

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**

PETITION FOR REHEARING AND REHEARING EN BANC

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Introduction

This case presents novel issues regarding the permissible scope of executive branch power in national security cases. The Court should grant rehearing and rehearing en banc to bring the Panel's opinion into conformance with controlling precedent in areas of extraordinary importance. First, the Panel's approval of warrantless surveillance conducted under § 702 of the FISA Amendments Act improperly eliminates critical privacy protections for Americans' online communications, including the protection afforded by individualized judicial review. Second, the Panel erred by sua sponte invoking harmless error doctrine to ignore numerous constitutionally-grounded evidentiary errors that tainted the jury's consideration of the strong entrapment defense. Third, the Panel incorrectly upheld a 30-year sentence for a 19-year-old American based on the use of a generic "terrorist" label to controvert individualized evidence establishing sincere remorse and low risk of recidivism.

Reasons For Granting Rehearing And Rehearing En Banc

A. The Panel's Approval Of Warrantless Electronic Surveillance Under § 702 Of The FISA Amendments Act Diminishes Fourth Amendment Protections For Millions Of Americans.

This case squarely presents the question of whether the executive branch's warrantless search and seizure of an American's private communications under

§ 702 is unconstitutional. The Panel opinion allowing warrantless searches of the content of Americans' communications contravenes Fourth Amendment precedent in two critical ways: (1) by creating a new exception to the warrant requirement based on law enforcement's subjective intent to "target" individuals without Fourth Amendment protections, and (2) by claiming American citizens have "diminished" rights to privacy with respect to their personal email communications. *See generally* Orin S. Kerr, *The Surprisingly Weak Reasoning Of Mohamud*, Lawfare (Dec. 23, 2016).¹ Further review is warranted to bring this case into conformance with Fourth Amendment precedent and to uphold public confidence in a decision of such importance. *See Berger v. New York*, 388 U.S. 41, 60 (1967) ("Few threats to liberty exist which are greater than that posed by use of eavesdropping devices.").

1. The Panel's Decision Creates A Broad New Exception To The Fourth Amendment's Warrant Requirement.

The Panel decision for the first time approved the warrantless search and seizure of protected American communications based on the agents' subjective intent to "target" individuals who have no Fourth Amendment rights. App. A at 39-40. Supreme Court jurisprudence provides no basis for defining a warrant exception

¹ The Panel recognized Professor Kerr's expertise in citing his internet privacy article. App. A at 43 n.26.

based on the subjective intent of the searching officer. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (“Fourth Amendment reasonableness ‘is predominantly an objective inquiry.’”) (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)); see *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.”). National security investigations are particularly ill-suited for an intent-based warrant exception given that secrecy insulates the agents’ claimed intent from any meaningful defense challenge. Its novelty and breadth place the holding squarely in conflict with precedent requiring warrant exceptions to be “specifically established and well delineated.” *Katz v. United States*, 389 U.S. 347, 357 (1967); see *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (exceptions to the warrant requirement are “zealously and carefully drawn”) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

The Panel’s new warrant exception substantially expands the “incidental overhear” rule. App. A at 40-43. As the Panel recognized, the “vast” quantity of protected communications expected to accompany § 702 surveillance distinguishes the program from any other type of incidental collection. App. A at 41. For that reason, the Panel erred in finding that cases involving search warrants, where the limited scope of the intrusion had already been individually approved by a neutral

judicial officer based on probable cause, were controlling. The standard rule requires independent justification for each incremental government intrusion into a protected zone. *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (the scope of the search must be strictly tied to and justified by the circumstances that rendered its initiation permissible); *see also Riley v. California*, 134 S. Ct. 2473 (2014) (unconstitutional to search contents of seized cell phone); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (unconstitutional to move items during protective sweep). The government's subjective intent to target foreign citizens abroad does not justify widespread, warrantless searches of protected American communications.

Further, the Court should hold that electronic surveillance conducted within the United States is subject to full Fourth Amendment protection. *United States v. United States Dist. Ct. for the E. Dist. Of Mich*, 407 U.S. 297, 323-24 (1972) (*Keith*). The Panel's conclusion that domestic surveillance is exempt from the Fourth Amendment when the target is located abroad ignores Justice Kennedy's controlling concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Justice Kennedy limited *Verdugo-Urquidez*'s holding to "extraterritorial application of the Constitution" against a non-citizen in a place where the Fourth Amendment could not be enforced. *Id.* at 275. Justice Kennedy had "little doubt that full protections of

the Fourth Amendment would apply” if the search had occurred, as in the present case, within the United States. *Id.* at 278.

2. *The Panel Erred By Concluding That Americans Have “Diminished” Expectations Of Privacy In Emails Seized And Searched In The United States.*

Email communications implicate core Fourth Amendment interests: “Personal email can, and often does, contain all the information once found in the ‘paper and effects’ mentioned explicitly in the Fourth Amendment.” *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1090 (9th Cir. 2016) (*Kitzhaber*). The Panel’s opinion conflicts with *Kitzhaber*’s recognition that individuals retain a strong and legitimate expectation of privacy in the contents of personal emails, regardless of where the emails are stored.

Under the “third party doctrine,” information intentionally disclosed to a third party such as a bank may no longer be private under the Fourth Amendment. *See Miller v. United States*, 425 U.S. 435, 443 (1976). However, courts have rejected application of the third party doctrine to service providers who have access to the content of emails. *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010); *see generally Jones v. United States*, 132 S. Ct. 945, 957 (Sotomayor, J., concurring) (“[The third party doctrine] is ill suited to the digital age, in which people reveal a

great deal of information about themselves to third parties in the course of carrying out mundane tasks.”).

In *Kitzhaber*, the Court found that individuals do not forfeit their expectation of privacy in emails merely because those communications are in a third party’s control. *Id.* at 1090-91. As the Panel acknowledged, the third party doctrine contemplates “a diminished expectation of privacy due to the risk that the recipient will reveal the communication, not that the government will be monitoring the communication unbeknownst to the third party.” App. A at 46. Yet the Panel has now extended the third party doctrine to permit widespread, secret government monitoring of protected, private communications. *Id.* (“the communications at issue here had been sent to a third party, which reduces Mohamud’s privacy interest at least somewhat”). Because communications by definition involve at least two parties, the Panel’s logic would reduce the expectation of privacy in virtually every communication.

The Panel’s reliance on *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007), failed to note that the Court found privacy expectations objectively reasonable in that case and distinguished cases on diminished expectations. App. A at 45-46. Those cases trace back to *Guest v. Leis*, a pre-*Warshak* civil case on standing that stands for the proposition that a communication delivered for public

posting on a bulletin board is not private. 255 F.3d 325, 333 (6th Cir. 2001) (“Users would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”). But the Panel’s ruling permits the government to intrude into private conversations based on the conclusion that simply *sending* an email reduces the expectation of privacy “somewhat.”

In addition to its doctrinal novelty, the Panel’s approach presents practical problems of application given advances in technology and the imprecise analogy to traditional letters. The privacy expectations of Americans in their electronic communications should not depend on whether an email has been received, opened, or sent directly to trash. The Court should reject the Panel’s view of private electronic communications as inconsistent with *Kitzhaber* and the limits of the third party doctrine.

3. *Full Review Of § 702’s Constitutionality Furthers The Public Interest On A Question Of Exceptional Importance.*

This case presents the first time since the enactment of § 702 almost a decade ago that an appellate court has the opportunity to rule on whether the government’s warrantless surveillance of millions of Americans violates the Constitution. *See Clapper v. Amnesty International*, 133 S. Ct. 1138, 1155 (2013) (holding that plaintiffs lacked standing to challenge § 702 surveillance); 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) (describing history of non-compliance with statutory notice requirement for § 702-derived evidence). Section 702’s unprecedented “bulk adjudication” of surveillance – utilizing general FISC-approved procedures for millions of interceptions, rather than individualized review and authorization of particular searches – has been called constitutionally “very questionable[.]” *See generally* Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251 (2016). Yet the Panel rejected the challenges to § 702 without conducting the thorough analysis and meaningful review necessary to the importance of the subject.

First, the Panel improperly assessed only a narrow application of one executive surveillance program. But reasonableness depends on the totality of the circumstances. The Panel acknowledged the importance of minimization procedures, but did not engage in any meaningful analysis of how those procedures impact the constitutionality of § 702 surveillance. To the contrary, the Panel concluded that retention and search of emails acquired pursuant to § 702 was “outside the scope of its review, as no such retention and querying is at issue in this

case.” App. A at 44.² But the degree to which minimization procedures protect Americans’ incidentally collected private communications from government intrusions is precisely at issue. The Panel’s approval of a warrant exception for surveillance that “targets” foreign nationals overseas constitutes a wide-open backdoor for the government to amass Americans’ personal emails for regular law enforcement use.

In the same vein, the Panel also misapplied Supreme Court precedent regarding the scope of a Fourth Amendment challenge to a statute. Under *City of Los Angeles v. Patel*, “the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant.” 135 S. Ct. 2443, 2451 (2015). It is irrelevant whether § 702 lawfully permits surveillance of a foreigner conducted overseas because the government does not need § 702 authorization for such activity. Section 702 is invalid because its “blanket grant of permission to eavesdrop [on protected email communications] is without adequate judicial supervision or protective procedures.” *Berger*, 388 U.S. at 60. Accordingly, *all* surveillance of American communications conducted under the authority of that

² This contention clashes with the premise of the district court proceedings, which involved extensive litigation of whether, once lawfully seized under § 702, the Fourth Amendment would limit the government’s authority to further access American communications.

statute is unlawful. *See* 50 U.S.C. 1806(g) (evidence derived from surveillance “not lawfully authorized or conducted” “shall” be suppressed); *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991) (the Constitution is “law” under FISA).

The Panel’s analysis also improperly adopted a piecemeal approach to the Fourth Amendment, First Amendment, and separation of powers. Those constitutional doctrines are inextricably interrelated. *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.”); *id.* at 317-18 (“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.”). A multifaceted constitutional analysis would also have supported narrowly construing § 702 to prohibit use of the contents of incidentally collected American communications absent prior judicial review. *See ACLU v. Clapper*, 785 F.3d 787, 813-16 (2d Cir. 2015) (narrowly construing § 215 of the Patriot Act to prohibit the bulk collection of electronic metadata).

Last, the lawfulness of § 702 should not have been determined without full disclosure of all relevant information to the defense. Secret proceedings regarding complex surveillance programs undermine the reliability of and public confidence

in the litigation's result. *Alderman v. United States*, 394 U.S. 165, 183 (1969) (in national security wiretap case, adversary proceedings provide superior results). This Court should resolve the important constitutional issues presented by this case with full defense participation.

B. The Panel's Sua Sponte Harmlessness Determination Violated Governing Precedent.

The government bears the burden of proving that constitutional trial error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Brooks*, 772 F.3d 1161, 1171 (9th Cir. 2014). The defendant's three-week entrapment trial here challenged the government's unprecedented infiltration into the life of a teenager who was described by a case agent as "confused" and "manipulable." As the defense established and the presentence report confirmed, "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." The defense called three experts in support of acquittal: an expert in adolescent psychology; an expert in the social psychology of context in reinforcing deviate behaviors; and a counter-terrorism psychiatric expert who opined that, when the government contacts began, Mr. Mohamud was a talker, but did not pose a

genuine threat of violence. In all, the defense presented a “solid case for entrapment.” App. A at 25.

Yet the Panel sua sponte determined that four categories of potentially erroneous evidentiary rulings, each of which were preserved on constitutional grounds, were individually and cumulatively harmless: (1) admitting hearsay testimony from numerous government agents regarding an Interpol Red Notice, and the Notice itself, that identified Amro Al-Ali as a terrorist; (2) excluding “outtake” recordings that displayed undercover agents’ unprofessional enthusiasm and bias; (3) admitting “commentary” evidence from agents’ about what Mr. Mohamud meant or thought during recorded statements; and (4) excluding Mr. Mohamud’s contemporaneous statements to demonstrate lack of predisposition. App. B at 5-9. The Court should grant rehearing and rehearing en banc because the sua sponte determination of harmlessness violated governing precedent.

1. The Court Should Reject The Panel’s Sua Sponte Harmlessness Determination In A Case Involving A Lengthy And Complex, Fact-Based Entrapment Defense.

Courts of appeals abuse their discretion by sua sponte addressing non-jurisdictional defenses that the government knowingly waived. *Wood v. Millyard*, 132 S. Ct. 1826, 1833-34 (2012). The requirement that appellate courts respect a waiver is consistent with the party presentation principle, by which courts “rely on

the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

As the Panel acknowledged, “Usually when the government fails to argue harmlessness, [appellate courts] deem the issue waived and do not consider the harmlessness of any errors” found at trial. App. B at 8 (citing *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005)); accord *Brooks*, 772 F.3d at 1171. A narrow exception exists permitting sua sponte harmlessness review in “extraordinary cases” based on: “(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation.” *Id.* The doctrine is exceptionally narrow: “If the harmlessness of the error is at all debatable, prudence and fairness to the defendant counsel against deeming that error harmless without the benefit of the parties’ debate.” *Gonzalez-Flores*, 418 F.3d at 1101.

In *Gonzalez-Flores*, the Court sua sponte found harmless error in a case involving a “small and simple” record and “overwhelming” evidence of guilt, to which the defendant “put on no defense.” *Id.* at 1102. By contrast, in *United States v. Kloehn*, this Court deemed sua sponte consideration of harmlessness inappropriate in lengthy and complex cases because it creates a risk of “unfairly tilt[ing] the scales

of justice . . . [in the government’s favor] by constructing [its] best arguments for it without providing the defendant with a chance to respond.” 620 F.3d 1122, 1130 (9th Cir. 2010) (alterations in original).

The record in this case does not support the Panel’s decision to apply the sua sponte harmlessness doctrine. The lengthy and complex trial record reflects a “solid” entrapment defense. The four categories of pervasive evidentiary errors did not involve trivial or merely cumulative evidence. The government itself identified the Red Notice as “a key piece of the government’s case” that was “integral” to proving the primary disputed issue of predisposition. The error of allowing numerous government agents to rely on the Notice for its truth, without any defense ability to cross-examine its author, was compounded by the fact that the Notice contained an unreliable and ambiguous translation.

Far from being innocuous, admission of the Notice allowed agents to “narrate the course of their investigations, and thus spread before [the jury] damning information that is not subject to cross-examination,” which went “far toward abrogating the defendant’s rights under the sixth amendment.” *Ocampo v. Vail*, 649 F.3d 1098, 1109 (9th Cir. 2011) (quoting *United States v. Silva*, 380 F.3d 1018, 1020

(7th Cir. 2004)).³ On this record, the appellate court’s finding of harmlessness cannot satisfy the defendant’s right to a jury trial, uninfected by error, to determine whether the government negated entrapment beyond a reasonable doubt. *Compare* App. D (defense opening statement) *with* App. E (description of pervasive trial errors). The defense arguments in favor of entrapment as a matter of law also negate a finding of harmlessness, where the analysis includes no deference to the tainted verdict. Op. Br. at 57-61.⁴

Moreover, the errors compounded the already existing power imbalance in this high profile case that received national coverage, often focusing on the government’s extreme overreach. *See, e.g.*, Nicolás Medina Mora and Mike Hayes, *The Big (Imaginary) Black Friday Bombing*, BuzzFeed News (Nov. 15, 2015). The secrecy of the trial makes harmlessness even more difficult to assess because the defense was (1) denied discovery and effective cross-examination regarding the two anonymous undercover agents, (2) denied the identity of “Bill Smith” and required

³ The Panel’s published opinion confirms this prejudice by its reference to Mohamud’s “correspondence with Al-Ali” as proof of his predisposition to commit acts of terrorism. App. A at 30. Absent admission of the Red Notice for its truth, no evidence established that Al-Ali was a terrorist.

⁴ The Panel appeared to follow the dissent in *United States v. Poehlman* on entrapment as a matter of law rather than the majority regarding the time frame for predisposition. 217 F.3d 692, 703 (9th Cir. 2000).

to accept testimonial hearsay from his FBI handler, and (3) prevented from participating in secret proceedings regarding *Brady* claims. Although the defense invoked de novo review for the constitutionality of these rulings (Opening Br. at 83-104, Reply Br. at 2-3, 26-27), the Panel simply held that these rulings were within the district court's discretion without addressing the constitutional dimension of the claims.

Given the entire context of the trial and the repeated evidentiary errors, this is not the “extraordinary” case where the Court can have certainty that any error was harmless. The government's failure to raise harmlessness on three of the four issues likely reflected its considered assessment that the errors were not harmless. The Court should bring this case into conformance with the extremely high standard for sua sponte consideration of harmlessness.

2. *The Court Should Categorically Reject Sua Sponte Harmlessness Doctrine For Constitutional Errors.*

This Court should also grant rehearing en banc to reconsider the fundamental premise of permitting sua sponte harmlessness review of constitutional errors. The doctrine is inconsistent with the Supreme Court authority of *Chapman* and undermines judicial neutrality in a number of ways:

- Sua sponte review conflicts with Supreme Court precedent establishing “that the government bears the burden of demonstrating on appeal that an error was harmless” and “that

adversarial norms govern appellate consideration of harmless error”;

- The adversarial system relies on the “judiciary’s neutrality” and appellate courts “ordinarily have no right to consider issues not raised by a party in either briefing or argument, both because our system assumes and depends upon the assistance of counsel, and because of the unfairness of such a practice to the other party”;
- The government’s choice not to raise harmless error in its briefing may well be telling because, “after all, the government might honestly believe that if the trial judge’s conduct was erroneous, the error had an impact on the trial[.]”

United States v. Pryce, 938 F.2d 1343, 1354-55 (D.C. Cir. 1991) (Silberman, J., dissenting).

The present case demonstrates the validity of these concerns. The Panel’s conclusory claim that harmlessness “is not reasonably debatable” usurps the jury’s role based on a speculative assessment regarding the impact of pervasive constitutional errors. *See Bumper v. North Carolina*, 391 U.S. 543, 551 n.16 (1968) (“But it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States.”). By adhering to the principle of party presentation, the Court would bring its jurisprudence into conformance with Supreme Court authority on a question of exceptional importance.

C. The Panel Should Have Reversed The District Court’s Inappropriate Use Of The Generic “Terrorist” Label To Controvert Individualized Sentencing Mitigation.

The Panel should have reversed Mr. Mohamud’s 30-year sentence because the district court improperly based the sentence on generic characteristics associated with the label “terrorist,” rather than individualized evidence establishing that Mr. Mohamud did not fit that mold.

At sentencing, the defense presented uncontroverted psychiatric reports from two well-qualified experts who opined that Mr. Mohamud presented a low risk of recidivism. The defense argued that Mr. Mohamud’s post-offense rehabilitation should “critically inform” the sentencing within the meaning of *Pepper v. United States*, 562 U.S. 476, 491 (2011), and that he must be assessed individually “as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996); accord *Gall v. United States*, 552 U.S. 38, 50 (2007).

In response, the government expressly relied on the language of *United States v. Ressam*, 679 F.3d 1069, 1091 (9th Cir. 2012) (en banc), for the proposition that “terrorists” categorically present a high risk of recidivism. ER 3479-80. Ignoring defense arguments that “the terrorist epithet will become a substitute for the individual being sentenced,” the sentencing judge used *Ressam* as controlling

authority: “The Ninth Circuit recognizes that terrorists, even those with no prior criminal behavior, are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.” ER 3687.

The Court should grant rehearing and rehearing en banc to clarify that the language in *Ressam* was limited to its particular facts and that the generic “terrorist” label cannot negate individualized evidence regarding future dangerousness. The sentencing judge’s reliance on *Ressam* was inappropriate. That case involved an Al Qaeda-trained operative who, with no government encouragement, attempted to transport explosives across the Canadian border to detonate in the Los Angeles airport. He initially cooperated, then reneged on his cooperation. The Court explained that his strongly held extremist beliefs rendered a 22-year sentence insufficient to protect the public.

In this case, the sentencing court’s reliance on *Ressam* violated *Pepper*, *Gall*, and *Koon*. Although the judge mentioned some of the relevant sentencing factors under 18 U.S.C. § 3553(a), the district court’s sole “finding” regarding future dangerousness consisted of the reference to *Ressam* and the hope that Mr. Mohamud’s letters reflected “a true change of heart, but there’s no real way to tell.” ER 3685. But actually there are ways to tell. Dr. Marc Sageman, a frequent government counter-terrorism expert in threat assessments, conducted extensive

interviews with Mr. Mohamud and his family and unequivocally opined: “He is at very low risk of being dangerous in the future, both in the criminal and political sense.” ER 3532. Further, Dr. David Kinzie, a professor at the Oregon Health Sciences University with 40 years of psychiatric experience, interviewed Mr. Mohamud eleven times over the course of pretrial custody, and concluded: “His history of appropriate values and behavior prior to his radicalization, combined with the shame for accepting criminal violence, make future involvement in this type of behavior highly unlikely.” ER 3530.

This Court should grant rehearing and rehearing en banc to bring the sentencing of this young man into conformance with governing precedent and to limit the future use of *Ressam* to the proper scope of that case.

Conclusion

For the foregoing reasons, the Court should grant rehearing and rehearing en banc.

Respectfully submitted this 17th day of February, 2017.

/s/ Stephen R. Sady

Stephen R. Sady
Chief Deputy Federal Public Defender

/s/ Lisa Hay

Lisa Hay
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/s/ Mark Ahlemeyer

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Steven Toby Wax
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/s/ Elizabeth G. Daily

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.	)	

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation because it contains 4,199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements and the type style requirements because it has been prepared in a proportionally spaced typeface using Word 2013, 14-point Times New Roman font.

Dated this 17th day of February, 2017.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, I electronically filed the foregoing Petition for Rehearing and Rehearing En Banc and attached Appendices 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

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOHAMED OSMAN MOHAMUD,
Defendant-Appellant.

No. 14-30217

D.C. No.
3:10-cr-00475-KI-1

OPINION

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted July 6, 2016
Portland, Oregon

Filed December 5, 2016

Before: Harry Pregerson, Carlos T. Bea,
and John B. Owens, Circuit Judges.

Opinion by Judge Owens

SUMMARY*

Criminal Law

The panel affirmed Mohamed Osman Mohamud's conviction for attempting to detonate a large bomb during the annual Christmas Tree Lighting Ceremony in downtown Portland, Oregon, in violation of 18 U.S.C. § 2332a(a)(2)(A).

The panel held that the district court properly rejected Mohamud's defense of entrapment as a matter of law. The panel could not say that no reasonable jury could have concluded that Mohamud was predisposed to commit the charged offense. Rejecting Mohamud's alternative argument that the case should be dismissed because the government overreached in its "sting," the panel wrote that while the government's conduct was quite aggressive at times, it fell short of a due process violation.

The panel held that, under the circumstances of this case, the district court did not err in denying Mohamud's motion to suppress, based on tardy disclosure, information collected pursuant to § 702 of the Foreign Intelligence Surveillance Act of 1978. The panel wrote that Mohamud cannot demonstrate prejudice, and that the district court did not err in finding that the late disclosure was not due to prosecutorial misconduct.

The panel held that the § 702 acquisition of Mohamud's email communications did not violate the Fourth Amendment. The panel noted that all this case involved was

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the targeting of an overseas foreign national under § 702, through which Mohamud's email communications were incidentally collected. The panel held that no warrant was required to intercept the overseas foreign national's communications or to intercept a U.S. person's communications incidentally. Assuming that Mohamud had a Fourth Amendment right in the incidentally collected communications, the panel held that the search was reasonable under the Fourth Amendment. The panel wrote that declassified facts foreclosed the argument that the discovery in this case strayed from protecting the country from a terrorist threat into the conduct of foreign affairs. Because no retention and querying of the incidentally-collected communications is at issue in this case, an argument regarding reasonableness was outside the scope of this court's review. The panel held that under the third-party doctrine, Mohamud had a reduced expectation of privacy in his communications to third parties. The panel held that Foreign Intelligence Surveillance Court-approved targeting and minimization procedures, which were followed in practice, sufficiently protected Mohamud's privacy interest, in light of the government's compelling interest in national security.

COUNSEL

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Kelly A. Zusman (argued), Appellate Chief; Ethan D. Knight, Pamala R. Holsinger, and Ryan W. Bounds, Assistant United States Attorneys; Billy J. Williams, Acting Assistant United States Attorney; United States Attorney's Office, Portland, Oregon; Joseph F. Palmer, Attorney, Appellate Unit; John P. Carlin, Assistant Attorney General; National Security Division, United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

Patrick C. Toomey (argued) and Alex Abdo, New York, New York; Andrew Crocker and Mark Rumold, San Francisco, California; Mathew W. dos Santos, Portland, Oregon; as and for Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Oregon, and Electronic Frontier Foundation.

Joshua L. Dratel, Law Offices of Joshua L. Dratel P.C., New York, New York; John D. Cline, Law Office of John D. Cline, San Francisco, California; for Amicus Curiae National Association of Criminal Defense Lawyers.

OPINION

OWENS, Circuit Judge:

Mohamed Osman Mohamud appeals from his conviction for attempting to detonate a large bomb during the annual Christmas Tree Lighting Ceremony in Pioneer Courthouse Square in downtown Portland, Oregon, in violation of 18 U.S.C. § 2332a(a)(2)(A). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.¹

I. FACTUAL BACKGROUND**A. Mohamud’s Activities Before Contact with the FBI**

In many respects, Mohamud was like any other American teenager. He liked music, the Los Angeles Lakers, and hanging out with his friends. Born in Somalia, he immigrated to the United States at the age of three, and grew up in the Portland area.

But after a December 2008 incident at London’s Heathrow Airport, things changed. Believing that airport security racially profiled him, Mohamud wrote an email in London stating that it is “the evil zionist-crusader lobbyists who control the world,” and calling on Allah to send fighters against them. He also created a new email account while in London—truthbespoken@googlemail.com. That email account would play a significant role in the prosecution’s case.

¹ We resolve several of Mohamud’s arguments in a concurrently filed memorandum disposition.

In 2009, Mohamud began communicating over the Internet with Samir Khan, a United States citizen then living in North Carolina.² Khan published *Jihad Recollections*, an online magazine aimed at English-speaking al-Qaeda supporters. From February to August 2009, Mohamud and Khan exchanged roughly 150 emails, with Mohamud using his truthbespoken email account. Topics included Islamic law and advice about personal relationships. They also outlined Mohamud's support for Osama bin Laden.

During this time period, Mohamud wrote four articles for *Jihad Recollections*.³ Among other things, the articles recommended physical exercise to prepare for war with the West and analyzed Europe's vulnerability to a jihadi attack. Mohamud's initial drafts of these articles contained more incendiary content. For example, Mohamud praised the proficiency of the September 11, 2001, hijackers who "hit them so fast the Americans became dumbfounded," the 2008 Mumbai attackers, who were "a great display of quickly entering the arena of battle and just decimating the kuffar [unbelievers]," and the fighters in Afghanistan who attacked landing American helicopters and then "finish[ed] off the wounded American soldiers." Mohamud also prayed for Allah to help the reader "prepar[e] you to meet Allah as a martyr" and included a photograph of the Twin Towers burning during the September 11th attacks. Khan removed

² The September 2011 drone strike in Yemen that killed Anwar al-Awlaki, an al-Qaeda leader, also killed Khan.

³ Three of the articles were published under the pen name Ibn al-Mubarak. Mohamud was not credited with publishing the fourth article, which appeared in *Jihad Recollections* under a different pseudonym, Abu Talha.

this more inflammatory material from the final versions of Mohamud's articles. On August 15, 2009, Mohamud informed Khan that he would no longer write for *Jihad Recollections* because he was "going through alot [sic] of things and i have a lot of things to do."⁴

Mohamud also struck up a relationship with Amro Al-Ali, a Saudi citizen who Mohamud met at a Portland mosque and who subsequently left the United States.⁵ On August 31, 2009, Al-Ali sent information to Mohamud at his truthbespoken email account about an Islamic school in Yemen. That same day, Mohamud called his father to say that he was leaving the country. His father begged him to stay in the United States, but Mohamud told him it was too late—he had his passport, visa, and ticket ready to go. When his parents confirmed that his passport was missing, they feared that Mohamud might return to Somalia, his place of

⁴ Mohamud also engaged in other pro-jihadi Internet activities. In June 2009, for example, he posted on a website that he was working on an "Islam's [M]ost Wanted List," which would be a "Black list" of people who had "offended Allah."

⁵ Saudi officials suspected Al-Ali had links to terrorist groups, and requested an Interpol Red Notice for his arrest. A Red Notice serves as an international wanted notice and provides information on the identification of fugitives charged with or convicted of serious crimes. Although Interpol will not publish requested Red Notices that violate Interpol's Constitution, which prohibits the organization from undertaking any activities of a political, military, religious or racial character, *see* Interpol Const., art. 3, Interpol does not independently vet the governmental request for a Red Notice for its factual and legal justification. The Red Notice led the FBI to consider Al-Ali a "dangerous [person] overseas" and to view Mohamud's communications with Al-Ali with concern. There was no evidence at trial that Mohamud knew of the Red Notice, which was non-public, or the FBI's interest in Al-Ali.

birth. And when they could not reach Mohamud, they called the FBI and asked an agent to stop their son from leaving the country. Eventually, Mohamud's mother got in touch with her son, scolded him, and brought him home. Mohamud did not actually have a visa or plane ticket, and he returned his passport to his parents. A few days later, Mohamud's father called the FBI agent back and told him that Mohamud had agreed to finish college and would not leave the country until he graduated. He also explained that his son had wanted to go to Yemen to study Arabic and Islam. Mohamud's father forwarded the FBI an email from his son about a school in Yemen, which allowed the FBI to identify Mohamud as the user of the truthbespoken email account.

B. Mohamud Attends College and the FBI Initiates Its Investigation

In September 2009, Mohamud began studying engineering at Oregon State University in Corvallis, where he had a "typical" college experience: he had a roommate, made friends, and attended parties (where he drank alcohol and used marijuana). His activities and religious principles often clashed, and in November 2009 he sought advice from a Muslim website on the difficulties of living a pious life on a college campus.

After the urgent August 31, 2009 call from Mohamud's father, the FBI opened an investigation into Mohamud. Agents conducted physical and electronic surveillance of Mohamud, but did not identify any overtly dangerous communications. The case agent believed that Mohamud's communications lacked "the same radical speak that he had espoused early on when he was communicating with Samir Khan." The agent opined that Mohamud had "left behind his

radical thinking” and was a “pretty manipula[ble], conflicted kid.”

C. The FBI’s First Direct Contacts with Mohamud

In November 2009, a contractor working undercover for the FBI—using the alias “Bill Smith”—emailed Mohamud at his truthbespoken account. Pretending to be an isolated Muslim in eastern Idaho, the contractor asked Mohamud for advice on how to get more involved in “the fight” for the Islamic community, and he stated that he wanted “to help rid the occupiers from [P]alestine.” Although Mohamud gave some general advice to move to a community with more Muslims, take care when talking about such issues online, and look out for “spies,” he never openly encouraged the contractor to commit acts of violence. By May 2010, their email communications had ended.

Mohamud planned to work in Alaska with his college roommate during the summer of 2010. But when his parents brought him to the Portland airport, he was not permitted to fly to Alaska. Instead, FBI agents met with Mohamud and his parents at the airport and questioned them. When asked, Mohamud denied having a ticket or visa to travel to Yemen, or having any interest in jihadi websites. When asked if he knew anyone in Yemen, he said “Amr,” but provided little detail. Mohamud made no mention of his *Jihad Recollections* articles or similar writings. When Mohamud returned home, he drafted a “To do list” which included “Find a job,” “Work till September,” get help from his parents for food and rent, and “you might have to take less classes” at Oregon State.

D. Introduction to FBI Undercover Agent “Youssef”**1. The Initial Email Contacts**

On June 23, 2010, an FBI undercover agent, using the alias “Youssef,” emailed Mohamud at his truthbespoken account and instructed him to set up a new “hushmail” email account that would be secure and encrypted. Mohamud responded later that same day: “assalamu alaykum [God be with you] brother how are you[?]” Two days later, Youssef emailed Mohamud again:

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.

Mohamud responded the same day that he was unable to travel:

i have been betrayed by my family, i was supposed to travel last year but Allah had decreed that i stay here longer than my heart desired. i am trying to find a way to go. i do not think i will be able to go for a while. i need to save up and also clear up somethings [sic]. look for my emails inshallah, i will contact you when i am able to travel. pray for me that allah will free my passage from the lands of the polytheists, peace be upon the

messenger of Allah, his family and his companions.

Three days later, on June 28, 2010, Youssef replied that “Allah (SWT) i’m sure has good reason for you to stay where you are” and asked to meet Mohamud. About two weeks later, when Mohamud had still not responded, Youssef sent a follow-up email. A week later, on July 16, 2010, Mohamud responded and agreed to meet.

Youssef declined Mohamud’s suggestion to meet at the local mosque because he wanted to meet privately and “the kuffar [unbelievers] have eyes and ears in almost all masjids in the US.” Mohamud responded that he would “have a set of questions for you when we meet” to “make [s]ure you are not a spy yourself.” Mohamud also wrote that “amr” (as in Amro Al-Ali) was the only person who could have given Youssef his email address, so he would want to know how Youssef knew Al-Ali as a “precaution.” Youssef praised Mohamud for thinking about security.

2. The First Meeting with Youssef

On July 30, 2010, Youssef met Mohamud for the first time in downtown Portland.⁶ Youssef told Mohamud he was from an “ihataa” (a religious “council”) and was interviewing seven people in the United States and Canada for possible

⁶ Although Youssef was wearing a transmitter and a recording device, the meeting was not recorded because the battery accidentally had been drained. An FBI agent listened to their conversation and summarized it in a report. The agent could not hear the first ten minutes, so he relied on Youssef to tell him what occurred. Every other in-person meeting between Mohamud and undercover agents was recorded and proffered as evidence at trial.

inclusion in a council project.⁷ Youssef asked Mohamud “what he had been doing lately to continue being a good Muslim.” Mohamud said that he had been writing poetry and articles for *Jihad Recollections*. Mohamud asked Youssef how he got his email address, and Youssef explained that the council had forwarded it to him.

When asked about travel, Mohamud described his unsuccessful attempt to go to Alaska. And when asked what he was “willing to do for the cause,” Youssef testified that Mohamud said that “originally he had planned to wage war within the United States,” but then he dreamt that he traveled to Yemen, received training, and “went to Afghanistan where he led an army against the kuffar or the unbelievers.”

Youssef asked Mohamud again what he would do for the cause, and Mohamud responded, “anything.” When offered five ways to be a good Muslim—(1) pray five times a day; (2) go to school to learn something that would help the brothers overseas, such as engineering or medicine; (3) raise money for the brothers; (4) become operational; or (5) become a martyr—Mohamud almost immediately picked “become operational.” Mohamud explained “operational” meant “doing like the other brothers do when they get a car, fill it with explosives, park it near a target location, and detonate the vehicle.” When asked about targets, Mohamud said he had thought about Washington, D.C., because of all the government buildings, but admitted he was not familiar with the area. Youssef told Mohamud to research possible

⁷ The FBI invented this “council” to serve as a fictional intermediary between Al-Ali and Youssef because Youssef would not be able to answer many questions about Al-Ali.

targets in Portland, and that he had a “brother that could help him with explosives.”

About four hours after their meeting, Mohamud sent Youssef an unprompted email with copies of his three articles published in *Jihad Recollections*.⁸ Youssef replied that Mohamud was “talented.”⁹

E. Meeting with “Hussein”

A few weeks later, on August 19, 2010, Youssef met with Mohamud again in downtown Portland and introduced him to “Hussein,” an undercover FBI agent posing as an al-Qaeda explosives expert. Youssef described Mohamud as a “jewel in the rough.” During the meeting, Mohamud told the agents he admired the Mumbai terrorist attack (in which ten men stormed buildings in Mumbai, India, and killed 164 people).

About thirty-four minutes into the meeting, Mohamud told the agents that he wanted to detonate a bomb in Pioneer Courthouse Square during the annual Christmas Tree Lighting Ceremony on November 26, 2010, the day after Thanksgiving. Mohamud explained that he had researched other potential targets, but this was the best option because:

⁸ Mohamud also sent Youssef an article he had recently submitted to *Inspire*, the successor to *Jihad Recollections*, observing that: “Much can be done to hurt the enemy or prepare for Jihad. According to your circumstances you could perform Jihad against the enemy where you are currently living by Mumbai style attacks, but my article is directed towards those brothers waiting to travel to the lands of Jihad rather than touch upon the issue of attacks within the Western nations.”

⁹ The undercover agents frequently flattered and praised Mohamud for his good writing or behavior.

(1) he could drive a car right into the Square from the street; (2) many people would be there; (3) nobody expected an attack in Portland; and (4) security would be light. Mohamud said that he planned on being in the car when it blew up. The agents (who were not familiar with Portland) had no input into Mohamud's chosen target.

Youssef wanted Mohamud to realize the seriousness of what he was saying. Mohamud assured them he did. He said that "since I was fifteen I thought about all this things before," and explained:

[I]magine every day we see you know in Arab, you know, newspapers and news you know our people are killed you know. So for us to see that you know it would be a smile from me to see them in the same. You know, you know what I like, what makes me happy? You know, what I like to see? Is when I see the enemy of Allah then they are you know their bodies are torn everywhere. . . . That gives me you know like high hope and happiness you know.

When Youssef pointed out that there would many women and children at the event, Mohamud responded:

[I]n general just a huge mass that will, you know like for them you know to be attacked in their own element with their families celebrating their holidays. And then for later on to be saying this was done for you to refrain from killing our children, women.

The agents told Mohamud there was “no shame” in not going through with his plan. They reminded him that “[w]ith us you always have a choice.” When asked what he would have done if he had not met the agents, Mohamud said that he had planned to leave the country, “find the right people,” “be somewhere they cannot capture you,” and meet up with Al-Ali. The three then walked to Pioneer Courthouse Square, where Mohamud detailed the proposed attack.

Two days later, Youssef emailed Mohamud that he and Hussein would present Mohamud’s plan to the “council.” He also asked Mohamud to explain his rationale for the attack, as “a bomb is a very serious matter.” Mohamud replied that he had prayed for guidance and that his faith “was sky high for no apparent reason,” which he saw as a sign “that the traffic[] [l]ight is green lol.”

F. Youssef and Hussein Test Mohamud’s Resolve

On September 7, 2010, Youssef and Hussein met again with Mohamud. They convinced Mohamud not to martyr himself (i.e., to detonate the bomb remotely), and offered to help him leave the country after the bombing. They also advised that he did not have to go forward with the plan. The agents showed Mohamud an FBI-produced mock jihadi training video, which included an explosion being triggered by cell phone. Mohamud said the video was “beautiful.”

To test his resolve, the agents gave Mohamud \$2,800 to carry out specific tasks: purchase a list of bomb components, decide where to park the van with the bomb, and rent his own

apartment.¹⁰ On October 3, 2010, they again met with Mohamud and told him to rent a storage unit for the van. Mohamud completed these tasks.

G. The Test Bomb

On November 4, 2010, Mohamud, Youssef, and Hussein drove to the Oregon countryside to explode a test bomb. On the drive, when asked what he wanted to do once he was overseas, Mohamud first said he wanted to learn Arabic, and later that he wanted to learn “the inside and out of weaponry” and “bomb-making.” When asked whether he saw himself teaching, he said he also wanted to teach “special operations,” and specialize in “making the enemies you know afraid.” During this conversation, Mohamud stated that “these people who live in this country are the most evil people on earth.”

Hussein again advised that Mohamud did not have to go through with the bombing. Mohamud ignored him, instead commenting on the irony of the term “Black Friday,” the day after Thanksgiving. When asked if he had told anybody about the plan, Mohamud responded that his image was “just a college student” and “nobody even knows that I have you know, that I’m inclined toward jihad, or even towards even like being Islamic.”

To test the bomb, Mohamud pushed buttons on a cell phone, which appeared to trigger an explosion, though an FBI agent actually detonated the bomb. After the explosion, Mohamud said “God is great” in Arabic, that he felt “good,”

¹⁰ Youssef explained that the FBI did not want Mohamud to have a roommate because it would be easier to maintain surveillance and reduce the chance that Mohamud would take matters into his own hands.

and that the bomb test was “just motivation for me.” When Youssef and Hussein asked if he had ever seen dead bodies, Mohamud responded that he thought it was “awesome” when people were jumping from skyscrapers during the September 11th attacks.

On the ride home, Youssef suggested that Mohamud make a “good-bye” video to explain his actions because it could be “inspirational.”¹¹ Mohamud ultimately agreed and wrote a script for the video using topics Youssef suggested.

Mohamud made the video later that day, and explained that this is a “message . . . to those who have wronged themselves.” He described the “dark day” that was coming, and said that no one would be safe “for as long as you threaten our security.” He said that living in the United States “is a sin,” and urged that Muslim parents living in the West not do what his did to him—that is, not “hold others back from completing their obligation” to Allah. Mohamud finished by reading his own poem that extolled the virtues of Muslims and jihad, and ended with a call to:

Carry on oh brothers, and march on ahead to
meet your creator and lie on silk beds, and the
martyrs don’t die, so don’t say they’re
dead. . . . Explode on these kuffar
[unbelievers]. Alleviate our pain. Assassinate
their leaders, commanders, and chiefs. From
your brother to his brother a poem in brief.

¹¹ On cross-examination, Youssef agreed that he had his “finger on the scale” and was trying to influence Mohamud to make the video, and that Mohamud initially wanted to wait to make the video until he was abroad.

H. The Final Countdown

About a week after the test bomb, Mohamud exchanged emails with a friend in Afghanistan. On November 13, 2010, the friend asked Mohamud to “investigate” predator and reaper strike drones to figure out “how to down them.” On November 17, 2010, Mohamud responded: “[D]on’t worry, brother, I will find you something inshallah. Please do not e-mail this email any longer. If someone replies from now on from this e-mail is not me, Remember that. I hope we meet again soon inshallah.”

On November 18, 2010, an excited Mohamud met with Youssef and Hussein for six hours. They went to the storage unit Mohamud had rented, which he had selected in part because there were no surveillance cameras. The three then drove to a hotel in Portland, where Mohamud showed the agents potential parking spots he had researched on his computer. Next, they walked to Pioneer Courthouse Square to discuss the plan further.

During the November 18th meeting, Youssef asked: “What’s a victory gonna be for you?” Mohamud replied: “Try to get most, the most casualties.” Mohamud thought the bombing would get a lot of publicity because “America’s boasting it so ‘oh we haven’t been attacked since 9/11.’” Hussein asked Mohamud if he had any doubts about the bombing. He did not.

On November 23, 2010, Mohamud and Hussein went to the storage unit to see the bomb parts. Mohamud helped load purported bomb parts into Hussein’s car, including barrels, wires, and nails. Mohamud also provided Hussein with items for their disguises to pose as water workers.

On November 25, 2010, Thanksgiving Day, Mohamud drove to Portland and spent the day with friends. His friends said he seemed “happy,” although at dinner he became “reserved.” They all went shopping at an outlet mall that night.

I. “Black Friday”—November 26, 2010

Early the next morning, on November 26th, Mohamud ran into a friend and told him that “I’m having the greatest morning of my life.” Around noon, Youssef picked up Mohamud and they drove to a store to buy reflective vests as part of their disguises. Then they met up with Hussein in downtown Portland. Mohamud appeared “happy” and “excited.”

The three drove about a mile to the parked van. When shown the “bomb” in the back of the van (which an FBI agent had constructed to look real but which was, in fact, inert), Mohamud said it was “beautiful.” They returned to their hotel, ate, talked, and prayed. Shortly before 5:00 p.m., the three drove to the van. Youssef dropped off Mohamud and Hussein, then drove to a pre-arranged meeting location a few blocks west of Pioneer Courthouse Square.

Hussein and Mohamud drove the van to Pioneer Courthouse Square. Before exiting the van, Hussein told Mohamud to connect the wires for the detonator to work. Mohamud did so, and then they walked several blocks to join Youssef in his car. The three drove toward a train station, dropped off Youssef, and then Hussein and Mohamud parked a few blocks from the station.

Mohamud pulled out the cell phone and Hussein read him the number to dial to detonate the bomb. When Mohamud dialed the number and nothing happened, Hussein suggested that they step out of the car for better reception—the arrest signal. Mohamud was dialing the number into the cell phone a second time when FBI agents arrested them both. Hussein was shouting “Allahu Akbar! [God is great]” as he was being arrested. Mohamud was quiet initially, but during transport he began to kick and had to be restrained. Later, when speaking with the jail’s psychiatric nurse, Mohamud cried and said he could not understand “how he had gotten from just being a student to being labeled a terrorist in jail.”

Agents found an undated email printout from Al-Ali in Mohamud’s wallet. A search of Mohamud’s computer revealed videos of the 2007 and 2008 Portland Christmas Tree Lighting Ceremonies, as well as an al-Qaeda video, an audio file titled “No Peace with the Jews,” and numerous references to the word “jihad.” In a notebook found in his apartment, Mohamud had written: “Non Muslims are the eternal enemies of Islam and they must be subdued and humiliated.” He also described the need to “mistrust” everyone and to act normal “to secure myself from the FBI.”

II. PROCEDURAL HISTORY

A. Indictment and Trial

A one-count indictment charged Mohamud with attempted use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(A). After several years of pretrial litigation and review of immense discovery (including considerable litigation under the Classified Information Procedures Act, 18 U.S.C. app. 3), trial began in January

2013 and lasted thirteen days. Both sides called numerous witnesses, and the cross-examinations were sharp and thorough.

There was no dispute that Mohamud had tried to blow up Pioneer Courthouse Square while it was filled with people. The spirited (and supportable) defense was entrapment—Mohamud, a teenager with no criminal record, had neither the means nor the intent to commit domestic terrorism until he became involved with the undercover FBI contractor (Bill Smith) and FBI agents (Youssef and Hussein). The government countered that Mohamud’s actions before any contact with the FBI—including his *Jihad Recollections* articles—as well as his readiness to commit such a horrific act of violence proved that he had the necessary predisposition to commit the crime. After the close of evidence and argument, the jury returned a guilty verdict, rejecting the entrapment defense.

B. Post-Trial Motions

Mohamud challenged his conviction on numerous grounds. He cited *Sherman v. United States*, 356 U.S. 369 (1958), to argue that the government had entrapped him as a matter of law. Mohamud contended that he had intended to complete college in the United States, and only the FBI’s aggressive and coercive actions had led him down the bombing path. The district court rejected that argument, pointing to evidence that before any contact with the FBI, Mohamud: (1) originally planned to wage war in the United States until a dream refocused him on Yemen; (2) wrote articles for *Jihad Recollections* which advised how best to prepare to carry out “jihad” on non-believers; and (3) had lengthy email conversations with men that the FBI believed

promoted terrorism. The court also highlighted that Mohamud never showed any reluctance (unlike the defendant in *Sherman*), and only thirteen minutes after meeting Youssef in person, he said that he wanted to become “operational” by using a car bomb.

After the verdict (but before sentencing), the government filed a supplemental notice that it had “offered into evidence or otherwise used or disclosed in proceedings, including at trial” information derived from information collected pursuant to § 702 of the Foreign Intelligence Surveillance Act of 1978 (“FISA”), 50 U.S.C. § 1881a (hereinafter referred to as “§ 702”).¹² Mohamud argued that this late notice warranted suppression of this evidence (and any fruits thereof). The government countered that FISA did not provide for suppression in these circumstances, and in any case, there was no substantial prejudice, as the district court could conduct a post-trial suppression analysis. The district court agreed, finding no misconduct in the late disclosure, and that Mohamud had suffered no prejudice from the delayed disclosure.

Mohamud also argued that suppression was warranted because § 702 violates the First and Fourth Amendments, as well as the separation of powers doctrine.¹³ As a threshold

¹² Section 702 was added to by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, and was amended by the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

¹³ Here, Mohamud contended that U.S. Foreign Intelligence Surveillance Court (“FISC”) review of targeting and minimization procedures under § 702 amounts to “providing a non-judicial advisory opinion” and authorizes a rule-making role for judges in violation of the non-delegation doctrine.

matter, the district court first held that § 702 did not “interfere[] with the prerogatives of another branch of government beyond requiring the executive branch to conform to the statute.” It also reasoned that because the FISC either approves or denies the requested acquisition (and electronic communication service providers must follow the directives or challenge them), its opinions are not advisory. The court then explained that Mohamud had not raised an independent First Amendment claim, because motions to suppress based on First Amendment violations are analyzed under the Fourth Amendment.

Finally, the district court held that § 702 does not violate the Fourth Amendment. The court reasoned that § 702 surveillance does not trigger the Fourth Amendment’s warrant requirement because U.S. persons’ data is collected only incidentally, but even if it did, no warrant would be required because the foreign intelligence exception would apply.¹⁴ The court then balanced the government’s interests in the search against the intrusions on Mohamud’s privacy, and held that the § 702 collection here was reasonable under the Fourth Amendment.

C. Sentencing

The Sentencing Guidelines called for a life sentence. The government recommended a sentence of forty years’ imprisonment, whereas Mohamud urged a sentence of ten years’ imprisonment.

¹⁴ The district court further held that subsequent querying of § 702-acquired data, without obtaining an additional search warrant, would also be constitutional, though it was “a very close question.”

During the sentencing hearing, the district court acknowledged that, although the jury had rejected the entrapment defense, Youssef and Hussein “imperfect[ly]” entrapped Mohamud through their frequent praise and religious references, especially considering his youth. But the “horrific” nature of the intended crime, which would have resulted “in a great deal of death and mutilation,” still warranted a sentence of thirty years’ imprisonment.

III. DISCUSSION

A. Standard of Review

We review the district court’s ruling on a motion for acquittal de novo. *See United States v. Sanchez*, 639 F.3d 1201, 1203 (9th Cir. 2011). When a defendant pursues an entrapment defense, we “should not disturb the jury’s finding unless, viewing the evidence in the light most favorable to the government, no reasonable jury could have concluded that the defendant[] [was] predisposed to commit the charged offenses.” *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994). We review the denial of a motion to dismiss based on a violation of constitutional rights de novo. *United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009).

We review de novo the denial of a motion to suppress evidence, but underlying factual findings are reviewed for clear error. *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). We review for an abuse of discretion a district court’s decision whether to use its supervisory powers—in this case, the supervisory power to decide whether to suppress evidence as a sanction for the government’s late supplemental FISA notice. *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011). Discovery

rulings and the denial of an evidentiary hearing are also reviewed for an abuse of discretion. *United States v. Mazzarella*, 784 F.3d 532, 537 (9th Cir. 2015).

We review de novo the constitutionality of a statute. *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010).

B. Entrapment as a Matter of Law

As the district court stated at sentencing, the defense made a solid case for entrapment. But the jury rejected that defense, and found Mohamud guilty despite the actions and encouragement of Youssef and Hussein and the communications (and attempted communications) from other government agents. And in light of that verdict, Mohamud has a steep hill to climb. “To establish entrapment as a matter of law, the defendant must point to undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act by trickery, persuasion, or fraud of a government agent.” *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986); *see also United States v. Williams*, 547 F.3d 1187, 1197 (9th Cir. 2008).

To avoid a finding of entrapment, the government must prove that: (1) Mohamud was predisposed to commit the crime before government agents contacted him, or (2) government agents did not induce him to commit the crime. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995). We focus our inquiry on Mohamud’s predisposition.

When evaluating predisposition, we often analyze five factors: (1) the character and reputation of the defendant;

(2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. *Id.* “Although none of these factors is controlling, the defendant’s reluctance to engage in the criminal activity is the most important.” *Id.*

We can assume that factors (1), (3), and (5) are in Mohamud’s favor. The second factor—whether the government made the initial suggestion of criminal activity—weighs against Mohamud. Although Youssef discussed with Mohamud five options of how to be a good Muslim, including the option to become “operational,” Mohamud—not Youssef—made the initial suggestion to fill a car with explosives near a target location. Mohamud also told Youssef that he wanted to “wage war” within the United States before Youssef mentioned the possibility of an “operational” role. The government can rely upon Mohamud’s statements to prove predisposition even though he made them after the initial contact by the government. *United States v. Tucker*, 133 F.3d 1208, 1217 (9th Cir. 1998).¹⁵ Here, Mohamud discussed placing explosives in vehicles near target locations after the government’s initial

¹⁵ In *Tucker*, a jury convicted the defendant of extortion and filing false tax returns. This court affirmed his conviction and sentence, and rejected his argument that the evidence proved entrapment as a matter of law. This court considered statements made by the defendant even after the initial contact between the defendant and the government, noting that “[t]o prove the defendant’s predisposition, the government can rely upon evidence occurring after the initial contact with a government agent.” *Tucker*, 133 F.3d at 1217.

contact with him but before Youssef suggested criminal activity. The second factor therefore weighs against Mohamud.

The fourth and “most important” factor also weighs overwhelmingly in the government’s favor. The government initiated its contact with Mohamud in November 2009 with the Bill Smith emails, and the more aggressive Youssef and Hussein operation began in June 2010. Despite being provided numerous opportunities to deviate from or terminate the plan, Mohamud never displayed any reluctance in going through with a horrific attack that would have killed and maimed countless people, including young children. Indeed, he expressed great enthusiasm in seeing it through. He picked the target—the Pioneer Courthouse Square Christmas Tree Lighting Ceremony—and planned where the van containing the explosives would be parked. He praised the terror attack in Mumbai, described the victims jumping from the Twin Towers on September 11th as “awesome,” and stated that he would be “happy” to see the bodies of “enemies of Allah” torn apart.

The complete lack of reluctance on Mohamud’s part to participate in the bombing—indeed, his immediate zeal to see it through—separates this case from those in which courts have found defendants entrapped as a matter of law. For example, in *Jacobson v. United States*, 503 U.S. 540, 553 (1992), Jacobson was not predisposed in part because “[t]he evidence that [Jacobson] was ready and willing to commit the offense came only after the Government had devoted 2 ½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law.” In *Sherman*, a government informant approached the defendant, a recovering drug addict, and asked for narcotics, ostensibly

because the informant was not responding to treatment. 356 U.S. at 371. The defendant resisted—“[f]rom the first, [he] tried to avoid the issue.” *Id.* Only “after a number of repetitions of the request, predicated on [the informant’s] presumed suffering, did [the defendant] finally acquiesce.” *Id.*; see also *id.* at 373 (“One request was not enough, for . . . additional ones were necessary to overcome, first, [the defendant’s] refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation.”). And in *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000), the government agent aggressively pushed the idea of sexual activities with children on an uninterested defendant until eventually he gave in:

While Poehlman’s reluctance might have been borne of caution . . . the fact remains that Poehlman’s earliest messages (which would be most indicative of his pre-existing state of mind) provide no support for the government’s case on predisposition. To the contrary, Poehlman’s reluctance forced [the agent] to become more aggressive in her suggestions

Id. at 704; see also *id.* at 695–97. At least as to this factor, this case is more akin to *Williams*, in which we held that the defendant was not entrapped as a matter of law in part because “[t]here is no evidence that [the defendant] expressed any reluctance about the robbery that needed to be ‘overcome by repeated government inducement or persuasion.’ The evidence indicated that [he] was ready and willing at all times to participate in the robbery.” 547 F.3d at 1198 (citation omitted).

Mohamud argues that his actions after the Bill Smith emails are irrelevant for entrapment purposes, as they were tainted by the government’s overwhelming inducement. And with those post-Bill Smith actions set aside, the argument goes, there was insufficient evidence for the jury to conclude that he had the necessary predisposition to commit this crime. This is wrong for two reasons.

First, although “only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition,” statements made after the inducement which make “clear that [Mohamud] would have committed the offense even without the inducement” are evidence of predisposition. *Poehlman*, 217 F.3d at 704–05. This would include Mohamud’s statements that he made about the “awesome” terrorist attacks in Mumbai and on September 11th, and that he had been thinking about these “things” since he was fifteen years old. And a reasonable jury could infer that his decisions to become “operational” and blow something up the first time he met Youssef (and later, to choose Pioneer Courthouse Square at its most crowded time) were evidence that his predisposition existed long before FBI contractor Bill Smith emailed him.

Second, even if there were a rigid wall between pre- and post-inducement, there was sufficient evidence for a reasonable jury to reject the entrapment defense. Mohamud’s *Jihad Recollections* articles—both the draft and final versions—provided ample evidence of his predisposition to carry out the charged crime. In those articles, he, among other things, coached people on how to prepare themselves physically to attack and kill their Western enemies, and saluted those in Afghanistan who “finish[ed] off” wounded American soldiers. Although these articles may come across

as a teenager trying to talk tough, they were enough to support the jury’s finding, and for us to conclude that Mohamud was not the “otherwise innocent person” that the entrapment-as-a-matter-of-law doctrine requires. *Smith*, 802 F.2d at 1124; *cf. United States v. Cromitie*, 727 F.3d 194, 207–08 (2d Cir. 2013) (holding that the defendant in a similar case was not entrapped as a matter of law, and observing that “potential terrorists who are available to be recruited by Al Qaeda or similar groups” may not have necessarily already formed a specific plan, but “[t]heir predisposition is to have a state of mind that inclines them to inflict harm on the United States, be willing to die like a martyr, be receptive to a recruiter’s presentation, . . . and welcome an invitation to participate”).

In addition, the jury learned of Mohamud’s correspondence with Al-Ali, which began months before the first contact from Bill Smith. The jury also learned of Mohamud’s desire to go abroad and study at the Islamic school in Yemen that Al-Ali recommended to him. A government expert testified that this school was founded by a Muslim cleric who supported jihad and that it served as a “stepping stone” to violent jihad, especially for people from the West. As detailed above, the same day that Al-Ali told Mohamud about the school in Yemen, Mohamud apparently made plans to leave the United States. Though Mohamud ultimately remained in the country, the jury could have reasonably interpreted his attempt as evidence of a predisposition to commit the crime charged. Further, Mohamud continued to demonstrate interest in attending the school in his December 2009 emails to Al-Ali, which occurred after the Bill Smith emails.

In sum, viewing the evidence in the light most favorable to the government, we cannot say that “no reasonable jury could have concluded that [Mohamud was] predisposed to commit the charged offense[.]” *Davis*, 36 F.3d at 1430. We therefore conclude that the district court properly rejected his defense of entrapment as a matter of law.

Mohamud’s alternative argument that we should dismiss this case because the government overreached in its “sting” and violated due process also fails. While the government’s conduct in this case was quite aggressive at times, it fell short of a due process violation.

In *United States v. Black*, we made clear that “[d]ismissing an indictment for outrageous government conduct . . . is limited to extreme cases in which the defendant can demonstrate that the government’s conduct violates fundamental fairness and is so grossly shocking and so outrageous as to violate the universal sense of justice.” 733 F.3d 294, 302 (9th Cir. 2013) (citation and internal quotation marks omitted). This is an “extremely high standard.” *Id.*; see also *United States v. Pedrin*, 797 F.3d 792, 797 (9th Cir. 2015) (“[I]n assessing whether the government’s conduct was ‘outrageous,’ the relevant question is what the government knew when it was setting up the sting, not what it learned later.”). For example, we have denied challenges to sting operations involving armed robberies of phony drug stash houses which necessarily put law enforcement and the defendant in grave peril. See *Black*, 733 F.3d at 302; *Williams*, 547 F.3d at 1200–01. Mohamud argues that the six factors for evaluating outrageous

government conduct set out in *Black* favor dismissal of the indictment.¹⁶ We disagree.

In *Cromitie*, a comparable Second Circuit case, the defendant was convicted of planning and attempting to carry out domestic terrorism offenses. 727 F.3d at 199–204. The defendant claimed that the government’s conduct in persuading him to commit the charged offenses violated due process. *Id.* at 217. The Second Circuit held that it did not. Even though the government “invented all of the details of the scheme,” the defendant’s express desire to “do something to America” and “die like a martyr” was sufficient to justify the government’s testing of how far he would go. *Id.* at 219. Like Mohamud, *Cromitie* argued that the government took advantage of his religious affiliation, but the court explained that a government agent “is entitled to probe the attitudes” of an individual who “volunteers that he wants to ‘do something to America’ . . . to learn whether his religious views have impelled him toward the violent brand of radical Islam that poses a dire threat to the United States.” *Id.* at 219–20.

¹⁶ These factors are analyzed collectively in determining whether government conduct is outrageous: “(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; (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.” *Black*, 733 F.3d at 303. The first three are relevant to how the government set up the sting, the fourth and fifth analyze the government’s role in the sting, and the last relates to the justification for the operation. *Id.* at 303–04.

Cromitie further claimed that the government had violated due process because a government informant had exploited his relationship with Cromitie to “manipulate Cromitie into agreeing to the planned attacks”; the court cited our precedent indicating that “the ‘illusory cultivation of emotional intimacy’ does not exceed due process limits.” *Id.* at 220 (quoting *United States v. Simpson*, 813 F.2d 1462, 1467 (9th Cir. 1987)). Even considering certain monetary benefits offered by the government informant—including \$250,000 cash, a barbershop valued at \$70,000, a new BMW, and a two-week vacation—the court held that the overall operation did not rise to the level of a due process violation. *Id.* Although Mohamud may have been more vulnerable than Cromitie, the government’s questionable actions in that case far exceeded anything here.

In light of the extremely high standard set out in *Black*, we hold that the government’s conduct here did not violate due process.

C. Late Notice Of § 702-Derived Evidence

FISA requires the government to “notify the aggrieved person and the court” prior to trial when it intends to use at trial evidence “obtained or derived from electronic surveillance” pursuant to FISA. 50 U.S.C. § 1806(c); *see also* 50 U.S.C. § 1881e(a) (stating that information acquired under § 702 is subject to the notice requirement in § 1806(c)). The government provided a supplemental notice regarding evidence derived under § 702 after the trial concluded. Mohamud argues that this late disclosure mandates suppression, or at a minimum, discovery and an evidentiary hearing to explore the tardy disclosure.

In answering this question, we must keep two principles in mind. First, “[s]uppression of evidence . . . has always been our last resort, not our first impulse.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *see also Davis v. United States*, 564 U.S. 229, 237 (2011) (“For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006) (“[T]he exclusionary rule is not a remedy we apply lightly.”). Second, Congress has the power to authorize suppression for statutory violations, as it has done elsewhere in FISA. *See* 50 U.S.C. §§ 1806(g), 1825(h), 1845(g) (FISA); *see also* 18 U.S.C. § 2518(10)(a) (Title III wiretap). However, Congress has not mandated suppression as a remedy for late disclosure of a FISA notice, and, indeed, it apparently anticipated the possibility of post-trial notification. *See* 50 U.S.C. § 1806(e) (providing that a motion to suppress “unlawfully acquired” or nonconforming information “shall be made before the trial . . . unless . . . the person was not aware of the grounds of the motion”). These two principles strongly suggest that automatic suppression is not a required remedy for delayed FISA disclosure.

And in any case, Mohamud cannot demonstrate how the late disclosure prejudiced him. As the district court explained, it fully evaluated the § 702-derived evidence as if the motion had been brought before trial. This put Mohamud in the same position he would have been in if the government had provided timely notice.

Moreover, the district court found that the late disclosure was not due to “prosecutorial misconduct.” Rather, the government had changed its legal opinion about when evidence could be considered “derived from” § 702 surveillance, performed another review of this case, and

provided the late supplemental notice on its own initiative. Our review of the unclassified and classified record supports that the district court did not clearly err in finding no prosecutorial misconduct.¹⁷

As the district court recognized, it had the power to suppress evidence, or even dismiss the indictment or grant a new trial, under its supervisory and statutory authority. *See Stinson*, 647 F.3d at 1210 (stating that a court may exercise its supervisory powers “to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal conduct” (citation omitted)); *see also* Fed. R. Crim. P. 16(d)(2). However, the district court determined that suppression as a sanction for the late supplemental FISA notice was not warranted here, and we agree.

We conclude that, under the circumstances of this case, the district court did not err in denying Mohamud’s motion to suppress premised on the late supplemental FISA notice.¹⁸

¹⁷ We do not reach whether suppression is necessary as a deterrent in light of the government’s apparent self-correction of its practices. *See United States v. Dreyer*, 804 F.3d 1266, 1280 (9th Cir. 2015) (en banc).

¹⁸ We also conclude that the district court did not abuse its discretion in denying discovery and an evidentiary hearing to explore the government’s late disclosure. Mohamud’s reliance on *United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013), is misplaced because the record here does not “suggest[] that the government may have deliberately withheld” the supplemental FISA notice. Therefore, we decline Mohamud’s alternative request to remand for further fact finding.

D. Section 702 Collection of Mohamud's Email Communications

1. Legal Background

In 1978, Congress enacted FISA “to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (citing 50 U.S.C. § 1801 *et seq.*). To do so, the government must obtain a FISA warrant from the FISC. *Id.* The FISA Court of Review assesses any denials by the FISC of applications for electronic surveillance. *Id.*

Thirty years later, Congress enacted § 702 as part of the FISA Amendments Act of 2008. 50 U.S.C. § 1881a. Section 702 “supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISC’s authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad.” *Clapper*, 133 S. Ct. at 1144. “Unlike traditional FISA surveillance, § [702] does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power.” *Id.* “And, unlike traditional FISA, § [702] does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.” *Id.* Instead, § 702 mandates that the government obtain the FISC’s “approval of ‘targeting’ procedures, ‘minimization’ procedures, and a governmental certification regarding proposed surveillance.” *Id.* at 1145 (quoting 50 U.S.C. § 1881a(a), (c)(1), (i)(2), (i)(3)).

2. No Fourth Amendment Violation

Although § 702 potentially raises complex statutory and constitutional issues, this case does not. As explained below, the initial collection of Mohamud’s email communications did not involve so-called “upstreaming” or targeting of Mohamud under § 702, more controversial methods of collecting information.¹⁹ It also did not involve the retention and querying of incidentally collected communications. All this case involved was the targeting of a foreign national under § 702, through which Mohamud’s email communications were incidentally collected. Confined to the particular facts of this case, we hold that the § 702 acquisition of Mohamud’s email communications did not violate the Fourth Amendment.²⁰

At our request post-argument, the government declassified certain facts about Mohamud’s surveillance. Through the monitoring of a foreign national’s email account,

¹⁹ Under “upstream” collection, entire streams of Internet traffic flowing across major U.S. networks are acquired and searched, as opposed to “PRISM” collection, under which particular user accounts are monitored, and communications to or from those accounts are collected, including communications with U.S. persons. *See, e.g., Privacy & Civil Liberties Oversight Board (“PCLOB”), Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), at 7 (hereinafter “PCLOB Report”); *see also id.* at 33–41 (comparing PRISM and upstream collection).

²⁰ In light of our holding, we do not reach the question of whether the good faith exception to the exclusionary rule provides an independent basis to affirm the district court’s denial of Mohamud’s motion to suppress. *See generally Davis*, 564 U.S. at 240–42; *Illinois v. Krull*, 480 U.S. 340, 349–55 (1987); *United States v. Leon*, 468 U.S. 897, 925 (1984).

the United States government learned that Mohamud was in contact with that foreign national, who was located overseas. This contact—a limited number of emails between Mohamud and the foreign national—was used to obtain a FISA warrant to surveil Mohamud and his activities. None of these emails was introduced at trial.²¹ We permitted the parties to file supplemental briefs to address the facts offered in the post-argument disclosure.

**a. No Warrant Required to Intercept
Overseas Foreign National’s
Communications or to Intercept U.S.
Person’s Communications Incidentally**

As a threshold matter, “the Fourth Amendment does not apply to searches and seizures by the United States against a non-resident alien in a foreign country.” *United States v.*

²¹ We address only Mohamud’s as-applied challenge. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”). Though he also purports to challenge § 702 facially, citing *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015), Mohamud does not explain why techniques not employed in this case would require suppression of the evidence gathered here. We do not read *Patel* to permit courts, in a criminal prosecution, to suppress evidence based on a Fourth Amendment challenge to techniques not employed in a particular case. *See, e.g., United States v. Posey*, 864 F.2d 1487, 1491 (9th Cir. 1989) (“[W]e think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance *against him* violated the Fourth Amendment. . . . Even if he is correct that the FISA’s language might be applied in ways that violate the Fourth Amendment, he must show that the particular search in his case violated the Fourth Amendment. Appellant cannot invalidate his own conviction on the argument that others’ rights are threatened by FISA.” (emphasis in original)).

Zakharov, 468 F.3d 1171, 1179 (9th Cir. 2006) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990)); see also *Verdugo-Urquidez*, 494 U.S. at 274–75 (“At the time of the search, [respondent] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”). Thus, the government’s monitoring of the overseas foreign national’s email fell outside the Fourth Amendment.

Mohamud argues that under *Verdugo-Urquidez*, the location of the search matters, and that here, the searches took place in the United States.²² Indeed, the government acknowledges that “collection from service providers under Section 702 takes place within the United States.” Yet, as one court put it, “what matters here is the location of the target,” and not where the government literally obtained the electronic data. *United States v. Hasbajrami*, No. 11-CR-623, 2016 WL 1029500, at *9 n.15 (E.D.N.Y. Mar. 8, 2016) (emphasis in original); see also Kris & Wilson, *National Security Investigations & Prosecutions* § 17:3 (2016) (“For non-U.S. person targets, there is no probable-cause requirement; the only thing that matters is [] the government’s reasonable belief about[] the target’s location.”).

Consistent with *Verdugo-Urquidez* and our precedent, we hold that this particular type of non-upstream collection—

²² Mohamud also argues that the targeted foreign national may have had sufficient “voluntary connection[s]” to the United States for the Fourth Amendment to apply. See *Verdugo-Urquidez*, 494 U.S. at 271, 273. We have reviewed the classified record, and are satisfied that is not the case here.

where a search was not directed at a U.S. person's communications, though some were incidentally swept up in it—does not require a warrant, because the search was targeted at a non-U.S. person with no Fourth Amendment right.

The FISA Review Court in *In re Directives Pursuant to Section 105B of FISA*, similarly applied this principle, holding that “incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful.” 551 F.3d 1004, 1015 (FISA Ct. Rev. 2008); *see also United States v. Donovan*, 429 U.S. 413, 436 n.24 (1977) (holding that a Title III wiretap warrant is not made unconstitutional by “failure to identify every individual who could be expected to be overheard,” but “the complete absence of prior judicial authorization would make an intercept unlawful”); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 280 (S.D.N.Y. 2000) (explaining that “in the Title III context, incidental interception of a person's conversations during an otherwise lawful surveillance” does not violate the Fourth Amendment).

Mohamud and Amici²³ urge us not to apply this “incidental overhear” approach. First, Amici contend that surveillance of U.S. persons' communications under § 702 is not “incidental” because the monitoring of communications between foreign targets and U.S. persons was specifically contemplated and to some degree desired. We agree that such communications were anticipated. As the Privacy and Civil Liberties Oversight Board found with respect to PRISM collection, “[t]he collection of communications to and from

²³ Amici are the American Civil Liberties Union, American Civil Liberties Union of Oregon, and the Electronic Frontier Foundation.

a target inevitably returns communications in which non-targets are on the other end, some of whom will be U.S. persons. Such ‘incidental’ collection of communications is not accidental, nor is it inadvertent.” PCLOB Report at 82; *see also* Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol’y 117, 159–64, 259–62 (2015) (discussing the relative volume and intrusiveness of surveillance authorized under § 702). The fact that the government knew some U.S. persons’ communications would be swept up during foreign intelligence gathering does not make such collection any more unlawful in this context than in the Title III or traditional FISA context.

Mohamud and Amici also contend that the “sheer amount of ‘incidental’ collection” separates § 702 from prior cases where courts have found such collection permissible. We agree with the district court’s observation that the most troubling aspect of this “incidental” collection is not whether such collection was anticipated, but rather its volume, which is vast, not *de minimis*. *See* PCLOB Report at 114 (“The term ‘incidental’ is appropriate because such collection is not accidental or inadvertent, but rather is an anticipated collateral result of monitoring an overseas target. But the term should not be understood to suggest that such collection is infrequent or that it is an inconsequential part of the Section 702 program.”). This quantity distinguishes § 702 collection from Title III and traditional FISA interceptions. However, the mere fact that more communications are being collected incidentally does not make it unconstitutional to apply the same approach to § 702 collection, though it does

increase the importance of minimization procedures once the communications are collected.²⁴

Additionally, Mohamud and Amici contend that prior cases upholding incidental collection involved prior judicial review or a “narrowly drawn exception to the warrant requirement,” as opposed to the collection here. *See, e.g., United States v. Kahn*, 415 U.S. 143, 156–57 (1974) (upholding interception of communications of a woman that were incidentally collected under a wiretap order targeting her husband); *United States v. Figueroa*, 757 F.2d 466, 473–75 (2d Cir. 1985) (holding that wiretap order was not made unconstitutional by permitting interception of conversations of “others as yet unknown”); *see also United States v. Martin*, 599 F.2d 880, 884–85 (9th Cir. 1979) (holding that the Fourth Amendment does not require wiretap application to show probable cause that non-targeted individual named as a “probable converser” committed a crime), *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984) (en banc). However, the searches in those cases targeted United States citizens and took place within the United States, so a warrant was required for the initial search to be constitutionally permissible. But “the guiding principle behind them applies with equal force here: when surveillance is lawful in the first place—whether it is the domestic surveillance of U.S. persons pursuant to a warrant, or the warrantless surveillance of non-U.S. persons who are abroad—the incidental interception of non-targeted U.S. persons’ communications with the targeted persons is also lawful.” *Hasbajrami*, 2016 WL 1029500, at *9.

²⁴ To the extent that Amici argue that the incidental overhear doctrine permits the unconstitutional and widespread retention and querying of the incidentally collected information, that issue is not before us.

For these reasons, and because the target of the surveillance was a non-U.S. person located outside of the United States at the time of the surveillance, the government was not required to obtain a search warrant to collect Mohamud's email communications with the overseas foreign national as an incident to its lawful search of the foreign national's email.²⁵

b. Collection of Mohamud's Emails was Reasonable

Assuming that Mohamud had a Fourth Amendment right in the incidentally collected communications, the search at issue was reasonable under the Fourth Amendment.²⁶

"Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution." *Maryland v. King*, 133 S.

²⁵ Because the incidental collection excepts this search from the Fourth Amendment's warrant requirement, we need not address any "foreign intelligence exception."

²⁶ It is unclear whether Mohamud had a right to bar use of these incidentally-collected communications in evidence against him on the basis that the communications were seized in violation of the Fourth Amendment. Commentators suggest that he does, so we will assume that here. See, e.g., Orin S. Kerr, *The Fourth Amendment and the Global Internet*, 67 Stan. L. Rev. 285, 313–14 (2015) ("Communicating with a person who lacks Fourth Amendment rights should not waive the rights of the person who has those rights. The Fourth Amendment should continue to fully protect the U.S. person who communicates with those lacking Fourth Amendment rights."); PCLOB Report at 94 ("The government has acknowledged that the Fourth Amendment rights of U.S. persons are affected when their communications are acquired under Section 702 incidentally or otherwise[.]").

Ct. 1958, 1970 (2013). In deciding reasonableness, we examine the totality of the circumstances and weigh “‘the promotion of legitimate governmental interests’ against ‘the degree to which [the search] intrudes upon an individual’s privacy.’” *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). We agree with the district court that under these circumstances, the search was reasonable under the Fourth Amendment.

i. Government Interest

“[T]he Government’s interest in combating terrorism is an urgent objective of the highest order.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Neither Mohamud nor Amici challenge this. Instead, they argue that (1) the statutory definition of “foreign intelligence information” in § 702 is overbroad because it is not confined to national security information but also includes “the conduct of [] foreign affairs”²⁷; and (2) even if national security justifies the initial acquisition, it is unreasonable to then retain and later search U.S. persons’ § 702-acquired communications without a warrant.

The declassified facts foreclose both arguments. First, as the district court observed, “the discovery in this case all concerned protecting the country from a terrorist threat and did not stray into the broader category of the conduct of foreign affairs.” Thus, we need not determine whether the collection of foreign affairs communications is reasonable. Similarly, the second argument is also outside the scope of our review, as no such retention and querying is at issue in this case.

²⁷ See 50 U.S.C. §§ 1801(e)(2)(b), 1881(a).

ii. Mohamud's Privacy Interest

The parties agree that Mohamud had some expectation of privacy in his electronic communications, but disagree as to the strength of his interest. The government argues that U.S. persons have a limited expectation of privacy when communicating electronically with non-U.S. persons located outside the United States because of the Fourth Amendment's "third-party" doctrine—that a person's privacy interest is diminished where he or she reveals information to a third party, even in confidence. Mohamud contends that the voluntary disclosure of information to third parties does not reduce the expectation of privacy. The district court determined that under the third-party doctrine, Mohamud had a reduced expectation of privacy in his communications to third parties. We agree.

With respect to a U.S. person's privacy interest, we treat emails as letters. *See, e.g., [Redacted]*, 2011 WL 10945618, at *26 (FISA Ct. Oct. 3, 2011) ("Whether they are transmitted by letter, telephone or e-mail, a person's private communications are akin to personal papers."); *United States v. Warshak*, 631 F.3d 266, 285–86 (6th Cir. 2010) ("Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection."). Accordingly, until electronic communications reach the recipient, they retain the same level of privacy interest as if they were still in the home. *See, e.g., United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970).

But as with letters, "[a] person's reasonable expectation of privacy may be diminished in 'transmissions over the Internet or e-mail that have already arrived at the recipient.'"

United States v. Heckenkamp, 482 F.3d 1142, 1146 (9th Cir. 2007) (quoting *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (citing *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001))); *see also Guest*, 255 F.3d at 333 (“[Users] would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient; at this moment, the e-mailer would be analogous to a letter-writer, whose ‘expectation of privacy ordinarily terminates upon delivery’ of the letter.” (citation omitted)).

It is true that prior case law contemplates a diminished expectation of privacy due to the risk that the recipient will reveal the communication, not that the government will be monitoring the communication unbeknownst to the third party. *See, e.g., United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. White*, 401 U.S. 745, 752 (1971); *Hoffa v. United States*, 385 U.S. 293, 302 (1966). While these cases do not address the question of government interception, the communications at issue here had been sent to a third party, which reduces Mohamud’s privacy interest at least somewhat, if perhaps not as much as if the foreign national had turned them over to the government voluntarily. *See also Hasbajrami*, 2016 WL 1029500 at *11 & n.18 (observing same distinction).

Thus, Mohamud’s interest in the privacy of his communications received by the overseas foreign national is diminished.

iii. Privacy Protecting Measures

An important component of the reasonableness inquiry is whether the FISC-approved targeting and minimization measures sufficiently protect the privacy interests of U.S.

persons. Targeting and minimization procedures govern, respectively, who may be targeted for surveillance and how intercepted communications are to be retained and disseminated.

In brief, targeting procedures must be “reasonably designed” to “ensure that any acquisition authorized under [the certification] is limited to targeting persons reasonably believed to be located outside the United States” and to “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.” 50 U.S.C. § 1881a(d)(1). Among other requirements, minimization procedures must be “reasonably designed” “to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.” 50 U.S.C. §§ 1801(h)(1), 1881a(e)(1).

After evaluating the protections detailed in § 702 and the classified minimization procedures, the district court concluded that as applied to Mohamud, § 702 is reasonable under the Fourth Amendment. Based on our review of the classified record, we agree that the applicable targeting and minimization procedures, which were followed in practice, sufficiently protected Mohamud’s privacy interest.

The government also contends that certain oversight procedures provide an important check on Executive Branch actions. For example, § 702 requires the Attorney General (“AG”) and Director of National Intelligence (“DNI”) to certify, among other things, that (1) a significant purpose of

the acquisition is to obtain foreign intelligence information, (2) they have adopted guidelines to ensure compliance with the statutory limitations in § 702(b), and (3) the targeting and minimization procedures and guidelines are consistent with the Fourth Amendment. 50 U.S.C § 1881a(g)(2)(A); *see also id.* § 1881a(g)(1)(B) (providing that if the AG and DNI determine that “time does not permit the submission of a certification under this subsection prior to the implementation of an authorization under subsection (a)” they shall submit the certification “as soon as practicable but in no event later than 7 days after such determination is made”). Further, the AG and DNI must periodically assess whether the government is complying with FISC-approved targeting and minimization procedures and guidelines, which adds further oversight and privacy protections. *See* 50 U.S.C. § 1881a(i).

While Executive Branch certification contributes some degree of further protection, it does not weigh heavily. Typically in the Fourth Amendment context, review from a neutral magistrate is considered the appropriate check on the Executive, which otherwise may be motivated by its interest in carrying out its duties. *See, e.g., Leon*, 468 U.S. at 913–14 (explaining that in obtaining a search warrant, a neutral magistrate is “a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime’” (citation omitted)). Under these circumstances, where the only judicial review comes in the form of the FISC reviewing the adequacy of procedures, this type of internal oversight does not provide a robust safeguard. The government notes that in *In re Sealed Case*, 310 F.3d 717, 739 (FISA Ct. Rev. 2002), the FISA Review Court observed that Congress recognized that certification by the AG in the traditional FISA context would “‘assure [] written

accountability within the Executive Branch’ and provide ‘an internal check on Executive Branch arbitrariness.’” (citation omitted). However, as described above, § 702 differs in important ways from traditional FISA, and a mechanism that might provide additional protections above and beyond those already employed in a traditional FISA context provides far less assurance and accountability in the § 702 context, which lacks those baseline protections. *See also Clapper*, 133 S. Ct. at 1144–45.

Accordingly, although we do not place great weight on the oversight procedures, under the totality of the circumstances, we conclude that the applied targeting and minimization procedures adequately protected Mohamud’s diminished privacy interest, in light of the government’s compelling interest in national security.

In sum, even assuming Mohamud had a Fourth Amendment right in the incidentally collected communications, the search was reasonable. Thus, we hold that the application of § 702 did not violate the Fourth Amendment under the particular facts of this case.²⁸

²⁸ We also agree with the district court that the FISC survives separation of powers and non-delegation challenges, as FISC review of § 702 surveillance applications does not “interfere[] with the prerogatives of another branch of government beyond requiring the executive branch to conform to the statute,” and is “central to the mission of the judiciary” as it is similar to “the review of search warrants and wiretap applications.” *See Mistretta v. United States*, 488 U.S. 361, 388 (1989). Further, we agree with the district court that FISC opinions are not advisory because the FISC either approves or denies the requested acquisition (and electronic communication service providers must follow the directives or challenge them). *See* 50 U.S.C. § 1881a(h), (i)(2). Finally, the district court correctly rejected Mohamud’s First Amendment challenge, as motions to suppress based on First Amendment violations are analyzed

IV. CONCLUSION

Many young people think and say alarming things that they later disavow, and we will never know if Mohamud—a young man with promise—would have carried out a mass attack absent the FBI’s involvement. But some “promising” young people—Charles Whitman, Timothy McVeigh, and James Holmes, to name a few from a tragically long list—take the next step, leading to horrific consequences. While technology makes it easier to capture the thoughts of these individuals, it also makes it easier for them to commit terrible crimes. Here, the evidence supported the jury’s verdict, and the government’s surveillance, investigation, and prosecution of Mohamud were consistent with constitutional and statutory requirements.

AFFIRMED.

under the Fourth Amendment. *See, e.g., United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007) (where a party alleges that a criminal investigation violated the First Amendment rights of a third party, “we have held that the *Fourth Amendment* provides the relevant benchmark” (emphasis in original)); *United States v. Aguilar*, 883 F.2d 662, 697 (9th Cir. 1989).

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 05 2016

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant-Appellant.

No. 14-30217

D.C. No. 3:10-cr-00475-KI-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted July 6, 2016
Portland, Oregon

Before: PREGERSON, BEA, and OWENS, Circuit Judges.

Mohamed Osman Mohamud appeals from his jury conviction and thirty-year sentence for attempted use of a weapon of mass destruction within the United States, in violation of 18 U.S.C. § 2332a(a)(2)(A). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

§ 1291, and we affirm.¹

1. Mohamud challenges the government’s closing argument. Specifically, Mohamud contends that the government treated the entrapment defense as categorically unavailable by arguing that, based on the jury’s own “common sense,” an individual could not be entrapped to commit the charged offense. There was nothing improper about the government arguing that entrapment was unsupported by the facts because common sense suggested that someone could not be induced to commit a crime of this magnitude. The government did not imply that entrapment was unavailable as a matter of law.

Mohamud also contends that the government misstated the law, and diluted its burden of proof, by implying that predisposition to commit “similar acts” sufficed to prove predisposition to commit the charged offense. Although “evidence that merely indicates a generic inclination to act within a broad range . . . is of little probative value in establishing predisposition,” *Jacobson v. United States*, 503 U.S. 540, 550 (1992), evidence of prior similar acts may be relevant to show predisposition. *See United States v. Williams*, 547 F.3d 1187, 1198 (9th Cir. 2008) (holding that the defendant was not entrapped as a matter of law into dealing

¹ A concurrently filed opinion, *United States v. Mohamud*, __ F.3d __ (9th Cir. 2016), addresses Mohamud’s other arguments.

cocaine in part because his prior bank robbery and illegal gun sales “suggest[ed] that he was predisposed to this type of criminal activity”). Therefore, it was not improper for the government to argue that the jury could consider evidence of Mohamud’s willingness to commit prior similar acts.

2. Contrary to Mohamud’s contention, the district court provided adequate jury instructions. The instructions were consistent with case law and sufficiently encompassed the defense’s theory of the case. *See United States v. Whittemore*, 776 F.3d 1074, 1078, 1080 (9th Cir. 2015) (Although “[a] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence,” he is “not entitled to the instructions of his choice.” (citation omitted)). The district court also did not err in its response to a jury question about the entrapment instruction. *See United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004) (setting forth standard of review). The response instructed the jury to consider “all” the evidence, and did not unfairly favor the prosecution’s evidence over the defense’s evidence.

3. Mohamud challenges the withholding and handling of classified materials under the Classified Information Procedures Act (“CIPA”), 18 U.S.C. app. 3. After reviewing the classified record, we are not persuaded by Mohamud’s arguments regarding the classified materials.

The district court acted within its discretion in excluding information about the true identities of FBI undercover agents “Youssef” and “Hussein” and FBI undercover contractor “Bill Smith.” *See United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995) (explaining that a court “must weigh the defendants’ rights to confront the government’s witnesses against the government’s interest in not compromising investigations and in protecting the informant’s identity” (citing *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957))). The district court also acted within its discretion in declining to make “Bill Smith” available as a witness at trial. *See id.*

In addition, the challenged substitution adequately satisfied CIPA’s requirement that the summary “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” 18 U.S.C. app. 3, § 6(c)(1); *see also id.* § 4. The classified record does not support that the government “selectively declassified” materials, thereby gaining an unfair advantage at trial. The classified record also does not support that discoverable information which was “relevant and helpful” to the defense was withheld, including information regarding Amro Al-Ali. *United States v. Sedaghaty*, 728 F.3d 885, 904 (9th Cir. 2013) (quoting *Roviaro*, 353 U.S. at 60-61).

Further, the district court did not abuse its discretion by using ex parte proceedings for classified materials and denying Mohamud's security-cleared counsel access to classified materials and proceedings. *See id.* at 908-09 (rejecting the defendant's challenge to ex parte CIPA procedures and stating that "the simple fact that defense counsel held security clearances does not mean that the attorneys were entitled to access the government's classified filings").

4. Mohamud challenges a number of the district court's evidentiary rulings. Although the district court likely did make several erroneous evidentiary rulings, any error was cumulatively harmless.

First, Mohamud contends that the district court erred in admitting an Interpol "Red Notice" seeking the arrest of Amro Al-Ali. *See* Gov't Exhibit 80. He similarly argues that it was error to admit various FBI agents' testimony explaining how their knowledge of the Red Notice and Al-Ali's status affected their targeting and investigation of Mohamud. Generally, evidence of agents' motivations or justifications for an investigation are irrelevant, even where entrapment is at issue. *See United States v. Makhlouta*, 790 F.2d 1400, 1402 (9th Cir. 1986) (explaining that under the entrapment standard, "it is not the state of mind of the government agent that is important; . . . it is the predisposition of the defendant . . . that counts" (first alteration in original) (citation and internal quotation marks omitted)); *see*

also *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992) (out-of-court statements which were probative of why officer took certain actions were inadmissible because they did “not bear on any issue involving the elements of the charged offense”). However, as the defense argued that the government targeted Mohamud because he was young and vulnerable, evidence that the government instead investigated him because of his communications with a “known terrorist” was relevant under Federal Rule of Evidence 401.² Nonetheless, only the testimony of the agents who actually directed the investigation was relevant to rebut Mohamud’s “targeting” arguments; the comparable testimony of the undercover agents was not relevant, nor was the Red Notice itself.³ Further, in several instances the government used this evidence for the truth of the matter asserted, rather than its effect on the agents.

Second, Mohamud argues that the district court erroneously restricted his cross-examination of the FBI agents’ bias and motivation by treating inadvertently recorded government agent “outtakes” as prior inconsistent statements under

² “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

³ Because the Red Notice was admitted for a non-hearsay use, it did not violate Mohamud’s right to confrontation. *See United States v. Wahchumwah*, 710 F.3d 862, 871 (9th Cir. 2012).

Federal Rule of Evidence 613. It is not clear that the court abused its discretion in so ruling, no error was by itself prejudicial, and any such errors were not cumulatively prejudicial. Mohamud was permitted to question the agents about the statements, and the only evidence excluded was the agents' tone of voice on the recording.

Third, Mohamud contends that the district court erred in permitting government witnesses to testify about what they believed Mohamud "meant" or was "thinking" in some of his recorded statements. We agree that the witnesses' speculation as to what Mohamud "meant" was not relevant under Rule 401.

Finally, Mohamud argues that the district court erred in excluding certain of his contemporaneous communications that reflected a lack of predisposition to commit the crime charged.⁴ Such statements were admissible under Federal Rule of Evidence 803(3) as indicative of Mohamud's then-existing state of mind, and it was likely error to exclude them. The government's cited authority is not to the contrary. *Cf. United States v. Sayakhom*, 186 F.3d 928, 937 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999) (holding that the defendant's statements were not admissible because they were statements of belief to prove the fact believed, which

⁴ Mohamud was permitted to introduce some evidence of his contemporaneous state of mind, but some statements were excluded.

are inadmissible under the terms of Rule 803(3)).

With respect to cumulative error, “[t]here are some cases where the cumulative effect of multiple errors may so prejudice a defendant as to require reversal, even though no single trial error examined in isolation is sufficiently prejudicial to warrant reversal.” *United States v. Cazares*, 788 F.3d 956, 990 (9th Cir. 2015). We consider here any error related to: (1) admitting the Red Notice and the undercover agents’ related testimony,⁵ and any improper hearsay use of the Red Notice; (2) excluding the recorded government agent “outtakes”; (3) allowing the agents to speculate about what Mohamud meant in certain recorded statements; and (4) excluding some of Mohamud’s contemporaneous statements.

As a preliminary matter, the government failed to argue that the evidentiary errors were harmless, except with respect to the exclusion of Mohamud’s contemporaneous statements. “Usually when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find.” *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005). However, we have discretion “to consider harmlessness sua sponte in extraordinary cases.” *United States v. Brooks*, 772 F.3d 1161, 1171 (9th Cir.

⁵ The district court gave several limiting instructions that this evidence was relevant only for its effect on the agents’ understanding (“mental state”).

2014). In doing so, we must consider “(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation.” *Id.* (quoting *Gonzalez-Flores*, 418 F.3d at 1101). The second factor is the most important. *Id.*

Here, in the context of the entire trial record, “the harmlessness of the error[s] is not reasonably debatable,” and further litigation would be futile. *Gonzalez-Flores*, 418 F.3d at 1101. Accordingly, we hold that any evidentiary errors were cumulatively harmless.

5. The district court denied Mohamud’s motion to suppress, in which he argued that the FBI’s conduct related to a separate state police investigation was unconstitutional, and therefore later national security investigation evidence was the fruit of an illegal search. The district court reasoned that the later national security investigation evidence was based on untainted, independent sources. Contrary to Mohamud’s contention, the district court did not err by declining to determine whether the FBI’s conduct violated Mohamud’s constitutional rights. *See United States v. Crawford*, 372 F.3d 1048, 1053-54 (9th Cir. 2004) (en banc) (affirming denial of motion to suppress on attenuation grounds, and stating that the court “need not” decide whether the search violated the defendant’s Fourth Amendment rights).

6. The district court did not abuse its discretion by denying Mohamud’s security-cleared counsel access to classified materials under the Foreign Intelligence Surveillance Act of 1978 (“FISA”). *See* 50 U.S.C. § 1806(f) (providing that under FISA, “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”); *United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987) (holding that FISA’s ex parte in camera proceedings did not violate due process, even though defense counsel had high security clearances).⁶ In addition, and as stated above, the summary of classified materials provided by the FBI adequately satisfied CIPA’s requirement that the summary “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” 18 U.S.C. app. 3, § 6(c)(1); *see also id.* § 4.

7. Finally, Mohamud argues that we should vacate his thirty-year sentence for two reasons, neither of which we find persuasive. First, we reject Mohamud’s

⁶ On appeal, Mohamud alternatively requested that we authorize supplemental briefing with defense access to the relevant classified FISA materials. We granted this request in part because, at our request post-argument, the government declassified certain facts about Mohamud’s surveillance, and we permitted the parties to file supplemental briefs.

contention that his sentence should be vacated because the government's forty-year sentencing recommendation was allegedly based in part on unlawful considerations.

Second, Mohamud contends that the district court procedurally erred by failing to resolve his future dangerousness on an individualized basis and by failing to explain adequately its reasons for rejecting a departure from the terrorism criminal history enhancement under U.S.S.G. § 4A1.3. These contentions are belied by the record. The district court considered Mohamud's arguments and evidence about his purported lack of future dangerousness, weighed individualized mitigating and aggravating factors, and adequately explained its reasons for Mohamud's below-Guidelines thirty-year sentence. *See United States v. Sandoval-Orellana*, 714 F.3d 1174, 1181 (9th Cir. 2013) ("If the record 'makes clear that the sentencing judge listened to each argument' and 'considered the supporting evidence,' the district court's statement of reasons for the sentence, although brief, will be 'legally sufficient.'" (quoting *Rita v. United States*, 551 U.S. 338, 358 (2007))).

AFFIRMED.

“(5) INTELLIGENCE COMMUNITY.—The term ‘intelligence community’ has the meaning given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

50 USC 1881a. **“SEC. 702. 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

Certification.

“(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 title I shall be construed to require an application for a court order under such title

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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 101(h) or 301(4), 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 Act.

“(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

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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 101(h) or 301(4), 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 Act;

“(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

Effective date.

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“(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.

Deadline.

“(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 103(e)(1) 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.

Deadline.

“(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.

Records.

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.

Deadline.

“(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.

Records.

“(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.

Deadline.

“(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

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103(e)(1) not later than 24 hours after the filing of such petition.

“(C) PROCEDURES FOR REVIEW.—A judge considering a petition filed **Deadline.** 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 **Records.** 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 **Records.** 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.—

Deadlines.

“(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 101(h) or section 301(4), 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

Deadline.

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“(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 **Records.** 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, **Records.** 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 **Deadline.** 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 **Records.** 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 **Deadline.** 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 **Applicability.** 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.

Applicability.

“(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.

Deadlines.

“(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-

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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.

50 USC 1881b. “SEC. 703. CERTAIN ACQUISITIONS INSIDE THE UNITED STATES TARGETING UNITED STATES PERSONS OUTSIDE THE UNITED STATES.

“(a) JURISDICTION OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT.—

“(1) IN GENERAL.—The Foreign Intelligence Surveillance Court shall have jurisdiction to review an application and to enter an order approving the targeting of a United States person reasonably believed to be located outside the United States to acquire foreign intelligence information, if the acquisition constitutes electronic surveillance or the acquisition of stored electronic communications or stored electronic data that requires an order under this Act, and such acquisition is conducted within the United States.

“(2) LIMITATION.—If a United States person targeted under this subsection is reasonably believed to be located in the United States during the effective period of an order issued pursuant to subsection (c), an acquisition targeting such United States person under this section shall cease unless the targeted United States person is again reasonably believed to be located outside the United States while an order issued pursuant to subsection (c) is in effect. Nothing in this section shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other title of this Act.

“(b) APPLICATION.—

“(1) IN GENERAL.—Each application for an order under this section shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under subsection (a)(1). Each application shall require the approval of the Attorney General based upon the Attorney General’s finding that it satisfies the criteria and requirements of such application, as set forth in this section, and shall include—

“(A) the identity of the Federal officer making the application;

“(B) the identity, if known, or a description of the United States person who is the target of the acquisition;

“(C) a statement of the facts and circumstances relied upon to justify the applicant’s belief that the United States person who is the target of the acquisition is—

Opening Statement - Defendant

1 THE COURT: Okay.

2 MR. SADY: On November 9th, 2009, Mohamed
3 Mohamud, who had just turned 18, had taken no action, had
4 sought no help, had not even mentioned use of a weapon of
5 mass destruction in the United States, you will hear he
6 was just a manipulatable and conflicted kid, in the words
7 of an FBI agent.

8 On November 9th, 2009, an FBI employee, using the
9 fake name "Bill Smith," contacted Mr. Mohamud, and he
10 said, "I'm Muslim. I want to bring war to America."

11 Because the Government must prove beyond a
12 reasonable doubt that at the time of the first government
13 contact Mohamed was predisposed to commit the crime
14 charged -- and that's use of a weapon of mass destruction
15 in the United States -- at the time of the first
16 government contact, and because the Government induced
17 the crime after the date of November 9th, he's not
18 guilty.

19 Now, this is a hard case, a hard case to decide
20 based on the facts and the law, not on fear and emotion.
21 Because you're going to see pictures, you're going to see
22 videos, and you're going to have emotional reactions to
23 those things. That's going to be Mohamed there saying
24 harsh things. You're going to see him on video doing bad
25 things. But the question is what led to that point. The

Opening Statement - Defendant

1 Government is starting the story at the end. What's
2 important to know is what was going on on November 9th
3 and what happened after that date.

4 The fake bomb, that's not going to be disputed.
5 The fact that Mohamed pushed the cell phone buttons,
6 believing that a huge explosion would occur, not
7 disputed. That's not the question here. That all
8 happened.

9 There's also not going to be any question that
10 Mohamed wrote on the Internet and spoke with friends
11 about things that are extremely unpopular in this
12 country, about jihad, about al-Qaeda, about Osama bin
13 Laden, about 9/11.

14 It may be that you'll be offended, angry,
15 disgusted at some of the things that you will hear of the
16 politics and viewed expressed and shared by Mohamed. But
17 the role you have here as dispassionate judges of the
18 facts means that you have to put such emotional reactions
19 aside and simply determine: Did the FBI target,
20 influence, and manipulate a teenager who they knew to be
21 conflicted and manipulatable toward committing a crime he
22 had not previously prepared for, he hadn't planned, he
23 had taken no action toward?

24 In America, we don't create crime. The
25 entrapment defense is how this fundamental American value

Excerpts of Record 3977

Opening Statement - Defendant

1 is made real in the courts. It's a line the Government
2 cannot cross. We all want law enforcement to stop crime.
3 But the FBI cannot create the very crime they intend to
4 stop. And sometimes it's just a matter of going too far.

5 This is not a case where a person was looking for
6 explosives and the FBI sets up a sting and pretends to
7 get explosives for that person. This is not a case where
8 a person was planning an attack and the FBI created a
9 sting to say, "We're going to help you with that attack."

10 When on November 9th, 2009 the FBI began
11 e-mailing, going into direct contact with Mohamed and
12 then sending agents months later to encourage him to do
13 something, to act rather than talk, the FBI simply went
14 too far.

15 About two months before November 9th, 2009, on
16 August 31st, 2009, Mohamed's father called the FBI asking
17 for help. His son, who had just turned 18 a few weeks
18 earlier, had told him he'd decided to travel overseas.
19 Mohamed said he had his passport, visa, ticket, and was
20 leaving. Mohamed's father, Osman, will tell you that he
21 and his recently divorced wife, Miriam, were afraid,
22 because they had heard of Somali kids going off to the
23 wars in Somalia.

24 Mohamed's family came to the United States to the
25 United States as refugees when he was only three years

Excerpts of Record 3978

Opening Statement - Defendant

1 old. They came as refugees from war in Somalia. He had
2 lived here his whole life. Other than a family trip to
3 Canada and a family trip to London, he had only been here
4 in the United States.

5 As Osman told the FBI, Mohamed is still a child.
6 He's an immature 18. And when Osman couldn't get Mohamed
7 on the cell phone, he was scared, he called the FBI, he
8 wanted help. He reached out for help, just as you'd
9 expect him to do. He expected that the FBI could stop
10 somebody from leaving the country if that's what was
11 happening. He explained his concerns about his son,
12 including concerns about who was influencing his son.

13 Now, it turned out that that same day, Mohamed
14 came home. He didn't have a plane ticket for Yemen. He
15 didn't have a visa. It was all talk. He did want to go
16 study there, and he just hadn't gone beyond talking with
17 a friend about it.

18 In high school, Mohamed had started developing a
19 deeper sense of his religion. He wanted to learn more
20 about it. He wanted to learn Arabic, different than
21 Somali. Arabic is the language of the Quran, which would
22 help him learn more about his religion.

23 He was looking for identity and community
24 overseas, something he openly discussed with his friends.
25 He had a contact, Amro Al-Ali, who had gone to Yemen; and

Opening Statement - Defendant

1 he had offered to help him to find housing, work, and an
2 Islamic school. But Mohamed's parents didn't approve.
3 Mohamed apologized to his parents for having caused them
4 such a scare. The family agreed that Mohamed should
5 complete his studies in the United States before going
6 abroad.

7 Osman called the FBI back the next day, as he had
8 agreed to do, and told them his son was home, everything
9 was resolved. He forwarded to the FBI the e-mail,
10 showing the Yemen school that he was interested in, and
11 told them Mohamed was all talk. The FBI accepted all the
12 information and they said, "We share your concerns."

13 While the FBI said that it shared his concerns,
14 it didn't share their concerns with Mohamed's father,
15 because it turns out the FBI had information about
16 Mohamed that his father didn't know, and they didn't
17 share that information with the father who called for
18 help.

19 You'll hear that Osman knew that Mohamed was
20 often online, that he had learned about and had questions
21 about a more strict practice of Islam. He didn't know,
22 however, that as a 17-year-old, as a senior in high
23 school, he was in contact with Samir Khan, an American
24 citizen with an elaborate jihadi website, operating
25 openly, not under indictment, not anything that was

Opening Statement - Defendant

1 unlawful, that would be known to anybody like Mohamed or
2 like Mohamed's father.

3 Now, Samir Khan has been called the rock star of
4 jihadi websites. He openly argued that Muslims were
5 oppressed, mistreated and disrespected in the West, and
6 that the mass media's narrative of al-Qaeda and bin Laden
7 was prejudiced against Muslims.

8 Mohamed, you will hear, he visited many extremist
9 websites, sites filled with ideas of political Islam.
10 Some talked religion, some talked politics, some were
11 plain nasty.

12 Eventually -- again, while Mohamed is still a
13 juvenile -- Samir Khan asked his blog readers to submit
14 articles, and those articles would go on his online
15 magazine that was called *Jihad Recollections*. And he
16 accepted Mohamed, who claimed to be a college student; he
17 wasn't. He claimed to be the best writer in the state;
18 he wasn't. As a 17-year-old, Mohamed wrote four articles
19 for *Jihad Recollections*, but stopped during August of
20 2009. Again, during this time Samir Khan is operating
21 openly in the United States.

22 Now, Mohamed's life on the Internet, his avatar,
23 was only part of his life in high school. You will hear
24 witnesses who will describe him during that time as
25 friendly, goofy, kind. He had diverse friends of all

Opening Statement - Defendant

1 types. He was liked by peers and teachers. He liked rap
2 music, playing basketball, reading Harry Potter, writing.
3 He even had a short essay published about what he
4 believed about Oregon. As with any teenager, Mohamed had
5 many different aspects. He was not a perfect human
6 being, but he wasn't someone sitting around thinking
7 about blowing up his hometown.

8 Like many kids, he was all over the Internet,
9 mostly mainstream sites, but some radical sites one. And
10 there is no doubt that Mohamed was drawn to a
11 romanticized idea of fighting jihad that he had seen on
12 the Internet. That's what you get from looking at his
13 entire writing, a naive and idealized view of a glorious
14 struggle against the oppression of the Muslim people.

15 It's also juvenile. For example, he wrote -- one
16 of his articles is about working out without weights; and
17 if you take out the rhetoric, it's basically a high
18 school gym class.

19 All of his Internet activity, all of this
20 writing, it's just talk, just words. And that's what
21 you'll find over and over in this case: a teenager who
22 talks big, does nothing until the FBI gets involved.

23 In September of 2009, after deciding against
24 going to Yemen, Mohamed enrolled part time as a civil
25 engineering student at Oregon State University. He had

Excerpts of Record 3982

Opening Statement - Defendant

1 roommates. He was a socially active student. But
2 unbeknownst to Mohamed, he went off to college with
3 company. Shortly after his father's call to the FBI on
4 August 31st, Mohamed was placed on full-time
5 surveillance. Teams of FBI agents followed him around.
6 Mohamed's e-mails were intercepted and read. His text
7 messages were intercepted and read, phone calls, text
8 messages, e-mails, thousands of communications between
9 him and everyone who had any contact with him.

10 And what did this surveillance produce? He was
11 studying. He was partying. Nothing about weapons of
12 mass destruction, nothing about attacking in the West,
13 nothing about any interest in doing bad in his hometown.

14 Now, one of the basic tenets of Islam --
15 conservative, moderate, whatever -- is you don't drink,
16 you don't smoke marijuana. And this supposed hardcore
17 extremist doesn't even keep to that basic principle. He
18 goes off to college and joins a mainstream party culture.
19 He drinks. He smoke pot. He parties. He has an online
20 life. There are things that are said, but what he's
21 doing is totally inconsistent with that talk.

22 Now, you've heard that while he is partying, the
23 FBI is worried about some of Mohamed's acquaintances.
24 They say to themselves, "Big chance here. We could bust
25 Mohamed for drugs, see if he will provide information."

Excerpts of Record 3983

Opening Statement - Defendant

1 At worst, he's in a situation where he's under
2 supervision, because the FBI agent -- as you will hear,
3 FBI Agent DeLong has heard Mohamed say he's very scared
4 of the police. He wrote -- Agent DeLong wrote in October
5 2009 to his supervisor that Mohamed may be an ideal
6 candidate for an intervention of some kind.

7 Instead of taking a low-key approach, however,
8 the FBI decided to ramp up their activities with Mohamed.
9 They decide to have this FBI employee, using a false
10 name, pretending to be a Muslim, start talking about
11 bringing war to the West. In his e-mails, as you'll see,
12 Smith presents himself as a recent convert, about the
13 same age, maybe a little older than Mohamed, and someone
14 who is looking to bring the fight here. In those
15 e-mails, the Government, through Smith, the FBI, through
16 this employee, raises the idea of bringing war to the
17 United States.

18 Here's some of what he wrote: "I am here in the
19 West as well. I want to get more involved in the fight
20 for the Ummah. I want to help bring about our Ummah here
21 in the West. I see in the news that other brothers are
22 trying to fight. I want to as well.

23 "I want to fulfill my purpose and help with what
24 is to come. If we can get the West preoccupied with
25 problems and struggles here, then they will be less

Opening Statement - Defendant

1 involved in Palestine.

2 "I know if we bring the fight here to the West
3 and bring the focus here, the efforts of our brothers in
4 Palestine will have more success, as the West will be
5 focusing here instead of there.

6 "I can't tell you how easy it would be to bring
7 any community here in the West to its knees.

8 "If more of us talked and thought about these
9 questions -- We aren't going to win by sitting and
10 letting incompetence run the show. I'm not afraid."

11 Remember, this is the FBI. They're encouraging a
12 manipulatable and conflicted kid to think about
13 committing violence in the United States, to act rather
14 than talk. Smith suggests over and over again that
15 action here in the West would be justified, that action
16 here in the United States is what should happen.

17 And you'll hear FBI Agent DeLong testify that on
18 November 6th -- 16th, a week after the first Bill Smith
19 e-mail, Mohamed is a, quote, pretty manipulatable,
20 conflicted kid. That's the kind of communications you
21 send to a manipulatable, conflicted kid. Being
22 conflicted, being vulnerable to manipulation is not
23 predisposition to use a weapon of mass destruction in the
24 United States.

25 You'll have other evidence that gives a glimpse

Opening Statement - Defendant

1 into Mohamed's mind around this critical date of
2 November 9th, the day of the first government contact.
3 You'll see text messages about drinking, about marijuana.
4 An intercepted e-mail from Mohamed to an Islamic website
5 on November 12th, three days after the first Bill Smith
6 communication, shows the confusion and conflict.

7 This is Mohamed's words: "I have become so lost.
8 All I need is some soft words to help my heart and
9 supporting advice."

10 The FBI intercepted this call for help from a
11 conflicted and vulnerable teenager, wrestling with
12 obedience to his parents, searching for faith, and how to
13 live on his own for the first time, out from under the
14 roof of his parents' home, and they sent him more Bill
15 Smith.

16 Vulnerable, being immature, isolated, sad is not
17 predisposition to commit the crime of using a weapon of
18 mass destruction in the United States. But for all the
19 FBI's effort, it turns out that Mohamed is not interested
20 in meeting Bill Smith. He chats online with him, but
21 proposes no meeting, no action over the next six months.

22 This evidence shows his reluctance to act. He's
23 talking, not acting. Instead, as you'll see from his
24 friends and his text messages, Mohamed is spending his
25 freshman year in college doing what many freshmen do,

Opening Statement - Defendant

1 studying and partying with his friends; and for Mohamed,
2 partying too much with his friends.

3 Although he did well in his first term, his
4 academic performance suffered, as he spends too much time
5 on his social activities. He remained engaged in college
6 life, going to football games, participating in school
7 clubs. He also acted in a play during the spring, just
8 during May of 2009. He sees his family every couple of
9 weeks, either going up to Portland or his father comes
10 down to visit in Corvallis.

11 As the school year ends, Mohamed, like most
12 college students, needs a summer job. And one of his
13 best friends at Oregon State, Luis Martinez -- a
14 non-Muslim, by the way -- was going home to Alaska for
15 the summer to work on the canneries and the fishing boats
16 and says, "I can get you a job up there, Mohamed."

17 In a lot of ways, this is an ideal situation for
18 Mohamed. He's going to have a difficult but regimented
19 workday. He's away from the temptations of college life,
20 and he could earn a pretty good salary to pay for his
21 upcoming tuition. Mohamed got his parents' permission to
22 go. He's 18, but he still gets his parents' permission
23 to go. And his father, Osman, buys him his ticket. The
24 ticket is for a departing flight on June 14th, 2010.

25 But the FBI has other plans for Mohamed. On

Opening Statement - Defendant

1 June 7th, 2010, you'll hear testimony that the FBI,
2 quote, got the green light to target Mohamed Mohamud, end
3 quote. The plan included setting up an incident at the
4 airport. The plan included more direct contact with
5 Mohamed. On June 14th, 2010, as Mohamed and his mother
6 and his father showed up at the airport, the FBI was
7 waiting. It wasn't two agents that were waiting. There
8 was a surveillance team. There was a cast of of
9 thousands.

10 It's hard for folks who haven't been in this
11 situation to imagine what it's like at the airport when
12 you're told you can't fly. You've got your ticket.
13 You've packed your bags. You've told your friends.
14 You're ready to go, and you're told you can't board the
15 plane. Did they tell you why? No. Did they tell you
16 you're on the no-fly list? They don't even tell you
17 that.

18 They tell you nothing, and you have no recourse.
19 The FBI was there waiting, and they used the occasion to
20 approach and interrogate the upset and stressed family,
21 just as they had planned a week earlier.

22 The evidence will show that this was a major
23 triggering event that the Government created and then
24 took full advantage of in targeting Mohamed. The FBI had
25 known since November that he was planning on going to

Opening Statement - Defendant

1 Alaska. They knew for -- since at least April that
2 Mohamed was planning on flying in June up to Kodiak.

3 The FBI's initial plans with Bill Smith hadn't
4 resulted in Mohamed showing any interest in committing
5 violence. Instead of stopping, another plan was
6 developed. And then nine days after the airport
7 incident, another team of agents makes contact with
8 Mohamed. Their approach is different than the last one,
9 markedly different, because this time we have a
10 full-court press.

11 Experienced and sophisticated agents were going
12 to try to meet with Mohamed personally, face to face, to
13 talk about taking action in the United States. They
14 would invoke an imaginary group of authoritative Muslim
15 leaders called a council that was judging individuals as
16 worthy to take on the cause of defending aggrieved
17 Muslims around the world. They began by instructing
18 Mohamed to start a hush mail account. Then an FBI
19 operative using the name "Youssef," acting on behalf of
20 the council, sent Mohamed an e-mail, asking if Mohamed
21 could, quote, help the brothers, unquote.

22 But again, as with Bill Smith, Mohamed did not
23 engage. Here's his e-mail back, which includes, "I do
24 not think I will be able to go for a while. I will
25 contact you when I am able to travel." Cut to the heart

Excerpts of Record 3989

Opening Statement - Defendant

1 of this response, Mohamed says, "Sorry, can't help you.
2 Don't call me. I'll call you."

3 Remember, the Government is claiming that Mohamed
4 has been trying to contact these guys for months. Here's
5 the opportunity. What does he do? He declines. All
6 talk, no action.

7 Remember, at this point the FBI has spent
8 countless hours and a huge sum of money watching Mohamed.
9 They've followed him around. They've listened to his
10 phone calls. They've intercepted his text messages. All
11 these resources spent and nothing to show for it.

12 Now Mohamed doesn't want to meet the next two
13 agents. The Government has offered Mohamed the
14 opportunity to commit a crime, to take violent action, to
15 meet up with co-conspirators, and nothing happens.

16 The agents don't let up. Instead, they egg him
17 on. Here's the e-mail they sent to Mohamed: "Allah, I'm
18 sure, has good reason for you to stay where you are."
19 Listen to that line again: "God has good reason for you
20 to stay where you are."

21 The FBI knows exactly how conflicted Mohamed is
22 about his lifestyle and religion, with the drinking and
23 the marijuana. They know exactly how he's trying to be a
24 better Muslim and is searching for direction and meaning
25 in life. Here's the answer: God has a purpose for you

Opening Statement - Defendant

1 here. Remember this theme, because it's going to come up
2 again and again in every interaction with the undercover
3 agents.

4 You will hear hours of recorded meetings between
5 undercover operatives and Mohamed, but that critical
6 first face-to-face meeting, not recorded. With dozens of
7 agents involved and sophisticated recording equipment
8 available, the first face-to-face meeting was not
9 recorded.

10 You'll hear multiple explanations for this
11 failure. You'll also learn that three days after the
12 meeting, the FBI agent who was listening intentionally
13 destroyed his notes of the meeting, so we don't have an
14 accurate record of exactly what happened on that
15 critically important occasion.

16 But you'll hear some strange things about this
17 meeting on July 30th, how the meeting was set up as a job
18 interview. The FBI agent who set it up will describe it
19 as one of the things they were bringing across was "We're
20 here to assess you. You're not here to assess us."
21 Mohamed was asked what he had done to prove he was a good
22 Muslim. It's a test, an interview.

23 During this meeting, the FBI introduced the idea
24 of being operational. They told him to do some research
25 and pick a target. They told him to pick a target in

Excerpts of Record 3991

Opening Statement - Defendant

1 Portland. Finally, after almost nine months, the FBI has
2 him talking about taking action.

3 The recorded meetings are both evidence of and
4 the result of the FBI's sophisticated influence, molding,
5 and manipulation. Mohamed says some awful things,
6 exaggerating, showing off, spinning tales for people he
7 believes he needs to impress. There's a big difference
8 between the nature and quality of evidence you're going
9 to hear about Mohamed before the point of government
10 contact and what you hear after the point of government
11 contact.

12 For example, Mohamed claims to the agents he
13 watched the Mumbai attacks when he was 15. The only
14 trouble is, he was 17 when that occurred. And they asked
15 him, "When did you first start thinking about this?"
16 What's his response? He rambles on about dreams. But
17 when they ask a direct question, it's "Yeah, since the
18 last time we talked."

19 As awful as some of the things you'll hear
20 Mohamed say are, they provide evidence for the defense
21 here. On the surface, the recordings are frightening and
22 offensive discussions of three co-conspirators talking
23 about a horrible crime. But what's really happening is
24 the two older and sophisticated FBI agents are setting up
25 a social context.

Excerpts of Record 3992

Opening Statement - Defendant

1 One of the biggest tasks for this jury is to slow
2 down and analyze what's going on during these meetings,
3 to deconstruct what's actually happening. And you'll
4 hear evidence that the undercover operatives are using
5 some of the most powerful means of psychological
6 influence. You'll hear evidence that they are isolating
7 him, that they are using praise and flattery to a
8 teenager, that they're appealing to faith and social
9 justice, that they're invoking an authority structure,
10 and that they're engaging in a pattern of reinforcing
11 directives, also called scaffolding.

12 Now, scaffolding is what psychologists call the
13 process that folks use all the time when they're dealing
14 with teaching kids, teaching education, and you can use
15 those techniques for good and for bad. It's assigning
16 small tasks and giving rewards to build towards
17 compliance. This method can shape behavior. And by
18 listening for directives throughout the recordings that
19 you listen to, you'll hear how the FBI staged the
20 evidence you'll hear and that will eventually be with you
21 in the jury room, but you will see in court.

22 Remember, the starting point, at the first
23 meeting, Mohamed says, "I don't know anything about being
24 operational." That's a word that the agent introduces
25 into the conversation. "I need training. I know nothing

Opening Statement - Defendant

1 of explosives."

2 So listen for how over the course of the
3 meetings, the FBI operatives directed the plot the entire
4 way: God's purpose for Mohamed is in the United States,
5 not overseas. Being operational is an option. Pick a
6 target in Portland, research routes, find parking spots,
7 buy components, get phones, rent an apartment, rent a
8 storage unit, act normal, make a video, create a new
9 identity, move barrels, press the button twice. These
10 are all things the FBI directed him to do.

11 Now, the FBI will probably play for you, or the
12 Government will play for you a chilling video that
13 Youssef made on November 4th. You're going to see
14 Mohamed dressed in camouflage, and he makes an awful
15 speech and recites a poem that is the same as or similar
16 to what you heard from the Government.

17 When you watch the video, it looks like Mohamed
18 came up with this all on his own. When you heard the
19 poem, it sounded like, oh, this must be what his ideas
20 are. But when you pull the curtain back and you see what
21 the undercover agents are leading him to, how they're
22 using methods to mold what he's doing, they're
23 essentially giving him a homework assignment.

24 (An audio recording is then played.)

25 MR. SADY: What you just heard is what pervades

Opening Statement - Defendant

1 all of the meetings: phony choices, FBI direction. The
2 FBI takes advantage of some of the most powerful social
3 psychology to influence, to mold, and to shape Mohamed's
4 behavior.

5 Listen for how the agents isolated Mohamed. When
6 the first operative convinced Mohamed to meet with him,
7 Mohamed's response, as you'll see in the evidence, is to
8 invite him to the mosque to pray publicly with him. He
9 wants him to meet his friends. The operative refuses,
10 saying they can't be seen together; the conversation must
11 be private between them.

12 This is the result of a lot of FBI -- how shall
13 we respond to this? And this is what they come up with,
14 is tell him, "Oh, it has to be secret." It's only then
15 that there's a reference to "Oh, am I supposed to be
16 being careful?"

17 "Well, I'm going to ask you about the security
18 question about Amro. He's going to say, How did you get
19 my e-mail? And he says, It must have been from
20 Amro. Was it from Amro?"

21 This is the big security test. He says twice in
22 the e-mail the name of the person that he assumes gave
23 him the contact.

24 Throughout the meetings, the FBI tells him time
25 and time again, "Keep everything secret. Don't talk to

Opening Statement - Defendant

1 other people about it," creating a very small echo
2 chamber of just them and Mohamed.

3 The FBI even decides to separate him from his
4 roommates, to have greater control over him. They very
5 consciously say, "He's with his roommates. He's in the
6 college campus. Let's get him off campus, in an
7 apartment by himself." And they give him \$2700 to rent
8 an apartment. It's the first time he's ever lived alone,
9 and he has no idea how to deal with a lease even. I
10 think at one point he asks them to cosign for him.

11 They even told him to be careful not to talk to
12 his family, mentioned both his father and his mother as
13 people he should not be talking to about this. The FBI
14 put him in a bubble with his extremist mentors, his FBI
15 extremist mentors.

16 Another social influence that you will hear from
17 the evidence that shapes behavior, especially for
18 teenagers, is praise and flattery. The FBI operatives
19 took very deliberate roles, older, confident, brave,
20 pious, competent men. Throughout the recordings, you'll
21 hear these authority figures make Mohamed feel special
22 and cared for:

23 "You're an amazing 19-year-old."

24 "I got a very talented young man in our midst."

25 "You should teach a writing class."

Opening Statement - Defendant

1 "School must come easy for you. You got a lot of
2 talent, brother Mohamed. You're probably smarter than
3 most people."

4 "If it helps you all, gives you a big head, I had
5 to travel far to talk to people about you."

6 "You can be a great poet."

7 "From what we see, we're impressed."

8 "Found a jewel, a jewel in the rough."

9 "We love you for the sake of God."

10 "I trust you with my life."

11 The operatives' messages of approval and praise
12 reinforce Mohamed's every bad action, from the
13 inflammatory rhetoric he parrots to them to the minor
14 tasks that he's directed to carry out.

15 Another type of behavior-influencing technique
16 that you're going to hear evidence of and that you should
17 be listening for throughout, which is perhaps the most
18 troubling, is that the agents constantly played to and
19 abused Mohamed's faith in God and his dedication to
20 social justice. Remember, the undercover operatives
21 started out telling him, "God has a purpose for you
22 here." At the first meeting, the undercover operative
23 says, "What have you done to be a good Muslim?"

24 As you're listening to the recordings, listen to
25 how often they use Arabic. As you're listening to the

Excerpts of Record 3997

Opening Statement - Defendant

1 recordings, the language of the Quran, the invocation of
2 God's name in Arabic, Allah, that's the same God of the
3 New Testament, Old Testament, the Holy Quran. Every time
4 you're going to hear bombarding: Inshallah, if God wills
5 it; bi'zuillah, with God's permission; al Hamdilillah,
6 praise to God, hundreds of repetitions. Everything they
7 say is soaked in religious approval for what they're
8 doing. It's coming from the FBI. Our government is
9 telling a conflicted and manipulatable young man, a
10 teenager, invoking God for his commitment to this
11 activity.

12 The overall message that you will be hearing
13 throughout the recordings is that Mohamed is doing God's
14 work and saving lives of men and women and children who
15 will otherwise die if he doesn't have the guts to act.

16 Now, you'll hear from a developmental
17 psychologist that the power from this social context that
18 we've been talking about is especially strong with
19 teenagers, whose natural immaturity, naivete, and
20 susceptibility to influence make them easy marks for this
21 type of setup. Juveniles and late adolescents are drawn
22 to risky behavior, don't think out the consequences the
23 way adults do. Young people are easier to sway, to
24 influence, to mold, for good and for evil.

25 There's also a gap between intelligence and

Opening Statement - Defendant

1 judgment that is kind of counterintuitive. What you'll
2 hear is that cognitive intelligence, you can get right up
3 there pretty quickly, even in mid teens, up to close to
4 adult levels. But what the social science will show is
5 that mature judgment, much -- a huge gap there between
6 mature judgment and cognitive intelligence. It's
7 important in this case, because you're going to hear
8 there is a disconnect between Mohamed's cognitive
9 intelligence and the terrible judgment and obliviousness
10 that you're going to see.

11 In deliberating in this case, you're going to
12 have the benefit of hearing from Dr. Marc Sageman, who is
13 currently in Afghanistan, where he's advising General
14 Allen and the United States Army regarding assessing
15 individuals who may be threats to our soldiers serving in
16 that country.

17 Dr. Sageman is one of the country's leading
18 experts on counterterrorism. He's advised the Chief of
19 Staff of the Army, the Secret Service, the City of New
20 York. He was on the ground as a CIA officer during the
21 Soviet war in Afghanistan. Since 9/11, he's dedicated
22 his life to understanding and combating terrorism and
23 terrorist threats.

24 You'll hear from Dr. Sageman that prior to the
25 influence of government actors, Mohamed was like a huge

Opening Statement - Defendant

1 number of Muslims who have conservative religious views,
2 political beliefs that Islam is being treated poorly by
3 the West. Mohamed was part of a community of talking and
4 writing. It's a huge community, a community with many
5 different aspects, but it's one of talk, discussion, a
6 discursive community.

7 Dr. Sageman has reviewed all the available
8 information in the case. He spent hours interviewing
9 Mohamed and Mohamed's parents. There's a different
10 between the mass of talkers and writings and the very few
11 who, on their own, commit terrorist acts. There is a
12 huge mass of writers and talkers with romanticized ideas
13 and desires to help Muslims through jihad.

14 After reviewing all the recorded meetings and
15 other government documents related to this case,
16 Dr. Sageman will testify about the importance of the
17 conduct of the FBI as the element in how Mohamed went
18 from being a college student to the person who pressed
19 the buttons a year later.

20 We'll hear that entrapment involves two
21 questions, one about predisposition, one about
22 inducement. For predisposition, you will need to decide
23 whether the Government has proved beyond a reasonable
24 doubt that Mohamed was disposed to commit the crime
25 charged -- use of a weapon of mass destruction in the

Opening Statement - Defendant

1 United States -- on the date that the Government first
2 contacted him on November 9th, 2009. If the Government
3 does not prove predisposition beyond a reasonable doubt,
4 they must prove beyond a reasonable doubt that the FBI
5 did not induce him.

6 These two questions will focus your attention on
7 the ultimate issue, which is did the Government create
8 the crime? Did the FBI foil its own plot?

9 On November 9th, 2009, the FBI began a process of
10 influencing and manipulating Mohamed. The evidence will
11 show that on that day, Mohamed was not predisposed to use
12 a weapon of mass destruction. The evidence will
13 establish that his character at that time was that of a
14 confused, immature, conflicted, naive, evolving college
15 student.

16 The evidence will show Mohamed's reluctance to be
17 involved, that he did not seek or act with Bill Smith.
18 He told Youssef in the first e-mail, "Don't call me.
19 I'll call you." And he did not have any plan or
20 preparation to do anything other than write and talk
21 prior to the first face-to-face meeting.

22 The evidence will demonstrate that the FBI
23 initiated criminal activity and every part of the plot
24 directing the action towards the United States, telling
25 him to research a target in Portland, instructing him on

Opening Statement - Defendant

1 buying items of hardware and telephones, giving him money
2 to rent an apartment and a storage unit, setting him up
3 to make a video, and ultimately telling him to blow up
4 the fake bomb that the FBI had designed, built, and
5 parked next to Pioneer Square.

6 There will be no evidence that this case involves
7 criminal activity towards profit. The evidence will be
8 that there was massive inducement, with the FBI knowing
9 everything about Mohamed's personal life and exploiting
10 this knowledge using every social science trick,
11 isolating him from his family and friends, appealing to
12 his fragile teenaged ego, invoking God and justice, and
13 directing him to do the little things and the big things
14 that ended up bringing evidence into court today.

15 After Mohamed was arrested, he was taken to the
16 Multnomah County Detention Center. He was placed in a
17 suicide smock, placed in a cell, hardly anything else in
18 it. As he sat on the floor, leaning against one wall,
19 psychiatric nurse Christina Barnes came in and sat down,
20 sat down on the floor, leaning her back against the other
21 wall, and Mohamed talked about how important the
22 undercover operatives had been to him.

23 And as they finished talking, this is what
24 Christina Barnes will tell you about what was said: "As
25 the interview progressed, Mohamed became tearful and

Opening Statement - Defendant

1 stated that he cannot understand how he got from being a
2 student to being labeled a terrorist and going to jail."

3 When the FBI first began its direct contacts on
4 November 9th, 2009, Mohamed was no terrorist. The FBI
5 just went too far. They created a crime that would never
6 have happened without them. Because the FBI cannot prove
7 beyond a reasonable doubt that Mohamed was not entrapped,
8 the only verdict that can be returned under the law is
9 not guilty.

10 Thank you.

11 THE COURT: All right. We'll be in recess now
12 until Monday morning. The Court will start at 9:00.
13 Please be here by a quarter to 9:00.

14 Now, I told you a number of times, talked to you
15 a number of times about the need to avoid receiving any
16 information about this case from any other source. So
17 keep in mind my admonition not to discuss the case with
18 anyone, not to look at anything that might be published,
19 TV, newspapers or anything. It's very important that
20 everybody be working with the same evidence, and that's
21 the evidence that came in the courtroom.

22 So have a good weekend. We'll see you Monday
23 morning at 9:00.

24 Thank you.

25 THE CLERK: Court is adjourned.

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

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