Koubriti v. Convertino et al Doc. 24 Att. 1

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KARIM KOUBRITI,

Plaintiff,

Case No: 07-13678

v

Hon. Marianne O. Battani

RICHARD CONVERTINO,
MICHAEL THOMAS and
HARRY RAYMOND SMITH,
Jointly and Severally
and in their Individual Capacities,

Defendants.

____/

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PROPOSED FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, KARIM KOUBRITI, by and through his attorney, BEN M. GONEK, and for his First Amended Complaint states the following:

Jurisdiction Allegations

1. This action is brought pursuant to the Fourteenth Amendment of the United States Constitution and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed. 2d 619, 91 S Ct 1999 (1971).*

2. Jurisdiction is conferred upon this Court by 28 USC 1331 et. seq.

3. The Plaintiff, Karim Koubriti, is a resident of the City of Detroit, Wayne County, State of Michigan.

4. Upon information and belief, Defendant Richard Convertino, is resident of Wayne County, State of Michigan and all times relevant to this Complaint was employed as an Assistant United States Attorney by the United States Department of Justice.

5. Upon information and belief, Defendant Michael Thomas, is resident of Wayne County, State of Michigan and all times relevant to this Complaint was a Special Agent employed by with the Federal Bureau of Investigation.

6. Upon information and belief, Defendant Harry Raymond Smith, is resident of Washington, D.C. and all times relevant to this Complaint was a Special Agent employed by with the Department of State.

7. At the time the events alleged in this Complaint occurred, the individually named Defendants were violating Plaintiff's constitutional rights and their actions were clearly unreasonable. As such, the individual Defendants named in this Complaint are not entitled to the defense of qualified immunity.

8. All the individually named Defendants are being sued in their individual capacities and were acting under color of law at all relevant times to this Complaint.

9. This Court has jurisdiction over all the parties and the amount in controversy exceeds $75,000.00.

Factual Allegations

10. This lawsuit stems from the violation of the civil rights of the Plaintiff, Karim Koubriti, in connection with Plaintiff's arrest and prosecution for the offense of conspiracy to provide materials for or resources to terrorists contrary to 18 USC 371 and 2339(a). Specifically, Plaintiff is claiming that the named Defendants violated his Fourteenth Amendment Rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence contrary to *Brady v. Maryland, 373 US 83, 87 (1963)*, prior to and during his prosecution for the offense of conspiracy to provide materials for or resources to terrorists contrary to 18 USC 371 and 2339(e).

11. On or about September 17, 2001, six days after the September 11, 2001 attacks on the United States, a group of task force agents from the Detroit Joint Terrorism Task Force ("JTTF"), searched an apartment on Norman Street in the City of Detroit for subjects on the FBI's Terrorist Watch List. In that apartment, the JTTF team found three of the Koubriti case defendants along with the following items, among others, which became evidence in the Koubriti case: a day planner

containing sketches, a videotape and numerous arabic language audio tapes. None of the individuals on this FBI Terrorist Watch List were found at this address.

12. The Plaintiff was arrested when there was no probable cause for his arrest and placed into the custody of the United States Marshall Service. The Plaintiff was initially detained on a complaint for the criminal offense of document fraud. Plaintiff was detained without bail.

13. On September 27, 2001, a grand jury issued an indictment charging Plaintiff with document fraud contrary to 18 USC 1028.

14. That at the time the Indictment was issued charged Plaintiff with document fraud neither the Plaintiff nor any of his co-defendants in the criminal case acknowledged engaging in terrorist activity. There was also no evidence tying Plaintiff or any of his co-defendants in the criminal case to any terrorist group. Before Yousif Hnimssa began cooperating with the prosecution, no witness could testify that either the Plaintiff nor any of this co-defendants in the criminal case had committed or were intending to commit any terrorist acts.

15. After the First Criminal Indictment was issued against Plaintiff, Defendant Convertino with the assistance of Defendants Smith and Thomas then began investigating Plaintiff for terrorist related activities.

16. Defendants Convertino, Thomas, and Smith then knowingly presented false evidence which included perjured testimony to a federal grand jury. Defendants

Convertino, Thomas, and Smith also failed to disclose numerous facts which would have completely undermined the evidence they presented to the Grand Jury. Had accurate and truthful evidence been presented a No Bill would have issued.

17. On or about August 28, 2002, a federal grand jury issued a Second Superseding Indictment charging Plaintiff with terrorist related offenses.

18. The criminal charges against Plaintiff proceeded to trial. On March 26, 2003, a trial commenced on the charges of the Indictment before the Honorable Gerald E. Rosen. The evidence the Government and the Defendants utilized to support the terrorist related charges consisted of what the government characterized as casing materials, testimony of Yousif Hnimssa and other "corroborating" evidence. Special Agent George testified that the casing which he defined as an evaluation of an area for operational use is always used in preparation for a terror attack.

19. The alleged casing materials that the Government relied on at trial consisted of the day planner sketches (The Government alleged that they were sketches of the Queen Alia Jordan and the Incirlik Air Base). The alleged casing materials also consisted of a videotape of tourists at the MGM Grand Casino in Las Vegas, Nevada, Disneyland, and some sites in New York.

20. The Government at the trial on Plaintiff's criminal charges also relied on the testimony Yousif Hnimssa. Hnimssa perjured himself and testified at trial that Plaintiff and other co-defendants were Islamic fundamentalist and involved in

terrorist activities.

21. The Government also relied on what they characterized as corroborating evidence. An example of such corroborating evidence included the "Farhat" summary of the audio tape recordings.

22. Based on the so-called "casing" materials, the testimony of Yousif Hnimssa, Plaintiff was convicted of a terrorist related offense.

23. Thereafter, the Plaintiff and his co-defendants in the criminal case filed a series of motion seeking a judgment notwithstanding the verdict, or in the alternative, a new trial. The motions alleged that the prosecution team engaged in a pervasive pattern of outrageous misconduct that deprived them of a fair trial and violated the very integrity of the judicial system. That claim also included specific allegations of knowing use of and deliberate failure to correct false testimony; affirmatively interfering with access to witnesses; improperly concealing evidence, and; improperly vouching and bolstering witness testimony. The Government filed responses and there were evidentiary hearings.

24. At one of the hearings, Judge Rosen found that two previously undisclosed documents clearly contained on their face indication both impeaching and exculpatory material. Judge Rosen also further noted that there was no question that the material should have been turned over. Although the Court declined to decide whether the failure to disclose the material affected the verdict, Judge Rosen opined that these documents should have been disclosed to the defense. The Court also ordered the government to conduct a thorough review of every

document in the case to determine if there were any documents that "were even close to being *Brady* or *Giglio* material. The Court also characterized the post-trial proceedings as a "fine kettle of fish" and the most unpleasant task that he had has in almost fourteen years of being a judge. The Court also indicated that it would not rule on the new trial motions until this review was complete.

25. Several months later, the Government concluded it's review of the case and issued a pleading called the Government's Consolidated Response Concurring in Defendant's Motion for a New Trial and Government's Motion to Dismiss Count I without Prejudice and Memorandum of Law in Support Thereof. (Attached as Attachment 1 to this Amended Complaint and incorporated as if more fully stated in this pleading).

26. In that pleading, the government concluded that there was no reason or probability that it could endure further hearings and emerge with the convictions of Plaintiff intact.

27. The Government also concluded in the pleading, in its best light, the record would show that the prosecution committed a pattern of mistakes and oversights that deprived the defendants of discoverable evidence (including impeachment materials) and created a record filled with misleading inferences that such material did not exist. The Government asked the Court to grant Koubriti a new trial in the criminal case. On June 1, 2006, Judge Rosen entered an Order setting aside the convictions and ordering a new trial.

28. Defendant Convertino while acting in an investigative type role withheld exculpatory evidence or fabricated evidence in the Plaintiff's criminal case by:

A. Failing to turn over photographs of the Queen Alia Hospital or ordering that they not be turned over to the Defendant or presented to the Grand Jury;

B. Failing to disclose that none of the Defendants could not establish which site or sites the sketches established (if either) after their respective trips to Jordan;

C. Ordering or directing Defendant Thomas not to memorialize any of the ten to twenty interviews of Yousif Hnimsssa prior to the Second Superseding Indictment being issued; and

D. Failing to disclose the Opinion of Air Force OSI SA Goodnight to the Grand Jury or Plaintiff concerning the alleged Incirlik Air Base sketches.

29. Had Defendant Convertino not presented fabricated evidence and/or presented the exculpatory evidence to Plaintiff, the Grand Jury and/or to Mr. Koubriti's lawyers, Plaintiff would not have been charged or convicted of any criminal offense.

30. Defendant Thomas also willfully and intentionally withheld exculpatory evidence or fabricated evidence in the following manner:

A. By failing to take photographs of the Queen Alia Hospital;

B. By failing to turn over photographs he received of the Queen Alia Hospital to either Defendant Convertino and/or to the defense lawyers for

Plaintiff in the criminal trial;

C. Failing to disclose e-mails to either Defendant Convertino and/or to Plaintiff's defense lawyers in the criminal case. The e-mails undermined his testimony or the testimony of Defendant Smith concerning the sketches of the Queen Alia Hospital;

D. Failing to disclose to Defendant Convertino and/or to the defense attorney representing Plaintiff in the criminal case that Nassa Ahmad told him his mentally unstable brother might have been doodling in the day planner in question;

E. Failing to disclose to Defendant Convertino and/or the defense lawyers representing the Plaintiff in the criminal case that Air Force OSI SA Goodnight stated that the alleged sketch of the Incirlik Air Base was not accurate;

F. Failing to disclose the names of witnesses who could testify that the sketches did not represent the Incirlik Air Base;

G. Failing to disclose a 9/11/2007 e-mail where Defendant Thomas admitted that there was difficulty transcribing the audio portions of the videotape due to among other things, the Tuniusei or Algeria dialect speech;

H. Failing to record by way of 302, the contents of the ten interviews with Yousif Hnimssa;

I. Failing to disclose to Defendant Convertino and/or the defense lawyers for Plaintiff that Yousif Hnimssa made many different statements.

31. Had Defendant Thomas not presented fabricated evidence and/or presented the exculpatory evidence to Plaintiff, the Grand Jury and/or to Mr. Koubriti's lawyers, Plaintiff would not have been charged or convicted of any criminal offense.

32. Defendant Smith also willfully and intentionally withheld exculpatory evidence or fabricated evidence in the following manner:

    A. By failing to take photographs of the Queen Alia Hospital;

    B. By failing to turn over photographs he received of the Queen Alia Hospital to either Defendant Convertino and/or to the defense lawyers for Plaintiff in the criminal trial;

33. Had Defendant Smith not presented fabricated evidence and/or presented the exculpatory evidence to Plaintiff, the Grand Jury and/or to Mr. Koubriti's lawyers, Plaintiff would not have been charged or convicted of any criminal offense.

34. Had the exculpatory evidence been turned over or presented to the Grand Jury, the jury and/or given to Plaintiff's lawyers, Plaintiff would not have been charged or convicted.

COUNT ONE

Violation of the Fourteenth Amendment - All Defendants

35. Plaintiff by this reference incorporates all previously pled paragraphs.

36. That as a result of their unlawful, malicious, reckless and indifferent acts or omissions, the Defendants alone and in concert, conspired to and acted under color or law but contrary to law and did deprive Plaintiff of his rights, privileges,

or immunities secured under the Constitution and laws of the United States, including his right to due process of law and to a fair trial, as guarantees by Amendment XIV of the United States Constitution, by knowingly or recklessly fabricating evidence against him; by failing to disclose exculpatory evidence in his favor; and by obfuscating or misrepresenting the facts to the Grand Jury and at his trial.

37. That as a direct and proximate result of the conduct of the Defendants, referred to more fully above, Plaintiff suffered loss of liberty; incarceration, and imprisonment. He further suffered and continues to suffer embarrassment; indignation; anxiety, mental anguish; emotional distress; humiliation; outrage; shame; fear; loss of income; damage to reputation; denial of constitutional rights; and other injuries, damages or consequences related to the incident.

THEREFORE, for all the above reasons, Plaintiff demands judgment against Defendants jointly and severally for whatever amount the jury may determine for compensatory damages. Further, Plaintiff demands judgments against each Defendant individually for punitive damage in whatever amount the jury may determine, plus costs, interest and actual attorney fees and whatever other relief is deemed reasonable and just under the circumstances.

Relief Requested

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief against Defendants:

a. Compensatory damages in the amount of $9,000,000.00;

b. Punitive and/or exemplary damages in an amount which is fair, just and

reasonable;

c. Such other and further relief as this Court may deem appropriate, including costs, interest and reasonable attorney fees pursuant to 42 U.S.C. § 1983.

Respectfully submitted by:

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Dated:

ATTACHMENT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL NO. 01-80778

HON: GERALD E. ROSEN

D-1 KARIM KOUBRITI,
D-2 AHMED HANNAN, and
D-4 ABDEL ILAH EL MARDOUDI,
Defendants.

_______________________________/

GOVERNMENT'S CONSOLIDATED RESPONSE CONCURRING IN THE DEFENDANTS' MOTIONS FOR A NEW TRIAL and GOVERNMENT'S MOTION TO DISMISS COUNT ONE WITHOUT PREJUDICE AND MEMORANDUM OF LAW IN SUPPORT THEREOF

The United States, through undersigned counsel, hereby submits its consolidated response to the defendants' motions for a new trial. For the reasons discussed below, the government agrees that a new trial is appropriate and further requests that the Court dismiss without prejudice Count I of the Third Superseding Indictment.

I. INTRODUCTION

On June 3, 2003, the jury found defendants Koubriti and El Mardoudi guilty of Counts I and II of the Third Superseding Indictment, but acquitted them of Counts III and IV; Hannan was convicted of Count II (document fraud conspiracy) but acquitted of

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Counts I, III and IV; and Ali-Haimoud was acquitted of all charges. The matter was forwarded to the Probation Department for preparation of a presentence report.

Thereafter, Koubriti, Hannan and El Mardoudi filed a series of motions seeking judgment notwithstanding the verdict or, in the alternative, a new trial. The motions alleged, inter alia, that the prosecution team engaged in a "pervasive pattern of outrageous misconduct [that] deprived them of a fair trial and violated the very integrity of the judicial system." That claim included specific allegations of the "knowing use of, and deliberate failure to correct, false testimony;" "affirmatively interfering with access to witnesses;" "improperly concealing evidence;" and "improper vouching and bolstering witness testimony." Numerous supplemental memoranda and responses were filed by the parties, culminating in a December 12, 2003 hearing.

During that hearing, this Honorable Court found that two previously undisclosed documents "clearly contain, on their face, indicia of both exculpatory and impeaching material." 12/12/03 Tr. 167. The Court further noted that there was "no question" that the materials should have been turned over, although it declined to decide whether the failure to disclose them had a material effect on the verdict. Id. at 167.[1] Having concluded that these documents should have been disclosed to the defense, the Court ordered the government to conduct a thorough review of every document in the case to determine whether there were any other documents "that are even close to being arguably

[1] In a later opinion, the Court found that government trial witness Youseff Hmimssa was not credible during his testimony at the December 12, 2003 hearing.

Brady or Giglio material." Characterizing the post-trial proceedings as "a fine kettle of fish" and "the most unpleasant task that I've had in almost 14 years as a judge," the court indicated that it would not rule on the new trial motions until this review was complete. Id. at 165.

On June 29, 2004, upon completion of the file review and this Court's ruling on several redaction/relevance issues, an organized disclosure of potentially exculpatory/impeaching unclassified documents was made to the Court, defense counsel, and the original trial prosecution team. That order also required the government to provide to the defense on or before August 1, 2004 (later extended to August 30, 2004), copies of any witness interview memoranda (FBI FD-302s in a redacted form). These memoranda would include post-trial FBI interviews conducted and supervised by the Public Integrity Section of the U.S. Department of Justice, Criminal Division. The Court shortly thereafter established an expedited briefing schedule and set evidentiary hearings for late summer/early fall.

Having conducted the thorough review of the record ordered by the Court, searched all known investigative files for undisclosed Brady/Giglio materials, and reviewed interview memoranda prepared by the Public Integrity Section, the government has concluded that (1) the prosecution failed to disclose matters which, viewed collectively, were "material" to the defense, see Kyles v. Whitley, 514 U.S. 419, 437 (1995) (evidence suppressed by prosecution must be "considered collectively, not item by

item"); (2) the prosecution allowed an incomplete and, at times, misleading record to be presented regarding several important issues; (3) Additional hearings will lead the Court to grant the new trial request; and (4) the defendants deserve to have a speedy re-trial of any remaining viable counts without enduring months of additional delay such hearings will necessarily require.

To date, the defendants' post-trial motions have resulted in a single day-long hearing in which government attorneys presented conflicting testimony about why significant impeachment material was not disclosed. That brief hearing gave just a glimpse of the conflicting testimony that would be presented at any future hearing regarding the additional non-disclosures uncovered during the Court-ordered file review. At such a hearing, government agents, attorneys and other employees would disagree about whether the prosecution knew of significant undisclosed materials, purposefully withheld them, and/or intentionally presented false and misleading testimony, but all would agree that materials were not disclosed. As more fully explained below, issues regarding knowledge and intent are not controlling; regardless of knowledge and intent, key materials like the Turkish National Police, Intelligence Division (TNP) opinion, the Air Force Middle East Map theory and the Jordan photos would have been found with minimal diligence.

As part of their fact finding mission, undersigned counsel provided to lead prosecutor Richard Convertino and co-counsel Keith Corbett copies of all documents

uncovered during the Court-ordered file review and requested their position regarding prior disclosure (if any), materiality, and impact on the government's response to defendants' new trial motion. AUSA Convertino, through a hypothetical proffer through his attorney, provided information that is at odds with other documentary evidence and testimony. Keith Corbett, his supervisor and co-counsel, informed us that he would not have participated in the case had he known of the existence of certain materials discovered in the Court-ordered file review. He also indicated that, in his view, the cumulative weight of the problems uncovered since the verdicts warranted the government's acquiescence in the granting of a new trial.[2]

As fully explained in the detailed memorandum of law, the government has concluded that there is no reasonable possibility that it could endure further hearings and emerge with the convictions intact. In its best light, the record would show that the prosecution committed a pattern of mistakes and oversights that deprived the defendants of discoverable evidence (including impeachment material) and created a record filled with misleading inferences that such material did not exist. Accordingly, the government believes that it should not prolong the resolution of this matter pursuing hearings it has no reasonable prospect of winning.

Koubriti, who was convicted of Counts 1 and 2, is currently being held without bond; Hannan, who was convicted of Count 2 only, has been released to a half-way

[2] This response does not address additional disclosure issues involving classified materials which can not be discussed in these pleadings.

house with electronic monitoring. Koubriti has filed a motion seeking bond. The government is filing a response to the motion seeking bond, recommending a restrictive form of release for defendant Koubriti similar to that of Hannan.

II. BACKGROUND

The Koubriti case (otherwise known as the "Detroit Sleeper Cell case") was the first case to proceed to trial on terrorism-related charges following the September 11th terrorist attacks. The case arose from a September 17, 2001 search of an apartment in the greater Detroit area. Detroit Joint Terrorism Task Force ("JTTF") agents went to the apartment in an attempt to locate and question Nabil Al-Marabh, an individual on the FBI's "watch list" of suspected terrorists. Although Al-Marabh's name was listed on the mailbox, he was not actually living at the apartment at the time of the search. Instead agents found defendants Karim Koubriti, Ahmed Hannan and Farouk Ali-Haimoud, who were living as apparent transients with little or no furniture. The defendants were found in possession of false identity documents, over 100 audio tapes featuring fundamentalist Islamic teachings, a videotape depicting a number of American tourist landmarks, and a day planner bearing suspicious drawings labeled "The American Air Base in Turkey under the Leadership of Defense Minister," and "Queen Alia, Jordan." Nonetheless, none of the defendants acknowledged engaging in terrorist activity; there was no direct evidence tying the defendants to any known Terrorist group; and, until Hmimssa began cooperating with the prosecution, no witness could testify that defendants had committed

or were intending to commit any terrorist acts.

Koubriti, Hannan and Ali-Haimoud were originally charged in a September 18, 2001 complaint with possession of a false identification and/or immigration document, in violation of 18 U.S.C. §§ 1028(a)(4), 1546, and 371. The case was assigned to Assistant United States Attorney Richard Convertino. The charges were amended several times. Most significantly, after a former roommate Youseff Hmimssa agreed to cooperate, the original three defendants were charged along with a fourth man (Abdel Ilah El Mardoudi) with conspiring to provide material support or resources to terrorists. The case proceeded to trial on a Third Superseding Indictment charging conspiracy to provide material support or resources to terrorism in violation of 18 U.S.C. §§ 371 and 2339A (Count I); conspiracy to engage in fraud and misuse of visas, permits and other documents, in violation of 18 U.S. C. § 1546(a)(b) and § 371 (Count II); fraud and misuse of visas, permits and other documents, in violation of 18 U.S.C. § 1546(a) and § 2 (Count III); and fraud and related activity in connection with identification documents and information, in violation of § 1028(a)(6) and § 2 (Count IV).

The detailed explanations contained within this memorandum are provided to establish the basis of the government's decision to agree to defendants' request for a new trial and to seek to dismiss Count I. Due to the nature of this case, a thorough and detailed exposition of the facts is necessary to ensure that the government's position and reasoning is accurately understood.

III. STANDARD OF REVIEW UNDER RULE 33

Defendants rest their new trial motions, in part, on a claim that the government failed to disclose exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 527 U.S. 263, 281-82 (1999), the Supreme Court explained the three-part test a defendant must meet: "There are three components of a true Brady violation: The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

The Brady rule requires the government to disclose evidence:

> in its possession that is *both* favorable to the accused and material to guilt or punishment. * * * [A] majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Presser, 844 F.2d 1275, 1281 (6th Cir. 1988) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)). Even if the Government withholds Brady material, defendant has a constitutional remedy "*only* if [he] can show that there is a reasonable probability that the 'omission deprived the defendant of a fair trial.'" Id., quoting Agurs, 427 U.S. at 108. For purposes of determining whether defendants are entitled to the reversal of their convictions and a new trial for Brady violations, however, a Court need not resolve underlying questions of wilfulness or inadvertence. Rather, "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where

the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added).

The term "material" applies to evidence that is admissible or would lead *directly* to admissible evidence. United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991) (emphasis added). Thus, under Brady, information is not "material" and therefore, disclosable, if it is only possible that it could lead to exculpatory evidence. Cf. Wood v. Bartholomew, 516 U.S. 1, 6-8 (1995) (disclosure of inadmissible polygraph results not required based on "mere speculation" that it might have led to additional admissible evidence).

In addition, impeachment information that is merely cumulative does not create a "reasonable probability" of a different result at trial. As the Sixth Circuit held in Byrd v. Collins, 209 F.3d 486 (6th Cir. 2000):

> [W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.

Id. at 518 (quoting United States v. Avellino, 136 F.3d 249, 257 (2nd Cir. 1998)).

Defendants must show not just a possibility, but a probability of a different result. Strickler v. Greene, 527 U.S. 263, 291 (1999). In determining materiality, evidence suppressed by the prosecution must be "considered collectively, not item by item." Kyles

v. Whitley, 514 U.S. at 419, 435 (1995). The question is whether defendants have met their burden of proving that this cumulative undisclosed evidence can "reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict." Strickler, 527 U.S. at 290 (emphasis added) (quoting Kyles, 514 U.S. at 419, 435).

IV. THEORY OF PROSECUTION

Count I (the material support charge) was premised on the theory that the defendants constituted the Detroit-based "cell" of an Islamic terrorist organization. See Third Superseding Indictment at 1-2. Although the indictment appears to allege that this organization was Al-Qaeda, the government did not attempt to prove this fact at trial.[3] Instead, it argued that the defendants were Islamic Salafists (i.e., Salafiyya followers) who sought to assist some unspecified international terrorist organization.

In the absence of evidence that the defendants actually committed terrorist acts or were tied to any specific terrorist organization, the government sought to establish that the defendants were a "shadowy group" that "stayed in the weeds, * * * planning, seeking

[3] The Third Superseding Indictment alleged that defendants aimed to assist "a loose transnational network of radical Islamists," who were influenced by the Salafiyya religious movement. Id. at 2-3. It also described Al Takfir Wal Hijira as a "radical and extremist" global jihadist faction that trained "cells" to blend into Western societies in order to plot terrorist attacks. Id. at 4. Finally, it alleged that "[t]he Salafist and Takfiris are one arm of the greater global Jihadist organization known as 'Al-Qaeda.'" Id. at 7. While there were occasional references to Al Qaeda at trial, the government did not present any evidence tying the defendants to any individual identified with Al Qaeda. Other than testimony that the defendants were found living in an apartment once lived in by Al Marabh, the government did not present evidence actually tying the defendants to Al Marabh.

direction, awaiting the call." 8 Tr. 1023-24 (Opening Statement). See also Third Superseding Indictment at 8 (defendants "operated as a covert underground support unit for terrorist attacks within and outside the United States, as well as a 'sleeper'operational combat cell").

The government's theory of the case was explained most clearly by FBI Supervisory Special Agent (SSA) Paul George, the Supervisor of the Detroit JTTF, who testified at trial as a summary expert. George opined that the defendants constituted an operational or potential operational cell that was "going to strike out against targets, against the United States and abroad." 25 Tr. 4635. George based these conclusions on (1) his opinion that the drawings and videotape seized from the defendants constituted operational terrorist "casing material"; (2) the testimony of Hmimssa; and (3) the defendants' acquisition of fraudulent identity documents and their involvement in other fraudulent activities (which he characterized as "economic Jihad"). Id. at 4635.

George made clear that the sketches and videotape factored heavily into his opinion. He explained that the defendants' possession of this casing material "clearly show[s] this is a repository of intelligence" containing "operational terrorist material." Id. He further explained that his examination of the casing material showed him that "this is an intelligence group, an intelligence cell whose purpose is to maintain potential targets, to maintain intelligence casing material." Id. at 4630. He testified that the wide variety of fraudulent documents was consistent with the testimony [of Hmimssa] that this cell

"had the purpose of bringing in other members." Id. He further testified that the defendants' attempts to obtain commercial driver's licenses were consistent with the transportation needs of a terrorist cell and that attempts to get hazardous material specifications were consistent with a list of things a terror cell seeks to establish. Id. at 4631. He testified that international wire transfers (like those evidenced in this case) are "the hallmark of an international terrorist organization." Id. at 4632. Finally, he testified that defendant El Mardoudi's "ability" (through credit card fraud schemes) "to connect two people who can communicate freely on the telephone or in code as it is called for by in some of the [terrorist] manuals is remarkable. Um, it exceeds any–any trade craft that I've seen as the ability of simply being untraceable, so I said that fulfills that communication, so it is my opinion that this is a terrorist support cell." Id.[4]

In short, the government's theory that the defendants were an "intelligence collection cell" and an "operational or potentially an operational cell" largely depended

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[4] In addition to testifying that the defendants constituted a terrorist cell, SSA George opined about the roles each played within the cell. 25 Tr. 4521. He testified that Koubriti had a leadership role based on Koubriti's "language abilities" and "leadership personality." Id. at 4516-17. He further testified that Hmimssa's testimony that Koubriti told him he would slit his throat and brand across his hand if he were an informant, is further indicia of leadership because "Leaders will react more impulsively. This, again, is why they are leaders because they are willing to take change [sic] because they are willing to express themselves more often and more aggressively then would be a member." Id. at 4518. He testified that El Mardoudi had a leadership role based on his ability to communicate internationally without leaving traces through his misappropriation of other people's credit cards, the fact that he received wire transfers, his knowledge of language and his level of education (a law degree). He testified he would put Hannan and Ali-Haimoud "as simply involved group members." Id. at 4516. As to Ali-Haimoud, he testified "I find him as a new member who is responsible or at least taken the role of a clarity of doctrine, a clarity of idea," which he explained was a very important aspect of recruitment. Id. at 4520.

on three different types of evidence: (1) expert testimony that the day planner sketches and the videotape constituted "operational terrorist casing material," (2) the testimony of Hmimssa that the defendants had terrorist leanings and intentions, and (3) corroborating evidence that the defendants did things that were consistent with terrorist activities (but also consistent with ordinary criminal, commercial or religious activities). The corroborating activities included document fraud, credit card fraud, attempting to obtain commercial truck licenses with hazardous material specifications, the possession of audio tapes of Salafist speakers, and the use of international wire transfers.

Unfortunately, numerous developments since trial, including the discovery of significant materials not disclosed by the prosecution, have undermined each part of this three-legged stool. The remainder of this memorandum discusses some of these developments, and their impact on the case. We recognize that this memorandum does not address all of the claims defendants have raised (or could be expected to raise) in support of their motions. Nonetheless, we believe that the issues discussed herein illustrate the problems that have motivated the government's decision to acquiesce in the new trial motions and to dismiss Count I without prejudice.[5]

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[5] During trial, the Court repeatedly instructed the government to provide necessary discovery in a timely fashion. See, e.g., 9 Tr. 1474 ("I've asked you to provide them with the names of witnesses [that you are going to call the next day]. Don't hold it close to your vest, err on the side of caution and provide them with more rather than less."). In addition, the Court made clear that it would decide for itself whether materials in the government's possession were discoverable. When AUSA Corbett suggested that the government usually decides whether FBI interview memoranda contained Brady or Giglio material, the Court responded "Not in this Court." Id. at 1505. The Court then explained that virtually every Court in the District required

A. Three-Legged Stool

1. Casing Materials

It was essential to the government's theory to establish that the day planner drawings and videotape seized from defendants' apartment were terrorist casing material. SSA George testified that casing, which he defined as the evaluation of an area for operational use, is always used in preparation for a terror attack. 25 Tr. 4529. He explained that for terrorist organizations, security is more important than details accumulated at the site because the people at the casing site can not know they are being cased. Id. at 4530-32.

a. The Day Planner Sketches

In the absence of any direct testimony concerning the creation, purpose and intended use of the day planner sketches, the government offered the expert testimony of SSA George to establish that the drawings with Arabic words "American Airbase in Turkey under the Leadership of Defense Minister" and "Queen Alia Jordan" were casing sketches. Id. at 4538 and 4540. George testified that these drawings were consistent with

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the government to turn over 302s in advance unless there was a good reason not to. Id. at 1504-09. During the course of the discussion, AUSA Convertino acknowledged that the defense did not want the government to have the gate-keeper function and assured the Court "If I have a question, I always refer it to the Court to make the ultimate determination as to whether or not it constitutes discoverable impeachment material." Id. at 1508. AUSA Corbett concluded the discussion by acknowledging that he understood what the Court was saying: "Any 302 of any witness we call will be presented to the defendants, or in the event it is not, it will be presented to the Court to make the determination in order not to be turned over. " Id. at 1512. Likewise, the Court followed the same procedure regarding other potential Giglio material, including AUSA Convertino's notes of his Hmimssa debriefings. 14 Tr. 2524-38.

casing sketches he had drawn in foreign countries and that, although the drawings might look crude, it is imperative to keep things simple because any unnecessary marks confuse the mind with too much detail. Id. at 4539. In George's opinion, the day planner drawings were examples of a situation where minimal details are recorded on an as-needed basis because everything the operator does is in preparation for the possibility of arrest. Id. at 4535.

SSA George explained that he evaluated the drawings and reached his opinions using a three step formula: First, he looks at the drawing to determine whether it could be a casing sketch – "Fundamentally, you're just looking at, does this depict something that could exist * * * that this may be something that could be casing." Next he questions whether the "casing sketch is consistent with a place in the real world"– a question he described as fundamental. The final question is whether or not the sketched location "is a possible [terrorist] target." Id. at 4539. He explained that he reached his opinion that the Turkey and Jordan drawings were operational terrorist casing sketches based entirely on this formula without reference to any other evidence. 26 Tr. 4697.

Applying this formula, SSA George testified that these drawings were operational terrorist casing sketches based on his opinion that "the drawing looked like it depicted something that could exist" (i.e.,"something that could be casing") and the opinions of others that the sketches were in fact "consistent with a place in the real world"and were

"possible targets." 25 Tr. 4538-39.[6]

(i) Queen Alia, Jordan Sketches

SSA George testified that GX 2A-6 (one of the Queen Alia drawings) was, in his opinion, a casing sketch because "it has all the markings one would need and has a location." Id. at 4540. In reaching this opinion, SSA George relied on the prior testimony of FBI SA Michael Thomas and Ray Smith, an employee of the US State Department assigned to the US Embassy in Amman, Jordan.

Special Agent Thomas, the government's first witness, testified that he traveled to Amman, Jordan in approximately December 2001 with the Queen Alia sketch (GX 2A-6) and showed it to members of the Jordanian Intelligence Service and a member of the US State Department (later identified as Ray Smith, 11 Tr. 1770-71). He further testified that the Jordanian intelligence officers said there were three locations in Jordan that have Queen Alia in their name – The Queen Alia Airport, the Queen Alia Hotel and the Queen Alia Military Hospital. He testified that he and the Jordanians visited all three sites with the sketch and that they believed the site in the sketch was the Queen Alia Military

[6] Additional factors relied upon by the Turkish National Police, Intelligence Division (TNP) and the CIA (infra at 33-35), as to whether a sketch matched the style of other known terrorist casing sketches, and the CIA's apparent emphasis on the quality or training level of the sketch artist, point out the vulnerability of SSA George's analysis in any retrial of Count I. We note that straight application of SSA George's formula without considering any evidence regarding the origin and intended use of the underlying material could, under certain circumstances, be misleading. For example, under this formula, any drawing of the World Trade Center towers prior to 9-11 or any video of various Las Vegas hotels could be described as operational casing material even though the drawing might have been made by a school child and the video might have been purchased by a tourist from a hotel gift shop.

Hospital. 8 Tr. 1131-35.

Thomas described the route he traveled to reach the hospital and showed the jury how it corresponded with the sketch. He then identified an object on the drawing as "a very large dead tree" and testified that from what he observed, the drawing was a representation of what he saw on the ground at the Queen Alia Military Hospital. Id. at 1131-34. At the request of the Court, he re-described in step-by-step detail exactly what they did and saw, testified that there was a large, dead tree with no leaves, only branches, and also identified a "very sharp turn" that was "exactly consistent" with the way it was drawn on the sketch. Id. at 1138.

The government did not use any photos of the Queen Alia Hospital to reinforce Thomas' testimony that the site matched the sketch. On cross-examination, Thomas was asked whether he had brought a camera with him to Jordan and whether he took any pictures of either the hospital or the dead tree. Thomas said he did bring a camera to Jordan, but unfortunately did not take any pictures of the hospital or the dead tree. He said that he did direct another individual who was with them (apparently Smith) to "take those photographs or ask that the photographs be taken," but that he (Thomas) did not take any himself. The cross-examiner did not ask Thomas whether the other person actually took any photos and Thomas did not indicate whether he had received any. Id. at 1179-80. Instead, the defense later questioned Smith about this. Infra at 19.

The following trial day, the Court inquired about upcoming witnesses and AUSA

Convertino indicated that the government intended to call Ray Smith, who would testify, like SA Thomas, that the sketch and the Queen Alia Hospital track one another. The defense inquired whether Smith intended to introduce any photographs and AUSA Convertino answered "No, I don't think so." 9 Tr. 1497-98. The government did not advise the Court that it had obtained photographs.

The next day, Smith testified that he had traveled with Thomas and two Jordanian agents to the Queen Alia Airport, the Queen Alia Hotel (which is next to the airport) and the Queen Alia Military Hospital in or about late February/early March 2002 to see if the sketch matched any of the three locations.[7] 11 Tr. 1770-87. Even before they arrived at the airport/hotel area, Smith was convinced that neither would match the sketch, having been there on previous occasions. Upon arrival they quickly concluded that those locations did not match the sketch. 11 Tr. 1773.

After viewing the airport/hotel area, they went to the Queen Alia Hospital because "the GID thought this might be a location worth checking." Referring to GX2A-6 as a map, Smith illustrated the routes they took to the hospital, addressed some landmarks he believed corresponded to the sketch, and then began to discuss a "prominent" dead tree standing by the side of the road. Smith testified that the tree was "another point that matched this sketch to me, started making me think more that this is related to the Queen

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[7] Neither Smith nor Thomas mentioned that AUSA Convertino had also traveled to Jordan and accompanied them on the site visits. See 8 Tr. 1132 (Thomas) and 11 Tr. 1771 (Smith).

Alia Military Hospital." Id. at 1778. Smith further testified that after they drove to the tree, they stopped, looked at the dead tree, and looked at a cross road that was also very similar to the drawing. He also testified that there was a particular road with a "hitch back coming down and leading to" a neighborhood, which made it seem "like every time we turned, it was getting more and more like this drawing." Id. at 1780. He further testified that based on his experience "as a security officer, if I were to see this sketch and I worked at that hospital, I'd be very concerned" that "this was part of some bigger plan." Id. at 1783-84. He further testified that the sketch had sufficient detail to be a casing sketch and that GX 2A-5 is, in his mind, just a smaller drawing of what he saw in the other sketch. Id. He also reiterated that the most prominent thing to him was "the tree and the hospital here, marked with an X." Id. at 1784. AUSA Convertino next asked Smith whether he had an opportunity to do an overhead flight of this location, and, if so how that vantage point affected his opinion. Smith testified that he did a security fly-over of the hospital when the Vice President visited Amman. He said from the fly over vantage point, the road was again prominent, but

> *[T]he thing that kept sticking out in my mind was this tree. I could see that at a 300 foot level. * * * No doubt in my mind I had sufficient information to believe that this sketch was similar to the Queen Alia Military Hospital, by just doing the on-the-ground work. But doing the fly over reinforced that a great deal.* Id. at 1787.

AUSA Convertino also asked if Smith took any photographs of the site. Smith responded that "[D]iplomats serving overseas * * * never take picture of a military

installation, quasi military installation or security people. * * * It could cause bigger political implications. * * * I would have to get higher approval as high as the Ambassador * * * who would have to pass it off to the Government of Jordan." Id. at 1785-86.

On cross-examination, Smith reiterated in even stronger terms that he did not believe he could have obtained photographs. He also conceded that it would not be wise for someone to pick a dead tree as a landmark because a dead tree could easily be removed. Id. at 1797-1811. Neither Smith nor AUSA Convertino gave any indication to the Court that there was a strong likelihood that the tree had, in fact, already been removed or that the prosecution had, in fact, obtained photos.

Based on the testimony of Thomas and Smith, George testified that in his opinion the "Queen Alia Jordan" drawing was a casing sketch because:

> *It has a clearly defined set of markings that would show on that. And most significant to me as evaluating this is casing, is actually the tree. * * * That is an important element, is that it tells me when I get there, I'm in the right place. And again, you put yourself in the shoes of the operator. There is a great deal of tension, a great deal of adrenaline and you need certainty. That mark there is that certainty. * * * If I were the person who needed to go there and know I was in the right place, a tree does better then does North, South, any other thing, any other description.* Id. at 4540-41.

Undisclosed Evidence Regarding the Jordan Sketches

Our Court-ordered file review raises serious concerns regarding the above testimony. On August 11, 2004, we received a series of e-mails from the State Department. The e-mails were requested after Ed Seitz, a State Department employee

assigned to the Detroit JTTF, advised that, at AUSA Convertino's request, he had obtained and given to SA Thomas a series of aerial and ground photos of the Queen Alia Hospital. The e-mails raise the prospect that, contrary to the testimony of Thomas and Smith, (1) there was no initial consensus that the drawings represented the hospital and (2) photos could have been and were in fact obtained upon request.

Some important features of these e-mails are as follows:

- A September 3, 2002 @ 8:59 am e-mail from Matthew Rhind to Ed Seitz indicates that Ray Smith (the government trial witness who positively matched the sketch to the Queen Alia Hospital) had advised Rhind that he, the "LegAtt," an FBI agent from Detroit and an AUSA went to visit the Queen Alia Hospital and Airport and, based on the sketch, they could not establish which site (if either) the sketch referred to.[8]
- In a series of subsequent e-mails, Seitz asked Rhind for photos (including aerials) of the hospital, road networks leading to the hospital, and the large dead tree located near the entrance of the rear parking lot. Within a week, Seitz received a return e-mail from Kevin O'Connor containing aerial photos of Queen Alia Military Hospital. O'Connor indicated that they were unable to locate the "large dead tree" which might have been removed

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[8] It is unknown how reliable or accurate Rhind's recollection is of what Smith told him. We note however, that a draft prosecution memorandum dated 04/02, which is after the Jordan trip, still refers to the casing sketch as that of the Queen Alia Airport, not the Hospital.

during recent renovations.

- Seitz then again requested photos of the dead tree, noting that "the AUSA is on my neck." O'Connor responded by suggesting again that the dead tree might have been removed, but enclosing additional photos of the area where it was supposed to be located. Two weeks later, Seitz tried again, giving O'Connor further direction about where the tree might be located. O'Connor responded by asking for a drawing.
- Several months later, in February 2003, Seitz forwarded the e-mail containing the second set of pictures to paralegal Ana Bruni with a copy to Convertino. Bruni responded by saying that they needed the earlier e-mail, which had more pictures. Seitz then forwarded that e-mail to Bruni with a copy to AUSA Convertino. Convertino sent a reply e-mail: "Thanks Ed!! We love ya."[9]

Neither the photos nor the e-mails were disclosed to the defense or the Court for consideration under the Court's Brady/Giglio procedures. Instead, misleading testimony was elicited that created the false impression that there was initial consensus that the

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[9] O'Connor indicated in a recent interview that he believed that Smith had previously attempted to take aerial photographs of the hospital but had some type of incident with the helicopter door coming open while the photographs were being taken. Although O'Connor was not involved in that first attempt, he said he and the Jordanian police were concerned about avoiding a repeat of that mishap. He further stated that he had no problem obtaining permission to take the aerial photographs and reiterated that it was the Jordanians who took him in the helicopter when they took the photographs. Kevin O'Connor 302.

drawing depicted the Queen Alia Hospital and that photos could not be taken due to diplomatic red tape. In addition to the testimony of Thomas and Smith, summarized above, George testified as follows during his cross-examination:

> *Q* *You heard the testimony of Harry Raymond Smith, the foreman [sic] policeman from South Carolina that works for the Department of State?*
>
> *A* *Yes, sir.*
>
> *Q* *You agree with him that the situation didn't warrant going through the whatever steps are necessary to take some photos?*
>
> *A* *My understanding of his responsibility at that embassy, sir, is, first, to protect the people inside that embassy. If at any time he feels any request he would make or any action he would make, would lesson the security of the Americans assigned to his embassy, sir, I leave that discretion entirely to him. So if he tells me he felt that taking photographs would, in any way, impact on his ability to do his primary mission, sir, I leave that entirely to him. 26 Tr. 4662.*

SSA George further testified "In fact the testimony [referring to Smith] specifically said that photographs could not be taken." Id. at 4843.[10]

The government had a duty to clarify the record and, at a minimum, submit the photos to the Court for an in-camera review under the Court's Brady/Giglio protocol. See supra at 13, n.5. The prevously undisclosed photos undermine the testimony of Thomas and Smith and therefore the derivative testimony of SSA George. It is difficult, if not impossible, to compare the day planner sketches with the photos and see a correlation between the drawings and the hospital site, a problem magnified by the disclosure in the

[10] There is no evidence that AUSA Corbett, SA's Brennan and George, or Ray Smith knew there were photos.

September 3, 2002 e-mail that Smith had advised that he, the FBI Legat, an FBI agent from Detroit, and an AUSA went to visit the airport and hospital with the sketch but could not establish which site (if either) the sketch referred to[11]. (Copies of both are attached to this memorandum.) Of course, it is possible that the site may have substantially changed between the time Thomas and Convertino viewed it (December 2001/early March 2002) and the time the photos were taken (September 2002). But given the Court's protocol, an argument that the photographs need not be produced due to "changed circumstances" should have been made to the Court.

While litigating this issue at a new trial hearing would pit government witness against government witness on issues of knowledge, intent and willfulness, it would not change the fact that the e-mails and photos could have been located and provided to the

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[11] Thomas has also stated to the Public Integrity investigators that the Jordanians initially believed that the sketch was of the Queen Alia Airport and not the hospital. Thomas did not reveal this fact to the jury. Indeed, his testimony seemed to suggest that the Jordanians focused on the hospital from the start: "We presented this document to the Jordanians. They said we believe this is the military hospital. There's three items here in Jordan that have the name Queen Alia attached to it: Queen Alia Airport, the Queen Alia Hotel and the Queen Alia Military Hospital." Likewise, when Smith was asked on direct examination why they went to the Airport first, he sidestepped the question, responding that "one of the reasons" they went to this location (i.e., the Airport) was because it had "Queen Alia" in its name. 11 Tr. 1771-72. This answer failed to address why they visited the airport first, before the hotel or the hospital which were also named after Queen Alia. Likewise, when asked on cross-examination whether the airport was the Jordanian's first suggestion upon looking at the sketch, Smith gave the same type of response: "I think because the airport was Queen Alia Airport. And from my understanding Arabic on this page [i.e., the sketch] said Queen Alia, they wanted to check the airport out and make sure it wasn't a match." Id. at 1805."

defense through reasonable diligence.[12] AUSA Convertino's lawyer has notified undersigned government counsel, via hypothetical proffer, that it is Convertino's position that while in Jordan he asked about photos, but was told by the GID and the RSO (Smith) that they could not obtain photos. Convertino continued to press for photos, but the State Department representative did not obtain them in a timely manner. Convertino says he does not recall ever seeing photos, but assuming arguendo that he did, he assumes that he did not pay attention to them because, as a result of construction, they did not represent the scene he observed. Even if he were available to testify at the new trial hearing, such testimony would conflict with documentary evidence and the testimony of other witnesses. Even if the Court credited AUSA Convertino's testimony about the photos, the government could not escape the fact that the photos and e-mails were within the purview of the government but were not disclosed to the defense.

(ii) Incirlik Air Base Sketch

In addition to the "Queen Alia, Jordan" sketches, the government relied at trial on a sketch labeled "American Base in Turkey Under Command of Secretary of Defense for

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[12] Although Seitz claims he gave Thomas two different sets of the photos, SA Thomas failed to enter the photos into the FBI's evidence files. Thomas denies receiving two sets and claims that he had planned to enter the photos into the FBI evidence file digitally, but Seitz never gave him the disk. Thomas says that he last saw the photos in the trial preparation room and speculates that paralegal Ana Bruni may have thrown them away after trial. Interestingly, SA Brennan, AUSA Keith Corbett (Convertino's supervisor), and SSA Paul George all claim that they were never told of the existence of the photos. The disappearance of these photos that the prosecution team sought so diligently to acquire would be difficult for the government to explain at a new trial hearing.

All Weapons." In the absence of any direct testimony regarding the origin, purpose or intended use of the sketch, the government relied on the expert testimony of SSA George to assert that this sketch was a "casing sketch" of the Incirlik Air Base in Turkey, drawn from a particular vantage point just south of the base boundary. In his opening statement, AUSA Convertino told the jury:

> *You'll hear evidence [from SSA Paul George] that that was a casing picture. Not only was that a casing picture, it was a casing picture of the United States base in Incirlik, Turkey, the air base that does Northern Watch over Iraq. And you're going to hear from a Lieutenant Colonel from Incirlik and she's going to tell you that the pictures on the page, the drawings depicted on the page, are the very flight pattern as the planes take off every single time at Incirlik.* ***She's going to tell you that on the bottom of the page is a harden bunker. She can identify the very hardened bunker. She is going to tell you where that sketch was drawn from the vantage point of the sketch itself.*** 7 Tr. 1016-17(emphasis added).

As promised, SSA George testified that, applying his three step formula, see supra at 14-15, the drawing was a casing sketch of the Incirlik Air Base. 25 Tr. 4538-39. He explained that "It may look crude, but the hallmark of an operational plan, whether it's a casing sketch or it's how the plan is carried out, is simplicity." Id. at 4539. Asked to explain the importance of the sketch, he said "It gives all the information one would need to conduct a terrorist attack." Id. at 4540.

As with the Jordanian sketches, George conceded that his opinion depended on the testimony of others who were familiar with the place depicted in the sketch. Id. at 4697. That testimony was supplied by SA Thomas and Air Force Colonel Mary Peterson. SA Thomas testified that he took the day planner sketch to Turkey and met with Turkish

Intelligence Officers and Special Investigation Air Force (OSI) officers Goodnight and Armes. 8 Tr. 1141. They visited a warehouse about 2000 feet from the base perimeter where the Air Force believed the sketch had been drawn. Id. Thomas and the agents climbed to the roof to observe the Incirlik base, and Thomas testified that what he observed was "almost identical" to the drawing. Id. at 1143-44. He saw a runway down the center of the air base and AWACs, tankers and fighter jets lined on the tarmac in a format that resembled the drawing. Id. at 1150. He also observed the three different aircraft take off in sequential order. Id. at 144-45, 1147. He observed a hardened aircraft shelter (HAS) that he said resembled the object drawn on the lower left side of the sketch. Id. at 1145-46. With reference to three circular objects on the drawing, he testified that he drove around the outer perimeter of the base and observed three "circular looking antennas" Id. at 1147-48.

Colonel Peterson, a former OSI Detachment Commander at Incirlik Air Base (IAB) during the time of Operation Northern Watch, testified as both an expert and a fact witness. Colonel Peterson indicated that she received a fax copy of the drawing on September 20, 2001, and "[i]t was apparent to me upon seeing it, that it was depicting air field operations." 13 Tr. 2225. In addition to the drawing's suggestive title, Peterson observed that the drawing apparently depicted AWACs, refueling airplanes and fighters (the three types of aircraft involved in Operation Northern Watch), that these planes were shown in the actual takeoff sequence, and that the drawing in the lower lefthand portion

of the page resembled a hardened air shelter (HAS) at Incirlik base. Id. at 2211-16, 2225-28. With respect to the hardened air shelter theory, Peterson gave detailed testimony about the ability to see a particular shelter (No. 51) from offsite (id. at 2231), and testified about similarities between the HAS door and the item depicted in the lower left corner of the drawing (id. at 2232-33).[13] Colonel Peterson further testified that the Incirlik base was a high threat installation, and based on her receipt of such threat information, she was of the opinion that the sketch was "some sort of starting or pre-operational surveillance of Incirlik Air Base." Id. at 2243. In addition, she offered her "strong belief" that slash marks on the drawing "could be field of fire from shoulder launched missiles." Id. at 2245-46. Unlike the situation with the Queen Alia Hospital, the government offered into evidence photographs of the airbase, the HAS and planes flying over the warehouse to support Colonel Peterson's testimony. Id. at 2228-32, 2239-41.

Significantly, Colonel Peterson attempted to bolster her opinion by testifying that she showed the drawing to "several different people who were as, if not more, familiar with the installation," including the Security Police Commander. She testified that he

[13] Unlike Thomas, who had suggested that the drawing was "almost identical" to what he observed from the roof of the warehouse, Colonel Peterson acknowledged that there were important differences between the actual base and the drawing. See, e.g., id. at 2227 (noting that tankers and refuelers are typically parked at a different end of runway). Accordingly, she described the sketch as not "a single drawing, but a series of depictions." Id. at 2225-27.

agreed that the lower left portion of the drawing appeared to be a HAS. Id. at 2228-30.[14] She further testified that the Senior Installation Commander and the Co-commander General of Operation Northern Watch both concluded, without prompting, that they saw the AWACs--tanker--fighter appearance (i.e., the three Operation Northern Watch aircraft), the HAS appearance, and the takeoff sequencing. Id. at 2236-37. In short, Peterson created the strong inference that all Air Force personnel who viewed the drawing were in agreement that the lower left corner depicted a HAS.[15]

Undisclosed Evidence Regarding the Turkey Sketches

As part of the Court-authorized review, the government found within the original Air Force OSI file a report dated March 26, 2003, which contained the following internal addendum by Air Force OSI SA Goodnight:

> *Although this report provides one analysis of the day planner, other versions of the analysis also exist. Without direct testimony of the author [of the sketch], any analysis is essentially opinion, particularly concerning aspects of the sketch which do not lend themselves to easy recognition. * * * [T]he portion of the sketch depicted in the analysis as a hardened aircraft structure (HAS) (Exhibit #1 lower left-hand corner), as well as portions described as dark parallel lines and human-like figures (that could represent fields of fire for a MANPADS attack) are highly speculative. In the opinion of the case agent [SA GOODNIGHT] the*

[14] When asked by the Court whether she sought "input from any other people on your team or at the base," Peterson responded "The Special Agent[s] within my OSI detachment, all, obviously, reviewed this Day Planner page as well. It was a fairly significant piece of information to come to us." Id. at 2238. What she did not tell the Court was that others within the Air Force, including a special agent within her detachment, disagreed with her testimony regarding the HAS and fields of fire.

[15] Peterson also testified that senior officers with oversight over flight operations at IAB modified flight arrival and departure protocols after viewing the drawing. Id. at 2243-44.

> *speculative portions of the sketch were "sold" to the AUSA too strongly as fact. During two meetings with the AUSA it was apparent that he believes strongly in the HAS theory and wants someone from AFOSI to testify that the drawing is in fact a HAS. In the opinion of the case agent, it might be difficult to convince a jury that the drawing represents a HAS, particularly since the door of the alleged HAS shows it opening from the rear [from the perspective the analysis indicates it was drawn]. It would be more logical to use the wording that says "The American base which is in Turkey under the command of the Secretary of Defense" and establish that it is the only "American base in Turkey" which has aircraft. This was explained to the AUSA but he indicated he believed the HAS theory and wanted to use it at trial.* (Paragraph 15 of internal addendum to March 26, 2003 Air Force OSI report.).

This memorandum, together with the statements of Goodnight and others, contradicts the strong inference of unanimity created by Colonel Peterson's testimony.

When interviewed by the Public Integrity investigators, Goodnight stated that the HAS theory originated with Peterson and the Security Forces Commander.[16] After the sketch was assessed at IAB, it was forwarded to ARTEC (the Regional Terrorism Infrastructure Cell) in Ramstein, Germany to be analyzed. ARTEC completed its own analysis of the sketch, which concluded that the figure at the bottom left might be a map of the Middle East. An October 2, 2001, email obtained from the Air Force OSI Koubriti file in Turkey contained what appears to be three pages of attachments. The email and attachments set forth the Middle East map theory. Another document depicting an enlargement of the Turkey sketch superimposed with geographic locations from the Middle East was also created by ARTEC as part of its analysis and was viewed by Colonel Peterson. The email contained writing stating "Gabe - what the heck? I'm

[16] Goodnight unexpectedly died of natural causes within the past 4 weeks.

guessing it's a joke, but I don't want to insult anyone if it's not!" which Goodnight identified as Peterson's. Goodnight himself had written the words "looks plausible" on the same e-mail.

Goodnight said he specifically warned Convertino not to "hang his hat" on the HAS theory. Goodnight explained that the sketch artist would have to have drawn the HAS upside down for the sketch to be accurate. Although the direction of the runaway at Incirlik appeared correct on the drawing, the door of the HAS opens the wrong way in relation to the runway. Goodnight's statements regarding the HAS door are consistent with his earlier handwritten notes on a October 24, 2001 e-mail stating "my only problem with our analysis is the HAS - it would have had to have been drawn upside down."[17]

Goodnight said he tried to tell Convertino that there was no need to present the HAS theory because the sketch contained an Arabic notation indicating that it was the American Airbase in Turkey. Goodnight feared that a jury could "pick the HAS theory apart." Goodnight said he also discussed these concerns with Peterson to no avail.

Goodnight's statements and the corroborating documents are troubling when viewed against Peterson's testimony on cross-examination. During cross-examination, Peterson re-iterated that she believed the sketch contained a drawing of the HAS and that

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[17] Goodnight also advised the interviewers that he believed that the planes on the sketch identified as AWACs could have been British planes that were also present at IAB. Goodnight believed the planes on the sketch were more consistent with the British planes, which have two engines at the rear of the planes, than AWACs, which have a disc in the center. It is not clear whether Goodnight brought this additional observation to the attention of Convertino and/or Peterson.

this was one of four key factors that led her to believe the drawing was a sketch of IAB. 13 Tr. 2249-50. When shown a defense exhibit overlaying the "HAS" drawing with a map of the Middle East, Peterson conceded there was some similarity, but reiterated that it was still her opinion that the drawing was a HAS and not a map of the Middle East. Id. at 2256-62.[18] She then added that even if someone were to say that it was a map of the Middle East, that would not allay her concerns regarding the threat represented by the rest of the drawing. Id. at 2262.[19]

The problems created by the prosecution's failure to disclose the ARTEC map of the Middle East theory are multiplied by another statement made by SA Goodnight but not disclosed to the defense or the Court. Goodnight stated that in June 2002, he and two other Air Force officers traveled to Detroit, Michigan to meet with SA Thomas and AUSA Convertino. While traveling in a car with Thomas and Convertino, Goodnight was

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[18] As part of this area of cross-examination, Peterson was shown an enlargement of the lower left drawing and asked if this was the first time she had seen the drawing magnified. She said that it was. Id. at 2255. In fact, the documents created by ARTEC as part of its own map theory contained an enlargement of the drawing labeled with arrows identifying similarities to geographical features of the Middle East. Peterson has since admitted to the Public Integrity investigators that she had seen the document prior to trial but did not associate that with the defense's question of whether she had ever seen a blowup. Peterson 302. Neither Peterson nor the prosecution advised either the defense or the Court of the Air Force's alternative theories.

[19] Goodnight's testimony about the differing positions regarding the HAS theory is corroborated not only by contemporaneous e-mails and other documents in the Air Force files, but also by statements of SA Armes (see Armes 302) and statements by FBI ASAC Larry Kuhl Upon returning from Turkey, Thomas advised Kuhl that they had obtained a new witness who could testify that the sketch represented Incirlik, but that one or more of her staff members did not think the sketch represented the base; Thomas told Kuhl that he did not write any reports regarding the information obtained during the trip because it could potentially place AUSA Convertino in a position as a witness.

told by Thomas that Nasser Ahmed, a Yemeni man, had told Thomas that his mentally unstable brother Ali Ahmed might have been doodling in the day planner and drawn a map of the Middle East. (Ali Ahmed's relationship to the day planner is discussed infra at 52-53). Convertino stated adamantly "it's not a map of the Middle East." Although Goodnight knew that the Air Force had developed a Middle East map theory, Goodnight knew from Convertino's tone that the topic was not up for discussion and there was no further discussion of the topic. (Goodnight 302). Thomas recalls being in the car with Goodnight but does not recall the above conversation. He stated that while it may have happened, he has no recollection of it. (Thomas 302).

The overall effect of Colonel Peterson's testimony was to suggest that Air Force personnel were unanimously in agreement with her opinions regarding the sketch. This was inaccurate. We note that AUSA Convertino and SA Thomas have said that they did not know prior to trial that the Air Force had developed a map of the Middle East theory. Even assuming, arguendo, that the Court were to credit that testimony, the Middle East map theory was clearly set forth in Air Force files that were within the purview of the prosecution. Convertino and Thomas traveled to Turkey and the Air Force OSI investigators traveled here. Both knew the other was conducting an investigation. Each investigation was sharing information with the other. Accordingly, the government would be hard pressed to argue that its failure to conduct a standard Brady/Giglio review of the Koubriti OSI files was reasonable and should be countenanced.

In addition to the undisclosed conflicting opinions regarding the HAS theory, there are also undisclosed opinions regarding the quality of the sketch itself. Goodnight stated that in September 2002, in anticipation of Thomas' and Convertino's visit to Turkey, Goodnight and Armes went to Ankara, Turkey, and briefed a high level Turkish National Police, Intelligence Division (TNP) Official about the sketch. This intelligence official stated that the sketch did not look like any terrorist sketch that they had seen in the past. Goodnight said that he and Armes did not lend a great deal of weight to the TNP opinion because the TNP did not believe that Al-Qaeda had a presence in Turkey while the Air Force believed that it did. Goodnight could not recall if he and Armes orally advised Thomas and Convertino of the TNP Official's opinion of the sketch, but stated that Peterson knew about it because Goodnight included it in a monthly report that Peterson saw. (Armes provided substantially similar statements to those of Goodnight regarding the TNP opinion.) In addition, Goodnight included the TNP opinion in the March 2003 OSI Report received by Thomas and filed shortly after the trial.[20] Like the ARTEC

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[20] In addition, OSI reports received from the Air Force reveal that an October 2002 version of the report also included Goodnight's description of the TNP opinion. Although the October report includes the Detroit FBI on the distribution list, there is no copy of that report in the FBI file. When questioned by Public Integrity investigators about the October and March reports, Thomas said he believed that he received three reports from OSI; one of which was received during the Koubriti trial. Thomas indicated that he routed the March report to the file after the trial without closely reviewing it. Thomas also stated that he went back and looked at the other two OSI reports that are contained in the classified sub-file. Thomas stated that the previous reports did not contain the TNP official's opinion. Thomas was shown an OSI report dated October 2002, with Detroit on the front distribution list. Thomas stated that he did not recall seeing the October 2002 report, but that it could be in the file. (Thomas 302, pp. 13-14.) It is not.

Middle East map theory, the TNP opinion would have been easily discovered by a standard Brady/Giglio review of the OSI Koubriti file.

In addition to the TNP opinion, William McNair, a former Information Review Officer for the Directorate of Operations at the Central Intelligence Agency (CIA), has advised the Court and present counsel by way of an unclassified declaration, that he provided AUSA Convertino with a similarly negative view of the Turkey air base sketch. McNair, who held operational and executive positions in U.S. intelligence agencies for over 40 years, traveled to Detroit, Michigan in October 2002, and personally viewed the Turkey sketch with Convertino and SSA George. McNair, who recalls the Turkey sketch but not the Jordan sketches, told Convertino and George that in his opinion the Turkey sketch was what one would expect from someone who was not very well-trained.

Because McNair was not familiar enough with the degree of professionalism of the training of Islamic terrorist organizations, he sought and obtained the opinions of various individuals in the CIA's Counter Terrorism Center, as well as document analysts at the CIA. The individuals with whom he spoke, who review all documents relating to terrorist organizations that are retrieved from around the world, indicated that they had not seen any documents or sketches similar to the Detroit day planner sketch and did not believe it was indicative of any particular group or country. McNair also had CIA paramilitary people review the sketch and was told that they did not believe the sketch conveyed any useful information.

McNair stated that he shared these opinions with AUSA Convertino over the course of approximately 5 to 10 phone conversations following his trip to Detroit. He told Convertino that he had run the sketch by various groups within the CIA, that no one there was prepared to say that these were the work of a particular cell or a particular group, and that it was the collective opinion of the people with whom he discussed the sketch that the sketch was not a very good work product.

McNair stated that AUSA Convertino "didn't much care what I was saying." He said that Convertino was not really asking for the CIA's opinion; he was stating that he thought that the drawings were casing sketches of the Incirlik Airbase and insisting that his case rested on that assessment. It was McNair's opinion that Convertino was shopping for an opinion consistent with his own. (McNair Declaration).[21]

Convertino (via a hypothetical attorney proffer), Thomas, and George take issue with any suggestion that they had knowledge of or intentionally withheld the Air Force

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[21] Convertino challenges the veracity of McNair, suggesting that Convertino had a dispute with him on another matter, that McNair wanted to testify in the Koubriti case, that he felt slighted by Convertino, and that he is retaliating against Convertino out of spite. Convertino denies McNair made any of the above referenced statements to him. As to one statement that George recalls McNair making in Detroit (that it was McNair's opinion that the sketches were what one would expect from someone who was not very well-trained), Convertino suggests that he never heard McNair say that, and if it turns out that he did say it, Convertino would not have heard it because he believed McNair was incompetent and had tuned him out. George claims that most of what McNair says is not inconsistent with his own testimony, but that McNair is placing a negative spin on what he is saying. He also questions McNair's qualifications, whether McNair really talked with others at the CIA, and, if he did, who he talked with, what their qualifications were, and the level of attention they gave to the discussion. While these responses might have been fair points to raise with the Court in a motion in limine, the matters should have been disclosed to the defense and then litigated, or, at a minimum, raised with the Court prior to trial.

map theory, the TNP opinion or the opinions of McNair. Regardless of the prosecution's knowledge or intent, these matters were clearly within the purview of the prosecution, could have been ascertained with minimal diligence, and should have been either disclosed to the defense or discussed with the Court. We note that during our meeting with him, AUSA Corbett also indicated that he had been unaware of any of these opinions before trial. He indicated that he found them troubling and suggested that, had they been disclosed to him, he would not have agreed to participate in the trial.

b. Videotape of American Tourist Sites

The search of defendants' apartment also uncovered a videotape of a U.S. cross-country trip ostensibly conducted by a group of young North Africans. GX 7A. The tape, which originally contained a commercial movie called "Le Prince," had been recorded over with various material, including TV news, a cartoon, a Lebanese singer, as well as scenes from the trip. 8 Tr. 1121. The tape was in a European format (also used in Africa) and could not be played on an American VCR.

The trip scenes included, inter alia, shots of Las Vegas (including the MGM Grand Hotel), Disneyland and New York. 25 Tr. 4563-71; GX 72U. Absent direct evidence regarding the origin, purpose or intended use of the tape, SSA George opined that this tape was a terrorist casing video. Id. at 4568-4628. George described how particular scenes could be useful in planning a terrorist attack. For example, George testified about a Disneyland sequence that showed the underground line to the Raiders of the Lost Ark

ride, including a garbage can at the end. Id. at 4582-91. George testified that the garbage can was "an ideal location" for a bomb, id. at 4593, and claimed that after this sequence a voice said "this is a grave yard." Id. at 4589. In his view, the tape contained "all the information * * * that is needed to conduct a terrorist attack at that line." Id. at 4593; see id. at 4629 (George expresses the "very strong opinion" that the videotape and the sketches are "operational terrorist material").

At trial, the defendants argued that the videotape was simply a tourist tape depicting (specifically) a group of young Tunisians visiting notable United States attractions. As part of that theory, the defense (and their translator) claimed that the videotaped language was a mix of Classical Arabic and a Tunisian dialect. 31 Tr. 5741-50, 5759-60. The defense maintained that the government translators mistranslated critical portions of the videotape because they had difficulty understanding Tunisian, or any of the closely related North African dialects, which are influenced by the French language. Id. at 5754. In particular, the defense translator contended that a portion of the videotape that the government's translator claimed contained a direct threat and derogatory remark about America, id. at 5773-74, actually contained an old song about eating a duck. Id. at 5744-47. The government disputed this position vigorously. Id. at 5769.

Under cross-examination by AUSA Convertino, the defense translator, Naima Slimani Benkoucha, a native Algerian, was asked whether it would change her opinion to

learn that six other translators had independently reviewed the portion of the tape in question and had agreed with the government's translation. Id. at 5757-58. She maintained that her translation would not change because the persons on the videotape were speaking Tunisian, "not speaking like people from the Middle East". Id. at 5757-58; see id. at 5758 ("Tunisian, it's different.").

To counter the defense argument, AUSA Convertino attempted to suggest that 1) there is little or no difference between Classical Arabic and the Tunisian dialect, the difference being akin to regional or state-by-state differences in the English language[22]; and 2) Arabic speakers from the Middle East (which includes the vast majority of FBI Language Specialists) have no difficulty in translating Tunisian or North African dialects.[23]

Undisclosed Evidence Regarding the Videotape

During the Court-ordered file review, undisclosed discovery, post-trial investigative interviews in other, unrelated cases, and AUSA Convertino's statements to the media have raised concerns about the accuracy of the government's position on the Tunisian dialect issue and the strength of the government's position as to the videotape's

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[22] AUSA Convertino tried to suggest through the Court's interpreter, Dr. Samaha, that the Tunisian dialect is like "Michigan", "Texas", "Creole,Louisiana", or "rural Louisiana or rural Alabama". 31 Tr. 5779-80.

[23] Dr. Samaha testified, in response to a question regarding whether one needs a background in "Tunisian Algerian Moroccan dialect" to decipher this tape, that he "didn't have a problem hearing everything, listening to it, understanding it, and write it down." 31 Tr. 5769.

significance.

Most significantly, AUSA Convertino's recent statements to the media regarding the videotape have brought to light previously undisclosed opinions expressed by the Las Vegas FBI and others that the videotape was not casing material. As result of these articles, the undersigned inquired and was advised by U.S. Department of Justice officials that sometime between August 29, 2002 and September 5, 2002, the Las Vegas FBI informed the Las Vegas U.S. Attorney's Office that, in their opinion, the Detroit tape was not a surveillance of Las Vegas sites. Further, on September 5, 2002 the Las Vegas U.S. Attorney's Office ATAC Coordinator sent AUSA Convertino an e-mail asking that he provide evidence as to why Detroit considered the tape to be surveillance, explaining that the Las Vegas FBI disagreed with that assessment. We do not believe that this Las Vegas assessment was furnished to the Court or the defense prior to trial. Under the Court's established protocol, the government should have brought this information to the Court's attention.[24]

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[24] According to an August 10, 2004 AP article entitled Vegas Police Say They Saw Terror Tapes, a purported e-mail from Assistant United States Attorney Sharon Lever in Las Vegas (to AUSA Convertino) in the Fall of 2002 stated: *"The FBI here has looked at the tape * * * They said it is not a surveillance."* Likewise, the Las Vegas Sun reported in an August 11, 2004 article entitled Debate over LV Terrorism Allegation Intensifies that several law enforcement officials in Las Vegas determined that the videotape represented no threat to that city. The article quotes Metro Undersheriff Doug Gillespie as saying *"[t]hese videos were characterized as tourist videos. There was no corroborating information that indicated that Las Vegas was the target of a specific terrorist threat."* The article also quoted *"[a]n intelligence source familiar with the Detroit investigation"* who stated *"It looked like a tourist video * * *. It did not have the type of detail you would expect to see in a terrorist tape, such as entrances and exits, parking garages and underground facilities. If you wanted to get the information seen on*

As to the Tunisian dialect issue, an undisclosed 09/11/02 FBI EC (electronic communication) from Detroit FBI Special Agent Michael Thomas to FBI Las Vegas contains a paragraph detailing the difficulty of "transcribing" (i.e., translating) the audio portions of the videotape due to, among other things, the Tunisian or Algerian dialect spoken. This is, of course, the very position defendants advanced and the government challenged at trial. According to Special Agent Thomas, Detroit Arabic Language Specialists "*have further advised that the dialect of the individuals in the video is that of Tunisian or Algerian, thus making it even more difficult to transcribe. Detroit will forward a copy of the tape to FBIHQ, ERF Unit for enhancement, and locate a Language Specialist who is familiar with this specific arabic dialect.*"

The videotape's significance has also been undermined by information the FBI recently obtained in connection with an unrelated investigation. In January of 2004, LAPD detectives arrested an individual named Ahmed Chaabouni for violation of the California Penal Code prohibiting fraudulent marriages. Chaabouni is Tunisian and during his post-arrest processing he was shown photographs taken from the videotape. He identified himself in the video and stated that he had entered the United States in March 2000, along with his brother and a number of other Tunisian students as part of a University social club. Chaabouni said that he ended up dropping out of the tour group and thereafter remained illegally in the United States. He did not recall any members of

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that videotape, you could have gotten that much information and more on the internet."

the club that were very religious or expressing radical ideas. In reference to the videotape, he told agents that he recalls his brother telling him that a Middle Eastern male who was part of the tour group purchased two video cameras and sold them for a large profit back in Tunisia. Chaabouni's statements have been deemed credible by the agents who interacted with him (agents completely unrelated to the matter).

Defense counsel would no doubt argue that Chaabouni's statements constitute "newly discovered evidence." Given his lack of knowledge concerning the purpose of the videotaping, Chaabouni's testimony would not necessarily have contradicted SSA George's tradecraft analysis. We acknowledge, however, that Chaabouni's testimony that his actions on the videotape (and the actions of others in his presence) were innocent would provide some additional support for defendants' claim that the videotape did not constitute terrorist surveillance.

2. Testimony of Youseff Hmimssa

Youseff Hmimssa was virtually the only fact witness who testified that the defendants were involved in terrorist activities.[25] Hmimssa, a Moroccan native, entered the United States illegally in 1994 using a false French passport in the name "Patrick Vuillaume." After settling in Chicago, Hmimssa acquired computer skills which he used to execute a large scale credit card fraud. Hmimssa was ultimately arrested by the Secret Service, agreed to cooperate, and then fled to Detroit where he met and moved in with

[25] The only other witness to offer such testimony was James Sanders, whose testimony was far more limited.

defendants Koubriti and Hannan at 1335 Riverside.

Hmimssa testified that all four defendants were Islamic fundamentalists involved in terrorist activities. Among other things, Hmimssa testified that the defendants (1) embraced fundamentalist Islamic doctrine, praised terrorists such as Sheik Omar Rahman and Osama Bin Laden, and criticized pro-US Arab leaders in Saudi Arabia and Jordan, 15 Tr. 2476-94, 2497-10, 16 Tr. 2567-73, 2577-85; (2) conducted surveillance of potential terrorist targets in Detroit, attended mysterious meetings with unknown persons, and threatened to kill Hmimssa if he proved to be an informant, 15 Tr. 2469-75, 16 Tr. 2566-67; (3) discussed various terrorist plots such as poisoning food on airplanes and shooting down commercial airplanes with Stinger missiles, 15 Tr. 2517-19, 16 Tr. 2573-77; (4) attempted to recruit Hmimssa to their cause using fundamentalist Islamic dogma, 15 Tr. 2493-94, 2507-09; (5) established methods to communicate internationally in an untraceable manner, 15 Tr. 2519-23, 16 Tr. 2555-58; (6) attempted to obtain false identifications, money and weapons to assist "brothers" overseas, 15 Tr. 2494-2500, 2516-17, 16 Tr. 2546-2550, 2557-58, 2561-64; and (7) conducted wire transfers with extremist "brothers" overseas. 16 Tr. 2558-61.

Hmimssa was cross-examined for three days. Questioning focused on inter alia, (1) his extensive criminal career in Romania and the United States: (2) his incentive to assist the government; and (3) his failure to allege that the defendants were terrorists in early government debriefings. Throughout his testimony, Hmimssa portrayed himself as

secular, loyal to the United States and, at least since his last arrest, entirely forthcoming.

Undisclosed Evidence Relating to Hmimssa's Testimony

Additional materials not disclosed in discovery might have assisted the defense in further impeaching Hmimssa in ways that were not strictly cumulative. First, the government failed to produce a letter to AUSA Joseph Allen from inmate Milton "Butch" Jones regarding his jail house communications with Hmimssa in late 2002 and early 2003. Jones' letter (and the more detailed handwritten notes that it referenced) assert that Hmimssa expressed hostility toward President Bush and Attorney General Ashcroft, bragged about fooling the FBI and the Secret Service, expressed a desire to escape from prison, asserted that God would punish the United States for its actions in Afghanistan, indicated a desire to hurt the U.S. economy through fraud, boasted about his ability to create false IDs and suggested that he sold such IDs to the September 11 hijackers. Assuming they would be admissible, Jones' claims could prove useful in impeaching Hmimssa. Indeed, the Criminal Chief of the Detroit U.S. Attorney's Office described the need to disclose this document to the defense as a "no brainer." 12/12/03 Tr. 71 (Allen), 83 (Gershel).[26] The Court has already held that the Jones letter "clearly contain[s] on [its] face, indicia of exculpatory and impeaching material", and that there is "no question

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[26] The government was originally prepared to argue that because Jones would have asserted his Fifth Amendment privilege at trial, the letter would not have led to the discovery of any admissible evidence. Since then, however, this Court has held that, notwithstanding the Fifth Amendment, Jones can be required to produce the letter and notes, and to provide testimony concerning his conversations with Hmimssa. Memorandum Opinion and Order dated January 12, 2004 at 28.

in the Court's mind that [this document] should have been turned over." It reserved only the question of whether there is reasonable probability that had the evidence been disclosed to the defense, the result would have been different. 12/12/03 Tr. 167.

Undisclosed impeachment evidence is not limited to the Butch Jones letter. Our file review has uncovered other undisclosed evidence, including evidence that Hmimssa himself harbored anti-American views and was vehemently opposed to U.S. involvement in Afghanistan after the September 11 attacks. For example, a copy of a Daily Iowan newspaper article dated 9/25/01, which was found in the trash at Hmimssa's Iowa apartment, has a photograph of Northern Alliance fighters over which was written "BAD MUSLIMS." Likewise, Robert Allen Dickson, the apartment manager in Cedar Rapids, told the Grand Jury that Hmimssa had said that "any solider who lands in Afghanistan will die." This statement is highly similar to Butch Jones' claim that Hmimssa said that God would punish the United States for all the wrong they were doing in Afghanistan.[27]

The failure to disclose the above impeachment material is compounded by AUSA Convertino's decision to limit the documentation of statements made by Hmimssa during

[27] The Court ordered the government to turn over this grand jury transcript in the expectation that Dickson would testify at trial. 11/5/02 Memorandum Opinion and Order at 12 (Witness 5). The government turned over a related FBI 302 but not the transcript and Dickson did not testify. Although the FD-302 suggested (in a less detailed way) that Hmimssa was not as pro-American as he purported to be, the FD-302 did not contain the comment about American soldiers in Afghanistan.

debriefings after he began cooperating in mid-March 2002.[28] It appears that AUSA Convertino made a deliberate decision not to have the FBI take any notes or prepare any memoranda of these sessions in order to limit defense counsel's ability to cross-examine Hmimssa. Rubio 302 at 1; Corbett 302 at 4. Instead, AUSA Convertino himself took handwritten notes of at least some of these interviews, which he then incorporated in a typewritten summary of Hmimssa's anticipated testimony. Convertino took the position that the Hmimssa interviews were all "witness preparation" and that his own notes were privileged and not discoverable. Likewise, Hmimssa was not called before the Grand Jury. As a result of these decisions, defendants were provided little discovery relating to Hmimssa's trial testimony.

AUSA Convertino's approach caused significant controversy within the Department of Justice. In recent interviews, witnesses have recalled that officials at Main Justice and the Detroit USAO cautioned AUSA Convertino against this approach. Brienholt 302 at 4, 6. Corbett 302 at 4. FBI SSA Paul George has indicated that co-case agent Jim Brennan was "adamantly opposed" to this practice, and that George therefore discussed it twice with ASAC Larry Kuhl. 3/17/04 George Statement at 8. AUSA Corbett said he warned AUSA Convertino against the practice, told him it was his strong opinion that it was ill-advised, but left the final decision up to him as lead prosecutor.

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[28] Agents prepared 302s of early proffer sessions with Hmimssa. 8 Tr. 1253. However, once Hmimssa began cooperating in mid-March 2002, the Detroit FBI Agents did not take any notes or prepare any more memoranda. FBI Agent Mike Thomas estimated that there were at least 10 undocumented interviews that took place over 20-30 hours. Id. at 1254.

These statements are troubling in light of testimony elicited at trial. Defense counsel repeatedly challenged the government's failure to prepare 302s, before both the Court and the jury. In response, some government witnesses went so far as to suggest that the note taking practices employed here followed normal government procedures. 9 Tr. 1369 (Manescu); 26 Tr. 4667-73 (George). FBI SA Thomas also specifically denied that Convertino instructed him not to take notes, claiming that "[i]t just didn't make sense both of us were taking notes." 8 Tr. 1177. In view of the heated internal debate on this issue, this effort to portray the FBI's failure to take notes as routine (indeed, so routine as to not merit any discussion) could be viewed as misleading. Indeed, SSA George recently indicated (in direct contrast to Thomas' trial testimony) that AUSA Convertino did specifically ask Thomas not to create any 302s. 3/17/04 George Statement at 8.[29]

After demanding to see the typed Hmimssa witness summary in camera, the Court concluded (without benefit of any prior versions) that it did not contain any Brady material and declined to disclose it to the defense. The Court also refused to make AUSA

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[29] In his recent interview, Thomas explained that the first time that the topic of Thomas not taking notes and creating FD-302's came up was during an interview with Hmimssa. Before the interview began, Convertino told Thomas that he would be leading the interview, and he told Thomas not to take notes * * * . After the interview Thomas went back to his office at the FBI and asked his supervisor and the Chief Division Counsel (CDC), Jim Dietz (Dietz) about Thomas attending interviews in which no notes or FD-302's were completed. Assistant Special Agent in Charge (ASAC) Larry Kuhl (Kuhl) was also consulted. Nothing was found by Deitz, George or Kuhl that indicated that Thomas was required to take notes and author FD-302's during the Hmimssa interviews. According to Thomas, during the Hmimssa interviews, Covnertino took extensive handwritten notes that documented everything. Thomas never read Convertino's notes.

Convertino produce any of his handwritten notes. Although the government prevailed on this issue at trial, AUSA Convertino's approach to documenting Hmimssa's cooperation prevented defendants from determining the extent to which, if any, his testimony changed over time.[30] Potential areas of concern include the following:

Although AUSA Convertino provided the Court with a version of his typewritten notes, other typed versions have recently surfaced. Not surprisingly, there are limited but not inconsequential discrepancies between these versions, supporting defense counsel's claim that Hmimssa's testimony evolved over time.[31]

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[30] The Jencks Act does not impose any obligation on the government to record witness interviews. United States v. Houlihan, 92 F.3d 1271, 1288-89 (1st Cir. 1996). Likewise, while the Ninth Circuit has condemned the practice of failing to create interview memoranda to avoid documenting changes in a witness's story, it has concluded that Brady does not require the creation of such material. United States v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990); United States v. Bernard, 625 F.2d 854, 859-60 (9th Cir. 1980). On the other hand, Due Process requires the disclosure of prior statements by a witness that could materially impeach him, United States v. Bagley, 473 U.S. 667, 675 (1985), and the government cannot evade that obligation by simply failing to record such statements. See United States v. Brimage, 115 F.3d 73, 76-78 (1st Cir. 1997).

[31] Perhaps the strongest example of the differences between the three versions located to date is as follows:

The earliest version (circa July 2002) of the notes states:

"Koubriti, Hannan and Ali-Hammoud all wanted to train for Jihad in the U.S. In particular, Ali-Hammoud said he had seen a cache of weapons from a ***black male*** *in Detroit and was going to purchase weapons, including fully automatic machine guns."*

Version No. 2, that is, the version created before trial states:

"Koubriti, Hannan and Ali-Hammoud all wanted to train for Jihad in the U.S. In particular, Ali-Hammoud said he had seen a cache of weapons from a ***black Muslim male*** *in Detroit and was going to purchase* ***and ship weapons to the GIA in Algeria****, including fully automatic machine guns* ***and weapons with laser sights.****"*

In addition to the three versions of typed notes, the evidence reveals that AUSA Convertino took handwritten notes. When interviewed, Jeffrey Breinholt indicated that the typed version of AUSA Convertino's notes was different from the handwritten version from which AUSA Convertino read at internal DOJ meetings. Breinholt 302 at 4; Thomas, note 29. Our extensive review of the file has not uncovered these handwritten notes. Accordingly, we cannot determine to what extent AUSA Convertino's handwritten notes differed from the later typed summaries. Accordingly, the absence of these notes makes it difficult for the government to determine whether the typewritten summary viewed by the Court contained all potentially disclosable statements uttered by Hmimmsa and/or recorded by AUSA Convertino.

3. Corroborating Evidence

Version No. 3, that is, the version given to the Court in camera during trial, states:

> *"Koubriti, Hannan and Ali-Hammoud all wanted to train for Jihad in the U.S. In particular, Ali-Hammoud said he had seen a cache of weapons from a* ***brother*** *in Detroit and was going to purchase and ship weapons to the GIA in Algeria, including fully automatic machine guns and weapons with laser sights."* According to Hmimssa, the term "brother" is used to define Islamists who are politically active. 14 Tr. 2465.

In addition, at least two items that appear in version #2 are dropped from the version given to the Court. First, under the subheading entitled "Initial Meeting with Defendants" there is a footnote that says *"(additional detail in notes)"*. The second item omitted is the following one sentence paragraph: *"Afterwards, the four got back in the car and Hannan said that he had a Lebanese friend who smuggled people from Canada to the U.S. via boat."* This was omitted from the 3rd version, but appeared in version #2, after the paragraph discussing the defendants secretly surveilling the Ambassador bridge. Without this sentence, the implication of the preceding paragraph was that the defendants were casing the bridge for a terrorist attack, as opposed to alien smuggling.

As stated, the third category of evidence relied upon by the government involved corroborating evidence that the defendants did things that were consistent with terrorist activities but also consistent with non-terrorist purposes.[32] Undisclosed materials have raised questions regarding the weight and/or trustworthiness of some of the corroborating evidence – questions that would likely remain unresolved even after the conclusion of any evidentiary hearing. Given the pattern of other problems discussed above, these issues raise additional concerns regarding the verdicts the government obtained at trial.

a. Farhat Summaries of Audio Tape Recordings

In addition to the casing materials, the physical evidence seized from the Norman Street address included approximately 105 Arabic language audio cassettes containing fundamentalist Islamic teachings. AUSA Convertino decided to translate these audio tapes so that expert witnesses could consider their meaning and significance, and their importance to the overall mission of the alleged terror cell.

In the aftermath of the September 11th attacks, the FBI experienced a shortage of government Arabic language specialists who could assist in translating these tapes. Accordingly, AUSA Convertino, through the FBI, employed Marwan Farhat to prepare descriptive summaries of the contents of the 105 tapes. Farhat was a cooperating witness for the FBI, who had a history of violence and drug related criminal convictions and was involved with individuals known to associate with Hizballah. He was also awaiting trial

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[32] Once again, SSA Paul George was asked to opine about the significance of this evidence as part of his tradecraft analysis.

on federal cocaine charges. In return for his work in the Koubriti case and his cooperation in other matters, Farhat was paid by the FBI and in July 2003 received an unusually large sentence reduction recommendation by AUSA Convertino.

Farhat's previously undisclosed work on the Koubriti case raises several issues. First, throughout and even prior to the trial, defense counsel constantly complained that transcripts had not been completed or made available. The government was under a broad Court-imposed obligation to provide the defense with translations when completed. The Court instructed the government to: "provide the defense with whatever – not just the copies of the tapes, with information as to which tape he was reviewing." 03/07/03 Daubert Hrg. Tr. 51. The Court also ordered that "[w]hatever he has used to review that he is basing his testimony on, whether in Arabic or English, you are to provide to them period. Very simple." Id. at 54. Further that: "I'm not asking. I'm telling * * * Not the translations. Whatever he has reviewed, if he's reviewed them in Arabic." Id. at 53.

Post-trial interviews suggest that the government's experts and translators did not rely in any significant way on the summary translations and interpretations of Farhat, and that these materials would therefore not have been discoverable under Rule 16. Whalid Phares, the government's expert witness as to Islamic Fundamentalism, the Salafist movement and Takfiries, 03/07/03 Daubert Hrg. Tr. 91,94, has acknowledged in a recent interview that he was given a stack of Farhat-created summaries and that he spoke with Farhat regarding those summaries. Phares further acknowledged that he read Farhat's

summaries, but contends that he did not rely on them in reaching his opinions because he did not consider them good work product. (Phares 302). Unfortunately, there is contrary documentary evidence, namely statements made by AUSA Convertino at the sealed sentencing hearing of Farhat and in letters to the FBI justifying payments to be made to Farhat. Regardless of the true value of Farhat's work in the Koubriti matter, and the extent, to which Phares relied upon that work, under the Court's orders the Farhat work product should have been brought to the Court's attention so the Court could determine whether the summaries were discoverable.

b. Seizure of False Documents

Finally, post-trial investigations have raised questions regarding the accuracy of an 9/18/01 FBI memorandum recording defendant Hannan's post-arrest statements. Recently, it was learned that the memorandum's author added a paragraph at the request of AUSA Convertino after the first draft had been completed. The added paragraph indicated that Hannan had acknowledged knowing that certain documents found in the Norman Street apartment were false. The author of the 302, who was in and out of the interview, did not personally recall this statement being made. Nonetheless, because another agent did recall it, the statement was included in the memorandum. Unfortunately, the original interview notes do not reflect Hannan's admission. Moreover, the FBI file does not contain the original notes or any supplemental notes attesting to this statement, even though the 302's author recalls supplemental notes being created. The

facts surrounding the creation of this 302 is another matter the Court would have to factor into its cumulative analysis of undisclosed materials.

B. The Ali Ahmed Defense

In addition to advancing its own theory of the case, the government also devoted considerable effort to rebutting the defense claim that the day planner sketches were drawn by Ali Ahmed, a mentally unstable Yemeni man. Both sides agreed that Ali Ahmed had previously occupied Hannan and Koubriti's apartment at 1335 Riverside, and that he had possession of and made notations in the day planner. The defense contended that Ali Ahmed, who had delusions about being a General in the Yemeni Army, had drawn the Queen Alia and the Incirlik sketches, and had then left the day planner behind in the apartment where it was discovered by the defendants. The prosecution contended that the defendants used Ali Ahmed as a dupe to provide "cover" for their terrorist activities by, inter alia, inducing him to hold and sign his name in the day planner.[33]

The government's theory had a potential flaw: Ali Ahmed committed suicide in March 2001 before Hannan and Koubriti moved to Detroit and no one in the neighborhood recalled seeing Ali Ahmed in the company of any of the defendants. The government sought to fill this gap by presenting testimony from Carolyn Fuhr Sadowski, a Sam's Club employee who was present in January of 2001 when Ali Ahmed and another man utilizing a driver's license in the name of Thamir Zaia purchased over $3000

[33] The government also relied on testimony from the landlord's son that everything in the apartment was thrown out before the defendants rented it.

in cigarettes with a bad check. After seeing a photo lineup that included the defendants, Sadowski identified Koubriti as the man with Ahmed at Sam's Club. Although Koubriti was working at a chicken farm in Ohio in January 2001, the government was able to show that he was not at work on the day in question.

The defense vehemently objected to Sadowski's testimony and in-court identification of Koubriti on the ground that Thamir Zaia was clearly the person who accompanied Ali Ahmed to Sam's Club. On advice of counsel, Zaia refused to testify at trial. The defendants emphasized that the man at Sam's Club had presented Sadowski with a driver's license in Zaia's name. Second, Zaia had a prior conviction for smuggling cigarettes. Finally, a man claiming to be Zaia had acknowledged in a phone call with police that he was at the Sam's Club with Ali Ahmed. The Court refused to exclude Sadowski's testimony but allowed the defense to introduce evidence suggesting that it was Zaia, not Koubriti, who passed the bad check with Ali Ahmed. Sadowski was apparently a persuasive witness; the Court noted immediately after her testimony that she was "certain. She didn't hesitate, she looked at everybody and she picked out Mr. Koubriti." 21 Tr. 3927.

Since trial, however, Thamir Zaia has told agents (who were unaware of Zaia's possible involvement in the Koubriti matter, and who were assigned to an unrelated FBI investigation where Zaia is cooperating and providing information concerning his and others involvement in fraudulent check schemes) that he was present with Ali Ahmed at

the Sam's Club and that Koubriti (whom Zaia does not know) was not. Zaia claims that the incident was part of a larger scheme to obtain cigarettes for resale using bad checks. Although Zaia provided very specific and accurate details about the transaction, and gave a handwriting sample that closely matched the writing on the bad check, he failed a polygraph examination that asked whether he was with Ali Ahmed and whether Koubriti was not present.

Notwithstanding the polygraph examination, Zaia's confession (combined with the other evidence of his involvement) makes it possible that Sadowski's identification of Koubriti was mistaken.[34] Regardless of whether Zaia's confession technically constitutes "newly discovered evidence,"[35] the government must factor into its overall analysis the possibility that Sadowski's testimony was mistaken in determining the cumulative effect of all of the above described matters on the new trial issue.

In addition, there have been two other recent developments relating to the Ali Ahmed defense. First, former CIA official William McNair has indicated that he learned

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[34] During the hypothetical attorney proffer, AUSA Convertino's lawyer suggested that defense counsel may have coached Zaia on how to confess to this crime. There is no evidence to support this claim nor is it clear why Zaia would falsely accept responsibility for someone else's crime.

[35] United States v. Montilla-Rivera, 115 F.3d 1060 (1st Cir. 1887) (discussing whether term "newly discovered evidence" includes newly available testimony from a co-conspirator who took the Fifth at trial); United States v. Garland, 991 F.2d 328, 335 (6th Cir. 1993) (testimony of witness known to the defense but unavailable at trial constitutes "newly discovered evidence.")

prior to trial of the prosecutions' theory that the defendants had used Ali Ahmed to secrete the day planner. McNair recalls challenging Convertino about that theory. He advised him that under conventional tradecraft, you would train operatives to only give items to people who were reliable and dependable. McNair's opinion, i.e., that the government's Ali Ahmed theory was inconsistent with conventional tradecraft analysis, was not disclosed to either the Court or the defense.[36]

The government may also have failed to turn over to the Court or defense significant information bearing on whether Ali Ahmed was the author of the Incirlik Air Base sketch. As noted above, see supra at 31, Ali Ahmed's brother, Nasser Ahmed, may have suggested to SA Thomas before trial that the figure at the lower left of the Incirlik sketch could be a map of the Middle East doodled by Ali Ahmed. Goodnight 302 at 4. Such statement, if made, should have been disclosed. Had it been disclosed, it would not only have supported defendants' claim that the design was a map of the Middle East, but also bolstered their contention that Ali Ahmed was capable of creating, and did create, the "casing sketches" relied on by the government.[37]

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[36] In his Opening Statement, AUSA Convertino told the jury that SSA Paul George would testify that using mentally handicapped people to adopt or sign documents was "consistent with terrorist cells, this is consistent with how they behave and act." 7 Tr. 1020-21. George did not, in fact, offer such testimony.

[37] At trial, Nasser Ahmed claimed that while the day timer was in his brother's possession, it contained only Ali Ahmed's signature without other writing on the page. 10 Tr. 1600-03, 1610. To refute this claim, defendants called FBI SA Samuel J. Ruffino, Jr. who testified that Nasser Ahmed had told him he had seen some of the notes and sketches in the book, and that Ali Ahmed might have drawn some of the drawings but was not capable of drawing all

V. ADDITIONAL CONSIDERATIONS

The government's nine month file review has required it to reconsider positions taken earlier in the post-trial litigation that in retrospect are no longer defensible. One notable example is the government's defense of AUSA Convertino's closing argument, which defendants claimed was improper. As reflected on page 72 of the closing argument transcript, counsel for defendant Ali-Haimoud objected: *"[t]his is a civic duty argument, which is improper for the last several minutes."* Defense counsel did not object during the prior several minutes. A review of the record shows that the prosecutor's specific remarks that prompted the objection were: *"[t]his is a dangerous group. This was a pre-operational cell, a cell that was stopped [,] a cell that was caught. A cell that cannot operate. These people belong in prison."* Other like comments are reflected on page 71 where the prosecutor stated: *"[d]on't give these people another chance to make their plan effective."*

The defendants also complained of another portion of the AUSA Convertino's closing argument which they did not object to at trial:

> *You know the defense is represented by those attorneys. We represent people too. The mother and father in the ride in the Disneyworld underground. The soldier in Incirlik, Turkey, who takes a plane off, sitting on $500,000 worth of – 500,000 gallons worth of fuel. The people in Amman, Jordan from the United States Embassy who go to that hospital.*

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of them. 30 Tr. 5627-5628. As noted above, defense counsel was not informed that the HAS/Map of the Middle East was one of the designs Nasser Ahmed thought Ali Ahmed might have drawn.

The people in Las Vegas in the lobbies of hotels. The person driving his car down Pacific Coast Highway or the person walking into the New York Times Building, thinking it's just another day. People here in Dearborn, Michigan and all parts of Michigan, people who think they're safe, who don't think about anything other than getting home to their families. Those are the people we represent as well.

(05/19/03 Closing Argument Tr. at 71-72).

In United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994), the Sixth Circuit clarified the test for determining when a prosecutor's closing argument is so improper that a new trial is warranted: "[f]irst, we determine whether a prosecutor's remarks were improper, and then we determine whether the impropriety amounts to reversible error." Id. at 1385. In determining reversible error, the court utilizes four factors: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." Id.

The government in its brief vigorously defended the above closing argument portions on the basis that: 1) the remarks did not "mislead the jury or prejudice the defendants"; 2) the remarks, although certainly not accidental "look to be more the result of a moment of zealous advocacy" (meaning not deliberate); and 3) the evidence relating to the defendants involvement in terrorism "was relatively strong." While the government defended the closing argument in good faith, in combination with our other findings, we believe that these remarks create a very substantial argument for a new trial and we have taken that conclusion into account in recommending acquiescence in the

defendants' motion.

VI. CONCLUSION

The government has concluded that the cumulative effect of the undisclosed impeachment/exculpatory material, examples of which are outlined herein, significantly undermines the basis of Count 1 and warrants a new trial. Accordingly, the government respectfully concurs in defendants' new trial requests and hereby moves to dismiss Count I without prejudice.

Respectfully submitted,

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