an Arabic expression to say Mohamed was his brother and as close to him as his "head and eyes." ER 4617-18.

After the meeting, Youssef sent Mohamed an email. ER 4310. The purpose was to get Mohamed to write out his justification for doing this act:

> Brother, please do another salat al istikhara [type of prayer] and let me know how you feel. A bomb is a very serious matter. I'm going back to the ijitma [religious council] tomorrow to talk about our conversation. They are going to want to know what the plan is, when you started thinking about the attack and why you feel it is justified. I know the answers to this, but I don't want to talk for you, and I want you to do the salat [prayer] first. I take what you said very seriously, and I have to be sure that you feel the same. This attack must come from your heart, dear brother.

ER 4310-11.

20. Additional Meetings: The undercover agents met with Mohamed five more times, until the attempted detonation on November 26, 2010. Each meeting was recorded. The meetings occurred on the following dates:

- September 7, 2010: Meeting with Youssef and Hussein in Portland;
- October 3, 2010: Meeting with Youssef and Hussein in Corvallis;

- November 4, 2010: Meeting with Youssef and Hussein in Corvallis area;
- November 18, 2010: Meeting in Portland with Youssef and Hussein;
- November 23, 2010: Meeting in Corvallis with Hussein;
- November 26, 2010: Date of Arrest.

ER 4245-55, 4267-4309, 4318-27, 4498-4552, 4597-4640.[10]

At most meetings, the agents flattered and praised Mohamed for his good writing or behavior. ER 4422, 4515-16, 4521-22, 6042. They gave him tasks to accomplish. ER 4320, 4323, 4358, 4364, 4509, 4516. At one meeting they encouraged him to write the script for what became a video; at a later meeting they filmed the video. ER 4433-46; Ex. 166. Hussein spoke in Arabic and used the phrase "God willing" frequently. ER 4521-23. Mohamed fully committed to the bombing plan, providing justifications for the actions and outwardly showing no reluctance to the agents. ER 4481, 6168.

On September 7, 2010, the agents' goal was to steer Mohamed away from martyrdom:

> We were advised with – we needed to steer him away from being – committing martyrdom and killing himself. We did not want him to be

[10] Appendix C lists the video exhibits played by the government and defense, organized by the meeting date to which they relate.

> out there doing something on his own, and we were asked to steer him away from that and basically to steer him to – to direct him to something a little more where he doesn't have to kill himself; as an operative for later.

ER 4508. At the meeting, Hussein advised Mohamed that he did not have to go forward with the plan. *Id*. They gave Mohamed two options. ER 4814. He chose not to martyr himself, but instead to park and leave the truck bomb, then go overseas. ER 4807-15.

The agents showed Mohamed an FBI-produced jihadi training video "as a recruitment tool." ER 4511. Mohamed said, "It's beautiful." ER 4325. The video showed an explosion being triggered by someone with a cellphone. *Id*. The operatives also assigned Mohamed specific tasks to complete. ER 4509-10. Hussein gave Mohamed $2,800 to rent an apartment and purchase items. ER 4368. Although Mohamed had initially planned on living with other OSU students, the FBI decided they "didn't want him to have roommates." ER 4317. They told him they wanted him to be taken care of and to have enough money. ER 4462. They walked on Pioneer Square and discussed where to park and the size of the bomb. ER 4359-60. They described how large and destructive the explosion would be. ER 4360.

On October 3, 2010, the agents met with Mohamed to give him more tasks. ER 4511-13. He was told to rent a storage shed and an apartment, and also to spend time with his family. *Id*. Mohamed said he wanted to move to an Islamic country but

his father was opposed. ER 4515. The agents praised Mohamed for his poetry; Hussein thought his writing was "amazing." ER 4515-16. Youssef suggested a topic for Mohamed: "Your departure from here" and suggested the audience could be "to the brothers, to your family." ER 4440-41. Mohamed later wrote on this topic and used the writing in a video that Youssef filmed. ER 4441.

On November 4, 2010, the agents took Mohamed to the countryside, where they exploded a test bomb. ER 4524-25. Mohamed pushed the cellphone buttons and appeared to cause the explosion, although an agent actually activated the bomb. ER 4525. Hussein said "God is great" in Arabic when the explosion happened. ER 4528. During the car ride to the site, Mohamed showed them parking spaces and escape routes he had organized on his computer. ER 4520. He showed them his Jihad Recollections articles, spoke of a friend in Afghanistan named Dawlat, and discussed Inspire magazine. ER 4529-31. Hussein knew Inspire was a terrorist magazine connected to al-Qaeda. ER 4531. Hussein advised Mohamed that he did not have to go through with the bombing, but, according to Hussein, Mohamed "wanted to see as many Americans to be dead or injured." ER 4529.

A week after mentioning Dawlat on November 4, 2010, Mohamed received an email purporting to be from Dawlat that read:

> Brother, while you wait, you should investigate about Predator B MQ-1 and MQ-9 Reaper strike drones and how to down them and their

> vulnerabilities. You have resources and there are a lot of science brothers in the mosque. Please, help me find something against those toys. They have killed so many brothers before my watching. By the way, Eid Mubarak. May Allah make you firm on His path.

ER 5301. Mohamed responded: "Wa alaykum assalam, don't worry, brother, I will find you something inshallah. Please do not e-mail this e-mail any longer. If someone replies from now on from this e-mail, it is not me. Remember that. I hope we meet again soon inshallah." *Id*.

On November 18, 2010, the agents spent six hours with Mohamed. ER 4532-50. The purpose was to bring his laptop to Portland and leave it where the FBI could image it. ER 4540. Hussein hugged Mohamed when they met. ER 4533. This was eight days before November 26th, and Mohamed seemed excited. ER 4533-34. He went with Hussein to the storage shed, where he used the code "hajj" – pilgrimage – for the door lock. ER 4535-36. In the car, Mohamed again talked about his friend Dawlat. ER 4537-38. He showed videos of his online research on Pioneer Square. ER 4538. He showed other videos on his computer, including the extremist video "High Hopes" or "Knowledge is for Acting Upon." ER 4726-27. Mohamed talked about another friend, Shukri, and jihad. ER 4543-44. He discussed the size of the bomb and said he hoped the nearby mall would collapse. Hussein asked Mohamed if he had any doubts, and he said he did not. ER 4544-45.

On November 23, 2010, Hussein and Mohamed went to the storage shed. ER 4547. The purpose was to see the bomb parts. *Id*. Mohamed helped load the barrels into Hussein's car, and put wire and nails in his car. ER 4550.

On November 26, 2010, the day of the attempt, Youssef picked Mohamed up at his friends' house. They drove to a store to buy reflective vests as part of their disguise, then went to the hotel where they met Hussein. ER 4732-33. As Youssef described the day:

> Hussein showed up less than an hour after we got to the hotel. And then we drove in my car to go see the van that had all the explosives. It was parked by, I believe, a Comcast building. He looked in it, saw it, and then we got back in the car and we went back to the hotel. At the hotel we ordered some food. We spoke for a little bit. We prayed. And then I dropped him back off at the van. They went towards Pioneer Square. I went past Pioneer Square and parked and waited for them to park their vehicle and then come to my vehicle, after which I drove to Union Station, I believe, dropped myself off there and let Hussein get in the driver's seat, and he drove underneath an overpass, where Mohamed made the phone call to detonate the explosive.

Id. At trial, the government showed the video of Mohamed in the passenger seat of the van, being driven to the bomb site. ER 4891. Hussein narrated the events of the day and said Mohamed was excited and ready. ER 4881-4897. When shown the bomb in the truck, Mohamed said it was "beautiful." ER 4885. The morning of the bombing attempt, Mohamed had run into a friend and told him he was having "the greatest morning of my life." ER 5573.

Mohamed was arrested after he pushed the cellphone buttons twice in an attempt to detonate the bomb. ER 4896. He kicked at the arresting officers after one made a comment to him. ER 4070-71. Later, when speaking with the jail psychiatric nurse, he cried. ER 5981. He told the nurse he could not understand "how he had gotten from just being a student to being labeled as a terrorist in jail." ER 5981.

21. Expert Witnesses: The government presented expert testimony from Mr. Evan Kohlmann. ER 5674-5814. The defense presented testimony from three experts, Dr. Fathali Moghaddam, ER 5887-5947, Dr. Elizabeth Cauffman, ER 6017-68, and Dr. Marc Sageman, ER 6110-92.

Mr. Evan Kohlmann: Mr. Kohlmann is an international terrorism consultant. ER 5674. His group collects data about and traces organizations that espouse a jihadi ideology, especially with respect to online activities. ER 5678-80. Through his research and academic work, Mr. Kohlmann identified six factors that he considers important in identifying characteristics common to people engaged in violent jihadist behavior. ER 5695. Mr. Kohlmann reviewed the facts of Mohamed's case and found that all six factors appeared in the case. ER 5802.

Dr. Fathali Moghaddam: Dr. Moghaddam is a psychology professor at Georgetown University and teaches about terrorism at such institutes as the Center for Homeland Security and Defense. ER 5887-88. His particular focus is on the

social psychology of situational factors, or context, to help explain what influences human behavior. ER 5893. Dr. Moghaddam testified about social influence and group dynamics, explaining that various famous studies – such as the Zimbardo prison experiment and the Milgram obedience experiment – demonstrated how the power of context could affect behavior and cause otherwise normal people to act in horrific ways. ER 5898-5901. He reviewed the specific facts of this case, noted stark differences between Mohamed's pre- and post-contact behavior and expressions, and opined that the artificial construct created by the FBI and the undercover operatives affected Mohamed's behavior. ER 5929-32.

Dr. Elizabeth Cauffman: Dr. Cauffman is a psychology professor at the University of California at Irvine specializing in adolescent development. ER 6017. She reviewed the interactions between Mohamed and the undercover agents and testified about Mohamed's immaturity and lack of sophistication. ER 6020-27. She also testified about the agents' actions that would be likely to significantly influence an adolescent, such as repeated praise and flattery. ER 6042-45. Dr. Cauffman also testified generally about characteristics endemic to adolescents such as risk-taking, susceptibility, and pretending to be someone they are not. ER 6027-28, 6050-57.

Dr. Marc Sageman: Dr. Sageman is a consultant on political violence who was one of two CIA agents "running" the Afghan mujahideen against the Soviet

Union in the 1980s. ER 6111-13. He is also a medical doctor, a forensic psychiatrist, and, at the time of Mohamed's trial, was working for the United States military to help prevent "insider" terrorist attacks in Afghanistan. ER 6111-14. Dr. Sageman had earlier been commissioned by the Air Force to develop a method to distinguish between people who turn to political violence, as opposed to those who espouse similar ideological rhetoric but do not become violent. ER 6117-20. Dr. Sageman developed a roughly 65-factor test that he applied to the facts of this case. ER 6159. He opined that, prior to government contact, Mohamed engaged in extremist dialogue like many other Muslim youths but was not a genuine threat in terms of committing a terrorist attack. ER 6122-26, 6159-61.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the relationship between citizens and their government during times of national alarm. A teenager was the focus of a massive and sophisticated governmental sting that became a high-profile domestic terror case. The government went too far in its prosecutive methods, and the trial court's rulings fell far short of assuring fair treatment and protecting Mr. Mohamud's constitutional rights.

The government's sting constituted entrapment as a matter of law and violated due process. Three principles compel this result: predisposition is measured at the

time of the first governmental contact; predisposition must be to the crime charged, not other nefarious activities; and post-contact evidence must be viewed as the potential product of the governmental contact. At the time of the first Bill Smith email, on November 9, 2009, Mr. Mohamud was not predisposed to attempt an attack in the United States, and his post-contact behavior could not supply proof beyond a reasonable doubt of predisposition to commit the charged offense and lack of inducement.

The entrapment principles from Supreme Court cases were obscured from the jury's full and fair consideration. In its closing arguments, the government repeatedly and wrongly argued that entrapment could not apply in a terror case: "An individual simply cannot be entrapped to commit an offense such as this." The prosecutor's arguments also suggested, contrary to what the law requires, that proof of undefined "similar conduct" could substitute for predisposition to commit the crime charged, thereby eviscerating Mr. Mohamud's lawful defense. When the jury indicated uncertainty about whether predisposition was to the crime charged or a "similar crime as stated by the prosecutor in closing argument," the trial judge gave a confusing and biased response that resulted in a guilty verdict shortly thereafter.

The prejudice from improper prosecutorial argument was compounded by instructions that omitted critical aspects of the requested defense instructions on the

theory of the case. The defense submitted jury instructions on seven areas necessary to presentation of the complete theory of the defense, each supported by facts and law, none of which were provided to the jury. The errors regarding jury instructions and arguments separately and cumulatively violated the right to a fair trial.

The government filed at least 16 in camera, ex parte, under seal filings with the district court during the course of this case, presenting classified materials and argument outside of the normal adversarial process. On appeal, the defense requests general review of classified proceedings and challenges the adequacy of disclosures. In addition, the district court's handling of classified material resulted in several fundamental errors that require reversal. The court permitted Youssef and Hussein to testify regarding their contacts with Mr. Mohamud under their false names, and without disclosure to the defense of identifying information. Similarly, the trial court, after first granting discovery regarding Bill Smith, later reversed course, barring the defense discovery or the ability to cross-examine Bill Smith himself. Instead, Bill Smith's handler was allowed to testify to the meaning of Bill Smith's emails. These rulings violated the rights to confrontation and compulsory process.

The trial court's handling of classified information also resulted in violations of the *Brady* right to favorable evidence and the Rule 16 right to the defendant's statements. The defense established that the government likely had in its possession

many more telephone calls, emails, and text messages than were produced. The government selectively declassified only a portion of those communications, retaining communications that would have helped the defense demonstrate the absence of intention, preparation, or planning regarding the charged offense. The trial court also refused to order discovery of classified material regarding Amro Al-Ali, even though a defense expert identified errors in the government's interpretation of evidence about Al-Ali and indicated that Al-Ali had made statements to Saudi authorities that would have been helpful to the defense.

The unfair limitation on defense access to helpful classified material under *Brady* also infected the single piece of substitute evidence under CIPA that the defense tried, unsuccessfully, to introduce. The government produced a summary hearsay report of an FBI agent regarding governmental assessments that "Mr. Mohamud would not make any attempt to conduct a terrorist attack without specific direction from the [undercover operatives]." The defense specifically objected that the substitute information was inadequate, but the trial court denied access to witnesses or a more detailed account of the *Brady* material. Further, when the defense attempted to introduce the summary document in evidence, the court sustained the government's hearsay objection.

During the trial, the trial court misinterpreted and misapplied the "state of mind" exception to the hearsay rule to allow introduction of an Interpol notice purporting to identify Al-Ali as a terrorist recruiter. Over objection, government witnesses then repeatedly referred to the notice and Al-Ali's alleged status as a terrorist recruiter even though they had no first-hand knowledge and their testimony was based on multiple layers of hearsay within the notice. Mohamed was denied his Sixth Amendment right to confront the out-of-court declarants' highly prejudicial claims about Al-Ali. The pervasive hearsay testimony regarding a critical fact violated the right of confrontation and requires reversal of the conviction.

The trial court's misinterpretation and misapplication of the "state of mind" exception to hearsay prejudiced Mr. Mohamud throughout the trial. The trial court allowed the undercover operatives to testify about what they believed Mr. Mohamud was thinking and what he meant during recorded conversations under a "state of mind" theory. At the same time, the court excluded Mr. Mohamud's contemporaneous communications as self-serving hearsay when they were correctly offered under Rule 803(3). After allowing FBI officers to testify about their own investigative states of mind, the trial court not only denied discovery necessary to challenge the testimony, it barred cross-examination regarding the bases for their testimony.

The trial court consistently failed to provide adequate hearings and remedies regarding suppression of evidence based on violations of constitutional rights, despite solid evidence of governmental overreaching. At the outset of the case, the defense asserted that, based on cooperation between local police and the FBI, the government, without judicial authorization, had seized Mr. Mohamud's personal computer twice, copied the hard drive, and engaged in a shadow interrogation in violation of the Fourth and Fifth Amendments. The trial judge repeatedly refused to hold a hearing to determine whether the agents' conduct violated the Constitution. Despite defense requests to determine the constitutionality of the searches, seizures, and investigations in a number of contexts, the trial court never did so.

Ten months after the trial, the government admitted that it did not provide pretrial notice of the products of FAA surveillance used at trial, despite the statute's mandatory language, and despite specific pretrial requests by the defense for evidence of warrantless surveillance. The trial court required no evidence, held no hearing, and provided no remedy other than post-trial consideration of a motion to suppress. The court's failure to provide a meaningful remedy violated the statute and requires dismissal or, alternatively, remand for a hearing on the governmental misconduct.

Since the trial court did not suppress the products of the FAA surveillance, the radical diminution of privacy rights caused by the FAA's abandonment of traditional protections under FISA and Title III electronic surveillance – including judicial review, individualized suspicion, and particularity – is squarely before this Court. As a statutory matter, this Court should find that the mass retention and accessing of the content of Americans' emails and telephone calls is beyond the authorization of the FAA. On the constitutional merits, the Court should evaluate the retention and accessing of the content of electronic communications of Americans at two levels. First, based on the secondary search of reading and listening to retained communications of Americans with no judicial authorization, this Court should find the question resolved in the favor of individual privacy based on the precedent leading to the Supreme Court's holding in *Riley v. California*, 134 S.Ct. 2473 (2014).

Second, the mass acquisition and retention of Americans' communications alone violates the basic Fourth Amendment rule that, once the justification for governmental intrusion no longer applies, any further intrusion requires an independent justification. Here, once the government knew or should have known that Americans' communications were involved, the lack of Fourth Amendment rights in foreign communications no longer justified seizing and searching the communication.

The sentencing proceedings were fundamentally flawed. First, as elaborated under seal, the government's recommendation was tainted by improper considerations. Second, despite extensive briefing and evidence on lack of future dangerousness and post-offense rehabilitation, the trial court failed to impose a procedurally-reasonable sentence. The trial judge did not adequately resolve controverted issues, misapplied this Court's precedent, and inadequately explained its rulings. If the Court upholds the conviction, the case should be remanded for an evidentiary hearing and resentencing.

ARGUMENT

I. The Government's Extensive Intrusion Into And Influence Over The Teenaged Defendant's Life Constituted Entrapment As A Matter Of Law And Violated Due Process.

Prosecutions must result in acquittal as a matter of law where the government encouraged crime, even if the charged individuals demonstrated interest in the subject matter of the sting. *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (pornography); *Sherman v. United States*, 356 U.S. 369 (1958) (drugs). The opinions in *Jacobson* and *Sherman*, as elaborated by this Court in *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000), establish the critical distinction that the court below failed to recognize: the difference between predisposition to commit the crime charged and a vulnerable person's potential to be induced to commit a crime.

Contrary to these three governing cases, the trial court denied relief based largely upon statements generated after government contact.[11]

A. Under *Jacobson*, Repugnant Religious And Political Beliefs Do Not Equate To Predisposition To Commit The Crime Charged, Which Is Measured From The Time Before The First Governmental Contact.

In *Jacobson*, the government sent mail correspondence to a defendant who had purchased pornography entitled Bare Boys I and II. 503 U.S. at 543-47. The correspondence encouraged and ultimately led Jacobson to buy child pornography. *Jacobson* did not claim to be virtuous. Rather, he asserted that, before the government contact, his activity did not demonstrate his predisposition to commit the charged crime. The Supreme Court found entrapment as a matter of law.

The predisposition the government must prove beyond a reasonable doubt is not to general mischief or even other crimes: the predisposition must be "to commit the crime charged." *Jacobson*, 503 U.S. at 551 n.3. "[E]vidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." *Jacobson*, 503 U.S. at 550.

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[11] The standard of review on entrapment as a matter of law is whether, viewing the evidence in the light most favorable to the government, no reasonable jury could have found in favor of the government as to inducement or lack of predisposition. *Poehlman*, 217 F.3d at 698.

Attitudes like Mr. Jacobson's interest in pictures of naked boys, or Mr. Mohamud's sympathy with jihadist ideology, do not provide the measure for predisposition. *Id*. at 551 ("[T]he fact that petitioner legally ordered and received the Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act."). "[A] person's inclinations and 'fantasies'" "'are his own and beyond the reach of the government.'" *Id*. at 551-52 (citations omitted).

"[T]he prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson*, 503 U.S. at 549. In *Jacobson*, the Court found the government "not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights." *Id*. at 552. Similarly, in this case, the government agents championed the need for action in the West to support oppressed co-religionists worldwide. In both cases, a "ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime . . . ." *Id*. at 553.

The crime charged in the present case is attempted use of a weapon of mass destruction against any person or property within the United States, in violation of 18 U.S.C. § 2332a(a)(2). Mr. Mohamud's internet and associational activity before the government contact was protected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (First Amendment protects expression unless the speaker's intent and the words' tendency are to produce or incite an imminent lawless act). As found in the presentence report adopted by the court, there is no evidence that Mr. Mohamud had planned – or even contemplated – committing an attack in the United States involving a weapon of mass destruction prior to the government's intervention. ER 3609 ("there is no evidence Mohamud had previously researched, planned, or intended to carry out a domestic attack" until the FBI "offered Mohamud the means and opportunity to become 'operational' within the United States."); SER 389.

Mr. Mohamud did not act on the initial series of emails from Bill Smith, as Mr. Jacobson did not initially seek illegal child pornography, nor did Mr. Mohamud respond at first to Youssef's solicitation. In fact, he told Youssef he could not help the "brothers" because he could not travel, to which Youssef responded, "Allah has good reason for you to stay where you are." ER 4409. As in *Jacobson*, the government's communications in this case unlawfully induced illegal conduct by

normalizing reprehensible actions beyond the defendant's previously expressed inclinations and beliefs. 503 U.S. at 552 n.3.

B. Under *Sherman*, The Government's Sabotage Of Mr. Mohamud's Rehabilitation Efforts And Exploitation Of His Vulnerabilities Are Unlawful Forms Of Inducement.

In addition to and in conjunction with *Jacobson*, the government actions in this case support entry of judgment of acquittal under *Sherman*. In that case, the government informant met Mr. Sherman during the course of Mr. Sherman's treatment for his narcotics addiction. *Sherman*, 356 U.S. at 371. Mr. Sherman had prior convictions for both possessing and selling drugs, and, when asked, said he knew of "a good source of narcotics." *Id*. After initial reluctance, Mr. Sherman bought drugs, shared them with the informant, and set up more sales, which ultimately resulted in arrest and prosecution.

The Court found entrapment as a matter of law. The Court explained that Mr. Sherman's prior convictions were insufficient to prove his predisposition to sell narcotics given his efforts at rehabilitation. *Sherman*, 356 U.S. at 375-76. In so holding, the Court held the prohibition on "implant[ing] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission" is not limited to people without vulnerabilities and vices. *Id*. at 372. Despite Mr. Sherman's drug activity, the Court reversed the conviction because "the Government

play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes he otherwise would not have attempted." *Id*. at 376.

Like Mr. Sherman's entry into treatment and attempt to recover from his addiction before the government intervention, Mr. Mohamud had forsaken his attempts to live abroad and agreed with his parents to complete his college education in the United States. Yet the government initiated direct contact, derailed his college plans, and thwarted his summer job in Alaska. The government's intervention in what was effectively a rehabilitative program unlawfully capitalized on his known vulnerabilities. The Court in *Sherman* further confirmed that criminal actions after the government inducement began are irrelevant to predisposition for entrapment purposes:

> It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of the course of conduct which was the product of the inducement.

Id. at 375.

Similarly, Mr. Mohamud's actions after the government intervened were not independent acts but the products of inducement. Mr. Mohamud initially deflected and ignored suggestions about action in America, both from Bill Smith and from Youssef. The evidence established that he was "conflicted" and "manipulable," as supported by his embrace of college life and the uncontroverted assessments of his

religious leader and the FBI case agent. The government's strong-handed interference unlawfully induced his later actions.

C. Under *Poehlman*, Exploitation Of Apparent Vulnerabilities Went Too Far In The Creation Of Crime.

In *Poehlman*, this Court applied *Sherman* and *Jacobsen* to a conviction for sex trafficking of a minor. Again, the defendant was not virtuous and had deep flaws. "[L]onely and depressed," he trawled the internet, receiving rebukes for deviant sexual suggestions he made online. *Poehlman*, 217 F.3d at 695. He eventually received responsive emails from undercover agents that went beyond what he was initially looking for and proposed sex with children. *Id*. at 695-96. Mr. Poehlman was initially hesitant but eventually agreed to act as a sexual tutor for his correspondent's children, sending explicit emails, buying gifts, and traveling with the intent to sexually abuse the children. *Id*. at 696. This Court found entrapment as a matter of law. *Poehlman*, 217 F.3d at 705.

As with *Jacobson* and *Sherman*, the holding in *Poehlman* compels acquittal in the present case. Mr. Mohamud, like the other targets, was vulnerable to inducement but was not predisposed to commit the crime charged. On his own, Mr. Mohamud had no wherewithal or capacity to commit the offense. His extremist inclinations had not ripened into a present intention to commit the crime charged. Mr. Mohamud's activities after inducement began were the products of government

activity, and hence not relevant to establishing predisposition. *Poehlman*, 217 F.3d at 703 ("[T]he relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition.") (emphasis in original). Because controlling precedent from the Supreme Court and this Court prohibits government action that preys on vulnerable individuals, thwarts their rehabilitation, and induces them to commit crimes, this Court should reverse the conviction based on entrapment as a matter of law.

D. In The Alternative, The Court Should Dismiss This Case Because The Government's Overreaching Violated The Due Process Clause.

A prosecution that results from complete fabrication of a crime or excessive governmental overreaching violates due process and should be dismissed with prejudice. *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2014).[12] In evaluating whether due process has been violated, this Court employs a six-part test that focuses on: (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct;

[12] This Court reviews the district court's denial of the motion to dismiss de novo with deference to any facts found that are not clearly erroneous. *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995).

(5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue. *Id*. at 303.

The first two factors about the target favor dismissal: a single non-criminal teenager whose individualized suspicion arose from First Amendment-protected activity. The three factors on government conduct strongly favor dismissal:

- **Prolonged surveillance of a juvenile:** The government monitored Mr. Mohamud's electronic communications when he was 17 years old, and chose not to intervene either directly or through his parents even though the government knew he was communicating with skilled and dangerous propagandists;

- **Interference with familial relations:** The government obstructed Mr. Mohamud's parents' efforts to keep him in school and focused on his future as a civil engineer, failed to provide assistance when the parents requested it, and blocked the parentally-supported summer job, instead recruiting Mr. Mohamud to "help the brothers";

- **Abuse of faith and psychological manipulation of a young person:** The government exploited Mr. Mohamud's religious faith to an extraordinary degree, even claiming that God had a purpose for him to remain in the United States and "help the brothers," and used sophisticated psychological manipulation including flattery, rewards, political justifications, and other extreme measures particularly likely to influence a teenager;

- **Knowledge of vulnerability:** The government was aware of Mr. Mohamud's vulnerability to suggestion because of its long-term surveillance that showed him to be lonely, depressed, and conflicted, and, through statements to the FBI from his father and

an informant at Mr. Mohamud's mosque, that he was immature and easily influenced;

- **Lack of wherewithal:** The government knew Mr. Mohamud had no capability to commit the crime charged on his own and provided the directions and means for the offense to occur;

- **Constitutional violations during the same investigation:** Government investigators violated the Fourth Amendment in seizing and searching Mr. Mohamud's computer beyond the scope of any voluntary consent and submitted him to a ruse interrogation in violation of the Self-Incrimination Clause of the Fifth Amendment;

- **Destruction or failure to preserve evidence:** The government failed to record the critical first face-to-face meeting on July 30, 2010, destroyed written notes of that meeting, and failed to record a ten-minute phone conversation with the undercover agent on August 28, 2010.

The last factor described in *Black*, especially the aspect of necessity, calls for dismissal where the government implemented a massive and sophisticated operation to derail a suggestible teenager from rehabilitation and manipulated him to commit a crime he did not otherwise contemplate or have the means to commit.

Under the totality of the circumstances, the government went too far. The government agents' "justification" for capitalizing on Mr. Mohamud's religious confusion and vulnerabilities – "I'm playing al-Qaeda recruiter and . . . that's basically what you do" – succinctly captures why reversal of this conviction is

imperative. ER 4521-22; 5738. The law does not allow the government to recruit and manipulate its vulnerable citizens in this manner.

II. The Prosecutor's Closing Argument Violated Due Process By Negating And Misstating The Legal Standard For The Defense Of Entrapment.

In closing argument, the government asserted that (1) "common sense" precluded the entrapment defense; and (2) the standard for predisposition was willingness to commit "similar acts." The first theme urged the jury to effectively nullify the entrapment defense by treating it as categorically unavailable for the offense charged, while the second theme diluted the government's burden to prove predisposition, an essential element of the crime charged. By negating the only theory of defense and diluting the burden of proof, the improper arguments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).[13]

[13] Whether closing argument constitutes misconduct is reviewed de novo. *United States v. Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006) (citing *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995)).

A. The Government Improperly Argued In Closing That An Individual Cannot Be Entrapped To Commit The Charged Offense.

The government's closing argument began and ended with the proposition that nobody could be entrapped to commit the type of offense charged in the indictment. The prosecutor began, "[T]here is an element of common sense you should consider as you begin your deliberations, and that is this: *An individual simply cannot be entrapped to commit an offense such as this*." ER 6223 (emphasis added). Throughout the argument, the prosecutor continued to ask the jury to treat the defense as categorically unavailable:

- "[T]here's simply no inducement, because this is the type of offense that one commits only because they wholeheartedly want to." (ER 6226);
- "There is nothing a government agent can do or did do to persuade someone to take the lives of these people." (ER 6223);
- "[I]n the larger context, getting back to that common sense argument, could someone be entrapped to commit an offense like this? That tells you the answer is no." (ER 6255).

At the mid-morning break, the defense objected to the argument and called for the judge to correct the improper argument:

> The government started its closing by saying an individual cannot be entrapped to commit this offense. That's absolutely wrong under the law. That needs correction, because that's what the jury is here to decide.

ER 6258. The trial judge declined to correct the argument. ER 6259-60.

In rebuttal argument, the prosecution repeated its categorical pronouncement that no one could be entrapped to commit the charged offense:

- "What government conduct would cause an otherwise innocent person to do this offense? So we're talking about what's called an objective standard, but it is what did the government do, what could the government do to cause an otherwise average, law-abiding innocent person to do this?" (ER 6355);
- "What did the agents do, what could the agents do to make a person push the button in this matter." (ER 6354-55);
- "There is nothing that could be done to persuade a person to do this." (ER 6356);
- "[T]his is not a situation where a person could be entrapped. It's not a situation where someone could be persuaded to do such a remarkable thing." (ER 6359);
- "[T]here is simply nothing that can be done to induce someone, to persuade someone to commit a remarkable offense like this, and it is remarkable and sad." (ER 6361-62).

B. The Government Improperly Urged Conviction Based On Predisposition To Commit Similar Acts.

The trial court had ruled pretrial that the government needed to prove specific predisposition to attempt to use a weapon of mass destruction in the United States, rejecting the government's argument that mere predisposition to engage in similar conduct sufficed (ER 2429; *see* ER 2431) ("[T]he instruction is going to be in the language of the [model instruction], and 'commit the crime' refers to the crime set

forth in the indictment.").[14] In closing argument, the prosecutor nevertheless conflated proof of predisposition with willingness to commit similar acts:

> And the Government in this case is showing you and will show you that this defendant was predisposed to commit this offense. That doesn't mean that we are suggesting or arguing that this defendant had decided to commit this precise act before he met the undercover agents, but, rather, *there was a willingness on his part to commit similar acts*. And that is the type of evidence that also can be used to show predisposition.

ER 6225 (emphasis added); *see also* ER 6234 (prosecutor argues that emails reflecting an intent to travel for training expressed "this willingness to commit *these sorts* of violent acts" (emphasis added)). The government admitted that "there's been no suggestion that the defendant was building a bomb before he met [the agents]," but argued, "That's not the point in the context of the law." ER 6256; *see also* ER 6272 ("[F]or years before [the defendant] was willing to do similar things, was already there.").

The prosecutor's argument was highly prejudicial because it led directly to the jurors' note that reflected confusion on a central issue in the case:

We are looking for clarification of Instruction #18 if possible

[14] The government's proposed instruction had edited the model instruction to include: "A defendant is predisposed to commit the crime charged if you find evidence near enough in kind to support an inference that his purpose included offenses of the sort charged." ER 1915.

> Where it states "the crime," does that refer strictly to the crime as stated in the indictment, *or could it include "a similar" crime as stated by the prosecution in closing statements*.

ER 2846 (emphasis added). The defense, consistent with the pretrial ruling, requested that the answer should be, "'commit the crime' refers to the crime set forth in the indictment." ER 6378-80. The government agreed, but requested the addition of, "However, the jury may consider evidence of similar conduct or willingness to engage in similar conduct as evidence of predisposition." ER 6378. The defense objected. ER 6380.

After a ten-minute recess, the trial court declared its intention to provide an instruction that began by approving the consideration of similar conduct evidence.

> The jury may consider evidence of similar conduct or willingness to engage in similar conduct, along with all the evidence, in deciding if the defendant was predisposed to commit the crime set forth in the indictment. Please review all of Instruction No. 18.

ER 6383. The defense argued that the response did not directly answer the question, constituted an inappropriate comment on the government's argument, and unfairly omitted the defense factors that should be considered. ER 6383-84. The defense also argued that the response would not "clearly tell them the answer to the question" and requested the court at least flip the order so the first answer stated the "crime is the crime charged in the indictment." ER 6384-85. The court declined to change the response. ER 6385. After the court sent the response to the jury (ER 2847), the

defense filed a motion to withdraw the answer or grant a mistrial, which was summarily denied. ER 131, 2787-90.

C. The Improper Closing Arguments Violated The Defendant's Right To Present A Complete Defense And Diluted The Government's Burden Of Proving Guilt Beyond a Reasonable Doubt.

A defendant has a fundamental constitutional right to a fair opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 687-90 (1986); *accord Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Closing argument that misstates the law or denigrates an available defense constitutes reversible error. *United States v. Segna*, 555 F.2d 226, 231-32 (9th Cir. 1977) (prosecutor argued incorrect presumption of sanity); *see Hanna v. Price*, 245 Fed. Appx. 538, 544 (6th Cir. 2007) (prosecution disparaged mental responsibility defense). Where prosecutorial closing arguments demean basic constitutional rights, the improper argument requires reversal of the conviction unless it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 609, 614 (1965). Closing argument is also improper if it urges "the jury to decide the matter based on factors other than those it is instructed," *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001), or if it dilutes or shifts the burden of proof, *Perlaza*, 439 F.3d at 1170-71.

In this case, the prosecutor repeatedly and emphatically denigrated the entrapment defense by arguing that no one could be entrapped to do what Mr.

Mohamud did. The prosecutor's arguments nullified the defense by contending the crime was so repugnant entrapment was impossible. The prosecutor thus asked the jury to decide the case based on policy considerations and emotion, instead of the evidence and the instructions. *See United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999) ("The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear."). Allowing the government to categorically argue that a person simply cannot be entrapped to commit the type of offense charged "shift[ed] the burden of proof and . . . deprive[d] [the defendant] of the reasonable doubt standard." *Segna*, 555 F.2d at 230; *see also United States v. Sandoval-Gonzalez*, 642 F.3d 717, 726-27 (9th Cir. 2011) (prosecutor's incorrect statement of law constituted constitutional error).

Likewise, the prosecutor's suggestion that predisposition to commit "similar acts" sufficed to prove predisposition to commit the charged offense diluted the government's burden and misstated the law. In *Segna*, this Court overturned a conviction on plain error review when a prosecutor's argument diluted the burden of proof regarding the insanity defense by arguing a presumption of sanity, even though the Court's instructions were correct. 555 F.2d at 231.

The government's arguments negating the availability of the entrapment defense and diluting the burden of proof regarding predisposition were prejudicial.

United States v. Weatherspoon, 410 F.3d 1142, 1145-46 (9th Cir. 2005).The court did not correct the improper arguments. The jury's note established prejudice from the argument about predisposition to commit similar acts, which – as further argued in the following section – the court failed to correct. *See United States v. Branson*, 756 F.2d 752, 754 (9th Cir. 1985) (jury note inquiry regarding inference from defendant's silence established that comment on silence was not harmless).

III. The Trial Court's Failure To Provide Adequate Jury Instructions On The Defense Theory Of The Case Violated The Right To A Fair Trial.

The criminally accused have "a constitutional right to have the jury instructed according to [their] theory of the case," "provided that the requested instruction is supported by law and has some foundation in the evidence." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011) (citing *United States v. Johnson*, 459 F.3d 990, 993 (9th Cir.2006), and *United States v. Bello-Bahena*, 411 F.3d 1083, 1088–89 (9th Cir.2005)).[15] A district court's failure to give a defendant's requested instruction that is supported by law and has some foundation in the evidence warrants per se reversal unless other instructions, in their entirety, adequately cover that defense theory. *Id*. In this case, the trial court's refusal to

[15] "If the defendant's theory of defense is supported by the evidence, we review de novo whether the district court's instructions adequately cover it." *Bello-Bahena*, 411 F.3d at 1089.

provide seven requested instructions on the entrapment defense, separately and cumulatively, requires reversal. Each instruction was supported by governing precedent and had an evidentiary foundation, and the generic substitute instruction was insufficient to cover the law pertaining to the defense theory of the case. Further, the court's answer to the jury's question about the entrapment defense was unresponsive, incomplete, and slanted in favor of the prosecution.

A. The Trial Court Failed To Instruct The Jury On Essential Aspects Of The Defense That Were Supported By The Facts And Law.

The trial judge refused to give seven requested defense instructions that sought to tailor, explain, and supplement aspects of the generic model entrapment instruction. As a result, the jury was never provided a sufficient understanding of entrapment law to assess the complete theory of defense based on the facts developed at trial. *See Crane*, 476 U.S. at 690 ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Predisposition To Commit The Specific Offense Charged: Prior to trial, the judge ruled that the government was required to prove predisposition to commit the specific offense charged: attempted use of a weapon of mass destruction in the United States. ER 2431. On the basis of that ruling, the defense requested an

instruction articulating the government's burden to prove that "Mr. Mohamud was predisposed to commit the specific crime charged" before being first contacted by government agents as held in *Jacobson*, 503 U.S. at 549. ER 2043. Over objection, the trial judge refused to instruct the jury consistently with its ruling and, instead, instructed only that the government had to prove predisposition "to commit the crime." ER 2830. Without an instruction on the narrow requirement of predisposition, which was the central point of the defense, the jury was misled by the government's argument, as reflected in its note.

The Meaning Of "Innocent": The Ninth Circuit's model entrapment instruction states that, in considering inducement, the jury may consider "any government conduct creating a substantial risk that *an otherwise innocent person* would commit an offense[.]" United States Courts for the Ninth Circuit, *Manual of Model Criminal Jury Instructions*, § 6.2 (2010) (emphasis added). The defense requested that the court replace "innocent" with "not otherwise predisposed." ER 2044. The defense also requested a clarifying instruction that a person need not be "innocent" in the dictionary sense in order to be induced to commit the crime:

> You should only consider whether Mr. Mohamud was predisposed to commit the specific crime charged. It is not a test of whether a person is inclined toward criminality generally or inclined to do other acts that have not been charged in the indictment.

ER 2043; *see* ER 1980-82. The trial court rejected the defense's requested instruction and instructed the jury only that inducement should be assessed based on "an otherwise innocent person" standard.

The court's refusal to instruct the jury on the meaning of "innocent" in the context of this entrapment case significantly compromised the defense. Mr. Mohamud admittedly did not conform to the vernacular definitions of "innocent" – which would include "pristine," "blameless," "angelic," "immaculate," "irreproachable," and "faultless." He expressed extreme and noxious views and engaged in underage drinking and use of illicit drugs. Without the defense-proposed clarifying instruction, the jury erroneously assessed predisposition and inducement using a lay understanding of the word "innocent" instead of evaluating whether he lacked predisposition to commit the crime charged in the indictment. The prosecutor capitalized on the ambiguity, using the word "innocent" in its vernacular sense repeatedly in closing argument. Under the facts of this case, the failure to qualify what "innocent" means in the entrapment context was reversible error.

"Wherewithal" Or "Capability" To Commit The Charged Crime: This Court has held that a defendant's ability to commit the charged crime without government assistance is relevant to the predisposition analysis. *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) (a "person's ability to commit a crime may illustrate

her predisposition to do so"); *Poehlman*, 217 F.3d at 698; *see* ER 2181-83. The defense requested the following instruction: "In determining whether a person was predisposed to commit the specific crime charged before being approached by government agents, you may consider the following: the person's wherewithal, or capability, to have committed the crime charged without the assistance of government agents . . . ." ER 2043.[16] Although the instruction correctly stated this Court's precedent, the trial court refused to give it.

A major defense theme was that a person predisposed to attempt to use a weapon of mass destruction in the United States would likely have taken some preliminary steps in preparation such as learning the needed technical skills, conducting internet research about bomb-making materials, or taking steps to gain sufficient funds to commit such a crime. Such steps were entirely absent in this case. The government did not claim Mr. Mohamud had the wherewithal or capability to commit the crime for which he was arrested. ER 2071. The trial court's refusal to issue the instruction constituted reversible error.

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[16] *See also* ER 2769 ("[I]f you find that Mr. Mohamud lacked any wherewithal, or capability, to commit the crime charged without the assistance of government agents, you may consider that as evidence that he was not predisposed to commit the crime charged.").

Vulnerability To Inducement: A defendant's vulnerability to inducement is relevant to assessing entrapment. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 656 (9th Cir. 2006) ("medical expert opinion testimony showing that a medical condition renders a person unusually vulnerable to inducement is highly relevant to an entrapment defense"). The defense requested that the jury be instructed that it may consider evidence of Mr. Mohamud's vulnerability to government influence:

> The defense contends that Mr. Mohamud was particularly vulnerable to the FBI's influence due to a number of factors including but not limited to his youth, his family problems, his conflicted feelings regarding his religion, and his identity issues. In analyzing predisposition, you may consider any evidence showing that Mr. Mohamud was particularly vulnerable to inducement. You may conclude that, the more vulnerable an individual is, the more likely agreement to participate in the crime charged was the product of inducement and not predisposition.

ER 2769; *see also* ER 2170. The law and the evidence supported an instruction on Mr. Mohamud's vulnerability to influence, but the trial court refused to issue it.

Evaluation Of Post-Contact Evidence Of Predisposition: The *Jacobson* and *Poehlman* decisions both expressed the need for caution in evaluating evidence developed after contact with government agents because the target's statements and actions are inevitably influenced by interactions with the agents. *Jacobson*, 503 U.S. at 552; *Poehlman*, 217 F.3d at 704-05 ("[O]nly those [post-contact] statements that indicate a state of mind untainted by the inducement are relevant to show

predisposition."). The defense requested that the trial judge instruct the jury to consider post-contact evidence of predisposition only if it is untainted by the government influence:

> The defense contends that a substantial part of the government's predisposition evidence post-dates – or comes after – the date of the government's first contact with and influence on Mr. Mohamud. For example, Mr. Mohamud's statements to undercover operatives may have been exaggerated or otherwise influenced by his earlier interactions with government agents. In considering the weight of predisposition evidence that occurs after the date of first contact, you should consider whether – and to what extent – the evidence itself is the product of the government's actions.

ER 2769. The defense similarly phrased the instruction in another request:

> With respect to any evidence that has been admitted to show predisposition, it is important to remember that if that evidence arose after government agents contacted Mr. Mohamud, the evidence should only be considered by you if:
>
> (1) Mr. Mohamud's actions or statements are untainted by any government inducement; and
>
> (2) The actions or statements reflect on Mr. Mohamud's disposition prior to him having been contacted by government agents.

ER 2169 (citing *Poehlman*, 217 F. 3d at 704-05).

The government relied heavily on post-governmental contact evidence to show pre-contact disposition. The government presented evidence that the Bill Smith emails and the initial contacts from the undercover agents were attempts to

assess Mr. Mohamud. But, despite blanket surveillance, the government had been unable to determine Mr. Mohmud's predisposition. Because Mr. Mohamud was interacting with characters formulated to inspire his admiration and desire to please, an instruction that told the jury how to properly assess Mr. Mohamud's response to those contacts was critical to the defense theory. Without an instruction advising the jury to cautiously consider that evidence, the government was free to spend the bulk of its closing argument focusing on statements made and actions taken long after the government contacts began, most prominently the fact that he pressed the cell phone numbers before he was arrested.

The Government Agents' State Of Mind: Government agents' good or bad faith is irrelevant to an entrapment defense. *See Poehlman*, 217 F.3d at 697. At trial, the government nevertheless tried to inject into the case the agents' "state of mind" to establish their reasons for investigating and show they had good intentions. Although the defense cross-examined about how the sting was conducted, the defense emphasized that testimony about why FBI agents took certain actions had no bearing on predisposition and inducement, and, thus, that their intentions were irrelevant. ER 6286-88.

The defense requested the following instruction to remove the agents' state of mind from consideration:

> The defense contends that the effect on Mr. Mohamud of the government's conduct in this case induced him, regardless of the agent's state of mind. In determining whether government agents induced Mr. Mohamud to commit the crime, you should not consider the agents' state of mind or intent. The question before you is not what the agents were trying to do; the question is the inducing effect of the agents' conduct on Mr. Mohamud. Even very subtle pressure or influences can have the effect of inducing an individual to commit a crime that he otherwise would not have committed.

ER 2766-70 (citing *Poehlman*, 217 F.3d at 692. The trial court refused to give the instruction. Without this instruction, the jurors were free to decide the case based on the agents' good intentions, or they could even have found that the lack of intent to entrap the defendant precluded a finding of inducement.

First Amendment Rights: The government relied heavily on evidence of Mr. Mohamud's inflammatory emails, magazine articles, and internet activity to prove his predisposition to commit the specific crime charged. The defense voiced concern that the prejudicial content of the expressions would impermissibly invite the jurors to convict Mr. Mohamud for his beliefs and expressions without fairly judging the question of predisposition. ER 1982; ER 1986-88. The defense requested the following First Amendment instruction:

> Mr. Mohamud also is not on trial for any opinions or beliefs, whether religious, political or otherwise, that he may have expressed orally or in writing. As all Americans do, Mr. Mohamud has a constitutional right to think, read, and express opinions as he wishes. The First Amendment guarantees the rights to freedom of speech, freedom of religion, and freedom of association to all persons in the United States.

ER 2040. The defense relied on this Court's supportive precedent and the need to safeguard unpopular First Amendment-protected activity. ER 2217 (citing *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (Kennedy, J.)); *see* ER 1980-81, 2128, 2374-77.

The trial judge refused to provide the requested instruction on the basis that it would "confuse" the jury and that the First Amendment's protection was "not relevant." ER 2377. When the defense told the court it intended to argue that a person should not be punished for what they read or write, the trial judge barred reference to the First Amendment in opening statement and closing argument. ER 2376, 2378, 2379; *see also* ER 159 (noting prohibition on "arguments about the First Amendment"). The court ultimately provided an instruction that, with no mention of the First Amendment, stated, "The defendant is also not on trial for any opinion or beliefs, whether religious, political or otherwise that he may have expressed orally or in writing." ER 2826.

The trial court's denial of the First Amendment instruction may have been mitigated if defense counsel had been able to argue that the jury should affirmatively protect First Amendment rights. But the gag order foreclosed that option, barring the defense from presenting to the jury the First Amendment aspects of the defense and creating additional constitutional error. "[D]enying an accused the right to make

final arguments on his theory of the defense denies him the right to assistance of counsel" and the right to present a defense, and relieves the government of its burden of proof. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (citing *Herring v. New York*, 422 U.S. 853, 862 (1975)). The jurors should have been explicitly instructed that the Constitution prohibited them from punishing Mr. Mohamud for his protected speech.

B. The Trial Court's Response To The Jury's Note Compounded The Prejudice From Incomplete Instructions And Violated Due Process By Only Instructing On The Government's Theory Of The Case.

The jurors were confused about a basic question: predisposed to what? The jury instructions on entrapment repeatedly referred to "the crime" or "the offense" without qualification. ER 2830-31. The jurors submitted a note that asked, "Where it states 'the crime,' does that refer strictly to the crime as stated in the indictment, or could it include 'a similar' crime as stated by the prosecutor in closing statement?" ER 2846. The defense, consistent with the pretrial ruling, requested that the answer should be, "'commit the crime' refers to the crime set forth in the indictment." ER 6378-80.

"When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *United States v. Frega*, 179 F.3d 793, 809 (9th Cir. 1999) (citing *Bollenbach v. United States*, 326 U.S. 607, 612 (1946)). The court's

response did not directly answer the question about what "the crime" referred to and incorrectly volunteered information about what evidence the jury may consider in determining predisposition, even though this was not the jury's question. *Supra* at 67-68.

In addition to failing to clarify the law of predisposition, the court's response to the jury's note implicated the due process requirement of equal treatment under the law. The court directed the jury's attention to the relevance of pro-prosecution arguments while denying comparable instructions about the relevance of evidence presented by the defense. *See Wardius v. Oregon*, 412 U.S. 470, 477-78 (1973) (discovery statute either construed to provide reciprocal right to defendant or it violated due process).

The court gave no instruction regarding the factors developed in the case law such as vulnerability, wherewithal, and post-contact influence and how those factors should be assessed. Instead, it chose to instruct the jury that it could consider evidence of "similar conduct," which was the government's theory. In effect, the court instructed the jury to give weight to government-favorable evidence but declined to instruct the jury to consider defense-favorable evidence, thereby failing to provide the balance and reciprocal rights required for a fair trial.

IV. The Government And District Court's Withholding Of Classified Evidence And Information Impermissibly Skewed The Fact-Finding Process And Violated Mr. Mohamud's Rights To Confront His Accusers, Due Process Of Law, And Effective Assistance Of Counsel.

The government's extended electronic surveillance and in-person investigations of Mr. Mohamud generated a vast quantity of evidence relevant to entrapment. But by asserting such evidence was exempt from disclosure under the state secrets privilege, its analogue under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1806(f), and CIPA, 18 U.S.C. App. III §§ 1-12, and by engaging in a process of selective declassification, the government withheld much of that evidence from the defense. The result was an unfairly skewed trial that violated Mr. Mohamud's Fifth Amendment right to due process and his Sixth Amendment rights of confrontation and the effective assistance of counsel.[17]

The state secrets privilege, which underlies CIPA and has an analogue in FISA, presupposes limited applicability in criminal cases. *Reynolds v. United States*, 345 U.S. 1, 12 (1953) ("The rationale of the criminal case 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*

[17] The constitutional and statutory issues should be reviewed de novo. *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (2009) (en banc).

governmental privileges to deprive the accused of anything which might be material to the defense") (emphasis added). When the government is concerned about national security in the context of a criminal prosecution, the Constitution requires that it make a choice: proceed with the case and disclose the material it has held as secret, or dismiss the case. *See Jencks v. United States*, 353 U.S. 657, 672 (1957) (witness statements); *Alderman v. United States*, 394 U.S. 165, 184 (1969) (surveillance records); *Roviaro v. United States*, 353 U.S. 53, 61, 65 n.15 (1957) (informer's identity). Relying on the privilege to withhold relevant evidence in a criminal trial impermissibly trenches upon fundamental constitutional rights. *United States v. Nixon*, 418 U.S. 683, 712 (1974).

CIPA and FISA contain provisions that permit the government to participate in ex parte proceedings and to withhold some classified information from the defense. But those provisions must be read in light of the Supreme Court's repeated admonitions that national security interests cannot be permitted to trump a defendant's constitutional rights in a criminal prosecution. The "fundamental purpose" of CIPA is to protect and restrict the discovery of classified information in a way that does not impair the defendant's right to a fair trial. *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005); *see also* S. Rep. No. 96-823, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4302 (CIPA "rests on the presumption that

the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without [CIPA].").

When considering a government motion to withhold discovery under CIPA, a trial court is to determine whether the information "is discoverable at all;" then determine if the government has made a proper claim of privilege; then determine if the information "is relevant and helpful" to the defense; then "determine the terms of discovery if any." *United States v. Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013). This analysis parallels the analysis set out in *Rovario* for disclosing informant identities. *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006) (citing *United States v. Yunis*, 867 F.3d 617, 623 (D.C. Cir. 1989)). Applying the *Roviaro* analysis in the national security context, district courts are permitted to balance a defendant's need for information against national security concerns. *Sarkissian*, 841 F.2d at 965.[18]

[18] The defense preserved below, and does so again on appeal, the claim that the obligation to provide effective representation to the defendant constitutes a "need to know," so that, under governing Supreme Court precedent, security-cleared counsel should be permitted access to helpful classified information and to participate in proceedings under CIPA and FISA without balancing. *But see Klimavicius-Viloria*, 144 F.3d at 1261-62.

A. Depriving Mr. Mohamud Of The True Identities Of The Undercover Operatives Who Testified Against Him Violated His Rights To Confrontation, Due Process, And Effective Assistance Of Counsel.

One of the factual disputes at trial involved the initial unrecorded meeting between Mr. Mohamud and Youssef. The government contended that at the meeting, Mr. Mohamud independently chose, without inducement, to become "operational" and select a target in Portland. Mr. Mohamud disputed how the subject was raised and contended he was induced. Thus, the operative Youssef was a percipient witness to critical events, and the jury's determination of what occurred during that first meeting depended on his credibility. The defense could not effectively confront his credibility, however, because the government invoked the state secrets privilege and CIPA to withhold the names and background information for Youssef and the other undercover operatives.

The government initially stated it would provide the names and backgrounds of its operatives in discovery. ER 1347, 1358, 1507, 1940. Closer to trial, the government filed a motion for a protective order, claiming that the FBI considered the names of its operatives to be classified information that it could withhold under the state secrets privilege and CIPA. ER 1939-58. The government also filed a motion ex parte and under seal under CIPA. ER 1940, 2063.

The government moved for nine limitations on disclosure of the operatives' identities, including use of pseudonyms, prohibition of questioning about identifying information, testimony under light disguise, entry to the courthouse through a non-public door, exclusion of the public from the courtroom, public viewing in a separate room via video feed with faces pixilated, and no recording of the operatives. ER 1944-45. The defense agreed with some proposals, but the court granted the motion in its entirety. ER 97-99. Consistent with the protective order, the government provided Mr. Mohamud sparse versions of the undisclosed operatives' backgrounds that included general but unhelpful information about them, for example, that pseudonymous Youssef was born in a foreign country and had worked for the FBI for 8.5 years. ER 4228, 4231; *see also* ER 4576.

The name and address of a witness is the basic starting point for effective cross-examination:

> [T]he very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. *The witness' name and address open countless avenues of in-court examination and out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Smith v. Illinois, 390 U.S. 129, 131-32 (1968) (emphasis added). In *Smith*, the Supreme Court reversed the conviction when the trial court did not allow the defendant to ask the government informer his true name and address, even though

"there was not, to be sure, a complete denial of all right of cross-examination." *Id*. at 130-31. Denial of cross-examination on the fundamental subject of identity is inherently prejudicial:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Id. at 132 (quoting *Alford v. United States*, 282 U.S. 687, 694 (1931)).

Applying the *Roviaro* analysis, this Court has uniformly held that the government can protect witness identities from disclosure only when it can establish clear evidence of an actual threat. *See*, *e.g.*, *United States v. Ordonez*, 737 F.2d 793, 809 (9th Cir. 1984) (potential danger cannot support non-disclosure of percipient witness who had direct contact with defendant in alleged criminal activity). Courts also have distinguished between situations in which the percipient witness had contact with the defendant, as opposed to one whose involvement was more peripheral. *See United States v. Ramos-Cruz*, 667 F.3d 487, 500 (4th Cir. 2012) (upholding a ruling against disclosure because the witnesses "proffered no evidence directly involving Ramos-Cruz or his activities.").

Depriving Mr. Mohamud of the operatives' true names and background information violated his constitutional rights because no actual threat to the witnesses was involved, and the unclassified information that was provided was inadequate to conduct even a minimal investigation of the witnesses necessary for any meaningful cross-examination. The operatives had worked under their true names for prolonged periods, so this information would have been useful for cross-examination because it would have supplied a basis to establish potential biases and other indicia of unreliability. SER 180-81, ER 4228, 4576-77.

In support of non-disclosure, the government submitted a declaration from Andrew McCabe, Assistant Director of Counter Terrorism of the FBI, who asserted that the proposed protections were appropriate for two reasons: the general safety of the operatives and their continued effectiveness. ER 2002-07. The declaration regarding safety was purely speculative and generic; there is no indication that defense counsel or Mr. Mohamud posed any threat to the government operatives. Assistant Director McCabe's generic declaration did not meet the strict requirement that identity can only be concealed where threat is "actual," and not mere "conjecture." *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *accord United States v. Sterling*, 724 F.3d 482, 516-17 (4th Cir. 2013); *United States v. Celis*, 608 F.3d 818, 830-32 (D.C. Cir. 2010). Moreover, while the interest in

allowing undercover operatives to continue other investigations may support closure of a courtroom or use of a screen, it should not be sufficient to deny a defendant the identity of a percipient witness. *See*, *e.g.*, *United States v. Lucas*, 932 F.2d 1210, 1216 (8th Cir. 1991).

Another avenue of cross-examination denied to Mr. Mohamud involved the repeated testimony from Youssef and the government's FBI agent witnesses that certain things were "standard" or "typical" based on their experience in other operations. ER 4230-31. Because Mr. Mohamud was denied information about other undercover operations in which the operatives had been involved, he was unable to test those assertions. Perhaps most prejudicial was SA Chan's testimony, over objection, that "the overwhelming majority of the cases where [the FBI] targeted subjects did not lead to criminal prosecutions." ER 5007.

The invocation of the state secrets privilege was particularly perverse here because Mr. Mohamud's defense team had discovered the true identity and background of one of the operatives before the government warned that their names and backgrounds were classified. SER 180-81, 227. Although two of Mr. Mohamud's counsel held security clearances, the district court and the government refused to allow the defense to use the information. SER 227-36, 272-74; ER 97-99. The protective order entered by the court explicitly prohibited counsel from asking

the operatives any questions about "identifying information." ER 97. While the operatives' identities may have been considered classified for their work on this case, the defense had discovered that work on other cases was not considered classified. This case presents a unique situation in which counsel knew of traditional avenues of investigation and questioning but were prevented from pursuing them by application of the state secrets privilege. As a result, counsel were unable to fulfill their constitutional obligation to provide effective assistance.

The protective order was fatally overbroad because it went too far in protecting the identities of the operatives at the expense of guaranteeing Mr. Mohamud a fair trial. Most of the identified risks from public disclosure of the operatives' identities were alleviated by provisions of the protective order with which the defense agreed. But by refusing *any* disclosure of the operatives' true identities and limiting *all* questioning about their backgrounds, the protective order failed to strike the proper constitutional balance. *Davis v. Alaska*, 415 U.S. 308, 318 (1974) ("to make any such inquiry [into bias] effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.").

B. The District Court's Denial Of Discovery Regarding, And Testimony From, "Bill Smith" Violated The Fifth And Sixth Amendment Rights To Compulsory Process, Confrontation, And Presentation Of The Complete Theory Of The Defense.

"Bill Smith" played a key but invisible role. The government first failed to disclose his role as an online operative, then claimed his participation was unrelated to this case. ER 1365-67. On April 17, 2012, in response to briefing, the district court ordered the disclosure of Bill Smith's real name and "whatever information you'd want if you were investigating this to determine what involvement Bill Smith had." ER 1566. On May 6, 2012, the government held its fifth ex parte session with the trial court. ER 1518-19. On May 8, 2012, the district court reversed course, finding that, under *United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2000), the informant's privilege provided a basis to withhold Bill Smith's identity. ER 20-21.

The defense filed a motion to reconsider, arguing that (1) the government had not previously raised the informer's privilege, (2) such a privilege did not apply, and (3) if it did apply, the balance of interests favored disclosure. ER 1616. The defense contended the limitations violated the constitutional rights to due process, confrontation, and compulsory process. ER 1620-25. In response, the government

claimed Bill Smith's emails "speak for themselves," ER 1656, which the district court adopted as the reason for denying reconsideration. ER 39.[19]

At trial, the government decided the Bill Smith emails needed to be explained to the jury. But rather than calling Bill Smith, SA Dodd, his handler, was allowed to testify, over objection, to the emails' meaning. ER 1623-24. SA Dodd spun the meaning of the emails in favor of the government and against the defense. ER 5200, 5226-27, 5238. Because of the denial of discovery, the defense was unable to effectively cross-examine and impeach SA Dodd's testimony, nor could the defense call Bill Smith to impeach SA Dodd and put a face on the person normalizing aggression against the West.

The Sixth Amendment assures the right to cross-examination to demonstrate an adverse witness's potential biases and motivations. *Davis*, 415 U.S. at 315-16; *Larson*, 495 F.3d at 1102. Once the trial judge overruled the defense objection to SA Dodd's testimony, thereby abandoning the previous ruling that the emails speak for themselves, Bill Smith's own testimony became essential as an affirmative counter-narrative, as impeachment of SA Dodd's dubious interpretation of the emails, and

[19] The trial court held an ex parte hearing with Bill Smith and asked questions provided by the defense, which provides material that this Court should review in evaluating the defense claim. ER 38, 1071.

as part of the complete theory of the defense that massive and sophisticated resources were unfairly brought to bear against a vulnerable teenager.

C. The Government's Selective Declassification Of Some Material Obtained Through Electronic Surveillance And Other Means, While Withholding Other Such Material From The Defense, Violated The Right To A Fair Trial.

Most of the government's classified information to which Mr. Mohamud sought access appears to have been derived from electronic surveillance of his emails, phone calls, text messages, and computer use under FISA and the FAA. The government selectively declassified the products of this electronic surveillance, producing some of the conversations, but leaving the rest classified, apparently without going through the CIPA process for producing still-classified material. The lower court's acquiescence to this selective disclosure of classified material gave the government an unfair advantage that violated Mr. Mohamud's right to due process.

Although selective declassification appears to raise questions of first impression under the Due Process Clause, the governing principle is clear: due process requires an even-handed approach to disclosure and the government's use of its powers. In *Wardius*, the Court held that a discovery statute could not constitutionally impose a notice requirement on the defense without placing a reciprocal obligation on the government. 412 U.S. at 476-79. In *United States v. Straub*, this Court held it was unconstitutional to give the government an unfair

advantage by selective immunization of witnesses unless the court provided the defense witness with similar immunity. 538 F.3d 1147, 1158-62 (9th Cir. 2008).

The foregoing principles equally apply to the use and withholding of classified evidence. Under Executive Order 13526, each agency that possesses information is authorized to determine whether to label it "classified" and, thereby, limit access. 75 Fed. Reg. 707 (Dec. 29, 2009). Each agency is similarly authorized to determine what it chooses to declassify and when it will do so. *Id*. Under *Wardius* and *Straub*, declassification decisions must be even-handed.

Telephone and email records procured by the defense revealed the government produced a mere fraction of the total communications intercepted over the course of the investigation. SER 63-66.[20] For example, between December 2009 and November 2010, Mr. Mohamud sent or received 11,634 text messages, but the government produced only 1,954. SER 64. Similarly, Mr. Mohamud made or received 4,147 phone calls during that time period, but the government produced only 775. *Id*. In total, the government withheld access to approximately 83 percent of the material that defense investigation revealed would have been seized during

[20] While Mr. Mohamud had access to his telephone bills, so he could determine the number of calls or texts made or received, he had no access to any content in the absence of the government's disclosure. SER 64.

the eleven-month period that the government acknowledged it intercepted Mr. Mohamud's communications. *Id*. The selection of surveillance records to disclose appeared to be based on the government's choice and did not always include the contextual communications of the party with whom Mr. Mohamud was interacting.

Surveillance provided contemporaneous insights into Mr. Mohamud's activities and state of mind during the time frame covered by the trial. The defense needed the same access as the government to the daily record of Mr. Mohamud's activities during that time. Throughout the discovery process and at trial, Mr. Mohamud objected to the unfairness inherent in the government's control over and selective disclosure of the electronic surveillance results, invoking *Brady* and the Rule 16 right to his own recorded statements recognized by this Court in *United States v. Bailleaux*, 685 F.2d 1105, 1113-15 (9th Cir. 1982).

By showing that he was not researching about bombs, picking United States targets, texting about violence, or viewing only jihadi websites, but was in fact surfing a wide range of innocuous internet sites, the defense could have provided the jury with more complete evidence to assess Mr. Mohamud's lack of predisposition toward domestic terrorism. The number of text messages and phone calls – out of the total number of such communications – that dealt with alcohol, drugs, and parties, or that involved discussions of efforts to study abroad or work in Alaska,

should have been available to provide critical support to the defense theory of the case.

The government's refusal to declassify all of Mr. Mohamud's communications, or at least those similar to the communications that were disclosed, skewed the presentation of evidence at trial and violated due process. For example, two of the critical subjects in this case on which the government presented extensive evidence were Mr. Mohamud's discussion of traveling to Yemen to study and his plans to work in Alaska, but the government failed to disclose communications about those subjects. ER 4191-95, 4232, 5118-20, 2026-27. The government disclosed emails between Mr. Mohamud and Amro Al-Ali in August 2009 on the subject of attending school in Yemen, but other emails between Mr. Mohamud and Mr. Al-Ali were not disclosed. SER 5.

With respect to Alaska and the No-Fly action, Mr. Mohamud made or received 24 text messages on the date he was stopped at the airport, none of which were produced. SER 5-6. About a month later, Mr. Mohamud also exchanged at least 42 communications with a former roommate about Alaska and his plans for the future, but only 27 were produced. SER 6. The government argued that both the discussion of study in Yemen and the trip to Alaska were sinister. ER 3955, 4185, 5416, 6237, 6244. The undisclosed communications providing context for the communications

on those dates would have undermined this inference and supported Mr. Mohamud's defense of entrapment.

The government's selective declassification severely impacted the jury's assessment of Mr. Mohamud's state of mind on several other critical dates as well. For example, the time period shortly before and after the time of the first government contact on November 9, 2009, was critical to the question of predisposition. No text messages were produced from the dates between November 9 and November 20, 2009. Ex. 1016 at 2-3.

The prejudice suffered by Mr. Mohamud at trial based on the skewed depiction of his communications was heightened when the government sought to gain advantage based on its own lack of production. The defense offered an exhibit that compiled Mr. Mohamud's text messages in chronological order so the jury could view any material presented by the government in the context of what Mr. Mohamud was actually doing on a given day. Def. Ex. 1016; ER 5948. Because the defense could only include communication content that it had received from the government, and because the government only provided a small fraction of the total text messages, the exhibit was necessarily an incomplete picture of Mr. Mohamud's activities. The government sought to cast doubt on the exhibit based on the incompleteness it had caused, asking its case agent, "And context is really helpful

when you can see the three or four messages on either side of a particular statement?" The answer: "Absolutely." ER 5492.

The government also exploited its information advantage in its opening statement and closing argument by implying that a printed email from Amro Al-Ali "found on Mohamud" when he was arrested demonstrated that Mr. Mohamud showed up at the bomb site planning to contact Al-Ali. ER 3975, 5471, 6277. The email contained contact information for Mr. Al-Ali in Yemen and said, "Let me know your arrival date." ER 3975, 4930-31. The implication that this was a recent communication was entirely unfair. Although the email was undated, from its physical appearance it was clear that the email was old, and that Mr. Mohamud had it with him only because his wallet was stuffed with papers he had accumulated. ER 4938-40.

Moreover, the email has a Google copyright date of 2009, ER 4940, further indicating it was printed more than a year before his arrest. Although the government conceded that the case agent did not know the date of the email, the government elicited testimony that the email displayed a time, suggesting that Mr. Mohamud printed the email hours before the planned detonation. ER 5718 ("It just says 3:44 a.m., four hours ago."). The defense attempted during closing to counter the false

impressions about the email, but without full context, the many threads of evidence could not easily be pulled together.

In order to combat the government's predisposition argument, Mr. Mohamud needed to be able to show the jury the totality of his life. Ironically, the extremely intrusive extent of the government's surveillance could have made that possible. Armed with all of the surveillance evidence, Mr. Mohamud would have been able to establish how extensive his non-fundamentalist and future-oriented activities were. He would have been able to show the jury that, despite some inflammatory rhetoric online or in a fraction of emails, the overwhelming majority of his communications and daily activities were those of a relatively normal, teenaged college student. The abuse of the declassification process and the skewing of the fact-finding process resulted in a fundamental unfairness and requires the granting of a new trial.

D. The Failure To Allow Discovery Of Classified *Brady* Material And Its Replacement With Inadequate Substitute Evidence Violated The Right To A Fair Trial.

The government provided two unclassified summaries following the district court's review of classified material under CIPA. SER 45-52.[21] One of the

[21] Under CIPA, the court may authorize the government to delete specific items from discovery, . . . , to substitute a summary of the information for classified

summaries was highly exculpatory, containing government assessments of Mr. Mohamud that went to the heart of both the predisposition and inducement elements of entrapment. SER 51. The CIPA summary evidence, a FBI 302 report prepared in July 2012 by then-case agent Ryan Dwyer, reported observations and opinions of other FBI agents from an unspecified date in August 2010, and from October 5, 2010, and November 10, 2010, that stated Mr. Mohamud "would not make any attempts to conduct a terrorist attack without specific direction from the UCEs." SER 51. The report, which did not go to the jury based on the government's hearsay objection, went on to state that Mr. Mohamud "did not know how to conduct [a car bomb-style] attack." *Id*.

In *Sedaghaty*, this Court reversed a conviction based in part on its review of a summary provided under CIPA that both distorted the actual evidence and was incomplete. 728 F.3d at 903-07. The Court should reach the same result after reviewing the classified information here. As in *Sedaghaty*, the defense was able to point to a number of deficiencies that appeared on the face of the document that rendered it inadequate and unfair. SER 46-50. The defense pointed out the difference between the specificity of the October 5 and November 10 dates and the vague

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documents, substitute a statement admitting relevant facts that the classified information would tend to prove. 18 U.S.C. App. III § 4.

reference to "August." The exact date in August was critical because the defense needed to know whether the assessment of Mr. Mohamud's unwillingness to act independently was made before or after important contacts with the undercover agents that occurred during that month. Further, the defense was entitled to let the jury know which and how many agents formed the opinion that he would not attempt to conduct a terrorist attack without inducement and did not know how to do so.

The summarized content of the assessment was also insufficient. The report states that the "available information supported [the] theory" that Mr. Mohamud would take no action without specific direction. The summary report omitted the crucial reference to the "available information" with respect to Mr. Mohamud's capability of taking independent action. He was entitled to all information and analysis from the FBI's classified surveillance that showed his lack of knowledge and research regarding bomb-making and absence of efforts to construct a bomb.

The harm to Mr. Mohamud was even greater than that suffered by Mr. Sedaghaty because the government took full advantage of its failure to produce the original material and the percipient witnesses at trial. The government introduced the content of the report by having its trial case agent, who was not the original case agent or even deeply involved in the case at the pertinent times, testify derisively and negatively about its content. ER 5312. The defense attempted to introduce the

assessment itself, but the trial court sustained the government's hearsay objections, which would have been baseless if the declarant had been produced. ER 5362-63, 5472-74, 5485. The summary report did not permit Mr. Mohamud to identify the actual percipient witnesses and holders of the opinions, call them as witnesses, and ask them the bases for their conclusions. Upon review of the classified information, the Court should find that the substitute evidence, especially when excluded as defense evidence, constituted an inadequate substitute for the underlying classified information, which requires reversal of the conviction.

E. The Trial Court's Refusal To Provide Material Regarding Amro Al-Ali Violated Due Process.

Throughout trial preparation, the defense sought information about Al-Ali, including the results of Al-Ali's interrogations, as well as the information underlying two Interpol notices about him. ER 1318, 1480-81, 1529-30, 2595. That information was never provided, despite insight from a security-cleared defense expert that the report was available to United States actors and that it was exculpatory. ER 6154. At the same time, the government was repeatedly allowed to present, over objection, testimony regarding the Interpol notices that purported to describe Amro Al-Ali as a known terrorist and recruiter for Al Qaeda, as demonstrated in the following section. The failure to provide access to basic discovery regarding the source of the

government's evidence left the defense unable to answer the government's case and resulted in a profoundly unfair trial under *Brady* and its progeny.

V. The Trial Court's Repeated And Pervasive Evidentiary Errors Require Reversal For Violation Of The Hearsay Rule And The Rights To Confrontation And A Fair Trial.

Misconstruction of evidence rules relating to "state of mind" pervaded the trial. Over objection, the government repeatedly presented hearsay testimony based on an Interpol notice that appeared to describe one of Mr. Mohamud's former associates, Amro Al-Ali, as a known terrorist and a recruiter for al-Qaeda. The Interpol notice was not admissible under the hearsay exception for "a statement of the declarant's then-existing state of mind," Fed. R. Evid. 803(3), because the declarant – the unknown author of the Interpol notice – was neither in the courtroom nor relevant to the case. Nor was it admissible for the asserted nonhearsay purpose of explaining why government operatives targeted Mr. Mohamud for investigation. *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992) (reversing conviction because out-of-court statements admitted to prove why the officer went to the defendant's mobile home were not probative of any relevant fact).

Even if the notice had relevance to explain the "course of investigation," full admission of the content of the notice exceeded the permissible purpose and violated the Confrontation Clause. *United States v. Silva*, 380 F.3d 1018, 1019-20 (7th Cir.

2004) (rejecting the idea that officers can "narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination" because this would "eviscerate the constitutional right to confront and cross-examine one's accusers."); *accord Ocampo v. Vail*, 649 F.3d 1098, 1109-11 (9th Cir. 2011). The government further exploited the court's erroneous "state of mind" ruling by using the Interpol notice substantively. The improper admission of testimony derived from the Interpol notice to establish the agents' investigative state of mind was exacerbated when the trial court repeatedly limited defense cross-examination about government witnesses' states of mind.

The trial court erroneously relied on a "state of mind" rationale to allow undercover operatives to inject prejudicial speculation about what they thought Mr. Mohamud "meant" during recorded conversations. At the same time, the trial court refused to admit statements in emails by Mr. Mohamud, excluding them as self-serving hearsay instead of admitting them as reflecting Mr. Mohamud's contemporaneous state of mind. *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977) (finding error in exclusion of contemporaneous statements in an entrapment case because they "were not self-serving declarations about a past attitude or state of mind, but were manifestations of his present state of mind").

During the trial, the judge acknowledged difficulty in interpreting and applying the hearsay rules relating to "state of mind" evidence. ER 4223, 5476, 5480. The overall effect of the errors, alone and in combination, requires reversal of the conviction.[22]

A. The Court Permitted Prejudicial Hearsay Evidence Regarding Amro Al-Ali, A Key Figure, In Violation Of The Right To Confrontation And To A Fair Trial.

Under the government's theory, Mr. Mohamud's connection to Amro Al-Ali was "integral" to proving his predisposition to commit this offense. ER 2593; *see* ER 2532 (referring to Al-Ali as "a key piece of the government's case."). In its opening statement, the government highlighted Mr. Mohamud's connection to Al-Ali, then characterized Al-Ali as someone who was "wanted by the Saudi government" and an "al-Qaeda recruiter." ER 3955. Trial testimony, however, established that Mr. Mohamud knew Al-Ali as an 18-year-old college student from Saudi Arabia, studying under a visa in Portland, Oregon, before he left in June 2008

[22] Whether the district court correctly construed the hearsay rule is a question of law reviewed de novo. *United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004). A violation of the Confrontation Clause is reviewed de novo. *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir.2007) (en banc). When the district court admits evidence in violation of the Confrontation Clause, the conviction must be reversed unless the government can show that the error was harmless beyond a reasonable doubt. *Id*.

for Yemen. ER 4119-20. Mr. Mohamud's limited email contact with Al-Ali after he left Oregon reflected the same immature glamorization of jihad and life abroad that prompted him to write for Jihad Recollections, not sophisticated communication with a known al-Qaeda recruiter. *See* Ex. 224.

The government's only evidence of Al-Ali's alleged al-Qaeda terrorist connections came from the two Interpol "Red Notices" from 2009 and 2011. SER 205-08; Ex. 80. The Interpol notices contained assertions of an unnamed declarant that Al-Ali was "known to be connected to a fugitive" who was wanted by Saudi Arabian authorities. A second sentence reported that "he" "also helped Al Qaeda" in recruiting foreigners for terrorist attacks. Ex. 80; SER 205-08. The exhibit also included a photo of a person purported to be Al-Ali.

The defense objected pretrial to the admission of the Interpol notices, arguing that the documents were hearsay not within any exception, that their introduction would violate Mr. Mohamud's right of confrontation, and that, because Mr. Mohamud had never seen the Interpol notices, they had no bearing on his mental state. ER 2145-48.[23] The defense also pointed to evidence from pretrial proceedings

[23] The defense, among its other objections, noted that the same rule explicitly excepted police reports like Interpol notices, citing Fed. R. Evid. 803(8) (excluding, "in a criminal case, a matter observed by law-enforcement personnel"). ER 2147.

that the notices were incorrect in their characterization of Al-Ali, because the "he" in the second sentence of the Interpol notice appeared to refer to the fugitive described in the first sentence of the notice, not Al-Ali. ER 2598, 5110.

At the pretrial hearing, the government argued for the first time that the Interpol notices were relevant to the mental state of the government agents who were investigating Mr. Mohamud, and admissible to explain why they had targeted him for the sting operation in 2010. ER 2495-97. Referring specifically to the Interpol notice, the defense argued that the government could not explain the background of an investigation through otherwise inadmissible hearsay evidence. ER 2591, 2594.

The court ruled that the exhibit was admissible because the government was entitled to explain the genesis of its investigation. ER 2597; *see also* ER 2643 (clarifying that the 2009 notice was not admitted for its truth, but "only as to the mental state of the investigating agents, period.").[24] The defense repeated its objections, emphasizing the Confrontation Clause violation that would ensue from admitting prejudicial and inaccurate out-of-court statements without the defense being able to "cross-examine the person that is claiming that Al-Ali is a terrorist."

[24] At the next hearing, the government withdrew the 2011 Interpol notice, agreeing that, because it was issued after the defendant's arrest, it was not relevant to the agents' mental state. ER 2642-43.

ER 2597-98. The court suggested the defense could "cross-examine on that," without acknowledging that the witnesses who made the relevant statements would not be available for cross-examination. ER 2598.

Throughout the trial, the government exploited the court's "state of mind" ruling and repeatedly introduced the hearsay from the Interpol notice in a manner that portrayed Al-Ali as a known terrorist and al-Qaeda recruiter. Beginning in its opening statement, the government affirmatively told the jury that Al-Ali was an al-Qaeda recruiter: "Al-Ali had been identified by the FBI as wanted by the Saudi government because he was recruiting Westerners as fighters for Al-Qaeda. He was an Al-Qaeda recruiter." ER 3955.

The government continued the pattern with its first witness. Within minutes of starting his testimony, SA Trousas, apparently relying on the Interpol notice, testified that Mr. Mohamud was "in contact with some dangerous people overseas" including Al-Ali. ER 4025-26.[25] When asked by the government what specific

[25] Before SA Trousas testified, the defense clarified on the record that his knowledge of Amro Al-Ali derived solely from the Interpol notices and from Al-Ali's emails. ER 4018-19. The government's agreement eliminated the need for a preliminary hearing on the basis for this lay witness's testimony, as the defense had requested in a written motion. ER 2736. The emails did not provide a separate basis for connecting Al-Ali to al-Qaeda because they contain no reference to al-Qaeda. Ex. 224. Moreover, the contents of the emails were also hearsay, as the defense noted

information about Al-Ali he had "that affected his decision-making," the agent testified:

> Mr. Al-Ali was on the Interpol list. There was a red Notice for him. He was wanted by Saudi Authorities . . . . The FBI had an open investigation.

ER 4027. The government was permitted to ask, over objection, why the authorities wanted Al-Ali and "how that affected your thinking," which elicited the response "[f]or terrorist and related activities." *Id*. The agent later elaborated for the jury that the Interpol notice charged Al-Ali with "links to terrorist organizations and connections to a fugitive who is an expert in explosives manufacturing." ER 4185.

After the recess, in an effort to enforce the court's ruling that the Interpol notice was admissible only as relevant to the agent's mental state, the defense requested a limiting instruction. ER 4220-21. The defense also repeated the Confrontation Clause, relevance, and hearsay objections to allowing the evidence in at all, noting that the agent's "mental state is not relevant in the way the government has put forward." ER 4221. The court acknowledged concern with "attorneys trying to push through an awful lot under the state of mind exception, when in fact they are getting in evidence for the truth of the matter," but seemed to indicate concern with

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in written objections. ER 2421. During trial, the court granted the defense a standing hearsay objection to all of the Al-Ali emails. ER 4021.

the defendant's statements or emails, not with the government's evidence. ER 4221-22. The court agreed to give the limiting instruction. ER 4225.

The government again injected hearsay from the Interpol notice into the case during testimony by the undercover operative, Youssef. After Youssef testified that he knew Mr. Mohamud "was in contact with a known terrorist in Yemen," and suggested that the terrorist was Al-Ali, ER 4232, 4234, the defense asked for a hearing outside the presence of the jury to inquire into the basis for those statements, noting that they appeared to be based on the hearsay contained in the Interpol notice. ER 4279. The court took up the request the following day, and the government argued that the statements were only offered for state of mind. ER 4333 ("[He] is not saying that for the truth. He's saying that, much like Agent Trousas, because it affected his decision-making."). The defense reiterated its objection to admission of the hearsay for that purpose and requested a limiting instruction, which the court refused to give: "I'm not going to give a limiting instruction every time state of mind comes up. We've given enough at this point." ER 4332-35.

The government continued to elicit the same, objectionable hearsay through witness after witness. The court permitted undercover operative "Hussein," over defense objection, to state that Al-Ali was "al-Qaeda related." ER 4708. SA Chan was permitted to testify, over defense objection, that he had been told that Mr.

Mohamud "was an associate, a friend of Amro Al-Ali, who was a known al-Qaeda facilitator." ER 5010-11. As in other instances, the court overruled the defense hearsay objection based on the government's assertion that "[s]tate of mind . . . to show why this agent acted in June 2010" was a proper ground for admission. ER 5010-11.

On the eighth day of the trial, the government sought to lay the foundation for introducing the actual Interpol notice, Exhibit 80, under the "state of mind exception." ER 5101. The defense argued that the document was unreliable and asked for a hearing outside the presence of the jury. ER 5101-03. The court repeated its prior ruling that "Exhibit 80 is allowed for the mental state of the FBI agents" and "is admissible if the government authenticates." ER 5103-04. After the government authenticated the document through testimony, the court admitted it "for state of mind" of the agents. ER 5115.[26]

Despite the court's limit on use of the Interpol notice, the government's case agent included the Interpol notice in his lengthy "summary for the jury that will help

[26] The government's witness agreed outside the jury's presence that Exhibit 80 was likely an English translation from the original Arabic and noted he was "not certain" who the alleged Al-Qaeda recruiter was in the second sentence of the notice (Al-Ali or the fugitive). ER 5110. For this additional reason, the defense argued the exhibit was unreliable and should not go to the jury. ER 5114.

identify the specific evidence and put it in context." ER 5259. The written reference to the Interpol notice had been removed from the summary timeline (Exhibit 263) before it was shown to the jury based on a defense objection, ER 5094, but the agent nevertheless referred to the Interpol notice in his testimony as he went through the timeline:

> And then in October the Red Notice notifying us that Al-Ali was a wanted terrorist from Saudi Arabia came out.

ER 5289. Because the case agent had testified that the Interpol notice was "evidence" against Mr. Mohamud, the defense cross-examined the agent about its ambiguities and reliability. ER 5462-67. The defense later requested a renewed limiting instruction on the use of the Interpol notice for state of mind only, ER 5488, which the court gave. ER 5673.

The government introduced the hearsay from the Interpol notice from 2011 later through its expert witness, Mr. Kohlmann. Because Mr. Kohlmann had not been part of the investigating team, his state of mind could have no relevance to the "course of investigation" in the case. Nevertheless, over defense objection, Mr. Kohlmann introduced the facts from the 2011 notice while testifying that Mr. Mohamud had "connections" with "known extremist individuals or terrorists." ER 5716. When Mr. Kohlmann started testifying about the content of the 2011 Interpol notice, the defense objected – "relevance based on time" – in that Mr. Mohamud had

been arrested in 2010, a year before this notice. ER 5716. The court overruled the objection, ER 5716-17, and the witness continued:

> THE WITNESS: In January 2011 the – the Interior Ministry of the Kingdom of Saudi Arabia issued a list of 47 individuals who were considered to be most wanted al-Qaeda terrorist suspects on the loose considered to be imminent threats and sought by the Interior Ministry for questioning and potentially for adjudication in a court. One of the individuals on that list was Amro Suleiman Al-Ali. According to information that was provided to Interpol by the Kingdom of Saudi Arabia, Mr. Al-Ali was alleged to have traveled to Pakistan to receive training in explosives.
>
> MR. WAX: Objection. Hearsay.
>
> THE COURT: Overruled. Mr. Kohlmann, go ahead.
>
> THE WITNESS: Thank you, Your Honor. Mr. Al-Ali reportedly traveled to Yemen – or, excuse me, to Afghanistan – excuse me, Pakistan to receive training in explosives, as well as to provide financing to al-Qaeda, and, according to the Interior Ministry, was also involved in recruiting Americans and other Westerners to join al-Qaeda.

ER 5716-17.

The government continued to improperly rely on the Interpol notice for a non-state-of-mind purpose during questioning of defense witnesses. Professor Moghaddam, for example, testified for the defense about the importance of understanding the context in which people act. ER 5897-5901. On cross-examination, the government asked, "in looking at context, shouldn't we also look at his relationship with Amro Al-Ali, who was an al-Qaeda recruiter?" ER 5944. The

defense objected and moved to strike. ER 5944. The court allowed the government to rephrase the question: "Also in this context, we should consider the defendant's contact with Amro Al-Ali, who the FBI believed to be an al-Qaeda recruiter, correct?" ER 5945. The government employed the same tactic while cross-examining one of Mr. Mohamud's college acquaintances, asking, over defense objection, if he knew that Mr. Mohamud "had secret email addresses that he only used for certain Islamic terrorists?" ER 5874. Answer: No.

By the twelfth day of trial, because unsubstantiated claims that Al-Ali was a terrorist and al-Qaeda recruiter had so permeated the evidence, the defense informed the government that counsel would ask the defense terrorism expert to discuss the meaning of the Interpol notices to show that the FBI's understanding of them was incorrect. ER 6011. The government objected, claiming that "[o]f course, the Government is only offering [Exhibit 80] for the state of mind of the agents involved, not for the truth." ER 6011-12.

After further argument, the defense was permitted to present the testimony of a counter-terrorism expert. Dr. Sageman had provided extensive expert services on counter-terrorism to the United States government, including the State Department, Congress, the CIA, and the FBI, and to foreign governments. ER 6119-20. He had most recently worked in Afghanistan, providing recommendations to mitigate the

heavy casualties that had been suffered from "green-on-blue" insider attacks. ER 6111.

Dr. Sageman testified that he routinely reviews and analyzes intelligence documents in his work, and that he had read "close to a hundred" intelligence reports about Al-Ali and the other fugitive named in the 2009 Interpol notice. 6151, 6154. Dr. Sageman testified definitively that the second sentence of the October Interpol notice referred to the other fugitive, not Al-Ali, and that Exhibit 80 did not establish a basis for believing that Al-Ali was an al-Qaeda recruiter. ER 6155. The trial court cut Dr. Sageman's testimony short, however, stating before the jury, "I do not believe that he has the background to testify on this subject of who was who in this. Go on to another subject, Counsel." ER 6156.

Almost every major government witness during trial had testified to their "belief" that Al-Ali was a terrorist and an al-Qaeda recruiter, but the testimony was purportedly not admitted for its truth. By closing argument the government had not introduced any substantive evidence that Al-Ali was a terrorist or al-Qaeda recruiter during the time relevant to this case. Undeterred, the government continued to use the "state of mind" ruling in closing to suggest to the jury that Al-Ali was an al-Qaeda terrorist. For example, in discussing evidence that Al-Ali had sent an email to Mr. Mohamud, the government described the FBI's "concern":

> And you heard testimony that this caused concern amongst the agents of the FBI that were looking at this case who knew some of this information and now believed, from their perspective, that a known terrorist was reaching out to this defendant with an invitation to travel.

ER 6241.

Moreover, the government went beyond even the limits of the court's "state of mind" ruling by using the Interpol notice substantively in its closing argument. As the prosecutor spoke, he showed the jury a timeline of events with related images from the evidence. ER 6259. Next to the date of an email sent by Mr. Mohamud to a group of contacts that included Al-Ali, ER 6233, he displayed a picture purporting to be Al-Ali – taken directly from Exhibit 80, the 2009 Interpol notice admitted for a supposedly limited purpose. ER 6259-60. At the break, the defense objected:

> Your Honor, the second issue: on its time line, which is being shown in this courtroom, related to a May 2009 email, the Government showed a photograph of a young man in a turban with the improper implication that that was Amr[o] Al-Ali. That's a photograph taken from the Interpol notice. Government's Exhibit 80. That Interpol notice was not admitted for its truth, only admitted for the effect on the agent's state of mind. We ask the Court to instruct the jury it was improper for the Government to show a photo of a young man in a turban with the implication that that was Amr[o] Al-Ali. There's no evidence of that, and that should be stricken.

ER 6259. The Court overruled the objection: "I don't believe there's anything inappropriate, at least that I can tell at this point." ER 6260-61. No limiting instruction was given to the jury to counteract the government's substantive use of

what was used as a sinister image, taken directly from the Interpol notice. The trial ended with the government in rebuttal again invoking Al-Ali as a terrorist: Mr. Mohamud had received a "December 3rd e-mail from Amro Al-Ali, a person the FBI at that point believed was in fact a terrorist." ER 6360-61.

The trial court erred in allowing agents to testify how their "state of mind" during the investigation was affected by Al-Ali's supposed al-Qaeda contacts reported in the Interpol notice, and further erred in admitting Exhibit 80 "for state of mind." The mental state of the government agents was irrelevant to assessing Mr. Mohamud's predisposition or to determining whether their interactions with him induced Mr. Mohamud to commit the charged crime. *Poehlman*, 217 F.3d at 697. Thus, the Interpol notice was not relevant to any nonhearsay purpose under this Court's precedent. *Dean*, 980 F.2d at 1288.

The admission of prejudicial hearsay evidence, over repeated objection, requires reversal. *See*, *e.g.*, *Ocampo*, 649 F.3d at 1100, 1110 (holding that trial court violated Confrontation Clause by allowing detectives' testimony referring to out-of-court statements in a manner that that inculpated the defendant); *Silva*, 380 F.3d at 1019-20 (reversing conviction where DEA agent was allowed to testify about conversations, observations, and actions of others that supposedly illustrated the "course of . . . investigations"); *United States v. Sallins*, 993 F.2d 344, 346-47 (3d

Cir. 1993) (finding "background" testimony of 911 call unnecessary and prejudicial); *United States v. Novak*, 918 F.2d 107, 109 (10th Cir. 1990) (reversing conviction where district court improperly allowed evidence of hearsay declarant's accusation to explain start of investigation); *United States v. Lamberty*, 778 F.2d 59, 61 (1st Cir. 1985).

By repeatedly eliciting testimony that numerous government agents were highly concerned about Al-Ali because they believed he was an al-Qaeda recruiter, the government clearly and unmistakably communicated to the jury that Al-Ali was, in fact, an al-Qaeda recruiter. The questions were posed even to witnesses whose states of mind could not plausibly be deemed relevant. Such clever questioning undermined Mr. Mohamud's right to a fair trial.

Admission in evidence of both the physical document, Exhibit 80, and of the testimony of agents repeating the contents of Exhibit 80, violated the Sixth Amendment because Mr. Mohamud had no opportunity to cross-examine the declarant of the out-of-court statements. *Ocampo*, 649 F.3d at 1113; *United States v. Macias*, 789 F.3d 1011 (9th Cir. 2015); *see generally Lily v. Virginia*, 527 U.S. 116, 124 (1999); *Pointer v. Texas*, 380 U.S. 400, 405 (1975). The opportunity to cross-examine an in-court witness about the statements of an absent witness is "no substitute for the direct confrontation guaranteed by the Sixth Amendment."

Ocampo, 649 F.3d at 1113. Admission of Exhibit 80 also violated due process because there were no permissible inferences the jury could have drawn from the evidence, and the evidence was of such quality as necessarily prevented a fair trial. *United States v. Vera*, 770 F.3d 1232, 1237 n. 5 (9th Cir. 2014).

The fact that the court at times provided limiting instructions to restrict use of the Interpol notice does not resolve either the hearsay or confrontation problem, both because the government ignored the restrictions and because, at some point, the mass of information admitted about Al-Ali as an al-Qaeda terrorist would have become impossible for the jury to compartmentalize as instructed. Limiting instructions can only go so far. In some contexts, even clear limiting instructions are no substitute for a defendants' constitutional right of cross-examination. *Bruton v. United States*, 391 U.S. 123, 135 (1968). The Supreme Court has identified misuse of the state of mind exception as one of the areas where "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds." *Shepard v. United States*, 290 U.S. 96, 104 (1933). As in *Shepard*, parsing the substantive truth of the Interpol notice from its supposed permissible purpose for the investigative state of mind "was a filament too fine to be disentangled by a jury." *Id*.

B. After Allowing Government Witnesses To Testify To Their "States Of Mind," The Court Erroneously Restricted Cross-Examination On That Topic.

Because the court had repeatedly ruled for the government that the mental state of its agents was relevant, the defense sought to cross-examine them about their mental state, including motivation and bias. Some of the agents had testified that they were dispassionately "assessing" Mr. Mohamud and were not intent on building a case to prosecute him. ER 4497; 4506. Part of the contrary evidence available to the defense were the "outtakes" – the inadvertent recordings of the government agents when they did not turn off recording devices after leaving meetings with Mr. Mohamud. *See*, *e.g.*, ER 4595-96. The outtakes provided a candid, contemporaneous snapshot of what the agents were thinking, feeling, and saying.

The government objected to use of the outtakes based on hearsay and relevance. ER 2478-82. The defense described for the court in writing (SER 32-35), then at a pretrial hearing, which portions of the outtakes would be relevant:

- "[T]he agents' statements that certain actions, quote, might be a problem in front of the jury";
- "[T]he sections where the agents talk about the roles they are adopting";
- "[T]he sections where the agents say that Mr. Mohamud has bonded with the agents, and they're approving that";
- "[T]he promises of rewards";

- "[The] sections where the agents discuss their glee at the fact that the defendant is done for, meaning what kind of sentence he would get";
- "[The] sections where the agents talk about whether Washington was going to consider this operation sexy enough."

ER 2577-78. The defense argued that the outtakes were admissible to demonstrate bias and inducement, not for their truth. ER 2578 ("The defense does not care if Washington actually thought the operation was sexy. What we care about is that the operatives themselves are expressing that bias."). The court deferred ruling. ER 2579.

During trial, the defense sought to use the outtakes to cross-examine a witness, but the government objected based on hearsay. ER 4563. The defense explained that the outtakes were not hearsay, and that, despite having claimed pretrial that the agents' intent was not relevant, the government had "put into issue the motive of its agents." ER 4564-65. The defense further argued that the tone of voice on the tapes was important, noting that the excitement expressed could not be reproduced by questions. ER 4568. The court treated the outtakes as prior inconsistent statements and ruled that the defense could play them only if a witness denied making the statement. ER 4574; *compare* SER 33 *with* ER 4648-49. The defense then questioned witnesses about the bias revealed in the outtakes, but was barred from playing any of the tapes for the jury. ER 4606-09, 5003; *see also* ER 6205-06

(sustaining government objection to exhibit reflecting agent's then-existing state of mind); ER 4859 (sustaining objection to question about motive of agent to make the crime more egregious in order to minimize his risk of having to testify at trial).

When the government presented testimony about the Bill Smith emails, the government was permitted, over objection, to inquire into the FBI agent's intent in crafting the emails. ER 5191, 5196-201. The government ended its direct examination with a question about good intentions: "And did you ever tell [Bill Smith] to try to implant the defendant's mind with some intent to commit a violent act here?" ER 5212. Yet when the defense sought to ask whether the emails could have had an unintended effect, particularly in light of the defendant's youth and trend away from radical ideas, the court sustained the government's objections. ER 5213-17. The defense's ability to confront the agents regarding their states of minds was also impaired by rulings that barred discovery regarding (1) the agents' meetings before and after their interactions with Mr. Mohamud (ER 22, 1534-35), and (2) bias based on the FBI's interest in persuading Portland to rejoin the Joint Terrorism Task Force (ER 22, 1484-86,1512-12, 1532-34, 1591-97). The court also denied a request for pre- and post-meeting information during trial. ER 115-16.

The trial court erred in restricting the use of recorded, contemporaneous statements in the "outtakes" to demonstrate the personal stake the agents had in the

outcome of the case. Evidence of a witness' bias is "almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984). Bias may be proved by extrinsic evidence. *United States v. Noti*, 731 F.2d 610, 613 (9th Cir. 1984). The agents' statements that the defense sought to admit demonstrated that they were self-interested in the outcome of the investigation and motivated both to aggrandize the planned crime and ensure that Mr. Mohamud followed through with it.

C. The Court Improperly Allowed Government Witnesses To Testify About What Mr. Mohamud Meant And Was Thinking About In Recorded Statements.

The government successfully invoked the misconstrued "state of mind exception" to introduce speculation from government operatives about what Mr. Mohamud was thinking during recorded conversations. As examples, the government elicited, over objection, Youssef's speculation about what the defendant wanted, ER 4286, why he was crying, ER 4308, and whether he was serious and not all talk. ER 4308-09. The defense requested and received a "standing objection to this witness's continued interpretation of the defendant's mental state." ER 4304.

Similarly, the government elicited, over objection, Hussein's speculation about what the defendant was thinking or meant. ER 4514, 4521. The court admitted

the testimony as relevant to "state of mind." ER 4514. For example, after Hussein testified that Mr. Mohamud said his parents did not believe in what he was doing, the government asked Hussein to interpret what Mr. Mohamud "meant":

> Q: And when you say they didn't believe in what he was doing, what did you think he meant by that?
>
> MR. WAX: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: He wanted to commit a terrorist act. He wanted to place a device at Pioneer Square.
>
> MR. WAX: Your Honor, I'll object and ask that that be stricken.
>
> THE COURT: Overruled. He's asking for his state of mind. He's giving his state of mind. Go ahead.

ER 4514. The government similarly elicited highly prejudicial speculation about what the agent believed one of Mr. Mohamud's friends was doing:

> Q: And based on what he told you and – about Dawlat, what did you believe that Dawlat was doing from Afghanistan?
>
> MR. WAX: Objection. Speculation.
>
> THE COURT: He's asking for his state of mind. Overruled.
>
> THE WITNESS: Well, as he spoke about Dawlat and the book they used to read, which is Al Mulk Deici, which talks about basically trade craft and what you do to evade being caught, to me, he's there as a jihadi to kill American soldiers.

ER 4530.

Hussein was also permitted to speculate that when Mr. Mohamud talked of "jihad," he meant joining a terrorist organization:

> Q: And in the context [Mohamud] was talking to you about jihad and Shukri, what did you believe he meant by "jihad" in that context?
>
> MR. WAX: Objection.
>
> THE COURT: I'll allow it for his state of mind, the witness's state of mind, at the time.
>
> THE WITNESS: To me, that's where individually he was trying – he was talking, the defendant, to let him go to Somalia to commit to join the As Sahab organization, which is a terrorist organization. That's what I got from the conversation; that it was helping him to do something like that.

ER 4544; *see also* ER 4718, 5015.

The court erred in admitting this highly prejudicial testimony that Mr. Mohamud "wanted to commit a terrorist act," "place a device at Pioneer Square," and "join a terrorist organization," and that that his friend was in Afghanistan to "kill American soldiers." ER 4514, 4530, 4544. The undercover operatives did not have any basis to testify about what Mr. Mohamud thought or "meant." The government used their prestige as highly skilled agents to paint Mr. Mohamud as someone thinking about terrorism. The court's rationale for allowing this speculation – "state of mind" of the operatives – was baseless. They had no role in initiating the investigation; their background was not disclosed to the defense; and the

conversations they interpreted for the jury were recorded. The introduction of prejudicial speculation over repeated objection requires reversal.

D. The Court Misconstrued The Hearsay Rule To Exclude Admissible Evidence Of Contemporaneous Communications By Mr. Mohamud That Reflected His Lack Of Predisposition To Commit The Crime Charged.

The trial court continued to misconstrue the "state of mind" exception to exclude emails that should have been admissible as to Mr. Mohamud's state of mind. The court permitted the government to selectively present Mr. Mohamud's communications as admissions of a party opponent reflecting a nefarious state of mind. *See* Ex. 224, 225 (emails). But the court rejected off-setting communications offered by the defense that reflected an exculpatory state of mind, finding that the contemporaneous statements constituted self-serving hearsay. ER 4140, 5446-52.[27] For example, the court sustained the government's objection to emails from the defendant to his father, in which the topic of going to school abroad was discussed, which the defense offered to demonstrate that the defendant was thinking about

[27] The court also initially refused to admit emails that provided context for the Beau Stuart email that referred to being a "martyr." The emails were offered to demonstrate that the phrase used was relatively innocuous in the context of the earlier exchanges. ER 4045-47, 4138-40; ER 2739-42 (defense objection to evidence). The judge ultimately relented and admitted the email chain four days later to provide full context, ER 4778-79, but the later ruling did not cure the damage from the initial testimony.

going to school. ER 5442-44. Another email contained the Yemen class schedule. ER 5448. The state of mind hearsay exception, properly construed, would permit the admission of these emails as proof of then-existing state of mind, and the documents should have been admitted for their truth under Fed. R. Evid. 803(3). *Partyka*, 561 F.2d at 125.

E. The Cumulative Effect Of The Evidentiary Errors and Constitutional Violations Requires Reversal.

The cumulative effect of the multiple trial errors requires reversal. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (eschewing "a balkanized, issue-by-issue" approach to assessing prejudice from multiple trial errors). The trial court's misconstruction of the state of mind hearsay rules to admit prosecution-favorable evidence and exclude defense-favorable evidence requires reversal under the rules of evidence, the Confrontation Clause, and the Due Process Clause.

VI. The Trial Court's Refusal To Rule On The Constitutionality Of The Government's Non-FISA Seizures, Searches, and Interrogations Violated Mr. Mohamud's Constitutional Rights.

Days before the government first initiated contact with Mr. Mohamud through the Bill Smith emails, FBI agents seized and copied his personal computer, searched his cell phone, and interrogated Mr. Mohamud using a local law enforcement investigation as a ruse. The trial court never ruled on the constitutionality of those actions, instead accepting the testimony of government agents who claimed that

none of the information they gained affected their investigation. The trial court's refusal to rule on the constitutionality of the government's actions violated a panoply of constitutional rights necessary to a fair trial and requires reversal.[28]

A. The Trial Court Repeatedly Refused To Rule On The Constitutionality Of Government Conduct.

On November 2, 2009, Mr. Mohamud participated in a polygraph examination conducted by Oregon State Police officers who were investigating sexual contact between Mr. Mohamud and another university student. ER 670-71. Unbeknownst to Mr. Mohamud, FBI agents were secretly observing his interview. ER 745. The agents had directed the state police officers to ask Mr. Mohamud, "at the minimum," about Somalia, "to see what his opinions were on the country and whether he wanted to go back." ER 788. During the interview, Mr. Mohamud shared with the police "a lot of background information." ER 674-75.

As part of the local law enforcement investigation, Mr. Mohamud had given the police consent to search his personal computer and cell phone to "make sure he was not researching date rape drugs." ER 600, 613. At the FBI's direction, the local

[28] The denial of an evidentiary hearing is reviewed for abuse of discretion. *United States v. Mazzarella*, 784 F.3d 532, 537 (9th Cir. 2015). Constitutional rulings and mixed questions of fact and law that implicate constitutional rights are reviewed de novo. *Berger*, 569 F.3d at 1035.

computer forensic examiner, Detective Williams, created a mirror image of the computer's hard drive. ER 678-79. The FBI also asked Williams to search the computer for key terms like "Yemen." ER 853. The FBI received four folders copied from Mr. Mohamud's computer hard drive. ER 680.

The folders contained hours of audio and video recordings including an extremist lecture by Anwar al-Awlaki, hundreds of photographs of Mr. Mohamud and his friends, and twelve of Mr. Mohamud's personal documents. ER 681, 765, 832, 897-98, 950-52. According to the government, all of the files that it received from Mr. Mohamud's computer dated from the two-week period between October 19, 2009, and November 2, 2009. ER 681. The FBI also copied all of the names and phone numbers from Mr. Mohamud's cell phone contacts. ER 678. Mr. Mohamud was exonerated of any wrongdoing in the local investigation. ER 744.

The defense filed a motion to suppress evidence derived from the federal intrusion into the local investigation. ER 595-612. The defense argued that the FBI's search and seizure exceeded the scope of the consent, which is "generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); ER 602, 608-09. Courts have directly applied *Jimeno* to require suppression of computer searches that exceed the stated purpose of the request for consent. ER 603. Further, this Court

has held that consent is not voluntary when obtained by ruse regarding the nature of the investigation. *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990).

Rather than rule on the constitutionality of the government conduct, the trial court accepted the government's assurance that it would not use the products of the searches, seizures, and interrogations at trial. ER 617. The court only considered whether the government's later investigation had an independent, untainted source. ER 2, 68-69. At a two-day hearing on the question of independent source, government witnesses confirmed that information learned in the state investigation was included in the central case file. ER 673, 720-21. They further confirmed that investigative decisions depend on the entirety of the information known to the investigators. ER 730, 780, 843. But the agents claimed that the information learned in the state investigation was largely duplicative of what they already knew and that it did not affect any investigative decisions. ER 709-10, 790, 824. The court repeatedly sustained objections to defense questions about the nature and scope of the existing investigation based on the government's assertion that the questions would elicit classified information. ER 708-09, 735, 754-55, 756, 769-70. The court permitted the government to provide classified answers to the defense questions to the court ex parte, without adversarial testing. ER 69.

After the initial hearing, the defense learned from its own forensic evaluation of Mr. Mohamud's hard drive that the government had provided an incomplete accounting of the computer's contents. ER 890. The computer contained twelve unreported personal files as well as activity records extending back a month earlier than the government admitted. ER 891, 893. The government eventually conceded the inaccuracies, ER 900-01, 924, but the case agent continued to assert at a supplemental hearing that no information learned in the state investigation had any effect on the FBI's operation. ER 966-69.

During the first hearing, the defense learned from a state police detective that he seized Mr. Mohamud's computer on a second occasion and provided it to the FBI for an unknown purpose. ER 859-60. The government had never disclosed the second computer seizure to the defense. ER 913. The defense moved to supplement the suppression motion based on the second search. ER 911-13. The government continued to oppose suppression, asserting that there was no "taint or derivative use" from the second seizure. ER 1078.

The trial court issued a written opinion denying the motion to suppress, ER 67-88, finding that, even if the information learned in the computer search and interrogation provided additional investigative context, it did not tend "significantly to direct" the FBI's conduct. ER 80. After the trial court issued its opinion, the

government provided to the defense additional discovery containing at least two internal FBI emails that appeared to demonstrate use of the information learned in the state investigation to profile Mr. Mohamud. One email described Mr. Mohamud as "a pretty manipulable/conflicted kid," who wanted to "have it both ways, live the hard ruling Islamic life and the college party scene at the same time." ER 1268. The defense asserted that the email, sent two weeks after the state interrogation, likely reflected Mr. Mohamud's statements during the state interrogation that his parents would "freak out" if they learned of his drug and alcohol use. ER 1271. Another email expressly mentioned Mr. Mohamud's demeanor during the state interrogation while discussing his tendency to be "very shy in the presence of older people and/or the police[.]" ER 1272. The trial court declined to reconsider its ruling.

As trial neared, the defense again requested that the trial court rule on the constitutionality of the government's conduct, asserting the illegality of the conduct was a trial fact that supported the entrapment defense and impeached the integrity of the government's investigation. ER 2011-12. The defense also requested a ruling on the constitutionality of the conduct as support for a motion to dismiss on due process grounds, ER 1973, and to assess the government's evidence regarding the reckless or intentional failure to provide pretrial notice of FAA surveillance. ER 3172-73. On

each occasion, the trial court refused to rule on whether the government agents had violated the Constitution.

B. The Trial Court's Refusal To Rule On Whether FBI Agents Acted Unconstitutionally Violated The Fourth And Fifth Amendments, The Due Process Clause, The Confrontation Clause, And The Fifth And Sixth Amendment Rights To Present A Complete Defense.

The trial judge lacked discretion to refuse to rule on the constitutionality of the government conduct. The exclusionary rule bars the introduction of "derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." *Mazzarella*, 784 F.3d at 541 (9th Cir. 2015) (citing *Murray v. United States*, 487 U.S. 533, 536-37 (1988)). Under the independent source doctrine, where evidence is derived from an unlawful search, the government has the burden to prove both that the information illegally obtained was not used in the investigation, and that the government actors would have taken the same investigative steps without that information. *Murray*, 487 U.S. at 542-43; *United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999) (remanding for a hearing to determine what officers would have done but for an illegal search).

In a scenario where a single government action results in the discovery of physical evidence, a district court might permissibly conclude that there is no need to determine the legality of the primary search before applying the independent source doctrine. But this case involves far more complex questions that can only be fairly answered after the court has held an evidentiary hearing determining the full extent of the primary illegal conduct. *See Mazzarella*, 784 F.3d at 541 (remanding for an evidentiary hearing because "the trial court abused its discretion in denying an evidentiary hearing and not permitting any discovery on [*Brady* and Fourth Amendment] issues."). The scope of the illegal conduct informs the likelihood that its fruits were put to an intangible use.

In this case, the district court could not fully assess the credibility of the government agents without determining whether they had been willing to violate the Constitution in their investigation of Mr. Mohamud. Given the severe restrictions on defense access to classified materials, the agents' credibility was crucial in assessing their claims not to have used the computer hard drive, the interrogation answers, or other unknown products of the illegal conduct in intangible ways such as creating a personality profile or adapting the sting to Mr. Mohamud's known vulnerabilities. Further, given the FBI agents' inaccurate or incomplete testimony, the fact that government actors were willing to violate the Constitution to gain what they

contended was useless and duplicative information would be highly relevant to the court's credibility assessment.

Apart from the motion to suppress and application of the Fourth Amendment's exclusionary rule, the trial court's refusal to rule on whether the government actors violated the Constitution infringed on Mr. Mohamud's right to present a defense because it prevented him from using that fact at trial to impeach the integrity of the government's investigation. *See Kyles v. Whitley*, 514 U.S. 419, 445, 448-49 (1995) (evidence that could be used to attack the integrity of the investigation is subject to *Brady* disclosure obligations). As a result, the FBI team involved in Mr. Mohamud's surveillance and eventual sting was able to present itself in a false light to the jury. A legal ruling that the actions were unconstitutional would have allowed the defense to impeach the agents' testimony that their investigative state of mind was lawful and professional.

A ruling on the constitutionality of the government conduct also would have provided needed context for the defendant's motion to dismiss based on government overreaching as well as the post-trial motions regarding failure to give notice of warrantless surveillance under the FAA. The refusal to rule deprived the defense of key arguments, violating a range of constitutional rights necessary to a fair trial

including the rights to present a complete defense, to confront witnesses, and to compel the production of favorable evidence.

VII. Because The Government Violated The Statute Requiring Pretrial Notice Of FAA Surveillance, It Should Have Been Barred From Using The Products Of Such Surveillance, Or, In The Alternative, The Case Should Be Remanded For A Determination Of The Facts.

The FAA requires the government to provide notice before trial of its intent to use evidence "derived" from warrantless surveillance. 50 U.S.C. § 1806(c). The government failed to provide the requisite notice in this case, even though the defense repeatedly and explicitly requested such information. Despite strong evidence that the prosecution intentionally withheld notice, the government presented no evidence to explain its violation. Still, the trial judge denied any meaningful relief. The trial court should have at least granted suppression of evidence derived from the FAA surveillance to remedy the notice violation and to deter future transgressions. At a minimum, this Court's precedent requires an adversarial hearing regarding the government's failure to provide pretrial notice. The lower court's refusal to impose any consequence – to even require evidence on why the government violated the statute – stripped the statute's notice provision of meaning. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)

(failure to apply exclusionary rule would reduce the Fourth Amendment to a mere "form of words.").[29]

A. The Statute Requires Pretrial Notice Of The Use Of Evidence Derived From FAA Warrantless Surveillance.

The notice statute requires that "the aggrieved person and the court" be told prior to trial when evidence "derived" from FAA warrantless surveillance is used at trial. 50 U.S.C. § 1806(c). The FAA incorporates the § 1806(c) mandatory notice requirement to cover surveillance activity under § 702 of the FAA – 50 U.S.C. § 1881a – by a cross-reference that is explicit and mandatory. 50 U.S.C. § 1881e(a) Despite the pretrial notice statute, the initial notice in this case provided no reference to FAA warrantless surveillance under § 702. ER 410-11.

The government's post-trial notice concedes that the products of § 702 surveillance were introduced at trial and otherwise used. ER 2907-08. Prior to trial, the defense explicitly requested discovery regarding warrantless surveillance because "the existence of any pre-FISA surveillance must be determined in order to litigate any FISA procedures as fruits of potential warrantless intrusions." ER 443.

[29] The constitutional and statutory construction issues are reviewed de novo. *Berger*, 569 F.3d at 1035; *Collins v. Gee West Seattle*, 631 F.3d 1001, 1004 (9th Cir. 2011).

Despite the direct request, the government provided no discovery that FAA warrantless surveillance occurred.

The use of the phrase "obtained or derived" in § 1806(c) unequivocally refers to the fruit of the poisonous tree doctrine, which in turn includes warrantless surveillance used to obtain a later warrant for surveillance. *United States v. Giordano*, 416 U.S. 505, 533 (1974); *see Chandler v. U.S. Army*, 125 F.3d 1296, 1304 (9th Cir. 1997) (in a civil wiretap case, "the statutory phrase 'evidence derived therefrom' imports the fruit of the poisonous tree doctrine used in search and seizure cases."). The context of the statute also links "derived" to the fruit of the poisonous tree doctrine because the statute requires suppression where evidence is "derived" from surveillance that was "not lawfully authorized or conducted." 50 U.S.C. § 1806(g). Derivative evidence includes statements, tangible evidence, and decisions that are "an indirect result of the unlawful search," which applies to later use to obtain a warrant. *Murray*, 487 U.S. at 536-37.

The pretrial notice statute protects core constitutional interests underlying the due process right to notice and an opportunity to be heard. *See United States v. Chun*, 503 F.2d 533, 537-38 (9th Cir. 1974) (discussing Title III notice). The FAA pretrial notice also serves statutory purposes such as imposing judicial supervision and control over the uses of electronic surveillance, providing aggrieved individuals an

adequate opportunity to challenge unlawful surveillance, reducing the threat of completely surreptitious surveillance, deterring abusive electronic surveillance, and assuring the public that surveillance techniques are fairly employed. *Id*. at 539. By systematically violating the notice requirement in this case and others since 2008, the government undermined these constitutional and statutory interests.

B. Based On The Defense Evidence That The Government Intentionally Or Recklessly Failed To Provide Pretrial Notice Of FAA Warrantless Surveillance, The Trial Court Should Have Suppressed Derivative Evidence.

On February 26, 2013, shortly after the verdict in this case, the Supreme Court decided *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013). The Court declined to reach the substantive challenge to the validity of the FAA based in part the Solicitor General's representation that such claims would be resolved in criminal cases because of the notice requirement in § 1806(c). *See id*. at 1154 ("if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, *it must provide advance notice of its intent*, and the affected person may challenge the lawfulness of the acquisition.") (emphasis added). Up to that time, no criminal defendant had ever received notice of FAA surveillance. Based on the record in *Clapper* and a series of journalistic disclosures derived from sources in the Department of Justice, it later became apparent that the Solicitor General's representations to the Court had been

incorrect because the pretrial notice statute was not being applied where the fruit of the poisonous tree was a FISA warrant. *See* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & The Right To Notice*, 54 Santa Clara L. Rev. 843, 866-72 (2015).

The defense in the present case – the second case in which such notice was provided – submitted to the trial court the public record of the sequence of events that ultimately resulted in the Attorney General's announcement that cases, including the present case, were being reexamined for compliance with the statute. ER 2925-29, 3089-90. The public information indicated that "there was no legal basis for a previous practice of not disclosing links" to FAA warrantless surveillance. ER 3090 (quoting Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013). The defense also provided the trial judge with the pretrial record of its specific discovery requests for evidence of "warrantless surveillance as a basis for FISA requests" (ER 2963-65), and the government's incorrect assurances that all discovery obligations had been met (ER 2965-67).

On the basis of the statutory violation and the apparently deliberate withholding of notice, the defense moved for suppression or dismissal of the indictment. ER 3083-102. The government represented in pleadings that "the

Department had not considered the particular question," while at the same time asserting that the prosecutors "acted in accordance with the Department's then-current standard practice." ER 2996-97. The trial judge found no contradiction in those statements and decided evidence was not needed because this was not a situation "where the law supports presumptions based on a prima facie case." ER 176.

Although the trial judge recognized that, under its supervisory and statutory authority, the remedies of dismissal or suppression were available, the court denied any relief for the failure to provide pretrial notice other than holding a post-trial suppression hearing, in which it afforded the defense no access to classified material. In doing so, the trial court rendered the statute toothless.

The notice statute should be interpreted to include remedies of dismissal or suppression for knowing and reckless violations. *See In re Grand Jury Subpoena (T-112)*, 597 F.3d 189, 201 (4th Cir. 2010) ("The proper remedy [for failure to comply with the notice provision] is exclusion under Title III or FISA, a remedy which is triggered when the government seeks to introduce evidence in a covered proceeding."). Further, the legislative history links the notice provision to Supreme Court cases that put the government to a pretrial choice: where a court believes disclosure is necessary but the government does not want to disclose, it must choose

– "either disclose the material or forgo the use of the surveillance-based evidence." S. Rep. 95-701 at 65 (1978); *accord Alderman*, 394 U.S. at 181; *Jencks*, 353 U.S. at 672; *Roviaro*, 353 U.S. at 61 & 65 n.15.

On the present record, the Court should construe the statute to at least require suppression, if not dismissal, based on the unrebutted evidence of deliberate or reckless withholding of notice. By requiring only a post-trial suppression motion, the trial court did not sanction the prosecution for deliberately or recklessly refusing to comply with the requirement of providing pretrial notice of warrantless surveillance.

C. In The Alternative, The Trial Court's Refusal To Hold A Hearing Regarding The Notice Violation Constituted Error Requiring Reversal And Remand For Fact Findings And Remedial Action Commensurate With The Violation Of Rights.

Governmental violation of a discovery statute designed to protect individual rights, whether a reckless error or a systematic failing, is no small thing. The trial court's ruling undervalued the principles behind the congressional requirement of pretrial notice by obligating the government to produce no evidence to explain its violation of the pretrial notice statute. In the context of criminal motions, "arguments in briefs are not evidence." *Comstock v. Humphries*, 786 F.3d 701, 709 (9th Cir. 2014).

The trial court possessed supervisory power "to implement a remedy for violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008) (quoting *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). The "flagrant" prosecutorial behavior that can warrant dismissal of the indictment includes "reckless disregard for the prosecution's constitutional obligations." *Id*. Given the explicit defense discovery requests, the decision to withhold notice was, at some level, made by government officials making deliberate choices.

To assess the underlying governmental conduct, this Court requires a factual determination of the reason for discovery violations. *United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013) (remanding for determination whether Rule 16 violation was "deliberate" because, "[i]f the government willfully withheld the certificate, then it should be precluded from introducing the document at any retrial of [the defendant], or perhaps even suffer a dismissal of the indictment with prejudice.") (citing *United States v. Kojayan*, 8 F.3d 1315, 1325 (9th Cir. 1993)). Without evidence, the trial court had no basis for judging the prosecutors' mental state in withholding notice, which is a predicate for determining the appropriate

remedy. *See Mazzarella*, 784 F.3d at 541-42 (evidentiary hearing necessary to determine predicate facts regarding potential *Brady* and Fourth Amendment violations). Nor can the purposes of deterrence be properly calibrated where the misconduct is – in essence – rewarded without even the need for an explanation. *See Chapman*, 524 F.3d at 1087-88 (prosecutor's unwillingness to "own up to" misconduct appropriate factor supporting dismissal of the indictment).

Basic procedural due process requires that controverted facts be subjected to a meaningful hearing. *Matthews v. Eldridge*, 424 U.S. 319, 333-35 (1976). The defense established a prima facie case that the decision to withhold notice of requested discovery was knowing and intentional, and at the very least reckless. The trial court's ruling ignored journalistic statements attributed to Department of Justice sources, the inferences from the timing of the disclosures, and the express pretrial requests for notice by the defense, violating the defendant's due process right to discovery and a meaningful hearing regarding the prosecutor's conduct.

VIII. The Warrantless Retention And Searches Of The Content Of Mr. Mohamud's Electronic Communications Violated The FISA Amendments Act And The Constitution.

Seven years after the FAA's enactment, this Court will have the first opportunity for appellate review of the FAA's meaning and constitutionality. Under the FAA, once the executive branch reasonably believes a person is a non-United

States citizen and is located outside the United States, the government may – by compelled assistance from electronic service providers – intercept all electronic communications the individual engages in so long as a significant purpose of the acquisition is for obtaining foreign intelligence information. 50 U.S.C. § 1881a(a) and (b) (Appendix A). The government's justification for the lack of traditional warrant protections is based on jurisdiction – a foreigner abroad is not covered by the Fourth Amendment. For the government, that is essentially the end of the constitutional analysis.

The government deems American citizens' communications as "incidentally" collected and not subject to Fourth Amendment protections even when the result of such targeting is that the government intercepts massive amounts of communications by individuals who are protected by the Fourth Amendment, such as American citizens who communicate with non-citizens abroad. Accordingly, the government has construed the FAA to permit the following: the government retains massive numbers of Americans' communications, stores them in a database, later queries that database using the name or identifying information of an American citizen, then accesses the content of Americans' communications. Other than the FISA Court approving non-case-specific targeting and minimization procedures on a yearly basis, no judicial review or individualized suspicion is required before the

government intercepts, retains, and accesses the content of American's electronic communications.

Although the defense in this case has been barred from learning anything about the process of interception or the evidence acquired, the government's pleadings and the district court's opinion indicate that the above process resulted in the contents of Mr. Mohamud's electronic communications being seized and searched without judicial review and used in this criminal prosecution. The FAA's overall structure for retaining American communications violates the First and Fourth Amendments as well as the separation of powers doctrine.[30]

A. The FAA Does Not Authorize The Government To Retain And Later Access Americans' Electronic Communications That Are "Incidentally" Intercepted While Targeting Foreigners.

The FISA and the FAA are directed at gathering foreign intelligence. The FAA purports to exclude intentional targeting of Americans, but is silent as to what happens when the interception of foreigners' communications also captures massive amounts of American communications. As a matter of statutory interpretation, the

[30] The constitutional and statutory construction issues are reviewed de novo. *Berger*, 569 F.3d at 1035; *Collins*, 631 F.3d at 1004.

FAA should be construed to prohibit retention and accessing of the content of American communications without some level of individualized judicial review.

Unlike the FAA, FISA generally requires a specific order approved by the FISA Court whenever the government seeks to acquire, for foreign intelligence purposes, the contents of electronic communication where an American citizen is involved. 50 U.S.C. § 1805(a)(4). Such an order is similar to a traditional warrant in that it requires specificity as to the target, the facility accessed, the duration of the surveillance, as well as a determination of probable cause that the person is a foreign power or an agent of a foreign power. 50 U.S.C. §§ 1805(a)(2) and (c)(1).

All that changed with the FAA. The FAA does not require the government to seek judicial approval of any particular targeting decision. Nor does the statute expressly require the government to make any sort of probable cause showing. Instead, the FAA merely limits the government to "targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(b). The minimization procedures include no additional direction, simply referencing the minimization procedures under FISA and directing they be adapted "as appropriate" to the new targeting directive of subsection (a). 50 U.S.C. § 1881a(e).

The effect of the FAA has been to break all connection with the original FISA rationale and framework for electronic surveillance for foreign national security purposes. In *Keith*, where the Court required warrants for electronic surveillance in domestic national security cases, the Court suggested that acquisition through Title III-type procedures, which include individualized judicial review, may well be constitutional. *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 323-24 (1972) (*Keith*); *see In re Directives*, 551 F.3d 1004, 1013 (FISA Ct. Rev. 2008) ("the more a set of procedures resembles those associated with the traditional warrant requirements, the more easily it can be determined those procedures are within constitutional bounds."). FISA implemented that suggestion.

The rationale for accessing American communications under the FAA depends on a fundamentally different premise: the acquisitions were intended to target foreigners' communications, so American communications are acquired incidentally. Despite the lack of explicit statutory authorization, the government claims its agents can retain and later query a database containing Americans' electronic communications that are incidentally acquired, without protections analogous to judicial review of a search warrant such as those found in traditional FISA orders. This Court should hold that the FAA does not authorize circumvention of the normal limits on search and seizure of the contents of American

communications. When the government acquires the electronic communications of American citizens, the statutory silence must be filled with traditional protections for American communications before the government can access their content.

The face of the statute does not authorize retention of American communications, nor does it authorize querying and accessing the content of American communications. The lack of explicit congressional authorization for such a radical departure from respect for personal privacy renders the retention and accessing of Mr. Mohamud's electronic communications unlawful for violation of the statute. *See ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (bulk collection program of telephone metadata was unlawful because not authorized by Section 215 of the Patriot Act). The governmental retention and accessing of the content of American communications involves even greater privacy intrusions than the collection of metadata in *Clapper* – and both intrusions are nowhere authorized in the respective statutes. As in *Clapper*, the "sheer volume of information sought is staggering," and the quality of the information seized – here the content of emails and phone calls – militates against statutory authorization in the absence of explicit congressional language. *Id*. at 813-16. Because there is no clear statement from Congress authorizing searches of American content, this Court should interpret the FAA to institute no greater derogation of customary liberties than "clearly and

unmistakably" required by the lawmakers' language. *Hamdi v. Rumsfeld*, 542 U.S. 507, 544 (2004) (quoting *Ex parte Endo*, 323 U.S. 283, 300 (1944)).

Such statutory construction would avoid the serious constitutional problems created by retention and accessing of Americans' telephone calls, emails, and text messages. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc). Just as the indefinite detention statute in *Zadvydas* was construed to incorporate a six month limit, and as *Buckland* construed the Controlled Substances Act to require jury determination of drug quantity, the Court should construe the FAA to incorporate Fourth Amendment analogues for the content of American communications that are missing in the present case in order to avoid serious constitutional problems.

B. The Government's Post-Seizure Searches Of The Content Of An American Citizen's Communications Violated The Constitution Because They Occurred Without Judicial Review And Other Analogues To The Fourth Amendment's Warrant Requirement.

The government claims that, once an electronic communication is collected and lawfully in the government's possession, a subsequent examination of the communication's content is not a search. ER 3142 ("subsequently querying that information isn't a search under the Fourth Amendment, it's information already in

the government's custody.").[31] Thus, by "targeting" and intercepting a foreigner's communications (which are not protected by the Fourth Amendment), the government reasons that retention of any "incidentally" seized Americans' communications, compilation of those intercepts in a database, and accessing the content of American communications, is permissible without judicial review.

This government theory runs counter to fundamental Fourth Amendment principles: "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). Incremental intrusions into protected privacy areas require independent Fourth Amendment justification for additional searches or seizures. *See*, *e.g.*, *Rodriguez v. United States*, 135 S. Ct. 1609, 1614-15 (2015) (prolongation of detention after purpose completed required Fourth Amendment justification); *Jimeno*, 500 U.S. at 251 (warrantless search must be limited to objectively reasonable scope of consent); *Arizona v. Hicks*, 480 U.S. 321, 326-29 (1987)

[31] Citing the government's expressed position before the Privacy and Civil Liberties Oversight Board, an independent bipartisan agency within the executive branch. *See* ER 3116.

(emergency justification for entry of home did not permit movement of stereo to read identification number beyond plain view).

The Supreme Court recently applied this basic principle to electronic data in holding that the government's lawful possession of a cell phone, seized incident to arrest, required a warrant or an exception to the warrant requirement before the government could search the electronic content of the phone. *Riley v. California*, 134 S. Ct. 2473, 2493-94 (2014); *see also Sedaghaty*, 728 F.3d at 910-13 (expansion of a computer search beyond the scope of the warrant violated the Fourth Amendment); *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987) (pills lawfully in government possession required warrant for testing); *United States v. Young*, 573 F.3d 711, 720-21 (9th Cir. 2009) (closed containers lawfully in government possession required warrant to search contents); *United States v. Crist*, 627 F.Supp.2d 575, 585 (M.D. Pa. 2012) (search of hard drive using EnCase required warrant to extend the scope of the private search of computer lawfully in government possession).

The additional search beyond the initial dragnet seizure and retention of Mr. Mohamud's emails and telephone calls as part of the capture of international communications – even if assumed to be lawful – requires additional Fourth Amendment justification because the communications are easily identified as

belonging to an American and require additional intrusions to access their content. *Alderman*, 394 U.S. at 177; *Katz*, 389 U.S. at 353; *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). "[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards." *Keith*, 407 U.S. at 313. Electronic surveillance requires compliance with the "basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Berger*, 388 U.S. at 63.

Once the government knew or should have known that the electronic communications involved a United States citizen, the initial justification for the seizure evaporated, and further intrusion by querying the retained communications constituted an additional search that required an independent justification. *See United States v. Song Ja Cha,* 597 F.3d 995, 999-1000 (9th Cir. 2010) ("Of course, a seizure reasonable at its inception. . . may become unreasonable as a result of its duration or for other reasons.") (quoting *Segura v. United States*, 468 U.S. 796, 812 (1984)). At the point the government conducted the further intrusion involving a United States citizen, the initial justification for the seizure – lack of Fourth Amendment protection for foreigners abroad – no longer provided a reason not to

fully apply the Fourth Amendment's protection of Americans and their electronic communications.

Just as in *Riley*, where a warrant or other well-established justification was required to access the content of the lawfully seized smart phone, the government's accessing of the contents of an American citizen's communications constituted a further search beyond the initial seizure of one of millions of communications potentially between parties neither of whom were American citizens. Once the government knew or should have known that the electronic communications involved a United States person, the government's additional warrantless invasion of privacy required suppression for violation of the Constitution.

C. Acquisition And Retention Of Americans' Electronic Communications Under The FAA Violates The First And Fourth Amendment As Well As The Separation Of Powers Doctrine.

Apart from the secondary search, the large-scale collection and retention of American communications pursuant to the FAA violated the First and Fourth Amendment as well as the separation of powers doctrine:

- under the Fourth Amendment, as in the electronic surveillance statute in *Berger v. New York*, 388 U.S. 41, 44 (1967), "the language of the statute is too broad in its sweep," failing to implement the minimal safeguards to prevent warrantless, unreasonable searches and seizures of Americans' electronic communications;

- under the First Amendment, the statute's breadth and vagueness chill the exercise of rights by millions of Americans in their use of electronic communications;

- under the separation of powers, § 702 institutionalizes an administrative, law-making role for judges that violates Article III of the Constitution and undermines judicial neutrality.

In the context of domestic national security, the Supreme Court requires a warrant before the government engages in mass collection, retention, accessing, and dissemination of Americans' electronic communications. *See Keith*, 409 U.S. at 313 (warrantless domestic surveillance for national security purposes violates the Fourth Amendment); *Berger*, 388 U.S. at 44 (statute that authorized electronic surveillance under judicial supervision violated the Fourth Amendment because it "permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment.").

Where searches and seizures involve First Amendment protected materials – here, communications implicating association, religion, press, and speech rights – the Fourth Amendment must "be applied with 'scrupulous exactitude.'" *See Armstrong v. Asselin*, 734 F.3d 984, 993-94 (9th Cir. 2013) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)). The Supreme Court recognizes the danger that warrantless surveillance in the name of national security would chill constitutionally protected speech. *Keith*, 407 U.S. at 313-14 ("National security

cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime.").

The intrusions in this case also implicate the separation of powers doctrine, which inheres in the structure of checks and balances created by the first three Articles of the Constitution:

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

Keith, 407 U.S. at 317-18 (footnotes and citations omitted). The intimate personal facts revealed by the government's perusal of citizens' electronic communications also infringe on the liberty protected by the Due Process Clause. *Compare Berger*, 388 U.S. at 63 ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."), *with Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

The FAA implements an unprecedented degradation of privacy protections for American's electronic communications. When compared against the array of protections inherent in the Fourth Amendment's warrant requirement, the FAA includes on its face none of the protections against, or even analogous amelioration

of, unchecked executive branch authority to intrude into Americans' electronic communications. The FAA's general search authority

- fails to provide judicial review of specific instances of searches and seizures of Americans' personal communications;
- fails to require probable cause, or any level of suspicion, before the government can search, seize, retain, and later access those communications;
- fails to require specificity regarding the individual targeted by – or the facility to be accessed during – the electronic surveillance;
- limits the FISA court's authority to insist upon, and eliminates its authority to supervise, instance-specific privacy-intrusion minimization procedures;
- provides no accountability regarding surveillance of individual Americans' electronic communications.

The Warrant Clause presupposes a number of measures that are addressed and accommodated under FISA and the Title III wiretap statute, none of which appear in the FAA. ER 3121.

In the absence of a warrant, governmental searches and seizures are per se unreasonable unless within "specifically established and well delineated exceptions to the warrant requirement." *Gant v. Arizona*, 556 U.S. 332, 338 (2009) (citing *Katz*, 389 U.S. at 357). The Supreme Court has never held that a national security exception strips Americans of protection under the Fourth Amendment's warrant requirement. Fourth Amendment exceptions must be "zealously and carefully

drawn" to pass constitutional muster. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 494 (1958)). In FISA, the exception for "electronic surveillance without a court order" includes surveillance directed at foreign powers only where "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party." 50 U.S.C. § 1802(a)(1)(B).

Where a foreign intelligence exception has been recognized, it has been recognized as "narrowly drawn." *See United States v. Bin Laden*, 126 F.Supp.2d 264, 277 (S.D.N.Y. 2000) ("the warrant exception adopted by this Court is narrowly drawn to include only those overseas searches, authorized by the President (or his delegate, the Attorney General), which are conducted primarily for foreign intelligence purposes and which target foreign powers or their agents.") (citing *United States v. Truong*, 629 F.2d 908, 915-17 (4th Cir. 1980)). The Executive Branch should be excused from securing a warrant "*only* when the surveillance is conducted 'primarily' for foreign intelligence reasons" and when "the object of the search or the surveillance is a foreign power, its agents or collaborators." *Truong*, 629 F.2d 915 (emphasis added).

In *In re Sealed Cases*, the FISA Review Court, in conducting an ex parte review of whether the FISA Court inappropriately created a "wall" between national

security investigation and national security crimes, focused on the narrow scope of the foreign intelligence surveillance. 710 F.3d 717 (FISA Ct. Rev. 2002). The FISA court had to find "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power, meaning a group engaged in international terrorism or activities in preparation for terrorism." *Sealed Cases*, 310 F.3d at 722; *see Zweibon v. Mitchell*, 516 F.2d 594, 613-14 (D.C. Cir. 1975) (en banc) (absent exigent circumstances, foreign national security electronic surveillance of domestic individuals, who were neither agents of nor acting in collaboration with a foreign power, required a judicial warrant). The face of the FAA does not limit surveillance to information regarding potential attack, sabotage, and clandestine intelligence activities.

In areas outside of core zones of privacy, government searches and seizures can be deemed reasonable based on a balancing of the intrusion against the government's need. *Terry*, 372 U.S. at 21-23; *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967). The Court should only weigh reasonableness of intrusions based on less than probable cause when the searches "occur in certain clearly defined places which by their public nature give rise to reduced expectations of privacy." *United States v. Winsor*, 846 F.3d 1569, 1576 (9th Cir. 1988) (en banc). Because

Americans' private communications are within the core zone of privacy, such a reasonableness analysis is inappropriate here.

The Supreme Court in *Keith* noted the type of balancing that might pass constitutional muster by analogy to administrative warrants in *Camera*. 407 U.S. at 323 ("For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."). Congress responded by creating a warrant under FISA that "may vary" from traditional Fourth Amendment requisites, but retained many analogues to such protection. Section 702 falls far short of the individualized procedures required for FISA surveillance – which include particularity, individualized suspicion, and direct judicial oversight.

For the contents of Americans' communications, the balancing of interests has already been performed by the Constitution: a particularized warrant, based on probable cause, is necessary for the government to collect, read the content of, or listen to, Americans' private conversations. The § 702 programs are unprecedented in terms of the broad scope of the collections and the lack of any particularized suspicion to support the massive acquisition and retention of Americans' communications. The minimization provisions of 50 USC § 1881a do not provide adequate protection to Americans because they do not provide adequate standards and supervision for gathering, retaining, querying, disseminating, and using

Americans' communications. The judicial participation in designing administrative procedures is neither a judicial branch function nor the result of an appropriate legislative delegation. *See Mistretta v. United States*, 488 U.S. 361, 385 (1989); *Morrison v. Olson*, 487 U.S. 654, 677 (1988) ("As a general rule, we have broadly stated that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'") (citations omitted). For these reasons the statute, to the extent it authorizes retention and accessing of American communications, is unreasonable and unconstitutional.

D. Alternatively, The Court Should Authorize Supplemental Briefing With Defense Access To The Relevant Documents.

In addressing the novel and complex issues surrounding the FAA, the trial court operated without defense participation regarding the classified material. After the government provided post-trial notice regarding warrantless surveillance, the defense moved again for access to the relevant classified material pursuant to 50 U.S.C. § 1806(f). ER 2910-84. Congress provided in § 1806(f) that, in deciding motions based on classified materials, "the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." Here, disclosure is necessary to ensure the surveillance's legality. This

Court should exercise its authority under 28 U.S.C. § 2106 to reverse the denial of access and authorize supplemental briefing.

The district court applied an overly-restrictive legal standard in denying discovery. The district court denied the initial discovery motion (ER 162-70), then, in denying the motion to suppress, the court interpreted "necessary" in § 1806(f) "to be much closer to 'essential' than to helpful." ER 224-26. This Court should reject the district court's "essential" standard for disclosure. Since FISA was enacted in 1978, no defense attorney has been given access as anticipated in § 1806(f). Congress expected more: "in some cases" no disclosure would be made, while in "other cases" disclosure would be considered "necessary" for a number of reasons. S.Rep. 604(i), 95th Cong., 1st Sess. 58-59, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3959-60; *see CT&IA v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003) (courts have frequently interpreted the word "necessary" "to mean less than absolutely essential, and have explicitly found that a measure may be 'necessary' even though acceptable alternatives have not been exhausted.").

In this case, the defense established an extraordinary pattern of government violations – both involving Mr. Mohamud and in declassified material regarding related programs. Most obviously, the government violated the pretrial notice statute in this case. Further, public documents demonstrated a history of non-compliance

with FISA and other rules. ER 2936-39. The application of the "essential" standard in this case resulted in the complete exclusion of defense participation. FISA's purpose of balancing civil liberties against national security forecloses this result. *See In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986) (FISA "was intended to strike a sound balance between the need for such surveillance and the protection of civil liberties.").

The issues surrounding the FAA both legally and technologically are novel and complex which renders "the displacement of well-informed advocacy . . . less justifiable."). *See Clapper*, 785 F.3d at 829 (Sack, J., concurring) (citing *Alderman*, 394 U.S. at 184). The resolution of the competing interests of individual privacy of Americans and the government's interest in foreign intelligence information arguably shapes the world in which the next generation will grow up. The arguments should not be made with the defense – the advocate for the individual citizen – shut out.

E. The Court Should Order Suppression Of Evidence And The Result Of Decisions Derived From Electronic Surveillance Conducted In Violation Of The Statute And The Constitution.

The violation of statute, as well as the violation of an array of constitutional protections, require suppression under the FISA statute and the Constitution. 50 U.S.C. § 1806(g); *Murray*, 487 U.S. at 536-37. The district court provided an

alternative ground for denying relief based on the good faith exception to the exclusionary rule. ER 218-23. This Court should reject that position for three reasons.

First, the statutory suppression remedy, which predated the judicial creation of the good faith exception, should be considered to require suppression in light of *Clapper*, which suggested criminal defendants would have standing to obtain constitutional review. 133 S. Ct. at 1154. This reasoning meant that criminal defendants would have reason to challenge the FAA, whether it was unlawfully "authorized or conducted." 150 U.S.C. § 1806(g). If no suppression results from violation of the FAA, the *Clapper* reasoning would be undermined.

The good faith exception also does not apply because the statute does not explicitly authorize the challenged conduct. In *Illinois v. Krull*, a statute expressly authorized searches of business records of auto dealers. 480 U.S. 340, 343 (1987). Unlike that statute, the FAA provides no instruction telling government agents that it is lawful to retain and later query and access the contents of American communications. The government's unauthorized expansion of the statute to access the content of American communications constitutes executive action to which the exclusionary rule properly applies.

Third, as a matter of the statute's plain meaning, if the surveillance was "not lawfully authorized or conducted," the evidence "obtained or derived from" the electronic surveillance "shall" be suppressed under § 1806(g). Whether the executive branch applied the statute in an unconstitutional manner or whether the statute is unconstitutional, the electronic surveillance was neither lawfully authorized nor conducted. As with Title III wiretaps, violation of the statute as well as constitutional violations result in suppression under the fruit of the poisonous tree doctrine. *Giordano*, 416 U.S. at 524-32.

The language and legislative history of the FISA statutory exclusionary rule does not include a good faith exception. *See United States v. Rice*, 478 F.3d 704, 711-14 (6th Cir. 2007) ("The language and legislative history of Title III strongly militate against engrafting the good-faith exception into Title III warrants."). The statutory exclusionary rule applies without qualification and must result in the suppression of all information obtained through the warrantless surveillance and all derivative actions and evidence. The district court's reliance on a "good faith" exception was misplaced.

IX. The District Court's Handling Of Classified Materials Deprived Mr. Mohamud Of Due Process Of Law And The Effective Assistance Of Counsel.

In this brief, the defense has objected to constitutionally deficient treatment of classified material where the specific ways in which he was harmed can be discerned. Because his attorneys were denied access to so much material that was submitted to the district court in camera, the Court must also conduct its own plenary review without the assistance of defense counsel beyond what can be identified in general terms. While noting for the Court areas for review, the defense continues to object to ex parte proceedings and renews here the requests made in the district court for access to the material. National security is not jeopardized if security-cleared counsel review the material to assist the Court in its consideration. As noted by the Supreme Court, without defense participation, the Court's ability to assess the significance of electronic surveillance is necessarily incomplete. *Alderman*, 394 U.S. at 182.

The government filed at least 16 in camera, ex parte, under seal filings with the district court. ER 1265, 1362, 1381, 1460, 1462, 1496, 1518, 1614, 1670, 1714, 1777, 2063, 2076, 3021, 3302, 3601. There were also some unknown number of in camera, ex parte, under seal hearings (*e.g.*, ER 658), and an unknown number of classified opinions and orders (*e.g.*, ER 66, 171). The defense does not know what

the government produced (or failed to produce) to the district court, what took place during any hearings, and what rulings the court ultimately made. The following issues address classified material believed to be exculpatory but which was not provided to the defense. If such material was not provided to the district court, the Court should direct the government to supplement the record.

Failure to require production of surveillance directed at Mr. Mohamud's computer and his internet activity: The defense provided strong circumstantial evidence that the government placed software such as the known FBI virus termed CIPAV or other similar surveillance programs on Mr. Mohamud's computer, by which the government may have monitored his activities and activated the computer's camera to spy on him. SER 32-39. The outtakes indicated that the FBI had extraordinary and intimate access to Mr. Mohamud's private life. SER 34-35, 38-39. The existence of any such super-intrusive surveillance would support the defense theory regarding the absence of acts related to domestic terrorism and the FBI's highly developed ability to tailor the sting to take advantage of Mr. Mohamud's particular vulnerabilities.

Failure to provide discovery and adequate review regarding Section 215 surveillance: The defense moved for suppression of derivative information from surveillance of phone call data under the section 215 program (ER 3056, 3154-58,

3400-01), which has been found unlawful as a misinterpretation of the statutory authorization and as implicating Fourth Amendment protected privacy. *Clapper*, 785 F.3d at 792. The defense also requested affirmative evidence from the program as it related to Mr. Mohamud's calls that may have been exculpatory. The trial court, after receiving classified submissions from the government, neither ruled publicly nor provided the requested exculpatory information.

Failure to provide discovery regarding FISA warrants to support *Franks* hearings: The trial court refused to provide access to information adequate for a determination whether reckless or intentional false statements or material omissions provided grounds for motions under *Franks v. Delaware*, 438 U.S. 154 (1978). ER 4, 14-18, 164-70, 3157-61. The defense provided abundant evidence to at least controvert the executive branch's submissions in support of FISA warrants. ER 443-44, 561. The failure to provide FAA pretrial notice alone should constitute a sufficient showing for a motion to controvert, as do the specific investigation and general failings regarding FISA activities. ER 2955-62. In *United States v. Daoud*, the concurring judge expressed concern that classification issues made *Franks* a dead letter in national security cases. 755 F.3d 479, 486-96 (7th Cir. 2014) (Rovner, J., concurring). If there is ever a case where, without discovery, a sufficient showing was made to provide discovery and to controvert affidavits, this is it.

Review of the FISA warrants based on "agent of a foreign power": The Court should review the trial court's finding regarding the "agent of a foreign power" requirement for issuance of FISA warrants. ER 15-18. The Court's review should determine whether the designation was "solely [based upon] activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A).

Contact with other agents of the government and information about Bill Smith: The defense repeatedly requested information about any government agents in contact with Mr. Mohamud. ER 1477, 1483-84, 1753-56. The district court's rulings and in camera interview of Bill Smith should be analyzed in light of the defense's desire to call him as a witness and the government's questioning of proxy witness SA Dodd, who speculated as to subjective reasons why Bill Smith wrote certain things in his emails. Further, the Court should assess whether Bill Smith was actually the first government agent in contact with Mr. Mohamud. The defense raised this issue in pretrial discovery requests (ER 1477, 1483-84), then again when the government produced an FBI internal email showing that a "Confidential Human Source" appeared to be in direct contact with Mr. Mohamud in the fall of 2009. ER 1754-55.

Failure to provide discovery regarding Mr. Mohamud's placement on the No-Fly list: The FBI's use of the No-Fly list to thwart Mr. Mohamud's summer plans to work in Alaska, which was immediately followed with contact by Youssef, provided strong potential for *Brady* materials. ER 1489-91. The Court should review any classified material about Mr. Mohamud's placement on the list, the timing of such events, the rationale behind it, and the interplay between that placement and the ultimate sting operation. At the least, if the rationale related to a belief that Mr. Mohamud desired to travel abroad, this would have been exculpatory in light of the defense theory that the government removed that option from Mr. Mohamud and, instead, encouraged a domestic attack.

X. In The Alternative To Reversal And Remand For A New Trial, The Sentence Imposed In This Case Should Be Vacated Because The Government's Recommendation Involved An Improper Basis And The Sentencing Involved Procedural Error.

A troubled American teenager was subjected to massive surveillance, then targeted by undercover agents who encouraged extremism and enabled antisocial behavior while giving it a veneer of religious justification. The government consciously decided not to arrange the sting around foreign travel – where his maximum sentence would be fifteen years – but to encourage a spectacular act of domestic terrorism. When the pretense of undercover support for the crime vanished with his arrest, the then 19-year-old began a journey toward redemption for his bad

acts, publicly renouncing violence, engaging in years of study and introspection, and providing valuable debriefing with the government. Two well-qualified psychiatrists provided uncontroverted formal opinions that his participation in extremism was part of adolescent conflicts and that he presented a low risk of recidivism.

The defense provided examples of similar sting cases where the sentencing range – often with government agreement – was between ten and 30 years' incarceration. Nevertheless, the government recommended 40 years in prison, based in part on unlawful considerations. The trial judge then imposed a sentence of 30 years in prison, failing to adequately decide controverted facts, explain its rulings, and follow the Supreme Court's directives regarding individualized sentencing. If the conviction stands, the Court should vacate the sentence and remand for a new sentencing hearing.

A. [Sealed Supplemental Opening Brief]

B. The Court Should Vacate The Sentence Based On Inter-Related Procedural Errors Involving Failure To Adequately Resolve Controverted Issues, Mischaracterization Of This Court's Legal Standard Regarding The Terrorism Enhancement, And Inadequate Explanation Of Rulings Regarding Post-Offense Rehabilitation, Imperfect Entrapment, And Future Dangerousness.

The Supreme Court's central directive for federal sentencing requires individualized consideration of every defendant. *United States v. Pepper*, 131 S. Ct.

1229, 1239-40 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). The existence of post-offense rehabilitation is an especially important consideration because it touches many sentencing factors, including evaluation of the individual, the need to deter the defendant and protect the public, and to "critically inform" the overarching duty to impose a sentence sufficient but not greater than necessary to accomplish the purposes of sentencing under 18 U.S.C. § 3553(a). *Pepper*, 131 S. Ct. at 1242-43.[32]

The defense sentencing presentation focused on Mr. Mohamud's sincere remorse, his post-offense rehabilitation, his actions that demonstrated renunciation of violence, and the psychiatric reports that established that he was a low risk for future dangerousness. ER 3493. The sentencing court imposed sentence without

[32] This Court reviews de novo "strict" compliance with Rule 32's requirement that controverted issues be resolved. *United States v. Houston*, 217 F.3d 1204, 1206-07 (9th Cir. 2000). "Where the defendant raises specific, nonfrivolous argument tethered to a relevant [18 U.S.C.] 3553(a) factor," this Court provides plenary review for whether the sentencing court's failure to adequately explain its rulings constituted legal error. *United States v. Trujillo*, 713 F.3d 1003, 1009-10 (9th Cir. 2013). A district court by definition abuses its sentencing discretion when it makes an error of law. *Koon*, 518 U.S. at 100.

deciding critical questions raised regarding post-offense actions and rehabilitation and the risk of future dangerousness. ER 3684-87; SER 474. Instead, the court imposed sentence under a legal analysis that created what amounted to an almost irrebuttable presumption of a high risk of future dangerousness.

The sentencing judge interpreted this Court as having placed terror defendants beyond the individualized sentencing requirements of *Gall* and *Pepper*: "The Ninth Circuit recognizes that terrorists, even those with no prior criminal behavior, are unique among criminal in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." ER 3687. In quoting from this Court's decision in *United States v. Ressam*, 679 F.3d 1069, 1091 (9th Cir. 2012), the trial court failed to recognize that Mr. Ressam, unlike Mr. Mohamud, acted without any government involvement and had terrorist training and an independent ability to carry out the threatened act.[33]

The sentencing court must determine any controverted matter that will be considered at sentencing and that may affect the ultimate disposition. Fed. R. Crim.

[33] The next line in this Court's quotation referenced "a heightened risk of future dangerousness due to his Al-Qaeda training." *Id*. at 1091 (quoting *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir.2011)). In contrast, in the present case, Mr. Mohamud had no training, could not have acted independently, and had no ability to act without help.

P. 32(i)(3)(B); *see Houston*, 217 F.3d at 1208; *United States v. Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc). The defense presented an extraordinary amount of information on the absence of future dangerousness, including Mr. Mohamud's concrete and public actions renouncing his behavior, to counter the terror enhancement under U.S.S.G. § 3A1.4. ER 3493, 3606, 3659. The trial court received Mr. Mohamud's four-year reading lists and his letter to the court detailing his change in thinking and his deep regret and shame for his actions. ER 3595-99, 3559-61. Most importantly, two psychiatrists with impeccable credentials found him a low risk of future dangerousness after spending many hours with Mr. Mohamud utilizing psychological testing and reviewing the complete record of the offense and his personal background. ER 3571-93.

The defense provided numerous reasons the terrorism enhancement from Criminal History Category I to VI was inapplicable to the present case because, under U.S.S.G.§ 4.A1.3(b)(1), "reliable information indicates that the defendant's criminal history category substantially over-represents . . . the likelihood that the defendant will commit other crimes." ER 3534-37. Given the psychiatric testimony and the totality of the sentencing presentation, departure was encouraged under § 4A1.3. *See Koon*, 518 U.S. at 94-95 (departure grounds mentioned in the Guidelines are "encouraged"). The defense provided precedent supporting such a

departure. ER 3534-35 (citing cases). The low risk of future dangerousness was supported by amenability to drug and alcohol treatment, which the court did not address, as well as imperfect entrapment, which the court only said "weighs slightly in the favor" of the defendant with no further explanation. ER 3685; SER 476.[34] Despite the over-representation of the terrorism enhancement being argued at length, the court said no more than it was "not persuaded by defendant's argument to reject the terrorism enhancement." ER 3685.

The sentencing judge must provide a sufficient record regarding the reasons for rejecting the claim that the terrorism enhancement was over-representative under U.S.S.G. § 4A1.3 and other departure grounds in order for this Court to provide appellate review. *Gall v. United States*, 552 U.S. 38, 50 (2007) (the sentencing judge must provide an adequate explanation "to allow for meaningful appellate review and to promote the perception of fair sentencing."); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) ("it would be procedural error for a district court . . . to fail to adequately explain the sentence selected."). A sentencing judge's explanation also "assures reviewing courts (and the public) that the sentencing process is a reasoned process" and helps the process to evolve. *Rita v. United States*,

[34] Under *Koon*, this Court's recognition of imperfect entrapment constitutes an encouraged ground for departure. ER 3519-20 (citing cases).

551 U.S. 338, 357 (2007). The sentencing judge's treatment of the terrorism enhancement and cursory rejection of post-offense rehabilitation failed to provide the reasoning and factual support necessary to sustain the ruling.

The failure to explain the rejection of the § 4A1.3 departure and the defense guideline calculation provides this Court no basis for meaningful review and creates an appearance of unfairness, especially in light of all the evidence of low risk of future dangerousness. The only remark by the sentencing judge on post-offense rehabilitation related to Mr. Mohamud's letters, which the court hoped reflected "a true change of heart, but there's no real way to tell." ER 3685. Although the court's post-sentencing statement of reasons mentions the psychological reports, the overall sentencing presentation, including post-offense actions and rehabilitation and very low risk of future dangerousness, was not addressed and resolved as required by Rule 32(i)(3)(B) of the Federal Rules of Criminal Procedure. *See* SER 476. Instead, the court appeared to interpret this Court's *Ressam* opinion to trump those critical sentencing factors based on terrorists as a class.

The sentencing court's failure to decide controverted facts and to correctly apply this Court's precedent should be vacated with the instruction to resentence without viewing the charge as defining the risk of future dangerousness. In *Ressam*, this Court had no occasion to address the type of extraordinary mitigation presented

in this case. The defendant in *Ressam* acted independently of the government and was a seasoned operative for al-Qaeda. Nothing close to psychiatric opinions of low risk and elements of government involvement in the offense were present. The sentencing judge erred as a matter of law in attributing to this Court an expansion of its precedent that, if interpreted as read by the judge in this case, would violate the Supreme Court's repeated injunctions that individualized sentencing must be the final rule.

Further, the court failed to rule on, or to adequately address, the facts relevant to imposition of sentence under the Guidelines and this Court's sentencing law. Despite submission of an alternative calculation of the Guidelines to reach a range of 121-151 months, ER 3547, the trial court did not make adequate rulings on the predicate facts and departure grounds raised by the defense submissions. The Supreme Court's requirement of individualized sentencing, based on fair resolution of controverted facts and legal arguments, should be applied with particular care especially where, as here, a teenager has engaged in four years of introspection and self-education, with his sincerity proven by assistance to the government and offers to help educate others against following his path.

Conclusion

The errors, considered separately or cumulatively, require reversal of the conviction and remand for an order of dismissal or a new trial. *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considering cumulative effect of errors in determining prejudice). In the alternative, the sentence should be vacated with a remand for evidentiary hearings and a hearing on resentencing.

Respectfully submitted this 4th day of September, 2015.

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

/s/ Lisa Hay
Lisa Hay
Federal Public Defender

/s/ Mark Ahlemeyer
Mark Ahlemeyer
Assistant Federal Public Defender

/s/ Steven Toby Wax
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Elizabeth G. Daily
Research & Writing Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 14-30217**
	)	
v.	)	
	)	
MOHAMED OSMAN MOHAMUD,	)	
	)	
Defendant-Appellant.	)	

STATEMENT OF RELATED CASES

I, Stephen R. Sady, undersigned counsel of record for defendant-appellant, Mohamed Osman Mohamud, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this 4th day of September, 2015.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 14-30217**
v.	)	
	)	
MOHAMED OSMAN MOHAMUD,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that:

This brief is submitted pursuant to a motion for leave to file an oversized brief under Circuit Rule 32-2, including the separately filed sealed portion, that was granted by order of the Appellate Commissioner dated July 17, 2015, which authorized a public opening brief not to exceed 180 pages. The brief has 179 pages, excluding the portions exempted by Fed. R.App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 4th day of September, 2015.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing Opening Brief of Appellant 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/ Jill C. Dozark
Jill C. Dozark

Appendix A

50 U.S.C. § 1881a. Procedures for targeting certain persons outside the United States other than United States persons

(a) Authorization

Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (i)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(b) Limitations

An acquisition authorized under subsection (a)--

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

(c) Conduct of acquisition

(1) In general

An acquisition authorized under subsection (a) shall be conducted only in accordance with--

(A) the targeting and minimization procedures adopted in accordance with subsections (d) and (e); and

(B) upon submission of a certification in accordance with subsection (g), such certification.

(2) Determination

A determination under this paragraph and for purposes of subsection (a) is a determination by the Attorney General and the Director of National Intelligence that exigent circumstances exist because, without immediate implementation of an authorization under subsection (a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to subsection (i)(3) prior to the implementation of such authorization.

(3) Timing of determination

The Attorney General and the Director of National Intelligence may make the determination under paragraph (2)--

(A) before the submission of a certification in accordance with subsection (g); or

(B) by amending a certification pursuant to subsection (i)(1)(C) at any time during which judicial review under subsection (i) of such certification is pending.

(4) Construction

Nothing in subchapter I of this chapter shall be construed to require an application for a court order under such subchapter I of this chapter for an acquisition that is targeted in accordance with this section at a person reasonably believed to be located outside the United States.

(d) Targeting procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to--

(A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(2) Judicial review

The procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (i).

(e) Minimization procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate, for acquisitions authorized under subsection (a).

(2) Judicial review

The minimization procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (i).

(f) Guidelines for compliance with limitations

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt guidelines to ensure--

(A) compliance with the limitations in subsection (b); and

(B) that an application for a court order is filed as required by this chapter.

(2) Submission of guidelines

The Attorney General shall provide the guidelines adopted in accordance with paragraph (1) to--

(A) the congressional intelligence committees;

(B) the Committees on the Judiciary of the Senate and the House of Representatives; and

(C) the Foreign Intelligence Surveillance Court.

(g) Certification

(1) In general

(A) Requirement

Subject to subparagraph (B), prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall provide to the Foreign Intelligence Surveillance Court a written certification and any supporting affidavit, under oath and under seal, in accordance with this subsection.

(B) Exception

If the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2) and time does not permit the submission of a certification under this subsection prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall submit to the Court a certification for such authorization as soon as practicable but in no event later than 7 days after such determination is made.

(2) Requirements

A certification made under this subsection shall--

(A) attest that—

(i) there are procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to--

(I) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(II) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States;

(ii) the minimization procedures to be used with respect to such acquisition--

(I) meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate; and

(II) have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court;

(iii) guidelines have been adopted in accordance with subsection (f) to ensure compliance with the limitations in subsection (b) and to ensure that an application for a court order is filed as required by this chapter;

(iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;

(v) a significant purpose of the acquisition is to obtain foreign intelligence information;

(vi) the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider; and

(vii) the acquisition complies with the limitations in subsection (b);

(B) include the procedures adopted in accordance with subsections (d) and (e);

(C) be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is--

(i) appointed by the President, by and with the advice and consent of the Senate; or

(ii) the head of an element of the intelligence community;

(D) include--

(i) an effective date for the authorization that is at least 30 days after the submission of the written certification to the court; or

(ii) if the acquisition has begun or the effective date is less than 30 days after the submission of the written certification to the court, the date the acquisition began or the effective date for the acquisition; and

(E) if the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2), include a statement that such determination has been made.

(3) Change in effective date

The Attorney General and the Director of National Intelligence may advance or delay the effective date referred to in paragraph (2)(D) by submitting an amended certification in accordance with subsection (i)(1)(C) to the Foreign Intelligence Surveillance Court for review pursuant to subsection (i).

(4) Limitation

A certification made under this subsection is not required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted.

(5) Maintenance of certification

The Attorney General or a designee of the Attorney General shall maintain a copy of a certification made under this subsection.

(6) Review

A certification submitted in accordance with this subsection shall be subject to judicial review pursuant to subsection (i).

(h) Directives and judicial review of directives

(1) Authority

With respect to an acquisition authorized under subsection (a), the Attorney General and the Director of National Intelligence may direct, in writing, an electronic communication service provider to--

(A) immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such electronic communication service provider wishes to maintain.

(2) Compensation

The Government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(3) Release from liability

No cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(4) Challenging of directives

(A) Authority to challenge

An electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition to modify or set aside such directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Standards for review

A judge considering a petition filed under subparagraph (A) may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) Procedures for initial review

A judge shall conduct an initial review of a petition filed under subparagraph (A) not later than 5 days after being assigned such petition. If the judge determines that such petition does not consist of claims, defenses, or other legal contentions that are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny such petition and affirm the directive or any part of the directive that is the subject of such petition and order the recipient to comply with the directive or any part of it. Upon making a determination under this subparagraph or promptly thereafter, the judge shall provide a written statement for the record of the reasons for such determination.

(E) Procedures for plenary review

If a judge determines that a petition filed under subparagraph (A) requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of such petition not later than 30 days after being assigned such petition. If the judge does not set aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the record of the reasons for a determination under this subparagraph.

(F) Continued effect

Any directive not explicitly modified or set aside under this paragraph shall remain in full effect.

(G) Contempt of court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(5) Enforcement of directives

(A) Order to compel

If an electronic communication service provider fails to comply with a directive issued pursuant to paragraph (1), the Attorney General may file a petition for an order to compel the electronic communication service provider to comply with the directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Procedures for review

A judge considering a petition filed under subparagraph (A) shall, not later than 30 days after being assigned such petition, issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section and is otherwise lawful. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(D) Contempt of Court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(E) Process

Any process under this paragraph may be served in any judicial district in which the electronic communication service provider may be found.

(6) Appeal

(A) Appeal to the Court of Review

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition with the Foreign Intelligence Surveillance Court of Review for review of a decision issued pursuant to paragraph (4) or (5). The Court of Review shall have jurisdiction to consider such petition and shall provide a written statement for the record of the reasons for a decision under this subparagraph.

(B) Certiorari to the Supreme Court

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(i) Judicial review of certifications and procedures

(1) In general

(A) Review by the Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court shall have jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e), and amendments to such certification or such procedures.

(B) Time period for review

The Court shall review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and shall complete such review and issue an order under paragraph (3) not later than 30 days after the date on which such certification and such procedures are submitted.

(C) Amendments

The Attorney General and the Director of National Intelligence may amend a certification submitted in accordance with subsection (g) or the targeting and minimization procedures adopted in accordance with subsections (d) and (e) as necessary at any time, including if the Court is conducting or has completed review of such certification or such procedures, and shall submit the amended certification or amended procedures to the Court not later than 7 days after amending such certification or such procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures.

(2) Review

The Court shall review the following:

(A) Certification

A certification submitted in accordance with subsection (g) to determine whether the certification contains all the required elements.

(B) Targeting procedures

The targeting procedures adopted in accordance with subsection (d) to assess whether the procedures are reasonably designed to--

(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(C) Minimization procedures

The minimization procedures adopted in accordance with subsection (e) to assess whether such procedures meet the definition of minimization procedures under section 1801(h) or section 1821(4) of this title, as appropriate.

(3) Orders

(A) Approval

If the Court finds that a certification submitted in accordance with subsection (g) contains all the required elements and that the targeting and minimization procedures adopted in accordance with subsections (d) and (e) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.

(B) Correction of deficiencies

If the Court finds that a certification submitted in accordance with subsection (g) does not contain all the required elements, or that the procedures adopted in accordance with subsections (d) and (e) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order--

(i) correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order; or

(ii) cease, or not begin, the implementation of the authorization for which such certification was submitted.

(C) Requirement for written statement

In support of an order under this subsection, the Court shall provide, simultaneously with the order, for the record a written statement of the reasons for the order.

(4) Appeal

(A) Appeal to the Court of Review

The Government may file a petition with the Foreign Intelligence Surveillance Court of Review for review of an order under this subsection. The Court of Review shall have jurisdiction to consider such petition. For any decision under this

subparagraph affirming, reversing, or modifying an order of the Foreign Intelligence Surveillance Court, the Court of Review shall provide for the record a written statement of the reasons for the decision.

(B) Continuation of acquisition pending rehearing or appeal

Any acquisition affected by an order under paragraph (3)(B) may continue--

(i) during the pendency of any rehearing of the order by the Court en banc; and

(ii) if the Government files a petition for review of an order under this section, until the Court of Review enters an order under subparagraph (C).

(C) Implementation pending appeal

Not later than 60 days after the filing of a petition for review of an order under paragraph (3)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order regarding, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the review.

(D) Certiorari to the Supreme Court

The Government may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(5) Schedule

(A) Reauthorization of authorizations in effect

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a), the Attorney General and the Director of National Intelligence shall, to the extent practicable, submit to the Court the certification prepared in accordance with subsection (g) and the procedures adopted in accordance with subsections (d) and (e) at least 30 days prior to the expiration of such authorization.

(B) Reauthorization of orders, authorizations, and directives

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a) by filing a certification pursuant to subparagraph (A), that authorization, and any directives issued thereunder and any order related thereto, shall remain in effect, notwithstanding the expiration provided for in subsection (a), until the Court issues an order with respect to such certification under paragraph (3) at which time the provisions of that paragraph and paragraph (4) shall apply with respect to such certification.

(j) Judicial proceedings

(1) Expedited judicial proceedings

Judicial proceedings under this section shall be conducted as expeditiously as possible.

(2) Time limits

A time limit for a judicial decision in this section shall apply unless the Court, the Court of Review, or any judge of either the Court or the Court of Review, by order for reasons stated, extends that time as necessary for good cause in a manner consistent with national security.

(k) Maintenance and security of records and proceedings

(1) Standards

The Foreign Intelligence Surveillance Court shall maintain a record of a proceeding under this section, including petitions, appeals, orders, and statements of reasons for a decision, under security measures adopted by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(2) Filing and review

All petitions under this section shall be filed under seal. In any proceedings under this section, the Court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

(3) Retention of records

The Attorney General and the Director of National Intelligence shall retain a directive or an order issued under this section for a period of not less than 10 years from the date on which such directive or such order is issued.

(l) Assessments and reviews

(1) Semiannual assessment

Not less frequently than once every 6 months, the Attorney General and Director of National Intelligence shall assess compliance with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f) and shall submit each assessment to--

(A) the Foreign Intelligence Surveillance Court; and

(B) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(i) the congressional intelligence committees; and

(ii) the Committees on the Judiciary of the House of Representatives and the Senate.

(2) Agency assessment

The Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence information under subsection (a), with respect to the department or element of such Inspector General--

(A) are authorized to review compliance with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f);

(B) with respect to acquisitions authorized under subsection (a), shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting;

(C) with respect to acquisitions authorized under subsection (a), shall review the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(D) shall provide each such review to--

(i) the Attorney General;

(ii) the Director of National Intelligence; and

(iii) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(3) Annual review

(A) Requirement to conduct

The head of each element of the intelligence community conducting an acquisition authorized under subsection (a) shall conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. The annual review shall provide, with respect to acquisitions authorized under subsection (a)--

(i) an accounting of the number of disseminated intelligence reports containing a reference to a United States-person identity;

(ii) an accounting of the number of United States-person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting;

(iii) the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(iv) a description of any procedures developed by the head of such element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under subsection (a) acquire the communications of United States persons, and the results of any such assessment.

(B) Use of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall use each such review to evaluate the adequacy of the minimization procedures utilized by such element and, as appropriate, the application of the minimization procedures to a particular acquisition authorized under subsection (a).

(C) Provision of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall provide such review to--

(i) the Foreign Intelligence Surveillance Court;

(ii) the Attorney General;

(iii) the Director of National Intelligence; and

(iv) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

Appendix C

The following list shows the parties' audio and video exhibits from meetings between Mr. Mohamud and the undercover agents, indexed by date.

August 19, 2010

- Gov. Ex. 82-91
- Def. Ex. 1040 (clip numbers LH303a, STW096a, LH148a, STW090a, STW130a, STW131a, STW134aa, LH193v, STW137b, STW400a, STW081a, STW143aa, STW143ba, STW143ca, STW145a, LH302a, STW149a, STW410, LH192a, LH064a, STW154v, STW155v, STW155aa, STW155ca, STW156a, LH030a, LH234a, LH300a, LH221a and LH150a)

September 7, 2010

- Gov. Ex. 102-106, 108-110
- Def. Ex. 1040 (clip numbers STW172aa, LH180a, STW172ba, STW172ca, LH213a, STW174a, STW175a, LH133a, LH117a, STW178a, STW177a, STW179a, LH201a, STW181a, LH200a, STW161a, STW183a, STW256a, STW190a and LH211a)

October 10, 2010

- Gov. Ex. 113-134
- Def. Ex. 1040 (clip numbers LH305a, STW195a, LH183a, STW199a, LH130v, LH196a, LH204a, LH123a, STW202a, STW207a, LH137a, LH128v, STW257a, LH101a, STW218a, STW272a, STW220a, STW213a, STW222a, STW160a, STW223a and STW225ca)

November 4, 2010

- Gov. Ex. 149-165
- Def. Ex. 1040 (clip numbers STW159a, LH104a, LH202a, STW406a, LH039a, LH040a, STW260a, STW248da, STW258a, STW246aa, STW246ba, STW246ca, STW246da, STW246ea, STW246fa, STW246ia, STW249a, STW250aa, STW250ba, STW250ca, STW250da, LH119a, LH106a, LH110a, LH112a, LH114a, LH232a, LH107a, LH109a, LH108a, LH113a, LH115a and LH111a)

November 18, 2010

- Gov. Ex. 178-188, 191-194

- Def. Ex. 1040 (clip numbers LH235a, LH229a, LH120a, STW405a and STW238aa)

November 26, 2010

- Gov. Ex. 208-217, 221
- Def. Ex. 1040 (clip numbers LH025a, STW275a and STW254a)