15-211

To Be Argued By:
IAN MCGINLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 15-211

UNITED STATES OF AMERICA,

Appellee,

—v.—

MUSTAFA KAMEL MUSTAFA,

Defendant-Appellant,

HAROON RASHID ASWAT, also known as Haroon, also known as Haroon Aswat, also known as Aswat Haroon Rashid, OUSSAMA KASSIR, also known as Abu Abdullah, also known as Abu Khadija, EARNEST JAMES UJAAMA, also known as James Ujaama, also known as Bilal Ahmed, also known as James Earnest Thompson, also known as Abu Sumaya, also known as Abdul Qaadir,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

GEOFFREY S. BERMAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200

IAN MCGINLEY,
KARL METZNER,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

PAGE

PAGE

PAGE

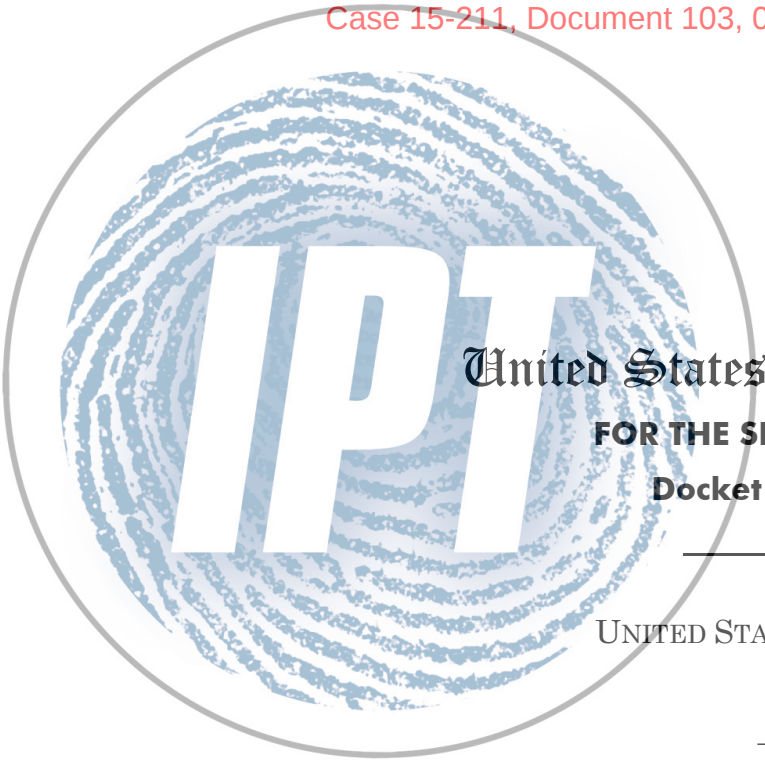
PAGE

PAGE

PAGE

PAGE

PAGE



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 15-211

UNITED STATES OF AMERICA,

Appellee,

—v.—

MUSTAFA KAMEL MUSTAFA,

Defendant-Appellant,

HAROON RASHID ASWAT, also known as Haroon, also known as Haroon Aswat, also known as Aswat Haroon Rashid, OUSSAMA KASSIR, also known as Abu Abdullah, also known as Abu Khadija, EARNEST JAMES UJAAMA, also known as James Ujaama, also known as Bilal Ahmed, also known as James Earnest Thompson, also known as Abu Sumaya, also known as Abdul Qaadir,

Defendants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Mustafa Kamel Mustafa, a/k/a "Abu Hamza" ("Abu Hamza" or the "defendant"), appeals from a judgment of conviction entered on January 12, 2015, in United States District Court for the Southern District of New

York, following a trial before the Honorable Katherine B. Forrest, United States District Judge, and a jury.

Indictment 04 Cr. 356 (KBF) (the "Indictment") was filed on April 19, 2004 in eleven counts. Count One charged Abu Hamza with conspiracy to take hostages, in violation of Title 18, United States Code, Section 1203. Count Two charged Abu Hamza with hostage-taking, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 1203 and 2. Count Three charged Abu Hamza with conspiracy to provide and conceal material support and resources to terrorists, in violation of Title 18, United States Code, Section 371. Count Four charged Abu Hamza with providing and concealing material support and resources to terrorists, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 2339A and 2. Count Five charged Abu Hamza with conspiracy to provide material support and resources to a foreign terrorist organization, in violation of Title 18, United States Code, Section 2339B(a)(1). Count Six charged Abu Hamza with providing material support and resources to a foreign terrorist organization, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 2339B(a)(1) and 2. Count Seven charged Abu Hamza with conspiracy to provide and conceal material support and resources to terrorists, in violation of Title 18, United States Code, Section 2339A. Count Eight charged Abu Hamza with providing and concealing material support and resources to terrorists, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 2339A and 2. Count Nine charged Abu Hamza with conspiracy to provide material support

and resources to a foreign terrorist organization, in violation of Title 18 United States Code, Section 2339B(a)(1). Count Ten charged Abu Hamza with providing material support and resources to a foreign terrorist organization, and aiding and abetting the same, in violation of Title 18, United States Code, Section 2339B(a)(1) and 2. Count Eleven charged Abu Hamza with conspiracy to supply goods and services to the Taliban, in violation of Title 18, United States Code, Section 371; Title 50, United States Code, Section 1705(b); and Title 31, Code of Federal Regulations, Sections 545.204 and 545.206(b).

Trial began on April 14, 2014, and ended on May 19, 2014, when the jury returned guilty verdicts on all counts. On January 9, 2015, Judge Forrest sentenced Abu Hamza principally to a term of life imprisonment on Counts One and Two; terms of five years' imprisonment on Counts Three and Seven; terms of ten years' imprisonment on Counts Four, Five, and Six; terms of 15 years' imprisonment on Counts Seven, Eight, Nine, and Ten; and 5 years' imprisonment on Count Eleven. All terms were to run concurrently.

The defendant is currently serving his sentence.

Statement of Facts

A. The Government's Case

At trial, the Government proved Abu Hamza's involvement in three terrorism plots. First, in late December 1998, Abu Hamza participated in a hostage-taking in Yemen, whose purpose was to coerce the

Yemeni government to free some of Abu Hamza's followers, including his stepson, from prison and which resulted in the murder of four Western tourists. Second, in late 1999, Abu Hamza tasked two of his followers with the mission of establishing a camp in United States for training men to fight with al Qaeda and engage in acts of murder in Afghanistan. And third, from 2000 to 2001, Abu Hamza provided a variety of support to al Qaeda and the Taliban in Afghanistan, including by dispatching a follower to train and fight with al Qaeda and by sending money and other support to the Taliban.

1. The Hostage-Taking in Yemen

In December 1998, Abu Hamza, operating from the safety of London where he was the influential leader of the Finsbury Park Mosque, participated in a hostage-taking of sixteen Western tourists, including two Americans, in Yemen. Four of the hostages were killed during a rescue operation by the Yemeni army. Abu Hamza had a close relationship with the Islamic Army of Aden, the terrorist group responsible for the kidnapping, and its leader, Abu Hassan al-Midhar ("Abu Hassan"). In fact, in the months leading to the hostage-taking, Abu Hamza served as the spokesperson for that terrorist group, issuing warnings that Westerners should stay out of Yemen. The hostage-taking was an effort to coerce the Yemeni government to free men who had been imprisoned days earlier, including Abu Hamza's stepson and other men who Abu Hamza knew in the United Kingdom. Abu Hamza had foreknowledge of the hostage-taking and participated in the hostage-taking by providing the terrorists with a

vital tool—a satellite phone—that was used during the kidnapping and by providing advice and guidance to Abu Hassan, the leader of the kidnappers, as the attack was underway.

a. The December 1998 Hostage-Taking

On December 28, 1998, a group of Westerners were on a guided caravan tour of Yemen. That morning, approximately 20 kidnappers, armed with AK-47 assault rifles, rocket propelled grenade launchers ("RPGs"), and hand grenades, ambushed a convoy of vehicles with the tourists. (Tr. 2720-23, 2862-63; PSR ¶ 22).[1] Sixteen tourists were taken hostage, including two American women, Mary Quin and Margaret Thompson. (Tr. 2867). The kidnappers took the hostages to a remote location in the desert, keeping them under armed guard. (Tr. 2724-25, 2866-67). Almost immediately after taking the tourists captive, the kidnappers collected passports from the hostages and demanded to know which of them were Americans. (Tr. 2728-29, 2869-70; PSR ¶ 22). Abu Hassan, the leader of the kidnappers, also told the tourists that it was not their fault that their countries had bombed Iraq and that the hostages would be held until the kidnappers' "friends" were released from prison. (Tr. 2731, 2873; PSR ¶ 22).

---

[1] "Tr." refers to the trial transcript; "GX" refers to a Government Exhibit; "Br." refers to the defendant's brief; "PSR" refers to the Presentence Report; "A" refers to the appendix; and "Dkt." refers to an entry in the District Court docket of this case.

The following day, on December 29, Yemeni military forces launched a rescue operation. A gunfight broke out between the hostage-takers and the Yemeni military forces, with the kidnappers using the tourists as human shields. The kidnappers ordered the hostages to stand on a raised embankment with their arms raised, while the kidnappers fired at Yemeni military from between the legs of the hostages. (Tr. 2736-39, 2880; PSR ¶ 23). At one point, two or three kidnappers advanced towards the Yemeni forces while each used a tourist as a human shield. (Tr. 2742-43). One of the American tourists, Ms. Quin, was being used a shield, with her captor pressing an AK-47 assault rifle against her back, when that captor was shot. (Tr. 2885-86). Ms. Quin then courageously wrestled the AK-47 from her captor and escaped to the awaiting Yemeni military forces. (Tr. 2885-87; PSR ¶ 23).

Four hostages—Margaret Whitehouse, Peter Rowe, Ruth Williamson, and Andrew Thirsk—were killed during the course of the rescue operation. (Tr. 2745, 2853, 2889-90). The Yemeni military rescued the surviving hostages, several of whom suffered serious injuries. (Tr. 2743-45, 2888-89). For instance, Ms. Thompson was shot in the leg during the gunfight. (Tr. 2743). The bullet completely shattered Ms. Thompson's left femur, requiring extensive surgery that entailed implanting a titanium rod in her leg and compressing her femur. (Tr. 2746). She continues to suffer from the effects of that devastating injury today. (Tr. 2746).

b. Abu Hamza's Role in the Hostage-Taking

Abu Hamza participated in this kidnapping in a number of ways. First, before the kidnapping, Abu Hamza agreed to serve as a "mouthpiece" for the Islamic Army of Aden. (Tr. 3272, 3476). Abu Hamza did so largely through the Supporters of Shariah ("SOS"), a pro-shariah organization that Abu Hamza operated out of the Finsbury Park Mosque. (*See* GX 15, 228 (January 11, 1999 television interview: "I was, and I am still, head of an organization which is called Supporters of Sharia.")). For instance, in a July/August 1998 SOS newsletter, Abu Hamza issued a warning about Yemen: "many foreign hostages have been kidnapped in attempts to leverage greater resources out of [the] central government. . . . We have also received news that a Mujahid who fought in Bosnia has killed three missionary nuns who were tempting Muslims [to] become Mushriks." (GX 615-H).

Shortly after issuing this warning, in a September/October 1998 SOS newsletter, Abu Hamza published an even more explicit threat, which was titled, "Yemeni Mujahideen are warming up." (GX 621). The SOS newsletter reported that the Islamic Army of Aden had "declared Jihad against the government [of Yemen]" and had conducted an attack on an oil pipeline. (*Id.*). This message also included a call to arms from the Islamic Army of Aden, urging "Muslim fighters to join their [the Islamic Army of Aden's] Jihad struggle and stop the invasion of the last state in the peninsula which is about to fall into the hands of the West." (*Id.*).

On October 11, 1998, Abu Hamza published another statement through the SOS, declaring that "[s]upporting the army of Aden is an obligation for those seeking Gardens of Eden." (GX 250, 250-T). Abu Hamza announced SOS's unwavering support for the Islamic Army of Aden, and urged others to support the organization as well: "S.O.S. supports and is devoted to the Aden Islamic army, incentives and talks about it, by asking whoever is capable of that support to do it sooner than later . . . ." (*Id.*). In this statement, which was issued approximately two months before the hostage-taking, Abu Hamza additionally warned all non-Muslims, or infidels, to leave Yemen unless they had permission from Abu Hassan to stay: "Therefore S.O.S. warns all the infidels to leave the region, or to seek a promise (protection) from the Emir of Jihad (Abul Hassan Al Mihdar, May God protect him) to stay . . . ." (*Id.*).

In addition to posting threats and warnings for Abu Hassan, Abu Hamza participated in the actual hostage-taking in a few ways. Abu Hamza provided the kidnappers with a satellite phone, which was an essential tool for the hostage takers to use to negotiate the release of the hostages. (PSR ¶ 25).[2] Months before the kidnapping, Abu Hamza bought a satellite phone in the United Kingdom. (Tr. 247; PSR ¶ 25). He then

---

[2] The hostage-taking occurred in December 1998, prior to the prevalence of cellular telephones, and in a remote part of Yemen. A working satellite telephone for the hostage-takers to use during the attack therefore was extremely important and valuable.

arranged for his stepson, Mohsin Ghalain, to transport the satellite phone to Yemen and provide the phone to Abu Hassan. (Tr. 3502-03; PSR ¶ 25). The terrorists used the satellite phone during the hostage-taking. In fact, as the hostage-taking was underway, Abu Hamza added airtime minutes to the satellite phone for the kidnappers. (Tr. 2779-81; PSR ¶ 25).

In addition, Abu Hamza was in frequent contact with Abu Hassan leading up to and during the hostage-taking. (PSR ¶ 29). Telephone toll records revealed that Abu Hamza and Abu Hassan spoke twenty times by telephone before the kidnapping—including a seven-minute call the day before the kidnapping—and twice during the kidnapping. (GX 1003; PSR ¶ 29). Abu Hamza later admitted to Ms. Quin that he had spoken with Abu Hassan during the kidnapping and had instructed Abu Hassan to negotiate from the back, to protect himself. (GX 219-T).

Abu Hamza's participation in the hostage-taking was consistent with his public statements. Abu Hamza repeatedly endorsed and advocated for the very sort of vile terrorist act that the Islamic Army of Aden conducted in December 1998. In numerous public statements, Abu Hamza proclaimed that non-Muslims in Muslim lands could be kidnapped and killed. For example, Abu Hamza stated that, "[i]f a kaffir [a non-believer in Islam] enters a Muslim land . . . , anybody could take him, capture him, and enslave him. Or even sell him in the market. He's like a cow. He's like a pig." (GX 130; PSR ¶ 30); "If Muslims cannot take them [kaffirs] to the, you know, and sell them in the market, then you just kill them. It's okay." (GX 109; PSR ¶ 30);

and "Killing a kaffir for any reason, you can say it's okay even if there's no reason for it." (GX 132; PSR ¶ 30).

Abu Hamza's participation in this particular hostage-taking was motivated by the preceding arrests in Yemen of several of his associates, including his stepson, Mohsin Ghalain. On December 23, 1998—just over two months after Abu Hamza proclaimed that Muslims were obligated to support the Islamic Army of Aden and warned "infidels" to stay out of Yemen (GX 250, 250-T)—Ghalain and five other men were arrested in Yemen. (GX 14; PSR ¶ 31). During his testimony at trial, Abu Hamza admitted to knowing four of those men: Ghalain, Sarmad Ahmad, Shahid Butt, and Malik Nasser Fadl Harhara. (Tr. 3499-05; PSR ¶ 31). Ghalain delivered the satellite telephone that Abu Hamza had purchased to Abu Hassan in Yemen on Abu Hamza's behalf. (PSR ¶ 31). British authorities seized a receipt for Ghalain's travel from London to Aden, Yemen in November 1998, during a May 2004 search of Abu Hamza's residence. (Tr.1008, 3503; GX 19, 502). Butt attended the Finsbury Park Mosque and provided security there. (GX 14; Tr. 3504; PSR ¶ 31). Harhara also attended the Finsbury Park Mosque. (Tr. 3499). In fact, Harhara's martyrdom letter also was found in Abu Hamza's home during a March 1999 search. (GX 26, 246, 246-T; PSR ¶ 31; *see also* Tr. 3500).

In October 2000, less than two years after the hostage-taking, Ms. Quin traveled to London to interview Abu Hamza regarding the kidnapping. (Tr. 2895; PSR ¶ 32). During the course of that interview, Abu Hamza

admitted that he partnered with and supported Abu Hassan, provided the satellite phone to Abu Hassan, and spoke with Abu Hassan during the kidnapping. (GX 219). Among other things, Abu Hamza told Ms. Quin that he considered the kidnapping to be "a good thing to do" under Islam, and even implicitly blamed her because, "we [had] been giving warnings, 'Don't come, don't come.'" (*Id.*). Abu Hamza further told Ms. Quin that the tourists had been kidnapped to hurt the Yemeni government and that the plan was to hold the tourists captive "until the government let my people go." (*Id.*). As Abu Hamza callously put it to this victim of his horrifying crime, "they snatched you to exchange you." (*Id.*). Tellingly, at one point during the interview, Abu Hamza even acknowledged his advanced knowledge of the hostage-taking to Ms. Quin: "*We* never thought it would be that bad." (*Id.* (emphasis added)).

2. The Bly, Oregon Terrorist Training Camp

Even after this tragedy, which left four innocent tourists dead, Abu Hamza continued to zealously advocate violent jihad. In the fall of 1999, Abu Hamza sent two of his devoted followers—Oussama Kassir and Haroon Aswat—from London to the United States with orders to establish a terrorist training camp on a remote ranch in Bly, Oregon. The purpose of this camp was to train young, impressionable men in America to fight and kill, so they could travel to Afghanistan to join forces with al Qaeda.

a. The Origins of the Plot

In around the fall of 1999, Earnest James Ujaama, one of Abu Hamza's U.S.-based followers, reached out to Abu Hamza and discussed plans to create a jihad training camp at a ranch in Bly, Oregon. (Tr. 2038). Ujaama—who had been a student of Abu Hamza's and had spent time with Abu Hamza at the Finsbury Park Mosque—was aware of Abu Hamza's view that physical jihad training was mandatory for all Muslims. (Tr. 2039). Abu Hamza was interested in Ujaama's training camp proposal, and agreed to send two men to the United States to help Ujaama establish the training camp. (Tr. 2039-40).

Abu Hamza received two faxes from Ujaama discussing the plans for the training camp. (Tr. 1940-42). The first fax, which was sent from Ujaama to Abu Hamza on October 25, 1999, contained language for a flyer to advertise the training facility and a message from Ujaama to Abu Hamza. (Tr. 2058-59; GX 315). In the message, Ujaama referenced "[t]he land that we spoke of," and emphasized that the land would simulate conditions in Afghanistan: the property "looks just like Afghanistan with mountains and small trees, dry, hot and cold extreme temperatures," and "[i]t barely rains, but snows heavily during the winter." (Tr. 2061; GX 315). Ujaama drew this comparison because the purpose of the camp was to train men to fight in Afghanistan. (Tr. 2055, 2061). Ujaama also explained that the property "is in a state that is pro-militia and fire-arms state," and assured Abu Hamza that "[o]ur ju'mat," referring to the group of young men from

Ujaama's Seattle mosque, "is young, strong and desirous." (GX 315). Ujaama told Abu Hamza that they were "expecting the two brothers that we discussed to come in November" (*Id.*); those "two brothers"—Kassir and Aswat—in fact arrived in Seattle in November 1999. Ujaama also told Abu Hamza that they were planning to bring Abu Hamza to the United States permanently, explaining that "[i]t is already understood that you will lead us here in America." (*Id.*).

A little under two weeks later, on November 6, 1999, Ujaama sent Abu Hamza a second fax. (GX 316). In this fax, Ujaama provided Abu Hamza with a list of tapes, including some of Abu Hamza's lectures, that Ujaama requested. (*Id.*). Ujaama also informed Abu Hamza that the "juma't" had split, "[t]he second juma't will operate underground," and "[t]he two brothers coming will not have contact with the first juma't." (GX 316). Twenty days later, those "two brothers" arrived in the United States.

b. Kassir and Aswat Travel to the United States

In November 26, 1999, Kassir, Aswat, and Kassir's wife and children flew from London to New York City, where they boarded a Greyhound bus for Seattle. (Tr. 2081-82; GX 2, 335, 336, 337, 338, 339). Upon arriving in Seattle, Kassir, Aswat, and Kassir's family were picked up by Ujaama, stayed at Ujaama's residence for two or three days, and soon were brought to the ranch in Bly, Oregon. (Tr. 2081-84).

At Bly, Kassir announced that he had been sent by Abu Hamza to train men to fight in Afghanistan.

(Tr. 152-53, 927, 939; PSR ¶ 34). Kassir boasted that he had received training at camps in Afghanistan associated with Bin Laden and that he himself had run training camps for Bin Laden. (Tr. 153, 939). Aswat similarly told people at Bly that he was there to train the brothers in jihad and that he too had received training at camps in Afghanistan. (Tr. 154).

Kassir brought with him various tools to conduct this training, including manuals on manufacturing poisons, nerve gas, and explosives. (GX 312-B, 312-C, 312-D, 330-C-T, 330-D; PSR ¶ 35). Kassir also was in possession of letters addressed to both Osama Bin Laden and Abu Hamza, reflecting his support for those individuals. (GX 330-E, 330-E-T, 330-F, 330-F-T). In his letter to Abu Hamza, Kassir thanked Abu Hamza for "the hospitality" that Abu Hamza extended Kassir at Abu Hamza's "residence" and for "correction of [Kassir's] knowledge," and further wrote, "I love you and I felt so comfortable with you." (GX 330-E, GX 330-E-T). Kassir also had a copy of Bin Laden's 1996 declaration of war against America and an issue of the SOS newsletter from December 1998/January 1999, which contained articles about the Islamic Army of Aden taking responsibility for the December 1998 kidnapping in Yemen and accusing "the United Snakes of America" of trying to kill Bin Laden. (GX 330-B, 330-G).

After arriving at Bly and viewing the property, Kassir was furious at Ujaama because the property at Bly did not resemble what Ujaama had represented to Abu Hamza. (Tr. 21, 928). In particular, Kassir aggressively confronted Ujaama because he had promised Abu Hamza that there would be brothers to train and

guns on the property, and because there was no place for Abu Hamza to stay. (Tr. 121-22, 928). Even so, Kassir and Aswat still attempted to institute military-style activities and conduct training. Both Kassir and Aswat armed themselves with firearms and organized armed patrols of the property at night. (Tr. 151). Kassir and Aswat conducted target practice and physical exercises, and instructed people at Bly on how to throw knives. (Tr. 928-30). On one occasion, Kassir trained an 18-year old teenager on how to slit a person's throat. (Tr. 144-46; PSR ¶ 36). During this demonstration, Kassir asked the teenager if he would kill a kaffir (*i.e.*, a non-Muslim). (Tr. 144-45).

Abu Hamza supported and directed Kassir and Aswat from London. Abu Hamza provided Kassir and Aswat with money to fund the training at the Bly property, and called the men while they were at Bly. (Tr. 126, 150-51; PSR ¶ 37). During one phone conversation with Abu Hamza, Kassir complained that the property at Bly was not what had been anticipated and questioned whether he should continue there. (Tr. 127-28). Abu Hamza responded by exhorting Kassir to persevere in his mission at Bly. (Tr. 128).

After Kassir and Aswat grew frustrated with the lack of men to train at Bly, they relocated to the Dar Us Salaam Mosque in Seattle. (PSR ¶ 38). At the mosque, Kassir taught men how to make silencers, how to assemble and disassemble an AK-47 assault rifle, how to convert an AK-47 into a fully automatic firearm, and how to modify an AK-47 so it could launch grenades. (Tr. 409-18). Kassir also met with men from the Dar Us Salaam Mosque at one of their homes,

where Kassir said he was only concerned about his martyrdom and that he had come to the United States to destroy. (Tr. 422).

Both Kassir and Aswat subsequently left the United States. (PSR ¶ 39). Kassir eventually returned to his home country of Sweden. In October 2003 and January 2006, Swedish authorities conducted searches of Kassir's residence. (GX 7, 8). During those searches, Swedish authorities found a large volume of jihadi material, as well as numerous manuals related to weapons, poisons, and explosives. (GX 7, 8; PSR ¶ 39).

Aswat subsequently linked up with the terrorist group al Qaeda. In September 2002, the Federal Bureau of Investigation ("FBI"), in conjunction with Pakistani authorities, conducted a search of a house connected to al Qaeda (the "al Qaeda house") in Karachi, Pakistan. (GX 4; PSR ¶ 40). During that search, the FBI seized a handwritten ledger, written in Arabic, which contained a list of names. (*Id.*). Among the names listed on that ledger was "Aswat Haroon," along with a notation indicating British nationality. (GX 1111-A-T; PSR ¶ 40). Numerous items recovered from the al Qaeda house contained the fingerprints of Khalid Sheikh Mohammed, who at the time served as al Qaeda's Chief Operational Planner. (GX 4; PSR ¶ 40).[3]

---

[3] The Government's terrorism expert, Evan Kohlmann, testified as follows about Khalid Sheikh Mohammed:

3. Abu Hamza's Support to al Qaeda and the Taliban in Afghanistan

a. Abu Hamza Sends Feroz Abbasi to al Qaeda in Afghanistan

In 2000, Abu Hamza instructed Ujaama to deliver another one of Abu Hamza's followers, Feroz Abbasi, to Ibn Sheikh al Liby ("Ibn Sheikh"), whom Abu

---

Q. Now, Mr. Kohlmann, what was Khalid Sheikh Mohammed's role in Al Qaeda?

A. Khalid Sheikh Mohammed was appointed within Al Qaeda to oversee special projects, and by special projects this meant large overseas military operations that required a great amount of complexity and that would have targeted some of Al Qaeda's most high-profile adversaries. The reason why KSM was chosen for this role is he had a history of coming up with very serious and high-profile terrorist plots that Al Qaeda admired.

Q. And has Khalid Sheikh Mohammed planned terrorist attacks?

A. Yes, he has.

Q. What are some of the attacks he's planned?

A. The chief plot in which he is associated with is the September 11, 2001 terrorist attacks in the United States, of which he is conceded of being the mastermind.

(Tr. 1176-77).

Hamza described to Ujaama as a "front-line commander." (Tr. 1948-49, 2584). Abu Hamza told Ujaama that Abbasi was going to Afghanistan to receive jihad training and fight on the front lines. (Tr. 1947, 2141).

Around that time, Ibn Sheikh ran the Khalden jihad training camp in Afghanistan, which was one of the primary training camps in the 1990s for individuals seeking to become mujahideen. (Tr. 1200). The Khalden camp produced many al Qaeda fighters, including al Qaeda operatives Richard Reid and Zacharias Moussaoui. (Tr. 1200-02, 1639; PSR ¶ 42). Ibn Sheikh had a reciprocal agreement with al Qaeda, by which individuals who received training at Khalden could then receive additional training at al Qaeda camps, and al Qaeda operatives could receive specialized training at Khalden. (Tr. 1202). Ibn Sheikh also was publicly praised by al Qaeda after his death for leading al Qaeda's ground forces against U.S. military personnel at the Battle of Tora Bora in Afghanistan in late 2001. (Tr. 1202-03).

Ujaama brought Abbasi to Pakistan and left him in Quetta. (Tr. 2161-62). Abbasi, however, succeeded in making his way into Afghanistan and in linking up with Ibn Sheikh. In Afghanistan, Abbasi was taken by Ibn Sheikh to an al Qaeda guesthouse called the House of Pomegranates, where Abbasi encountered Saajid Badat, a cooperating witness who testified at trial via closed circuit television. (Tr. 1642; PSR ¶ 43). Badat later saw Abbasi at the al Faruq training camp, which was al Qaeda's primary training camp and where recruits were trained in topics that included military tactics, weapons, and explosives. (Tr.1632, 1647-48; PSR

¶ 43). Abbasi also met with senior al Qaeda leaders, Saif al-Adl and Abu Hafs al-Masri, who asked if he was willing to participate in attacks on behalf of al Qaeda against American and Jewish targets. (Tr. 1652-54; PSR ¶ 43).

Abbasi subsequently was transferred to the custody of the United States military in Afghanistan in December 2001. (GX 6).

b. Abu Hamza's Support of the Taliban

Abu Hamza also provided goods, services, and supplies in Taliban-controlled areas of Afghanistan from spring 2000 through late 2001. (PSR ¶ 48). At the time, a national emergency had been declared by Executive Order with respect to the Taliban, thereby prohibiting United States persons from making any contribution of goods and services to or for the benefit of the Taliban, and from supplying any goods, software, technology, or services to the Taliban or to the area of Afghanistan that was controlled by the Taliban. (PSR ¶ 45-47). The evidence at trial, including the testimony of Ujaama, a United States citizen, established Abu Hamza's knowledge of these U.S. sanctions against the Taliban. (GX 613-A, 615-B; Tr. 2005-06; PSR ¶ 48).

Yet despite his awareness of these sanctions, Abu Hamza directed Ujaama to deliver Abbasi to al Qaeda in Afghanistan in areas controlled by the Taliban. (PSR ¶ 48). Abu Hamza also tasked Ujaama to deliver large sums of money to several individuals, including Ibn Sheikh and Abu Khabab, an explosives expert,

both of whom operated from the safety of Taliban controlled territories of Afghanistan. (Tr. 1949, 2146-51, 2169-81; PSR ¶ 48).

4. Additional Evidence of the Defendant's Intent and Motive

The trial evidence also overwhelmingly demonstrated Abu Hamza's intent and motive to commit the charged terrorism offenses. This evidence came largely in the form of audio and video recordings of Abu Hamza's speeches, and evidence recovered from searches of his residence in London and the Finsbury Park Mosque.

Consistent with his efforts to establish a terrorist training camp in the United States and sending one of his young followers, Abbasi, to Afghanistan to train and fight with al Qaeda, Abu Hamza repeatedly preached that physical training and fighting in jihad was mandatory for Muslims. For instance:

- "What in short we need, we need parents to educate their children and to give them training, capability, power. Send them to the front lines." (GX 107).
- "No, my dear brothers and sisters, because many of these brothers, they get killed on the cheap. They get killed. We don't want you to go to get killed after a hot talk. Allah said prepare. So for those who want to go, this is why we are running our camps. We don't want people to die of negligence. You go in the name of

Allah. You go and fight. But you must be trained." (GX 106).

- "And also there is a need for you to train, so you can last longer. If you want to be a martyr, then you might as well fight many battles. You don't have to go and get killed in the first battle." (GX 106).
- "Fighting has been made obligatory to you." (GX 102).
- "[T]he backbone of jihad is fighting. Every fighting is jihad. But not every jihad is fighting. Now Allah meant fighting is the obligation. Because when you fight, you automatically do jihad." (GX 102).

Abu Hamza also repeatedly told his followers that it is appropriate to kidnap, capture, enslave, sell, and even kill non-Muslims who set foot on Muslim land. This of course was consistent with his role in the December 1998 hostage-taking in Yemen, when sixteen Western tourists were taken captive while on vacation in a predominantly Muslim country. For instance:

- "If a kaffir [non-Muslim] enters a Muslim land or, you know, anybody could take him, capture him, and enslave him. Or even sell him in the market. He's like a cow. He's like a pig." (GX 130).
- "What will bring you honor? Unless you go and put his [a kaffir's] nose into the toilet. And you chop his head. And you take his wife as a booty. And you throw

him in the stable. Then he will understand what honor Allah have given you." (GX 130).

- "If a kaffir is walking by, when you catch him, what are you doing here, then he's a booty, you can sell him in the market. This is what Islam says. What are they doing there anyway? Most of them are spies and things like that. Even if they didn't do anything. If Muslims cannot take them to the, you know, and sell them in the market, then you just kill them. It's okay." (GX 104).
- "Killing a kaffir for any reason, you can say it's okay even if there's no reason for it." (GX 132).

Abu Hamza also made statements that revealed his admiration of and support for Osama Bin Laden, his agreement with al Qaeda's attacks on America, and his view that suicide operations can be permissible. These statements were consistent with Abu Hamza's intent to support al Qaeda in connection with the Bly training camp and sending Abbasi to Afghanistan. For instance:

- "Everybody was happy when the planes hit the World Trade Center. Anybody who tell you he was not happy, they are hypocrites. For the Muslim Nation, I'm telling you. Everybody." (GX 113).

- "Sheikh Bin Laden is not a normal person. He's an example for all of the mujahideen [Islamic fighters]. With his past, experience, goals, and achievements." (GX 110).

When asked by Evan Kohlmann about his opinion of Bin Laden, Abu Hamza answered: "Well, I would call him a reformer, you see. He is a person that is trying to reform. He's got … I think he's a victim as well. He's a victim from the American policies and he's a victim of the scholars of his country. He's a good-hearted person. He likes to share the, to poor people, their, their, their, you know, their way of life. He hates injustice, he likes heroism as well, and he doesn't care about death, you know. He's a very great man, you know. But, unfortunately, as I say he's a victim of international bad policies and, and selfishness." (GX 101). Abu Hamza continued, still referring to Bin Laden: "I think he's good. He's a hero and we should not undermine him because it does fire back even if you know him because these kind of people, God mighty. He put some love in the hearts of people to them, and you can't fight that." (*Id.*).

When asked in an interview whether he approved of the October 2000 bombing of the *USS Cole*, which killed 17 American sailors, Abu Hamza responded: "Of course. I agree with it." (GX 113).

When Ms. Quin also inquired about his view on the *USS Cole* bombing, Abu Hamza similarly opined: "I think it's a good thing. I think it's a good message. I think it's a good thing. I think it's something for Mus-

lims to, to, to rejoice. Not only um, because of the operation, but also that the desire to fight any force is there." (GX 219).

When asked by an audience member "whether suicide bombing's allowed," Abu Hamza answered: "It is not called suicide; it is called uh, it is called, uh, *shahid* operation. Suicide, this is what the people call it, suicide to make people off it. It is not called suicide, this is called uh, *shahada*, martyrdom. Because, if the only way to hurt the enemies of Islam, uh, except by taking your life for that—then it is allowed." (GX 131).

Searches conducted of Abu Hamza's residence and the mosque he led further confirmed his steadfast support for violent jihad. On May 27, 2004, British law enforcement searched Abu Hamza's residence in London. (GX 19). This search resulted in the recovery of ten volumes of the Encyclopedia Jihad (GX 507); computer files that included multiple images of Bin Laden (GX 508-B, 508-F, 509-A, 509-B, 509-C, 511-K), a copy of Bin Laden's 1996 declaration of war against the United States (GX 510-B), a photograph of the September 11, 2001 attacks (GX 508-A), an image of Abu Hamza speaking with the writing, "Allah Happy when kaafir get killed." (GX 508-C), and an image with photographs of Abu Hamza and Bin Laden side-by-side (GX 511-W); and portions of the al Qaeda propaganda video, *Destruction of the USS Cole*, featuring footage of al Qaeda recruits receiving physical training (GX 511-Y).

A January 20, 2003 search of the Finsbury Park Mosque—where Abu Hamza was the leader and the imam—also resulted in the recovery of a host of items

that reflected support for al Qaeda and violent jihad. (GX 17). British law enforcement seized from the mosque, among other things, various computer files including another copy of Bin Laden's 1996 declaration of war against the United States (GX 615-D), an image of the *USS Cole* (GX 613-D), more photographs of Bin Laden including one of Bin Laden holding an AK-47 assault rifle (GX 614-E, 615-C, 615-I), a suicide video for one of the September 11th hijackers (GX 614-G), and a flyer advertising a speech by Abu Hamza regarding Bin Laden's swearing of an oath of allegiance, called *bayat*, to Mullah Omar (GX 613-A), as well as a military helmet (GX 612), a gas mask (GX 611), a hatchet (GX 607), and nuclear, biological, and chemical clothing (GX 610).

B. The Defense Case and Jury Verdict

After the close of the Government's case, Abu Hamza elected to testify. During the course of his testimony, Abu Hamza denied: (i) participating in the kidnapping in Yemen in December 1998; (ii) sending men to Bly, Oregon to set up a jihad training camp; (iii) sending Abbasi to Afghanistan for jihad training; and (iv) providing assistance to the Taliban after July 4, 1999. (Tr. 2975-76).

On May 19, 2004, the jury found Abu Hamza guilty on all eleven counts charged in the Indictment.

C. Abu Hamza's Sentencing

Judge Forrest sentenced Abu Hamza on January 9, 2015. Before Judge Forrest imposed sentence, Abu

Hamza said, among other things, that he "maintain[ed] his innocence from all these charges," (A. 617) and noted that, "It is not a big sacrifice for the truth to come and for the victims of all these false wars to come together and ask the people who resulted in all these false intelligence to see their days in court." (A. 626).

Judge Forrest then sentenced Abu Hamza principally to a term of life imprisonment on Counts One and Two, terms of five years' imprisonment on Counts Three, Seven and Eleven, terms of ten years' imprisonment on Counts Four, Five, and Six, and terms of 15 years' imprisonment on Counts Seven, Eight, Nine, and Ten. All terms were to run concurrently.

In imposing sentence, Judge Forrest stated:

> Evil comes in many forms but doesn't always show itself immediately in all of its darkness. And the complexity of the human can make, sometimes, that a more difficult place to find. But I do believe that there is another side of you and that there is the side of you which this court views as evil.
>
> I don't believe that the world would be safe with you in 10 years or 15 years. I have looked at increments far less than a life sentence. I have tried to determine whether or not, if there was a point in time that you would be essentially incapable of, at an age, of doing any harm, was there a point when I could see a release for you? And I have thought very

> hard about that, because for one human being to pronounce a life sentence on another is perhaps, I think, the most difficult thing that one can do as a judge. But I could not think of a time when I did not believe that you would not try to, yet again, inspire others to do that which perhaps you would not yourself be able to do, and that those acts could well result in death or harm to others, and that they certainly, in my view, would be directed at trying to have those results.

(A. 642).

D. Relevant Background and Related Cases

1. Kassir's Arrest, Convictions and Appeal

Kassir was arrested and detained in the Czech Republic on December 11, 2005, and was extradited to the United States on or about September 25, 2007. (PSR ¶ 52). On May 12, 2009, after a four-week jury trial before the Honorable John F. Keenan, Kassir was found guilty of eleven counts: (1) two counts of conspiring to provide and conceal material support and resources to terrorists, in violation of 18 U.S.C. § 2339A; (2) two counts of providing material support and resources to terrorists, in violation of 18 U.S.C. § 2339A; (3) two counts of conspiring to provide material support and resources to a designated foreign terrorist organization, al Qaeda, in violation of 18 U.S.C. § 2339B; (4) two counts of providing material support and resources to a designated foreign terrorist organization, al Qaeda, in violation of 18 U.S.C. § 2339B; (5) two

counts of conspiring to kill, kidnap, maim, and injure persons in a foreign country, in violation of 18 U.S.C. § 956(a); and (6) one count of distributing information relating to explosives, destructive devices, and weapons of mass destruction, in violation of 18 U.S.C. § 842(p)(2)(A). (PSR ¶ 19). These charges related to Kassir's participation in Abu Hamza's efforts to establish the jihad training camp in Bly, Oregon, as well as his operation of terrorist websites out of Sweden. On September 15, 2009, Judge Keenan sentenced Kassir to life imprisonment. (*Id.*).

In 2011, this Court denied Kassir's appeal in its entirety and upheld his convictions. *See United States v. Mostafa*, 406 F. App'x 526 (2d Cir. 2011).

2. Abu Hamza's Extradition from the United Kingdom

Abu Hamza was arrested and detained in the United Kingdom on May 27, 2004, based on a provisional arrest warrant issued at the request of the United States Government. (PSR ¶ 50). Abu Hamza was subsequently arrested on British charges on October 19, 2004. (*Id.* ¶¶ 50, 94). Following a jury trial in the United Kingdom, Abu Hamza was found guilty on February 7, 2006 of, among other things, soliciting murder and promoting racial hatred. (*Id.* ¶ 95). Abu Hamza was sentenced by the British court to a term of seven years' imprisonment. (*Id.* ¶ 94).

After years of litigation challenging his extradition to the United States in the United Kingdom and before the European Court of Human Rights, Abu Hamza

was extradited to the United States on October 6, 2012. (PSR ¶ 50).

3. Aswat's Extradition, Conviction, and Sentence

In connection with his efforts to establish a jihad training camp in Bly, Oregon, Aswat was charged in an Indictment in four counts: (1) conspiring to provide material support and resources to terrorists, in violation of Title 18 United States Code, Section 2339A ("Count Three"); (2) providing material support and resources to terrorists, also in violation of Section 2339A ("Count Four"); (3) conspiring to provide material support and resources to an FTO, in violation of Title 18, United States Code, Section 2339B ("Count Five"); and (4) providing material support and resources to an FTO, also in violation of Section 2339B ("Count Six"). (*See* PSR ¶ 20).

Aswat was arrested by authorities in Zambia and extradited to England in June 2005. He was extradited to the United States and first appeared before the District Court on October 21, 2014. (PSR ¶ 49). Aswat pled guilty on March 30, 2015, to Counts Five and Six of the Indictment, pursuant to a plea agreement with the Government. Aswat was sentenced to 20 years' imprisonment.

ARGUMENT

POINT I

The Government Overwhelmingly Proved Abu Hamza's Guilt

Abu Hamza challenges the sufficiency of the evidence to sustain his convictions on Counts Three through Eleven, under various theories. But witnesses with first-hand knowledge and corroborating documentary evidence proved that Abu Hamza's purpose in establishing a terrorist training camp in the United States was to train men to fight in violent jihad in Afghanistan and to assist al Qaeda, and that Abu Hamza sent Abbassi to Afghanistan to train to fight and to join al Qaeda.

A. Applicable Law

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). Although this Court reviews a claim of insufficient evidence de novo, *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004), a jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004) (internal quotation marks omitted).

In considering the sufficiency of the evidence supporting a guilty verdict, the evidence must be viewed in the light most favorable to the Government. *United States v. Temple*, 447 F.3d 130, 136-37 (2d Cir. 2006). A reviewing court must analyze the pieces of evidence "in conjunction, not in isolation," *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011), and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others," *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). It is not the Government's burden to "disprove every possible hypothesis of innocence." *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998). To the contrary, the Court must "credit[ ] every inference that the jury might have drawn in favor of the government," *United States v. Temple*, 447 F.3d at 136-37 (internal quotation marks omitted), because "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court," *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

Moreover, with respect to the conspiracy convictions for Counts One, Three, Five, Seven, Nine and Eleven, the deference accorded a jury's verdict is "especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (internal quotation marks omitted). As with the other elements of a conspiracy, "a defendant's knowledge of the conspiracy and his participation in it with criminal

intent may be established through circumstantial evidence." *United States v. Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

B. Discussion

1. Abu Hamza Provided Material Support to Terrorists and to the Terrorist Organization al Qaeda

a. Applicable Law

At all relevant times,[4] 18 U.S.C. § 2339A provided:

> Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 956 (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country), among other statutes] . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 2339B provided:

> Whoever, within the United States or subject to the jurisdiction of the United

---

[4] Both statutes were amended on October 26, 2001. The amendments are not relevant to this appeal.

> States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

Both statutes defined "material support or resources" the same way as:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4).

b. Discussion

i. Jihad Training in Bly, Oregon and Seattle, Washington

Counts Three and Four of the Indictment charged Abu Hamza with providing and conspiring to provide material support to terrorists through the Bly training camp, knowing that it would be used to kill, kidnap, or injure people outside the United States, in violation of Title 18, United States Code, Section 2339A. On appeal, Abu Hamza concedes that there was evidence sufficient to demonstrate that jihad training occurred

in the United States, but he disputes that the purpose of this training was to commit acts of violence abroad. (Br. 48). The record is to the contrary.

The trial witnesses from Bly and Seattle explained in great detail that the purpose of the training camp was to engage in violent jihad in Afghanistan. Kassir clearly stated his purpose was violent while his was in the United States. David Smith described Kassir's speech to the men at the mosque:

> He said that he had came there for the sake of Allah; that he was only concerned about his Shuhada, which means his martyrdom; and that he did not come there to, come here to play games; and that he said people are going to point fingers at him and blame one another; some people could die, some people could get hurt; he said that he—he came—he came here to destroy.

(Tr. 422). Kassir also told the people at Bly that he had previously taught in training camps in Afghanistan. (Tr. 153, 939).

The training in the United States was real and violent. While at Bly, Kassir taught an 18 year old how to slit another man's throat. As Angela Morris explained,

> A. [Kassir] was still holding my brother's head. And he had the knife in his right hand. And he said you don't cut the throat from the front, you cut it from the back, so you can sever the base of the

> neck and incapacitate them. And he made a slicing motion across the back of my brother's neck, on one side of his throat, across his neck, and to the other side.
>
> Q. What was Abu Abdallah holding in his hand as he made that motion across your brother's neck?
>
> A. He was holding that curved blade knife.

(Tr. 144-45). Kassir taught others how to throw knives and a number of the men at Bly carried guns and organized armed patrols in the middle of the night. (Tr. 151, 928-30). When he moved to Seattle, Kassir taught the men at the mosque how to make silencers. (Tr. 409-18).[5]

Kassir also explicitly stated that he had been sent by Abu Hamza to Bly to train men to go fight in Afghanistan. Kassir told Ayat Hakima the following:

> Q. What did Abu Khadijah [Kassir] say about why he was at the Bly property?
>
> A. He was there to train men for jihad.
>
> Q. He was there to train men for jihad, you said?
>
> A. Yes.

---

[5] That the training camp was not as successful as Abu Hamza had hoped is immaterial. He participated in the conspiracy and the training actually occurred.

Q. Did he say, did he mention any specific locations?

A. He, they were going to go to Afghanistan.

Q. Now, what, if anything, did Abu Khadijah say about who had sent him to Bly in order to train men for jihad?

A. He said that Abu Hamza sent him.

Q. Abu Khadijah said this?

A. Yes.

Q. And what, if anything, did Abu Khadijah say about the kind of training he intended to give at Bly?

A. He intended to train them to fight.

(Tr. 927). Kassir made a similar statement to Ms. Morris:

Q. Now, during the time when you were at Bly, did there ever come a time when Abu Abdallah spoke about what his plans were at Bly?

A. Yes.

Q. And who was present when Abu Abdallah spoke about that?

A. He spoke about it on many different occasions, but it was Haroon, Semi, and myself.

Q. What did Abu Abdallah say about his plans for Bly?

> A. He said the Sheikh Abu Hamza had sent him there to train the brothers and that he was going to train them for jihad and whatever, whenever he was done with the training, someone else would come to train them.
>
> Q. He said the term jihad. What did you understand the term jihad to mean?
>
> A. To go fight and defend the Muslims where they were being persecuted.

(Tr. 152-53).

One of the faxes that Ujaama sent to Abu Hamza also lays out that the plan for Bly was to train men to fight in Afghanistan. (GX 315). The fax notes that the training camp would be located in a "pro-militia and fire-arms state" that "looks just like Afghanistan," and that the group in Bly is "stock-piling weapons and ammunition." (GX 315). A purpose of the camp was to "take some of the external pressure off the backs of our brothers abroad." (GX 315). As Ujaama testified, that was a reference to the mujahideen and the Taliban in Afghanistan who were, at the time, fighting and killing members of the Northern Alliance for control of Afghanistan. (Tr. 2055, 2061). Ujaama also explicitly testified that he and Abu Hamza agreed that the purpose of the camp was violent jihad training, with the ultimate goal being that those trained could participate in fighting jihad on the front lines in Afghanistan. (Tr. 2039-40).

Finally, Abu Hamza's own statements demonstrate that he intended for the men trained in the United

States to fight violent jihad. Abu Hamza exhorted his followers to get jihad training to go to the front lines and fight. In GX 102, Abu Hamza states: "How you are going to be training for fighting? Back home with the wives? No go to the front, first you have to be training not to be afraid from, from, from the dark. Not to be afraid from the sound of weapons . . . not to be afraid from the blood, and the smell of the, of the blood." Jihad training had a very specific meaning to Abu Hamza. It was not about a personal struggle or making hijrah (*see* Br. 51)—it was about kidnapping, killing, and hurting others.

The evidence likewise proved Abu Hamza's intent to support al Qaeda through the training camp, as charged in Counts Five and Six. First, when Kassir taught the men in Seattle how to make silencers, Aswat was seated among these other men listening to Kassir's instructions. (Tr. 409-18). Aswat also followed Kassir everywhere he went at Bly, and the two practiced shooting, hunting, and knife throwing. They also performed armed patrols of Bly together at night. Just two years later, Aswat's name was found on a ledger inside an al Qaeda safe-house in Karachi, Pakistan. (GX 4). The ledger bore the fingerprints of Khalid Sheikh Mohammed, al Qaeda's head planner of terrorist attacks. (GX 4). The fair inference from this evidence was that Kassir trained Aswat in the United States for violent jihad in Afghanistan and to join al Qaeda.

Kassir also possessed evidence in Bly that evinced his intent and Abu Hamza's intent for the training to

support al Qaeda. Kassir carried bin Laden's "Declaration of War" speech, in which bin Laden declared war on the United States and urged his followers to kill Americans, including civilians. (GX 330-B). Kassir also carried with him a letter he wrote to bin Laden, which stated, "God knows how much we love you here." (GX 330-F-T). The letter was addressed to bin Laden, the "Leader of Warriors," because bin Laden was the leader of the mujahideen in Afghanistan at the time.

Finally, Abu Hamza's statements also support the jury's verdict that one of the purposes of the training in the United States was to support al Qaeda. In GX 101, Abu Hamza stated that bin Laden "was an example for all the Mujahedeen," and that bin Laden gave bayat (a pledge of allegiance) to the Taliban "to show the people now, that we are all one country, and we are all one people." (GX 101). This speech, from 1999, shows that Abu Hamza equated fighting with bin Laden and fighting with the Taliban in Afghanistan—they were the same. Further, in an SOS article, Abu Hamza noted that bin Laden was the leader of the mujahideen in Afghanistan. (GX 615-C). Thus, as Abu Hamza understood it, to fight as a mujahideen in Afghanistan was to fight under bin Laden.

ii. Abbasi's Jihad Training in Afghanistan

Counts Seven and Eight of the Indictment charged Abu Hamza with providing and conspiring to provide material support to terrorism by sending Abbasi to Afghanistan to receive jihad training, in violation of 18

U.S.C. § 2339A. Counts Nine and Ten of the Indictment charged Abu Hamza with providing and conspiring to provide material support to al Qaeda for the same conduct, in violation of Title 18, United States Code, Section 2339B. In contending that the evidence was insufficient to support his convictions on these counts, Abu Hamza ignores and mischaracterizes the evidence of his guilt.

Abu Hamza explicitly asked James Ujaama, Abu Hamza's co-conspirator on these counts, to take Abbasi to Afghanistan to Ibn Sheikh, whom Abu Hamza described to Ujaama as a "front line commander." (Tr. 1948-49, 2584). After Ujaama and Abbasi left London together in November 2000, Abbasi ultimately arrived at an al Qaeda guesthouse with Ibn Sheikh, who was in fact a front line commander. (Tr. 1642).

Ibn Sheikh ran the notorious Khalden training camp in Afghanistan that produced many al Qaeda fighters, including Richard Reid, the shoe bomber, and Zacharious Moussaoui, who wanted to join the 9/11 hijackers. (Tr. 1200). When Ibn Sheikh died, al Qaeda issued a press release mourning his death and commending his bravery in battle. He was a front line commander. (Tr. 1212). He was affiliated with al Qaeda. That was why Abu Hamza sent Abbasi to train with him.[6]

---

[6] On direct examination, Abu Hamza admitted to knowing Ibn Sheikh, but claimed, incredibly, that Ibn Sheikh said that he did not want any more people

Abbasi's statements to Smith also corroborate that Abu Hamza sent Abbasi to Afghanistan to engage in violent jihad training. Abbasi told Smith that if one were obedient to Abu Hamza, Abu Hamza could arrange for that person to go to jihad training in Afghanistan. (Tr. 386). Abu Hamza also had a map of al Qaeda training camps in his home office, indicating he knew exactly where to send his followers and where to send Abbasi. (GX 504).

After Abbasi arrived with Ibn Sheikh in Afghanistan, Abbasi received jihad training at the al Faruq training camp, an al Qaeda training camp. (Tr. 1632, 1647-48). Abu Hamza mischaracterizes the testimony on this point, claiming that Abbasi only did some digging or spade work at the camp. (Br. 43). First, whether Abbasi in fact received training is insignificant as a legal matter. Abu Hamza sent him to al Qaeda to fight. Material support includes personnel, like recruits such as Abbasi. And the jury learned that Abbasi was in fact with al Qaeda—at the House of Pomegranates, at the al Faruq camp, and meeting with al Qaeda leadership, Saif al Adl and Abu Hafs al-Masri. By sending Abbasi to Afghanistan, Abu Hamza committed the crimes charged in Counts 7 through 10. The evidence of Abbasi's conduct in Afghanistan provides even more evidence of Abu Hamza's guilt. Saajid Badat saw Abbasi at the al Faruq training camp. This

---

training with him in Afghanistan. (Tr. 3364). This admission confirmed that Abu Hamza (1) knows Ibn Sheikh; and (2) discussed with Ibn Sheikh his training camp in Afghanistan.

was al Qaeda's primary training camp. Badat testified that Abbasi was at al Faruq taking the tactics course in basic military training. Badat, who also took this course himself, explained that the course consisted of training on military tactics, guns, and explosives. (Tr. 1647-48).

At some point after this training, Abbasi met with senior al Qaeda leadership and was asked whether he was willing to carry out attacks against American and Jewish targets. (Tr. 1652-54). While Abbasi did not agree on the spot, that does not erase the fact that he was already a trained al Qaeda fighter, sent by Abu Hamza to al Qaeda. After this meeting with al Qaeda leadership, Abbasi continued his training with al Qaeda, taking the urban warfare course. (Tr. 1654). In addition, after 9/11, Abbasi guarded al Qaeda's Matar training complex, proving, once again, that he had become a full-fledged member of the terrorist organization. (Tr. 1859).

2. Abu Hamza's Convictions on Count Seven through Ten Had a Sufficient Nexus to the United States

a. Applicable Law

Criminal statutes may have extraterritorial reach. *See, e.g., United States v. Siddiqui,* 699 F.3d 690, 700 (2d Cir. 2012); *United States v. Al Kassar,* 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Yousef,* 327 F.3d 56, 86 (2d Cir. 2003). Courts first look to the text of a criminal statute to determine whether Congress intended extraterritorial application. *Al Kassar,* 660 F.3d at 118. However, when a statute is silent, courts

look to the nature of an offense to determine whether to infer extraterritorial application. *Id.*

In addition, a statute may be applied extraterritorially when to do so would not violate due process. *Id.* Whether extraterritorial application violates due process depends on whether there is a sufficient nexus between defendant and the United States such that application would be neither arbitrary nor fundamentally unfair. *Id.; see also Yousef,* 327 F.3d at 111. In instances in which charged conduct involved non-U.S. citizens and occurred entirely abroad, "a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests." *Al Kassar,* 660 F.3d at 118; *Yousef,* 327 F.3d at 112.

In *Al Kassar,* the Second Circuit found a sufficient jurisdictional nexus where the conduct occurred outside of the United States. The *Al Kassar* court upheld the convictions of the non-U.S. citizen defendants on account of their plans to sell arms to FARC to be used to kill Americans and destroy U.S. property. *Al Kassar,* 660 F.3d at 118. There, the Court found that the geographical location of the undercover sting operation at issue was "irrelevant" to the sufficiency of the jurisdictional nexus. *Id.* "If an undercover operation exposes criminal activity that targets U.S. citizens or interests or threatens the security or government functions of the United States, a sufficient jurisdictional nexus exists notwithstanding that the investigation took place abroad and only focused on foreign persons." *Id.* The Court rejected defendants' argument that the

application of the statutes at issue to their actual conduct was so tangential to any real U.S. persons or interests as to be fundamentally unfair and violative of due process. *Id.* at 119.

In a challenge to subject-matter jurisdiction, this Court reviews a district court's factual findings for clear error and its legal conclusions *de novo*. *Al Kassar*, 660 F.3d at 117 (citing *APWU v. Potter,* 343 F.3d 619, 623-24 (2d Cir. 2003)).

b. Discussion

Abu Hamza contends that there is insufficient evidence of Ujaama raising money in the United States in support of the hijrah fund—which was used to send Abbasi to Afghanistan—to sustain his convictions on Counts Seven and Eight for violating 18 U.S.C. § 2339A. Abu Hamza raised this same argument before the District Court in his pre-trial motion to dismiss these counts for failure to state a sufficient nexus to the United States, and in his Rule 29 argument at trial. Both times the District Court denied Abu Hamza's motions, for good reason.

As the District Court noted in denying Abu Hamza's pre-trial motion to dismiss the Indictment as to Counts Seven and Eight, "both counts allege conduct that occurred in the United States (a co-conspirator raising funds in the United States, used to pay travel expenses for personnel to travel to a jihad training camp in Afghanistan). This is a sufficient nexus at this stage." *United States v. Mostafa*, 965 F. Supp. 2d 452, 459 (S.D.N.Y. 2013). The evidence at trial proved those same allegations.

Ujaama traveled to the United States in 2000 to raise money for the Supporters of Shariah hijrah fund. (Tr. 2134-36). He went to a few mosques, and raised a small amount of money for the fund. (Tr. 2135-36). That fund was then used to finance his trip to Afghanistan with Feroz Abbasi—the trip that resulted in Feroz Abbasi going to al Qaeda. (Tr. 2153, 2516-18). That trip to New York to raise money—regardless of how much money James Ujaama raised (Br. 63), and regardless of whether he in fact raised money—is all that was needed with respect to Counts Seven and Eight under 2339A.

To the extent there were any discrepancies about Ujaama's activities in New York and his purpose in coming to New York, those potentially competing versions of events were for the jury to evaluate and choose between at trial. *See United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (noting that "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court"). On direct examination, Ujaama testified to his raising money for the hijrah fund in New York, and that the fund was used to finance Abbasi's travel to Afghanistan. The jury accepted this testimony. The Government also proved that Abu Hamza directed and was aware of conduct in the United States in furtherance of sending Abbasi to Afghanistan. Nothing more was required, as the District Court found in denying Abu Hamza's Rule 29 motion. (Tr. 2973); *see also Mostafa*, 965 F. Supp. 2d at 469 ("There is a sufficient domestic nexus between the allegations . . . to avoid the question of extraterritorial application altogether. Overt acts occurred in the United States."); *United States v. Zarrab*,

2016 WL 6820737, at *8 (S.D.N.Y. Oct. 17, 2016) (citing *Mostafa* and holding that a co-conspirator's conduct in the United States provides a sufficient nexus).

As to Counts Nine and Ten, section 2339B specifically provides for its extraterritorial application, and has done so since 1996. *See* 18 U.S.C. 2339B(d) ("There is extraterritorial Federal jurisdiction over an offense under this section") (effective April 24, 1996 to October 25, 2001); *see also Mostafa*, 965 F. Supp. 2d at 459 ("Counts Nine and Ten both allege violations of 18 U.S.C. § 2339B. That statute has an explicit provision allowing for extraterritorial application.").

The application of both of these statutes to Abu Hamza's conduct is also consistent with Due Process. *See Mostafa*, 965 F. Supp. 2d at 460 ("Nor do the challenged counts violate defendant's due process rights. It is sufficiently clear that the conduct alleged is criminal to eliminate any concerns regarding whether defendant had fair notice that such acts could subject him to criminal prosecution"). Significant activity—the raising of funds—took place in the United States by a U.S. citizen (Ujaama), in connection with Abu Hamza's provision of material support for terrorist activity, as charged in Counts Seven and Eight. The alleged activity within the United States in furtherance of these counts is in itself a sufficient basis for establishing the requisite nexus with the United States. *See United States v. Yousef*, 2010 WL 3377499, at *4 (S.D.N.Y. Aug. 23, 2010) ("In determining whether a sufficient nexus exists, courts also have considered factors such as the 'defendant's citizenship or residency, the location of the acts allegedly giving rise to the suit and

whether those acts could be expected to or did produce an effect in the United States.' ") (quoting *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 106 (E.D.N.Y. 2010)). As previously noted, Abu Hamza was also aware that Ujaama came to the United States to raise this money for the hijrah fund. (Tr. 2135).

In addition, the jihad training camp to which Abu Hamza sent Abbasi provided, among other things, military and weapons training, and explosives. (Tr. 1647-48). Attendees of the jihad training camp were schooled in jihad, including from bin Laden himself. (Tr. 1648-49). In view of the activities and purpose of the jihad training camp, as well as the reasonably foreseeable results of sending individuals to such camps, Abu Hamza's conduct had more than a sufficient nexus to the United States to support his prosecution here. *See United States v. Epskamp*, 832 F.3d 154, 169 (2d Cir. 2016) (denying Due Process challenge to prosecution in the United States because defendant's conduct was self-evidentially criminal and he had every reason to believe he would prosecuted for it).

Counts Nine and Ten alleged that Abu Hamza conspired to, and did, provide material support to al Qaeda. As proven at trial, Al Qaeda's primary purpose and defining philosophy is its commitment to attack the United States, its allies, and its interests, and to kill Americans anywhere in the world they may be found. Abu Hamza understood this agenda, because, among other reasons, he possessed a copy of Osama Bin Laden's "Declaration of Jihad Against the Americans," which called for the murder of United States military personnel serving in the Arabian peninsula.

(GX 510-B). Abu Hamza also spoke approvingly of al Qaeda attacks against the United States, including the USS Cole bombing and 9/11. (GX 113). In addition, Abu Hamza dispatched Abbasi to Afghanistan to fight with al Qaeda, and Abbasi was captured by U.S. troops in Afghanistan post-9/11, during a war. (Tr. 1912-1915). In light of al Qaeda's unambiguous agenda to attack the United States, and Abu Hamza's support for al Qaeda knowing that terrorist organization's goals, Abu Hamza's convictions for Counts Nine and Ten also have a sufficient nexus to the U.S. and pose no problem under the Due Process Clause.

Abu Hamza improperly suggests that this Court has held that extraterritorial application of United States criminal laws is entirely disfavored. (Br. 64). In reality, in *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013), this Court emphasized that "statutes prohibiting crimes against the United States government may be applied extraterritorially even in the absence of clear evidence that Congress so intended." *Id.* at 73 (quotation omitted). Similarly, in *United States v. Siddiqui*, 699 F.3d 690 (2d Cir. 2012), this Court reasoned that "the nature of the offense—protecting U.S. personnel from harm when acting in their official capacity—implies an intent that [the statute] apply outside of the United States." *Id.* at 700 (quoting *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011)). Similarly, here, any presumption against extraterritoriality here is overcome by the United States' interests in defending itself against violent jihad and al Qaeda.

3. Abu Hamza Violated the International Emergency Economic Powers Act ("IEEPA")

Count Eleven charged Abu Hamza with conspiring to supply goods and services to the Taliban, in violation of 50 U.S.C. § 1705(b) and the accompanying regulations. Under those laws and an Executive Order signed by President Clinton in 1999, because of the national security threat to the United States by the Taliban and Osama bin Laden, Abu Hamza was prohibited from conspiring to provide goods or services to the Taliban or to Taliban controlled territories of Afghanistan. (*See* GX 1002 (1999 Executive Order)).

On appeal, Abu Hamza does not dispute that he provided four envelopes of money to Ujaama to take to Afghanistan. (Br. 70). However, he contends that the money was not "provided to the territory of Afghanistan controlled by the Taliban or to the Taliban or to persons whose property or interests in property are blocked" by the Executive Order. (Br. 70).

As an initial matter, Abu Hamza wholly ignores that IEEPA prohibits providing personnel to train in Taliban controlled territories. That is exactly what Abu Hamza did when he sent Abbassi to train in Afghanistan with Ibn Sheikh in 2000. At the time, al Qaeda and Ibn Shiekh only operated in areas of Afghanistan controlled by the Taliban. (Tr. 1210, 1213). Indeed, Abu Hamza told Ujaama that Ibn Sheikh was a front line commander, which meant that he was fighting for the Taliban against the Northern Alliance. (Tr. 2140-41). Abu Hamza also gave Ujaama a letter to give to Ahmed Mutawakil, who was then the Taliban's Foreign Minister. (Tr. 2143-2144). The purpose of the

letter was to grant Ujaama entry into Afghanistan for this trip. (Tr. 2144).

Further, in addition to delivering Abbasi to the Taliban-controlled area of Afghanistan in 2000, Abu Hamza also directed Ujaama to deliver money to Ibn Shiekh and to Abu Khabab, two terrorists who lived in Taliban-controlled territories of Afghanistan. (Tr. 2146-50). The money for Ibn Sheikh was intended to ultimately go to widows of the mujahideen fighters in Afghanistan. (Tr. 2149). Ujaama also provided other goods to areas of Afghanistan controlled by the Taliban, including a CD of Abu Hamza reciting the Koran. (Tr. 2148-49). Abu Hamza also directed Ujaama to give 2,500 pounds to a girls school in Khost, a city in a Taliban-controlled part of the country. (Tr. 2146). Lastly, in 2001, Abu Hamza directed Ujaama to make a return trip to Afghanistan. For this trip, Abu Hamza gave Ujaama 6,000 pounds to deliver to a man in Kabul, another area of Afghanistan controlled by the Taliban at the time. (Tr. 2192-93).

This type of support to the Taliban or to Taliban controlled territories without first obtaining a license was prohibited under the Executive Order, regardless of whether it was to set up a computer lab or for widows of the mujahideen. (GX 1002 (prohibiting "the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, software, technology (including technical data), or services to the territory of Afghanistan controlled by the Taliban or to

the Taliban or persons designated pursuant to this order . . .")). The evidence of Abu Hamza's guilt on Count Eleven was clearly sufficient.

POINT II

Evan Kohlmann's Testimony Was Properly Admitted

Abu Hamza challenges the District Court's decision to admit the testimony of the Government's terrorism expert, Evan Kohlmann, a recognized expert on terrorist organizations such as al Qaeda, who has testified in numerous criminal trials in this Circuit. Abu Hamza contends that (1) Kohlmann should not have been permitted to testify as both an expert and fact witness; (2) his methods and testimony were unreliable; and (3) his testimony was highly prejudicial. The District Court's decision to admit Kohlmann's testimony was far from an abuse of discretion. To the contrary, the District Court's determination that Kohlmann's testimony was well-grounded and helpful to the jury finds robust support in the evidentiary record and the applicable law.

A. Relevant Facts

Before trial, the Government notified Abu Hamza that it intended to call Evan Kohlmann at trial to provide expert testimony about four general areas: (1) al Qaeda's history and structure; (2) al Qaeda's methods for training its new recruits; (3) specific terrorist attacks and plots perpetrated by al Qaeda; and (4) al Qaeda's use of recordings and speeches to recruit will-

ing participants or to otherwise engage in jihad by carrying out attacks against the United States. *See United States v. Mostafa*, 2014 WL 1744717, at *3 (S.D.N.Y. Apr. 23, 2014). Abu Hamza objected to this testimony, on the grounds that it would inject irrelevant and substantially prejudicial testimony into the trial. *Id.* at *1. Abu Hamza also contended that Kohlmann's testimony was inadmissible because it was partially based on hearsay, namely custodial interrogation or other similar testimonial statements. *Id.* The District Court denied Abu Hamza's motion in its entirety. *Id.*

Before and during trial, the Government explained to defense counsel and the District Court that it would seek to elicit ten to twelve minutes of fact testimony from Kohlmann, after the conclusion of Kohlmann's expert testimony. (Tr. 1042-3). This fact testimony consisted of Kohlmann describing his interview of Abu Hamza in 2002, along with audio clips of portions of that interview. (Tr. 1043). The Government requested that the Court instruct the jury on when Kohlmann switched over to his fact testimony so that there was a clear delineation between the two. (Tr. 1042). After Kohlmann finished his expert testimony, the District Court instructed the jury as follows:

> Ladies and gentlemen, as I mentioned to you shortly after Mr. Kohlmann took the stand, he's going to be providing also testimony as a fact witness. Now, you should understand that just because Mr. Kohlmann is going to be providing, on direct, testimony as a fact witness, that by no

> means suggests that you should give it necessarily any more weight than you would give any other witness just because he's testified as an expert here. You can decide with Mr. Kohlmann, as you can with any witness, how much of his testimony you believe or don't believe, how probative you find it, as you would with any witness. So, on direct examination, he's provided some expert testimony and now he's going to provide a piece of it that's fact testimony. That means that he's actually perceived the events himself, touched, heard, felt, smelled, something with his own senses, versus basing it upon things which he has expertise in and may not have himself seen.

(Tr. 1255).

B. Applicable Law

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied

> the principles and methods reliably to the facts of this case.

Fed. R. Evid. 702.

Before admitting expert testimony under Rule 702, a trial court must determine that the proffered expert testimony "rests on a reliable foundation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). When conducting this inquiry, a "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). The object is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." *Id.* A district court's determination to admit expert testimony will not be set aside "absent a showing of manifest error." *United States v. Farhane*, 634 F.3d 127, 158 (2d Cir. 2011).

C. Discussion

1. Kohlmann Properly Served as Both an Expert and Fact Witness

In the context of law enforcement officers acting as both fact and expert witnesses, this Court has previously allowed this practice, while cautioning that such testimony "should be carefully circumscribed to ensure that the expert does not usurp either the role of the judge in instructing on the law, or the role of the jury in applying the law to the facts before it." *United States*

v. Mejia, 545 F.3d 179, 192 (2d Cir.2008) (internal quotation marks omitted); *see also United States v. Dukagjini,* 326 F.3d 45, 56 (2d Cir.2003) (declining "to prohibit categorically the use of case agents as experts" despite risk of juror confusion). This Court has noted that a limiting instruction is helpful when switching over to fact testimony to guard against any juror confusion. *See United States v. Morales*, 474 F. App'x 30, 33 (2d Cir. 2012) ("Here, the district court guarded against the risk of juror confusion by limiting Detective Fox's expert testimony to issues beyond the knowledge of the average juror. Further, when Detective Fox began to offer testimony as to facts he learned during the course of his investigation, the district court specifically instructed the jury that he was no longer testifying as an expert.").

Here, there was less of a concern of juror confusion because, although Kohlmann served as a Government expert, he is not a law enforcement officer. Nevertheless, to guard against any prejudice to the defendant, the Government requested and the Court gave a detailed limiting instruction after Kohlmann's expert testimony concluded. Given the District Court's instruction at the close of Kohlmann's expert testimony, it was crystal clear to the jury that Kohlmann's factual testimony about his meeting with Abu Hamza should not be given more weight simply because Kohlmann had previously been qualified as an expert. Accordingly, the demarcation between Kohlmann's expert and fact testimony was clear to the jury.

The distinction between Kohlmann's expert and fact testimony was also clear on cross-examination,

contrary to what Abu Hamza now claims. (Br. 97). Because of the clarity of the limiting instruction, when, on cross-examination, Kolhmann was asked about al Qaeda, the jury understood he was testifying as an expert. Similarly, when Kohlmann was asked on cross-examination about his one meeting with Abu Hamza, the jury understood Kohlmann was testifying as a fact witness.

There is no support in the record for Abu Hamza's bald assertion that Kohlmann presented himself as an expert on Abu Hamza. (Br. 90). In fact, Kohlmann did nothing of the sort. Kohlmann did not testify to any involvement in the investigation of Abu Hamza. He was not a summary witness, testifying to the case file or about his discussions with any witnesses in this case, except for Abu Hamza, whose words were admissible at trial in any event. *Compare United States v. Dukagjini*, 326 F.3d , 45, 55 (2d Cir. 2002) (expressing concern that Government expert witness exceeded scope of expert testimony because his testimony was "drawn largely from his knowledge of the case file and upon his conversations with co-conspirators, rather than upon his extensive general experience with the drug industry"). Instead, Kohlmann testified to the circumstances surrounding a recorded interview that Abu Hamza freely granted Kohlmann in 2002, during which Abu Hamza praised Osama bin Laden. (Tr. 1256-66). Kohlmann was not asked to opine on this interview and he did not make any "sweeping conclusions about the defendant's activities." (*See* Br. 93). His testimony was entirely proper.

2. Kohlmann's Methods and Testimony Were Reliable

Courts in this Circuit have repeatedly rejected challenges to the expert testimony of Evan Kohlmann in terrorism cases. *See United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347, 351 (2d Cir. 2008); *United States v. Sabir*, 2007 WL 1373184 (S.D.N.Y. May 10, 2007), *aff'd sub nom. United States v. Farhane*, 634 F.3d 127, 158-60 (2d Cir. 2011); *United States v. Nayyar*, 09 Cr. 1037 (RJS), *United States v. Kassir*, 2009 WL 910767 (S.D.N.Y. Apr. 2, 2009); *United States v. Ghayth*, 2014 WL 978629 (S.D.N.Y. Feb. 28, 2014). Like the District Court in this case, the court in each of these cases was satisfied that Kohlmann's testimony was sufficiently reliable to be considered by the jury. Indeed, in *Paracha*, the court conducted a day-long *Daubert* hearing before concluding that Kohlmann had sufficient education, experience, and training to qualify as an expert, and that his methodology was sufficiently reliable. The court found that

> [Kohlmann's] methodology consists of gathering multiple sources of information, including original and secondary sources, cross-checking and juxtaposing new information against existing information and evaluating new information to determine whether his conclusions remain consonant with the most reliable sources. . . . His methodology is similar to that employed by his peers in his field; in-

> deed, he explained that he works collaboratively with his peers, gathering additional information and seeking out and receiving comments on his own work.

Paracha, 2006 WL 12768, at *20. The court further found that Kohlmann's expert opinions "regarding al Qaeda's origins, leaders and certain tradecraft are generally accepted within the relevant community" and that his methodology was "a sufficiently reliable methodology to meet the requirements of" Rule 702. 2006 WL 12768, at *20.

On appeal, this Court agreed with the district court's conclusions. In rejecting Paracha's challenge to the admission of Kohlmann's testimony, this Court held that "the court was well within its discretion in ruling that Kohlmann's methodology was sufficiently reliable and his testimony relevant to the jury's understanding of al Qaeda so as to be admissible under" Rule 702 and *Daubert*. *Paracha*, 313 F. App'x at 351.

In *Sabir*, the district court held that Kohlmann was "qualified as an expert to provide testimony on" al Qaeda's origins, history, structure, leadership, training camps, instructional methods, and operational logistics, specific acts of terrorism perpetrated by al Qaeda, and Azzam Publications, a producer of jihadi videos. 2007 WL 1373184, at *2, 10. This Court affirmed that ruling. *Farhane*, 634 F.3d at 158-59. The *Farhane* court also noted with approval the district court's reliance on the *Daubert* hearing in *Paracha*, which established that "Kohlmann's work had undergone various forms of peer review, that his opinions

were generally accepted within the relevant community, and that his methodology was similar to that employed by experts that have been permitted to testify in other federal cases involving terrorist organizations." *Id.* at 159 (internal quotation marks omitted).

Courts have repeatedly reached this conclusion for good reason: Kohlmann's expert testimony on the origins, history, structure, leadership, and operational methods of al Qaeda and other terrorist organizations fully comports with the requirements of Rule 702. Abu Hamza cites no authority to the contrary. (Br. 81). Abu Hamza contends that a "New York jury" does not "need an expert to educate them as to the nefarious nature of al Qaeda." (Br. 82). But Abu Hamza fails to cite, let alone mention, the authority in this Circuit rejecting this precise argument. In *Paracha*, Judge Stein allowed Kohlmann to testify "regarding al Qaeda's origin, leadership, and operational structure," despite the fact that it was "undoubtedly true . . . that the jurors will already be aware of the existence of an entity known as al Qaeda and that its leader is Usama bin Laden." 2006 WL 12768, at *21-22. Relying on cases involving expert testimony of organized crime families, Judge Stein concluded that "expert testimony about al Qaeda is appropriate despite its regular appearance in the popular media both because the media's depiction may be misleading and because some features of al Qaeda relevant to the allegations in this case remain 'beyond the knowledge of the average citizen.'" *Id.* at *22 (quoting *United States v. Amuso*, 21 F.3d 1251, 1264 (2d Cir. 1994)). This Court agreed. 313 F. App'x at 351 (holding that Kohlmann's testimony

was "relevant to the jury's understanding of al Qaeda").

Similarly, in *Sabir*, Judge Preska concluded that "Kohlmann's proffered testimony will assist the jury in understanding the evidence." 2007 WL 1373184, at *11. For example, Kohlmann's "testimony regarding the history, structure, organization, membership, and operation of al Qaeda will give the jury an important overview of al Qaeda, so that the members of the jury will have at least a working knowledge of what al Qaeda is," and be able to place other evidence in context. *Id.* Affirming, this Court wrote that Sabir's argument that Kohlmann's testimony was unhelpful because of jurors' familiarity with al Qaeda and Bin Laden "requires little discussion." *Farhane*, 634 F.3d at 159.

Judge Keenan, in *Kassir*, also concluded that Kohlmann's testimony would help the jury:

> Although al Qaeda has become a household name, it remains true that some depictions of it on television, in the movies, and perhaps even in the national news may be misleading. Furthermore, many of al Qaeda's operational methods relevant to the charges in this case may not be known to the layperson. . . . Likewise, Kohlmann's testimony about the use of the internet by al Qaeda to distribute recruiting and training materials would aid the jury in determining whether the websites allegedly operated by Kassir provided material assistance.

> Defendant also claims that al Qaeda's leader, bin Laden, is well known to the public, and that the leadership structure below him is irrelevant to this case. This is not so. The Government represents that it will introduce evidence of terrorist propaganda, allegedly seized from Kassir's computer, containing images of al Qaeda leaders whom the jury would not recognize. Expert testimony identifying these individuals and their role in al Qaeda would place this evidence into context and help the jury understand its relevance to the charges.

2009 WL 910767, at *5. Again, this Court affirmed. *Mustafa*, 406 F. App'x at 528-29.

Kohlmann's testimony regarding al Qaeda's methods of recruitment, training, and other operational methods are also not known to the layperson and were relevant here. As Judge Keenan held in *Kassir*, "Kohlmann will testify about the use and importance of jihad training camps to al Qaeda. This testimony would help the jury appreciate how a camp set up in Bly, Oregon could materially assist al Qaeda." *Kassir*, 2009 WL 910767, at *5.

Moreover, although Abu Hamza was not charged with participating in al Qaeda attacks (*See* Br. 81), the recordings and statements of Abu Hamza that the Government offered at trial contained references to groups, places or events with which members of the jury were unfamiliar, such as the Taliban and partic-

ular al Qaeda facilities in Afghanistan, including specific training camps and an al Qaeda religious institutions, and such terrorist attacks as the August 1998 bombings of the U.S. Embassies in East Africa, and the October 2000 bombing of *USS Cole*. Indeed, in these statements, Abu Hamza often expressed approval for these attacks, which, as the District Court held, was probative of Abu Hamza's intent and motive. But without Kohlmann's testimony to explain these people, places, and events, the jury could not have understood or had context for the statements on the recordings. *See Ghayth*, 2014 WL 978629, at *1 ("Kohlmann's proposed testimony would be relevant to understanding the nature of the conspiracy that the defendant allegedly joined, the identity of the conspiracy's other participants, and the extent, if any, to which the defendant's words and actions constituted provision of material support or resources to terrorists."). As the District Court also noted, Kohlmann's testimony "need not relate directly to all of the events charged in the Indictment to be relevant and helpful to the jury. It will be helpful for the jury to hear about the structure of al Qaeda as context for his overall testimony." *Mostafa*, 2014 WL 1744717, at *4.

Further, Kohlmann's testimony about Khalid Sheik Mohammed was directly relevant to the charges against Abu Hamza for materially supporting al Qaeda. (Br. 85). One of the Government's theories of guilt on Counts Five and Six was that Abu Hamza's co-conspirator, Haroon Aswat, was training in Bly and Seattle to go fight for al Qaeda in Afghanistan. As evidence of this, the Government offered a ledger recovered from a "safe house" in Pakistan with Aswat's

name on it and on which were found Khalid Sheik Mohammed's fingerprints. It was therefore important and highly relevant for the jury to understand who Khalid Sheik Mohammed was and his role in al Qaeda in evaluating these counts.

Similarly, al Qaeda's recruitment efforts and propaganda were also relevant and helpful to the jury in assessing the material support charges. *Mostafa*, 2014 WL 1744717, *4 ("Testimony regarding the political or other agenda of al Qaeda, as well as the method and means that it has used in training and recruitment, would similarly be helpful to the jury."). As the District Court held, "[t]o the extent that defendant's expressed opinions are consistent with al Qaeda's views and methods, testimony regarding those views and methods constitute circumstantial evidence probative of whether defendant would be likely to support that organization." *Id*. For these reasons, Kohlmann's testimony about the al Qaeda's operative Haznawi's martyrdom video, which was found in Abu Hamza's home, was relevant to explain the importance and context of such a video.

District courts have limited the scope of Kohlmann's expert testimony, but under very different circumstances. *See United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006). For example, in *Paracha*, Kohlmann was precluded from offering testimony about the defendant's co-conspirators, because the proposed testimony was based solely on the summary statements of these conspirators that the Government provided to Kohlmann, which the court believed amounted to the Government offering statements that

would not otherwise be admitted through an expert. *Paracha*, 2006 WL 12768, at *22. The court in *Paracha* distinguished Kohlmann's testimony about the co-conspirators from Kohlmann's testimony about Khalid Sheik Mohammed, which was admissible and drawn from multiple sources. *Id*. Here, as described below, Kohlmann's expert testimony was not based on statements the Government provided him about the members of al Qaeda, or the defendant's co-conspirators.

This case is also wholly distinguishable from *United States v. Mohammed Zaki Amawi*, 03 Cr. 719 (D. Ohio), which Abu Hamza relies on for the proposition that Kohlmann's testimony should have been limited here. In that case, Amawi was not charged with providing material support to al Qaeda or to any other specific terrorist group, and the Government did not allege that the defendant in that case had a connection to a specific terrorist group. The court in *Amawi* therefore held that Kohlmann's testimony about groups, individuals, and events referenced in terrorist materials seized from the defendant had minimal probative value. Here, in contrast, the defendant was charged in multiple counts with providing and conspiring to provide material support to al Qaeda, making such testimony highly probative on all of the counts related to al Qaeda.

It is also simply untrue that Kohlmann merely regurgitated the out-of-court statements of others in reaching his expert opinions and in his testimony at trial. (Br. 97). As the District Court noted in denying Abu Hamza's motion to preclude Kohlmann, the Government did not "seek to introduce into evidence the

statements upon which Kohlmann has relied in his expert report, but rather his expert opinion based on those statements as well as other sources." *Mostafa*, 2014 WL 1744717, at *5. Indeed, at trial, the District Court asked the Government to confirm that nothing Kohlmann testified about was based on statements obtained through enhanced interrogation techniques, to avoid any confrontation issues. (Tr. 1126-27). The Government confirmed that with Kohlmann. (Tr. 1126).

Ultimately, as the District Court found, Kohlmann provided highly relevant and helpful testimony. This testimony was not cumulative. Neither Badat nor Ujaama knew—or were asked about—the full history of al Qaeda and all of al Qaeda's terrorist attacks. Nor would either be qualified to opine extensively on such historical matters that they did not participate in.

3. Kohlmann's Expert Testimony Was Not Unduly Prejudicial

Abu Hamza contends that Kohlmann's testimony about al Qaeda's hierarchy, methods, and members was highly inflammatory and confused the jury about the relevant issues at trial (Br. 86). But Kohlmann's testimony was no more inflammatory than the charges Abu Hamza faced; indeed, his testimony pertained to the more mundane aspects of al Qaeda, including its leadership, its training methods, and its methods of garnering support and recruits. The District Court correctly held that Kohlmann's testimony "would be no more disturbing than the crimes charged and not un-

duly prejudicial, and the relevance of Kohlmann's testimony would outweigh and prejudice." *Mostafa*, 2014 WL 1744717, at *6.

Moreover, the evidence at trial already contained numerous references to al Qaeda, Osama Bin Laden, and other top al Qaeda leaders that were independent of Kohlmann's testimony. Kohlmann's testimony did no more than explain who these individuals were, and how they were connected to al Qaeda. (Tr. 1197-1205). Likewise, Kohlmann's testimony about al Qaeda's use of training camps and how al Qaeda recruits entered these training camps helped the jury to understand how Abu Hamza could provide material support to al Qaeda by training Haroon Aswat and sending Abbasi for jihad training in Afghanistan. (Tr. 1207, 1216-1219). Such testimony was not unfairly prejudicial, but was necessary to enable the jury to fairly evaluate the evidence before it.

POINT III

The District Court Properly Admitted Evidence of Abu Hamza's Statements and Evidence Seized from Abu Hamza and his Co-Conspirators

Abu Hamza asserts that the District Court improperly admitted irrelevant and unfairly prejudicial evidence in numerous forms. In general, Abu Hamza challenges three types of evidence that he claims the District Court should not have admitted: (1) Abu Hamza's taped statements from speeches and interviews he gave; (2) evidence seized from the residence of co-conspirator, Oussama Kassir, in Sweden; (3) evidence seized from Abu Hamza's co-conspirators in Bly,

Oregon, and in Seattle, Washington, and (4) evidence seized from the Finsbury Park Mosque and Abu Hamza's residence in London. (Br. 99-100). Because this evidence bore directly on Abu Hamza's guilt of the crimes charged and was not unfairly prejudicial in light of the offense conduct, the District Court did not err, much less abuse its discretion, by admitting this evidence.

A. Relevant Facts

The evidence that Abu Hamza contends was improperly admitted was the subject of extensive pretrial litigation. Before trial, the Government produced an exhibit list to Abu Hamza and the District Court, which contained the exhibits that are the subject of this appeal—namely audio and videotapes, photographs and other documentary evidence that did not explicitly refer to the charged conduct. Abu Hamza objected to these exhibits. The District Court held argument during two lengthy hearings on April 9 and 10, 2014. *See United States v. Mostafa*, 16 F. Supp. 3d 236, 248 (S.D.N.Y. 2014). The parties also submitted briefing on the subject. (Dkt. 290, 301)

In a detailed and thorough 47-page opinion, the District Court preliminarily ruled, after carefully balancing the evidence, that the bulk of the Government's evidence was admissible, subject to the proper foundation being laid at trial.[7] In general, the District Court

---

[7] The District Court ruled GX119, GX 127, GX 128, GX 129, and GX 131 preliminarily inadmissible.

found this evidence to be highly probative of Abu Hamza's state of mind with respect to the charged crimes, and thus admissible as both direct evidence of the charged crimes and as other act evidence pursuant to Rul1 404(b). *See id.* at 256 ("[T]he evidence that the defendant knows of bin Laden and approves of him is highly probative of his state of mind with respect to charged conduct"). The court also found that the evidence was not unduly prejudicial because it was not more disturbing than the charged crimes. *Id.* ("While any mention of viewing bin Laden approvingly carries prejudicial impact, that impact is no worse than the charges in the Indictment and does not outweigh its probative value.").

To mitigate any potential prejudice from the admission of the audio and video-taped statements of Abu Hamza (the "Taped Statements"), the District Court gave a limiting instruction to the jury as to the proper use of the Taped Statements. The court gave this limiting instruction throughout the trial, almost every time one of the Taped Statements was published to the jury:

> You are going to see, over the course of this trial, statements that the defendant either made or that he is interviewed as part of, and they are audio tapes and videotapes. And I'm going to refer to these generally speaking as taped statements. And government exhibit 113 is one of those. And I want to give you a special instruction on those taped statements. These statements are not admissible as

proof, and may not be used by you as proof of the character of the defendant, that is of the type of person that he is.

The statements cannot be used to show what kind of a person the defendant is in order to try and show that he was likely to have committed the crimes with which he has been charged.

Let me put this another way, because I want to be clear about this. It would be improper for you to use these statements as proof that someone who would say these kinds of things, is the type of person who would commit the crimes charged. Instead, the defendant—the taped statements of the defendant may only be considered by you as evidence of the defendant's motive, his intent, preparation, plan, his knowledge, absence of mistake, in regards to the conduct in the crimes charged.

The defendant cannot be found guilty solely based on his beliefs, or his expression of beliefs, even if those beliefs favored violence. The defendant can be found guilty only if the government proves beyond a reasonable doubt that the defendant committed one or more of the crimes charged in the indictment.

Now 113, when you—when we hear that statement, that is being offered for the

> purpose of showing the defendant's motive, intent, or absence of mistake. But it will ultimately be for you to decide how probative or not probative any piece of evidence is, including the taped statements.

(*See* Tr. 199-200).

B. Applicable Law

1. Relevance

Rule 401 of the Federal Rules of Evidence provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and if "the fact is of consequence in determining the action." Fed. R. Evid. 401; *see also United States v. Abu-Jihaad*, 630 F.3d 102, 131 (2d Cir. 2010). "Evidence need not be conclusive in order to be relevant," *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003) (quoting *Contemporary Mission v. Famous Music Corp.*, 557 F.2d 918, 927 (2d Cir. 1977)), and "factors which make evidence less than conclusive affect only weight, not admissibility." *Id.*

Likewise, evidence can be relevant despite being created outside the timeframe of the charged conduct. *See United States v. Farhane*, 634 F.3d 127, 144 (2d Cir. 2011) (allowing testimony regarding a defendant's preaching jihad and support for Osama bin Laden in the late 1990s, a number of years prior to the charge that between 2003 and 2005 he conspired to provide material support to the "terrorist organization al Qaeda"); *see also Abu Jihaad*, 630 F.3d at 132 ("Although these conversations made no mention of the

charged disclosure [of the leaked intelligence document at issue] and, in fact, took place more than four years after that charged crime, they were undoubtedly relevant to a jury's assessment of Abu-Jihaad's guilt.").

As a general matter, courts have long approved of "the evidentiary use of speech to establish the elements of a crime or to prove motive in or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 4889 (1993) (holding that the First Amendment was no bar to this evidentiary use). Indeed, "[e]vidence of a defendant's previous declaration or statement is commonly admitted in criminal trial subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.*

This Court has found that the above holds true in the context of modern-day terrorism cases as well. In *United States v. Rahman,* 189 F.3d 88, 118 (2d Cir.1999), the Second Circuit affirmed the conviction of a Muslim cleric charged with, *inter alia,* seditious conspiracy, soliciting the murder of Egyptian President Hosni Mubarak, soliciting an attack on American military installations, and a bombing conspiracy. *Id.* at 103–04. One object of the conspiracy was the bombing of the World Trade Center, which occurred in 1993. *Id.* at 107–08. The cleric, Rahman, had preached violent jihad; he had instructed his followers to "do jihad with the sword, with the cannon, with grenades, with the missile . . . against God's enemies." *Id.* at 104. His role in the conspiracy was overall supervision and direction of the membership. *Id.* "According to his speeches and writings, Abdel Rahman perceives the United States as the primary oppressor of Muslims worldwide, active in assisting Israel to gain power in

the Middle East, and largely under the control of the Jewish lobby." *Id.*

Rahman objected to the admissibility of his speeches, writings, and preachings that did not themselves constitute the crimes of solicitation or conspiracy. *Id.* at 117–18. This Court found that the district court had acted properly in admitting such materials, because they made motive for the crimes charged more probable, "The Government was free to demonstrate Abdel Rahman's resentment and hostility to the United States in order to show his motive for soliciting and procuring illegal attacks against the United States . . . " *Id.* at 118.

2. "Other Act" Evidence

"It is well established that evidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Gonzalez,* 110 F.3d 936, 942 (2d Cir.1997) (alterations and internal quotation marks omitted); *United States v. Kassir,* 2009 WL 976821, at *2 (S.D.N.Y. Apr. 9, 2009), *aff'd, United States v. Mustafa,* 406 Fed.Appx. 526 (2d Cir.2011). Such evidence is direct evidence of a crime. *See Kassir,* 2009 WL 976821, at *2. A Rule 404(b) analysis is, however, prudent where it is not manifestly clear that the evidence in question is proof of the charged crime. *Id.*

Under Rules 404(b) and 403 of the Federal Rules of Evidence, evidence of other crimes, wrongs, or acts is admissible if that evidence is relevant to some issue at trial other than the defendant's character and if its probative value is not substantially outweighed by any unfair prejudice. *Huddleston v. United States*, 485 U.S. 681,685 (1988); *United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000); *see also* Fed. R. Evid. 404(b); Fed. R. Evid. 403. In applying these rules, this Court has "long been committed to the inclusionary approach to other crimes evidence," *United States v. Benedetto*, 571 F.2d 1246, 1248 (2d Cir. 1978), under which evidence of other crimes, wrongs, or bad acts is admissible for "any purpose other than to show a defendant's criminal propensity," *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002); *accord, e.g., United States v. Mercado*, 573 F.3d 138, 141-42 (2d Cir. 2009).

Proof of state of mind, such as intent and knowledge, is a "proper purpose" for admission of other crimes evidence under Rule 404(b). *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996); *see United States v. Caputo*, 808 F.2d 963, 968 (2d Cir. 1987) ("[w]here intent to commit the crime charged is clearly at issue, evidence of prior similar acts may be introduced to prove that intent"). In particular, this Court repeatedly "has approved the use of similar acts evidence where a defendant does not contest that he was present during a . . . transaction but denies any wrongdoing." *United States v. Colon*, 880 F.2d 650, 659-60 (2d Cir. 1989) (collecting cases) (internal quotations and citations omitted); *see also United States v. Zackson*, 12 F.3d 1178, 1182 (2d Cir. 1993) ("Where a defendant claims that his conduct has an innocent explanation,

prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged").

3. Rule 403

Rule 403 provides that a court may exclude relevant evidence if, for example, its probative value is outweighed by its prejudicial effect. Fed. R. Evid. 403; *see also Old Chief v. United States*, 519 U.S. 172, 180 (1997). However, "the fact that evidence 'may be highly prejudicial' does not necessarily mean that it is 'unfairly prejudicial,'" *United States v. Schaffer*, 851 F.3d 166, 182 (2d Cir. 2017) (citing *United States v. Davis*, 624 F.3d 508, 512 (2d Cir. 2010)), and upon review, this Court "generally maximiz[es] [evidence's] probative value and minimiz[es] its prejudicial effect." *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004) (per curiam) (quoting *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002)).

One method for determining whether evidence is unduly prejudicial asks whether an alternative exists that has "substantially the same or greater probative value but a lower danger of unfair prejudice." *Old Chief*, 519 U.S. at 182-83. In addition, this Court has considered whether certain safeguards are present when possibly prejudicial evidence is introduced. For example, this Court has noted as relevant the length or duration of the piece of evidence if it is audio or visual, the degree to which the evidence is limited only to its probative parts, whether the evidence is more prejudicial than the act the defendant is accused of com-

mitting, and whether the judge has taken steps to ensure the jury understands the ways in which the evidence may be used. *See e.g., United States v. Monsalvatge*, 850 F.3d 483, 495–96 (2d Cir. 2017); *United States v. Roldan Zapata*, 916 F.2d 795, 804 (2d Cir. 1990); *Abu-Jihaad*, 630 F.3d at 133 (finding that conversations referring to support of jihad were not more inflammatory than the charges in the indictment).

In addition, at trial, a court can address any potential prejudice through a curative instruction. *See United States v. Mickens*, 926 F.2d 1323, 1328-29 (2d Cir. 1991). Of particular relevance here, this Court has noted that a limiting instruction protects against the danger that a defendant will be convicted based on hateful or unpopular speech. In *Rahman*, the Court approved of the limiting instruction given by Judge Mukasey, which was similar to the limiting instruction given in this case. This Court held:

> Furthermore, Judge Mukasey properly protected against the danger that Abdel Rahman might be convicted because of his unpopular religious beliefs that were hostile to the United States. He explained to the jury the limited use it was entitled to make of the material received as evidence of motive. He instructed that a defendant could not be convicted on the basis of his beliefs or the expression of them —even if those beliefs favored violence. He properly instructed the jury that it could find a defendant guilty only if the

> evidence proved he committed a crime charged in the indictment.

United States v. Rahman, 189 F.3d 88, 118 (2d Cir. 1999).

4. Standard of Review

This Court reviews challenges to evidentiary rulings "deferentially," *Abu-Jihaad*, 630 F.3d at 131 , reversing only for "abuse of discretion," *see United States v. Quinones*, 511 F.3d 289, 307 (2d Cir. 2007), resulting from an "arbitrary and irrational" determination. *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001). A district court's decision to admit evidence of prior bad acts is reviewed for abuse of discretion, which [this Court] will find only if the judge acted in an arbitrary and irrational manner." *United States v. Lombardozzi*, 491 F.3d 61, 78-79 (2d Cir. 2007); *accord United States v. Mercado*, 573 F.3d at 141. Likewise, great deference is owed to a district court's Rule 403 rulings, because it "sees the witnesses, the parties, the jurors and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *Li v. Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998). "[S]o long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Al-Moayad*, 545 F.3d 139,159-60 (2d Cir. 2008) (internal quotation marks and citation omitted); *see also Id.* at 160 ("To avoid acting arbitrarily, the district court must make

a 'conscientious assessment' of whether unfair prejudice substantially outweighs probative value." (internal quotation marks and citation omitted)).

C. Discussion

1. Abu Hamza's Taped Statements

The Taped Statements were highly probative of Abu Hamza's intent and motive to commit charged crimes. As noted above, courts have approved of the admission of this type of evidence in similar terrorism trials. *Rahman*, 189 F.3d at 118 (admitting the defendant's speeches, writings, and preaching because they made motive for the crimes charged more probable). As in those cases, Abu Hamza's statements supporting training for terrorism, committing acts of terrorism, and terrorist groups were highly probative of his state of mind in connection with the charged offenses.

The Taped Statement were probative of Abu Hamza's intent to commit the charged crimes, whether analyzed under Rule 401 or 404(b). Abu Hamza appears to concede as much on appeal, but appears to argue that the court admitted too much evidence in this regard. (Br. 121 ("Appellant does not claim that every piece of highly prejudicial evidence was not admissible, however, many or most of the at least 37 videos that were admitted were unnecessary")).

Counts Three, Four, Seven and Eight of the Indictment charged Abu Hamza with providing material support to terrorists, knowing that this support would be used to carry out violent jihad in a foreign country. Abu Hamza's statements about the obligation of men

to train for violent jihad showed that Abu Hamza intended to provide this material support when he attempted to establish a training camp in the United States, and when he sent Abbasi to fight in Afghanistan. *Mostafa*, 16 F. Supp. 3d at 257 ("The defendant's statements regarding the importance of violent jihad, the use of words as a method a waging jihad, and training for jihad are directly relevant to numerous counts of charged conduct. They are probative of the defendant's knowledge of jihad, motive to support jihad, absence of mistake in taking actions that might be construed as supporting jihad, and intent to support jihad.").

Counts Five, Six, Nine and Ten of the Indictment charged Abu Hamza with providing material support to the terrorist organization al Qaeda. As to those counts, Abu Hamza's statements in support of al Qaeda certainly make it more likely that he had the intent and motive to provide material support to al Qaeda when he plotted to establish a terrorist training camp in the United States and when he sent Abbasi, one of his followers, to receive jihad training in Afghanistan, the home base of al Qaeda. *Mostafa*, 16 F. Supp. 3d at 256 ("The defendant's 2002 statements supporting bin Laden are probative of his state of mind with respect to these charged crimes. That is, he knows who bin Laden is, supports bin Laden, views him as a hero; the statement is therefore probative of

the defendant's motive, knowledge, and intent.").[8] Indeed, before trial, Abu Hamza wrote to the District Court expressing his intent to testify and mention 9/11. *Mostafa*, 16 F. Supp. 3d at 263 ("It bears noting that the defendant himself stated in two separate letters to the Court his intent to testify and to mention the events of September 11 in that testimony. (ECF Nos. 252, 267). As a result, his references to September 11 are also part of his own offer of evidence at trial."). Abu Hamza did just that, mentioning al Qaeda and his admiration for bin Laden during his testimony.

Counts One and Two charged Abu Hamza with hostage taking and conspiring to commit hostage taking. The hostages were a number of western tourists in Yemen. His previous statements about, for example, capturing non-Muslims in Muslim countries (GX 130) was therefore certainly probative of whether he had the intent to commit this hostage taking, or whether he was merely acting as a peacemaker, as he claimed when he testified. *Mostafa*, 16 F. Supp. 3d at 267-68 (holding that GX 130 relevant to Counts One and Two of the Indictment).

The District Court preliminarily ruled Exhibit 119 inadmissible as being unduly prejudicial. *Mostafa*, 16 F. Supp. 3d at 264. This exhibit was a speech by Abu

---

[8] Similarly, the defendant's statements supporting the Taliban (*see* GX 103) were probative of whether he conspired to supply goods and services to the Taliban, as charged in Count Eleven of the Indictment.

Hamza approving of martyrdom operations, such as suicide bombings. After hearing the evidence at trial, however, the District Court admitted this evidence because the relevance of martyrdom operations had been established and because other admissible evidence about suicide bombings was found in Abu Hamza's home and at the Finsbury Park Mosque. (Tr. 1241). In particular, Mr. Smith testified that Kassir told him that Kassir came to the United States for martyrdom. (Tr. 422 ("[Kassir] said that he had came there for the sake of Allah; that he was only concerned about his Shuhada, which means martyrdom; and that he did not come there to, come here to play games . .."). That Abu Hamza spoke approvingly of martyrdom makes it more likely Abu Hamza and Kassir conspired to establish a terrorist training camp in the United States, the goal of which was killing and martyrdom. To convict Abu Hamza on the counts related to this training camp, the Government not only had to show that Abu Hamza set-up the camp, but also that Abu Hamza intended for the fighters trained there to go to Afghanistan and fight and kill. Clearly, his approval of one such technique to fight and kill (suicide bombings) was probative of his knowledge that the purpose of the camp was to train for violent jihad.

The absence of specific dates associated with a number of the Taped Statements makes no difference. The temporal proximity of these statements to the charged conduct goes to the weight of the evidence, not its admissibility. *Mostafa*, 16 F. Supp. 3d. at 256 ("To the extent that Mostafa's statements occurred after the period of the charged conduct, that concern goes to the weight of the evidence.").

Abu Hamza also contends that the Court should have waited until the end of the defense case to determine whether to admit the taped statements. (Br. 120). Doing so, however, would have prejudiced the Government because Abu Hamza placed intent at issue in his opening statement. (Tr. 73 (stating that Abu Hamza "did not participate in any of the acts that are charged here")). Thus, it was entirely proper for the Government to offer evidence of Abu Hamza's criminal intent in its case-in-chief, even though the statements did not directly refer to the charged crimes, because these statements were highly probative of Abu Hamza's intent, motive, and participation in the charged crimes. *See United States v. Pitre*, 920 F.2d 1112, 1120 (2d Cir. 1992) ("[W]here it is apparent that intent [or knowledge] will be in dispute, evidence of prior or similar acts may be introduced during the government's case-in-chief, rather than waiting until the conclusion of the defendant's case.").

Finally, the District Court carefully balanced the probative nature of the Taped Statements against their prejudice to Abu Hamza and correctly found that they were not unduly prejudicial. *See, e.g., Mostafa*, 16 F. Supp. 3d at 256 ("While any mention of viewing bin Laden approvingly carries prejudicial impact, that impact is no worse than the charges in the Indictment and does not outweigh its probative value."). The jury heard witness testimony about Abu Hamza plotting to establish a terrorist training camp in the United States and about Abu Hamza sending Abbasi to fight in Afghanistan with al Qaeda. The jury also heard from victims of the hostage taking Abu Hamza orchestrated in Yemen, who spoke about how their fellow

tourists were murdered and how they were injured (and in the case of Ms. Thompson, permanently disabled). The Taped Statements were no more inflammatory than this evidence or the charges against Abu Hamza. In addition, to guard against any danger that Abu Hamza might be convicted solely for his hate speech supporting terrorism, the District Court gave the limiting instruction approved of in *Rahman* throughout the trial. Thus, these highly probative Taped Statements were not unduly prejudicial.

2. Evidence Seized from Co-Conspirator Ousaama Kassir

At trial, the Government offered evidence seized from searches of the home of co-conspirator Ousaama Kassir in 2003 and 2006 in Sweden. This evidence consisted primarily of terrorist literature and photos of terrorist acts. *See* GXs 400-437.

The Government offered this evidence as direct evidence of the crimes charged or, in the alternative, as Rule 404(b) evidence, because Kassir's support for al Qaeda and violent jihad was probative evidence that Kassir and Abu Hamza agreed to establish a terrorist training camp in the United States. This evidence was also probative as to the purpose of the training camp that they agreed to establish—to fight violent jihad (which meant killing) in Afghanistan and to support al Qaeda in Afghanistan.

Because of the probative value of evidence seized from Kassir's residence, it was admitted in the *Kassir* trial, as well as in Abu Hamza's trial. *See United States v. Kassir*, 2009 WL 976821, at * 6 (S.D.N.Y. Apr.

9, 2009) (holding that evidence seized from Kassir's residence that Kassir associated with terrorist groups other than al Qaeda is admissible to prove defendant's motive, intent, preparation, knowledge, and absence of mistake or accident). This Court affirmed that decision. *United States v. Mostafa*, 406 F. App'x 526, 528 (2d Cir. Jan. 19, 2011). The District Court here adopted the reasoning in *Kassir* for admitting this evidence. *Mostafa*, 16 F. Supp. 3d at 268 (noting that "[t]he Court adopts the rationale set forth in Judge Keenan's opinion [in *Kassir*]" for admitting the materials seized from Kassir's residence"). This evidence was clearly probative on whether Abu Hamza and Kassir conspired to establish a jihad training camp in the United States, the purpose of which was to train men to fight in Afghanistan and support al Qaeda.

Abu Hamza is simply wrong that this Court does not permit the admission of third party 404(b) evidence and the cases that he cites in favor of this incorrect argument are inapposite. (Br. 103). For example, in *United States v. Blum*, 62 F.3d 63 (2d Cir. 1995), a case relied upon by the defendant, this Court held that it is proper for a defendant to offer 404(b) evidence about a third party that tends to exculpate the defendant. But this Court has never held that third party 404(b) evidence cannot be offered by the Government; indeed, the case law is just the opposite and this evidence is considered under the same rubric as any piece of 404(b) evidence. *See United States v. Lyle*, 856 F.3d 191, 207 (2d Cir. 2017) (holding that in determining whether to exclude evidence of crimes by a defendant's

co-conspirators under Rule 403, the Court must balance the probative value of the evidence with the potential for unfair prejudice to the defendant).

3. Evidence Seized from Co-Conspirators in Bly, Oregon and Seattle, Washington

Abu Hamza's arguments with respect to other Government exhibits about his co-conspirators are similarly misguided. Abu Hamza objects to the admission of a CD Kassir gave to Semi Osman when he arrived in Bly, Oregon. GX 330-E-T. The CD contained letters praising Abu Hamza and bin Laden. This was probative evidence that the purpose of the training camp in Bly was indeed to support terrorism and the terrorist organization, al Qaeda.

The evidence seized from the Dar us Salaam Mosque and from Semi Osman was similarly admissible. (*See* GXs 23, 24, 331). To prove that the purpose of the training in the United States was to support violent jihad, the Government was entitled to offer evidence of the guns found at the Mosque and seized from Osman, a co-conspirator, at around the time of the conspiracy. It was also proof that actual jihad training occurred in Bly and at the mosque.

The presence of Aswat's name in a ledger (GX 4, 1111) found in an al Qaeda safe house in Karachi, Pakistan in 2002—a ledger that also contained the fingerprints of al Qaeda's chief operational planner, Khalid Sheik Mohammed—was also direct evidence of the

charged crimes.[9] The Government contended at trial that Kassir trained Aswat in Bly and Seattle for violent jihad and to assist al Qaeda. The ledger evidence is proof that Kassir succeeded, that the training in fact occurred, and that the purpose of the training was to fight in Afghanistan with al Qaeda.

4. Evidence Seized from the Finsbury Park Mosque and the Defendant's Residence in London

Finally, Abu Hamza contends that the evidence found in the attic of the Finsbury Park Mosque and in the mosque's bookstore had a tenuous link to Abu Hamza. (Br. 106). Abu Hamza also contends that many people had access to Abu Hamza's computer at the mosque, so that any evidence seized from that computer could not be directly tied back to Abu Hamza. (Br. 106). These arguments all go to weight to be according such evidence, not its admissibility. At trial, the Government established that Abu Hamza led the Finsbury Park Mosque and had final say over all of the articles published by the Supporters of Shariah, his organization. (Tr. 1954-55, 1980-81, 2694). The gas masks, hatchet, and military gear found in the attic of Abu Hamza's mosque all support the conclusion that, in plotting to establish a terrorist training camp in the

---

[9] This ledger was also admitted at Kassir's trial. *See United States v. Kassir*, 2009 WL 2913651, at *2 (S.D.N.Y. Sept. 11, 2009) (noting admission of ledger at trial).

United States, Abu Hamza intended that the camp be used for training soldiers to fight and kill.

Similarly, a video (GX 511Y, the "Cole video") found on one of Abu Hamza's computers at his home, which contained images of men carrying weapons and training at an al Qaeda training camp, was probative of Abu Hamza's intent to support al Qaeda and to support violent jihad. *Mostafa,* 16 F. Supp. 3d at 279 (preliminarily admitting the Cole video because "jihad training, and fighting are highly relevant to the charged conduct"). Abu Hamza was free to argue to the jury—and he did argue—that others in the mosque could have been responsible for the evidence in the attic and on his computer. (Tr. 77). The jury was similarly free to reject that argument.

POINT IV

The District Court's Evidentiary Rulings During the Defense Case Were Correct

At trial, Abu Hamza testified on direct examination and at the beginning of cross examination that he was a "peacemaker" at the time of the offenses in this case. Given this lie, the District Court permitted the Government to question Abu Hamza about his previous convictions and his possession of bomb making literature while incarcerated in the United Kingdom. Abu Hamza now contends that this cross-examination was improper and, also, that Abu Hamza should have been permitted to testify about being placed in solitary confinement during his time in U.S. custody.

Abu Hamza's arguments are without merit. The Government's cross-examination was responsive to Abu Hamza's testimony on direct, and was entirely appropriate impeachment. In addition, Abu Hamza's proffered testimony about the conditions of his confinement was an impermissible attempt at jury nullification.

A. Applicable Law

District courts have broad discretion regarding the admissibility of evidence and the scope of cross-examination, and such determinations are reviewed for abuse of discretion. *See, e.g., United States v. Caracappa*, 614 F.3d 30, 42 (2d Cir. 2010) ("[T]he trial court is accorded broad discretion in controlling the scope and extent of cross-examination." (internal quotations omitted)); *United States v. Kelley*, 551 F.3d 171, 174-75 (2d Cir. 2009); *United States v. Bermudez*, 529 F.3d 158, 161 (2d Cir. 2008). "To find such an abuse, [this Court] must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996).

In cases where a defendant fails to object to questions on cross-examination, appellate claims related to the cross-examination are reviewed for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Gaind*, 31 F.3d 73, 76 (2d Cir. 1994). In addition, even where an objection was made, any error in admitting evidence should be disregarded if the error is harmless. *See* Fed. R. Crim. P. 52(a) ("[a]ny error . . . that does not affect substantial rights must be disregarded"). Accordingly, so

long as there is "fair assurance" that the jury's "judgment was not substantially swayed by the error," the error will be disregarded as harmless. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *United States v. Kaplan*, 490 F.3d 110,122-23 (2d Cir. 2007); *United States v. Rea*, 958 F.2d 1206,1220 (2d Cir. 1992). For an error to be deemed harmless, the court is "not required to conclude that it could not have had any effect whatever; the error is harmless if we can conclude that that testimony was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Rea*, 958 F.2d at 1220 (citation and internal quotation marks omitted).

Rule 608(b) of the Federal Rules of Evidence provides that district courts have discretion to permit cross-examination concerning specific instances of a witness's conduct if the conduct is probative of truthfulness or untruthfulness. Specifically, the Rule provides that, "in the discretion of the court, if probative of truthfulness or untruthfulness," specific instances of prior conduct "may" be inquired into "on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." Fed. R. Evid. 608(b). Federal Rule of Evidence 609 provides that evidence of a prior felony conviction "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant."

Importantly, the admission of evidence to impeach a witness's testimony is not subject to analysis under

Rules 404(b) and 608(b). Under the doctrine of "impeachment by contradiction," when "a witness puts certain facts at issue in his testimony, the government may seek to rebut those facts, including by resorting to extrinsic evidence if necessary." *United States v. Ramirez*, 609 F.3d 495, 499 (2d Cir. 2010); *see also* Fed. R. Evid. 608, advisory committee notes to 2003 amendments ("[T]he amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction. . .) to Rules 402 and 403."). "Thus, where a defendant testifies on direct examination regarding a specific fact, the prosecution may prove on cross-examination 'that [the defendant] lied *as to that fact.*" ' *United States v. Garcia*, 936 F.2d 648, 653 (2d Cir. 1991) (quoting *United States v. Garcia*, 900 F.2d 571,575 (2d Cir. 1990)) (further internal quotations omitted). "The same holds true for defendant's false statements on cross-examination." *United States v. Beverly,* 5 F.3d 633, 639-40 (2d Cir. 1993). In addition, "the government's opportunity to impeach the defendant's credibility once he has taken the stand includes the opportunity to use evidence that it was barred from using on its direct case." *Id.* at 640.

Otherwise admissible evidence is subject to exclusion under Rule 403 of the Federal Rules of Evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Huddleston v. United States*, 485 U.S. 681, 685 (1988). The "prejudice that Rule 403 is concerned with involves 'some adverse effect . . . beyond tending to prove the fact or issue that justified its admission into evidence." ' *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995) (quoting *United States v. Figueroa*, 618 F.2d 934,943 (2d Cir.

1980)). "Because the district court retains broad discretion to weigh potential prejudice against probative value, appellate courts reviewing a district court's evaluation of evidence under Federal Rule of Evidence 403 'generally maximiz[e] its probative value and minimiz[e] its prejudicial effect.'" *United States v. LaFlam* 369 F.3d 153, 155-56 (2d Cir. 2004) (quoting *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002)).

B. Discussion

1. The District Court Properly Precluded Abu Hamza From Testifying About The Conditions of His Confinement and His Contacts with the British Government

At the beginning of Abu Hamza's direct examination, defense counsel attempted to elicit from Abu Hamza that he had been held in solitary confinement since being extradited to the United States in 2012. (Tr. 2984). Abu Hamza answered before the Government objected, and that objection was sustained. Defense counsel proffered that the probative value of this testimony was to show the impact not speaking to larger groups had on Abu Hamza's ability to communicate on the witness stand at trial. (Tr. 2985). The District Court precluded Abu Hamza from asking about Abu Hamza's time in solitary confinement. (Tr. 2985). The District Court noted, "[y]ou can do it differently and you know you can do it differently. . . . If you ask him have you spoken to a crowd since you were arrested, you may do that." (Tr. 2985). Defense counsel then elicited the following testimony from Abu Hamza:

> Q: Have you spoken to any crowd in more than a decade, in a decade?
>
> A: No more than one person at a time.
>
> Q: And has your period of confinement, this decade of confinement had an impact on your memory?
>
> A: I had a problem with memory before. It increased dramatically during that condition, but thank God since the trial started three weeks ago, three and a half weeks ago, thank God I improved quite dramatically interacting, seeing people, walking, watching, different activities around me. Struggling with words before, so I'll do my best.

(Tr. 2987).

Abu Hamza complains that he should have been able to go further and explain that solitary confinement specifically had impacted his ability to testify at trial. (Br. 132). As detailed below, it demonstrably did not, and the District Court properly identified that theory as a transparent pretext for seeking sympathy from the jury relating to Abu Hamza's time in solitary confinement. Regardless, Abu Hamza was permitted to testify on these issues, as quoted above. Abu Hamza's placement in solitary confinement and the imposition of Special Administrative Measures on him had no relevance whatsoever to the purported purpose for which the testimony was offered—to show that Abu Hamza was no longer the powerful speaker that he once was at the time he committed the offenses in this

case. (*See* Br. 135). Instead, as the District Court recognized, Abu Hamza's reference to his time in solitary confinement improperly tried to provoke sympathy. (Tr. 3080). By permitting Abu Hamza to testify that he had not spoken with a large group of people in a decade, the District Court properly balanced the probative value of any additional references to solitary confinement against the prejudice to the Government from such testimony. *See United States v. Gotti*, 399 F. Supp. 2d 417, 419 (S.D.N.Y. 2005) (noting that the probative value of evidence is "undercut by the availability of other, less prejudicial evidence that makes the same point" (internal quotation marks omitted) (citing *Old Chief v. United States*, 519 U.S. 172, 182-83))

As it turned out, and as the District Court and defense counsel noted, Abu Hamza had no problem testifying powerfully and articulately at trial. (Tr. 3080-81).

> The Court: . . . the defendant right now I have to say, he started off quiet, but now his voice is strong, what he is saying is clear. He does—I think he's making his points in a very articulate manner and I understand your point and I'm not suggesting it wouldn't have been different had he not had the conditions of confinement. What I'm suggesting is it's not apparent he's having any particular problems right now.
>
> Mr. Dratel: I agree, your Honor, but it was a concern, when we started out, it was a significant concern to me . . .

(Tr. 3080).

In addition, because the recordings the Government admitted at trial showed Abu Hamza's speaking skills and Abu Hamza was articulate when he testified, the Government was certainly entitled to comment on these skills, particularly in arguing to the jury that Abu Hamza lied so easily on the witness stand because of these skills. Accordingly, the District Court did not abuse its discretion in precluding Abu Hamza from testify about his time in solitary confinement.

The District Court also properly precluded Abu Hamza from testifying about his contacts with British intelligence. During trial, Abu Hamza informed the Court that he intended to testify about his purported contacts with British intelligence officials. (Tr. 2829). Defense counsel proffered that Abu Hamza had previously discussed with British intelligence "Afghanistan," but "not about Abbasi specifically or Ujaama"; and Yemen generally, but not "the kidnapping in Yemen." (Tr. 2829-30, Tr. 2836). Defense counsel also proffered that Abu Hamza discussed "training camps" with British intelligence. (Tr. 2830). Abu Hamza contended that this evidence was admissible because it went to Abu Hamza's intent—specifically, the defense's arguments that Abu Hamza was merely acting as an intermediary during the hostage taking in Yemen, and, more generally, was actually trying to cool down the community. (Tr. 3831). The District Court rejected these arguments, noting, among other things, that this type of "prior good act" evidence was inadmissible under Second Circuit precedent. (T. 2929-31).

Abu Hamza now contends this ruling was incorrect because evidence about Abu Hamza's meetings with British intelligence were relevant to rebut allegations that Abu Hamza encouraged and supported terrorism. (Br. 138). Abu Hamza also contends that this evidence was relevant to the defense theme that Abu Hamza's inflammatory remarks were necessary to maintain his credibility in the community. (Br. 140).

Again, Abu Hamza is wrong. As an initial matter, the proffered testimony was irrelevant to the charges. *See* Fed. R. Evid. 401. That Abu Hamza allegedly met with British intelligence officials to discuss matters wholly unrelated to the conduct at issue at trial had no bearing on the jury's determination of guilty here. Instead, Abu Hamza's purpose in offering this evidence, as the District Court recognized, was either to show prior good acts under Rule 404(b), or to prove good character under Rule 405. Neither rule permits him to do this, however.

Courts have long precluded defendants from offering evidence of "good deeds" to demonstrate that it was less likely that they intended to commit the charged crimes under Rule 405. *See United States v. Doyle*, 130 F.3d 523, 542 (2d Cir. 1997) (affirming district court's decision to exclude evidence of specific instances of defendant's conduct that defendant sought to introduce to rebut evidence of his knowledge and intent); *United States v. Fazio*, No. S2 11 Cr. 873 (KBF), 2012 WL 1203943, at *5 (S.D.N.Y. April 11, 2012) ("As many courts have made clear, a defendant may not affirmatively try to prove his innocence by reference to specific instances of good conduct; character is to be proven by

reputation or opinion evidence."). Similar efforts invoking Rule 404(b) have likewise been rejected. In *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006), the defendant wanted to offer evidence of his previous email practices to show that he acted with "innocent intent" with respect to the charged conduct. This Court noted that this was merely an impermissible attempt to introduce propensity evidence:

> Quattrone seeks to justify the emails on the basis that they establish his intent and disavows that the evidence is relevant only for propensity purposes. But propensity would be the only basis for justifying the evidence. The emails relate to Quattrone's intent only if one could infer that Quattrone acted in conformity with past patterns of shooting off quick emails to subordinates. The inference, of course, is that Quattrone must have done so for innocent purposes. This is a clear example of the propensity reasoning that Rule 404(a) prevents. Dubbing the emails circumstantial evidence of Quattrone's intent merely obfuscates the analysis—they are relevant only if an inference is drawn that Quattrone acted in conformity with a character trait or habit.

Id. at 191-92.

Abu Hamza's reliance on *Gilmore v. Henderson*, 825 F.2d 663 (2d Cir. 1987), is misplaced. In that case, this Court vacated a state murder conviction because the defendant was precluded from offering evidence at

trial that he fled town because he was scared of the police rather than because he was guilty. The evidence the defendant intended to offer in that case was of a different sort, however. The defendant in *Gilmore* sought to offer evidence that he fled after learning that soon after the murder, detectives had come to a relative's house looking for him armed with shotguns and that the police had pointed one of these guns at a relative. In that case, the evidence tied directly to whether the defendant's flight constituted consciousness of guilt. Here, there was no such connection. As defense counsel admitted, the evidence of Abu Hamza's contact with British intelligence were wholly unrelated to the charged crimes.

Abu Hamza's claims that the Government somehow opened the door to the introduction of this evidence similarly fail. (Br. 141). The Government never claimed that Abu Hamza's testimony that he was a peacemaker during the hostage taking in Yemen was a recent fabrication. (Br. 141). Indeed, the portion of the Government's argument cited by Abu Hamza in support of this argument states just the opposite—that the Government's theory was that Abu Hamza lied about his role in the Yemen hostage taking all long. (*See* Tr. 3704 "If he was just being an honest negotiator he would not need to lie. And he not only lied to you in this courtroom, he lied about the kidnapping back then.")). In addition, this testimony would not have contradicted Ujaama's testimony that Abu Hamza was angry with him for sending the fax because it could have been intercepted by MI-5. Br. 141-4. That Abu Hamza had a relationship with MI-5 at the time actually makes it *more likely* that Abu Hamza understood

the agency's surveillance capabilities and was angry at Ujaama for sending a fax that could be intercepted.

2. The Government Was Properly Permitted to Cross-Examine Abu Hamza About His Convictions in the United Kingdom

The Government asked Abu Hamza six questions on cross-examination about his previous convictions in the United Kingdom for soliciting murder and inciting racial hatred. The District Court did not abuse its discretion in permitting limited cross-examination on these convictions, because Abu Hamza opened the door to these questions on direct examination by misleadingly implying that he was in custody in the United Kingdom solely on the charges in this case and by portraying himself as a peacemaker.

Under Rule 609, in determining whether to admit a prior felony conviction, the following four factors are generally regarded as relevant: (1) the impeachment value of the prior crime, (2) the remoteness of the prior conviction, (3) the similarity between the past crime and the conduct at issue, and (4) the importance of the credibility of the witness. *See generally United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977); *accord, e.g., United States v. Vasquez*, 840 F. Supp. 2d 564, 567-68 (E.D.N.Y. 2011). As the District Court correctly found, these factors weighed in favor of admitting limited evidence about Abu Hamza's previous convictions.

Analysis under the first factor begins with a presumption. "Rule 609(a)(1) presumes that all felonies are at least somewhat probative of a witness's propensity to testify truthfully." *United States v. Estrada*, 430

F.3d 606, 617 (2d Cir. 2005). Indeed, Rule 609 is based on the "common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath." *United States v. Chauncey*, 420 F.3d 864, 874 (8th Cir. 2005) (citation and internal quotation marks omitted). Especially against the backdrop of the referenced presumption, the first factor weighed strongly in favor of permitting brief cross-examination of Abu Hamza on his 2006 U.K. convictions. This is so for many reasons.

First, on direct examination, Abu Hamza sought to stoke sympathy in the jury by creating the false impression that he had been in prison since 2004 based wholly on the charges in this case. Abu Hamza testified:

> Q. And when did you come to the United States for the first time?
>
> A. The first time I came it's after eight and a half years from my arrest. I've been extradited here. October 2012.
>
> Q. And that was in connection with this case, right?
>
> A. Yeah. *From the start to here to now it's all about this case.*

(Tr. 2984 (emphasis added)). This was simply inaccurate. In addition to the pending extradition to the United States, Abu Hamza was arrested in the United Kingdom on separate criminal charges in 2004, he went to trial in London Central Criminal Court in

early 2006, and he was convicted in February 2006, resulting in a seven-year sentence. (*See* PSR ¶ 5). The trial testimony that Abu Hamza opted to give was directly impeached by allowing brief cross-examination on the 2006 U.K. convictions.

Second, additional impeachment value from the 2006 United Kingdom convictions stems from the nature of the charges of which Abu Hamza was convicted. Defense counsel opened the trial with assertions that Abu Hamza worked to calm violent situations, even working with United Kingdom authorities. (*See* Tr. 79-80). Abu Hamza made similar points from the stand—speaking, for example, of his soothing of a convicted terrorist (Tr. 3167), and of his having been brought to the Finsbury Park Mosque in part to promote racial reconciliation. (Tr. 3161, 3169-3170). Further, at the beginning of cross-examination (before Abu Hamza was crossed about his prior bad acts), he was asked if he acted as a peacemaker during the Yemen hostage taking. (Tr. 3465; "And your testimony today, as you stand trial for that Yemen kidnapping, is that you wanted to act as a peacemaker during the hostage taking?). Abu Hamza replied, "[o]f course." (Tr. 3465). But all of this testimony, as well as defense counsel's opening, was badly undercut by the 2006 United Kingdom convictions for inciting racial hatred and soliciting murder.

Finally, Abu Hamza testified in his United Kingdom trial and the fact that he was subsequently convicted indicates that he testified untruthfully. This Court has held that this cuts in favor of permitting evidence of the prior conviction. *See Hayes*, 553 F.2d at

828 ("[A]ppellant testified in his own defense at the trial that resulted in his prior conviction, and his conviction can be viewed as a de facto finding that the accused did not tell the truth when sworn to do so." (internal quotation marks and citation omitted)).

The second factor is a temporal one. *See Hayes*, 553 F.2d at 828. This factor also cut in favor of permitting the brief cross-examination that happened at trial. The 2006 United Kingdom convictions involved conduct that was in close proximity to the charged conduct in this case, which covered the period of 1999 through 2001. Those convictions were not remote in time. Moreover, these convictions related to some of the last periods during which Abu Hamza was at liberty. And finally, to the extent that the 2006 convictions appear somewhat older, that was because Abu Hamza had spent years resisting his extradition to the United States. That was, of course, his right. But it was those efforts that kept his United States trial from occurring sooner, so any remoteness between those events was entirely his doing.

The third factor, *see Hayes*, 553 F.2d at 828, also cut in favor of permitting brief cross-examination. The United Kingdom convictions did not involve any of the courses of conduct charged in this case. In all of these circumstances, there is no reason to think that, having learned of the 2006 U.K. convictions, the jury will believe that those convictions are "so similar to the offense[s] charged [here] that the jury" will "slip into the belief that the crime alleged was merely a repetition of one previously proven." *United States v. DeAngelis*, 490 F.2d 1004, 1009 (2d Cir. 1974).

The fourth factor is the importance of the credibility of the witness whose testimony is to be impeached. It would be difficult to imagine a more important witness in a criminal trial than a defendant who had opted to testify, and for a number of days.

As the District Court correctly found, each of the four factors set out in *Hayes* cut in favor of permitting brief cross-examination on Abu Hamza's 2006 U.K. convictions.

In addition, to guard against any improper prejudice, the Government limited its cross-examination with respect to the 2006 U.K. convictions to six, court-approved questions. (Tr. 3357). The Government did not cross-examine Abu Hamza about the nature of the evidence introduced against him at his U.K. trial. And the cross-examination on this topic was even more limited than expected because Abu Hamza did not directly answer the questions posed by the Government, and the Government did not follow up. (Tr. 3472-73). In fact, the only facts the jury learned were that Abu Hamza was convicted in 2006 of six counts of soliciting murder, that those charges were separated from the charges in this case, and that Abu Hamza went to trial in the U.K. (Tr. 3472-73).

The District Court carefully balanced the probative value of this evidence against the potential for prejudice to Abu Hamza. (Tr. 3356 ("Here, because the prior convictions do not reflect on honesty or veracity the Court does perform a careful Rule 403 analysis.")). Abu Hamza's previous convictions were for crimes no worse than the ones for which he was on trial; in addition, the jury had already heard many of Abu Hamza's

speeches promoting violent jihad and terrorism. Further, any prejudice was mitigated because the Court gave a limiting instruction that the evidence of Abu Hamza's previous convictions could only be used in evaluating Abu Hamza's credibility. (Tr. 3393-94).

3. The Government Was Properly Permitted to Cross-Examine Abu Hamza About His Activities At Belmarsh Prison in the United Kingdom

During cross-examination, the Government also questioned Abu Hamza about a document found in Abu Hamza's cell at Belmarsh prison in the United Kingdom, which related to manufacturing an improvised explosive device (the "IED Document"). (Tr. 3475). Defense counsel did not object to these questions. (Tr. 3474-75). Abu Hamza generally denied possessing the IED document. (Tr. 3475). On re-direct, Abu Hamza testified that he was never disciplined while at Belmarsh and had never been informed of any infraction related to the IED document. (Tr. 3573). The IED document was not admitted into evidence.

The Government's questioning about the IED document was appropriate given Abu Hamza's statements throughout his direct that he was a peacemaker and usually aimed to "calm a situation." (Tr. 3161, 3465). In this regard, through this questioning, the Government was not offering Rule 404(b) evidence. (Br. 143). Rather, these questions were designed to impeach Abu Hamza's credibility, in light of his statements about being a peacemaker, because no peacemaker would have the IED document in his prison cell.

When Abu Hamza denied possessing the IED document, the Government was stuck with his answer.

Finally, even if the District Court had abused its discretion in allowing these questions–which it did not–any such error was harmless. The Government introduced far more important and compelling evidence, including the testimony of cooperating witness Ujaama, the testimony of Mary Quinn, a victim of the hostage taking, and testimony from numerous witnesses who attended the Bly training camp. The jury credited that evidence and rejected the alternative explanations offered by Abu Hamza at trial. Accordingly, the jury's judgment could not have been "substantially swayed" by any possible error that the District Court purportedly committed in its evidentiary rulings during the defense case. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

POINT V

The Conscious Avoidance Jury Instruction Did Not Dilute The Burden Of Proof

Abu Hamza contends that the conscious avoidance jury instruction given by the District Court was improper because (1) the instruction improperly stated the law; and (2) there was no factual basis to warrant a conscious avoidance instruction. (Br. 160). However, the District Court's conscious avoidance instruction followed well-established precedent and left no confusion that, even under a conscious avoidance theory, the Government had to prove Abu Hamza's guilt beyond a reasonable doubt. In addition, the trial evidence—including Abu Hamza's own denials—suggested that if

he did not know the exact details of the objects of the charged conspiracies, it was only because he consciously avoided this knowledge. Thus, there was a proper factual foundation for the charge.

A. Relevant Facts

One of the main defense themes at trial was that Abu Hamza's co-conspirators did not act at his express direction, but were rather acting on their own in committing the charged crimes. Abu Hamza himself laid out this defense when he testified and denied his participation in all the charged crimes. (Tr. 2975-77).

As to the specific charges, Abu Hamza acknowledged that he had supported the Islamic Army of Aden, warned that Westerners might be kidnapped in Yemen, served as the group's spokesman, and spoke with Abu Hassan during the kidnapping. (Tr. 3476-80). But he denied any knowledge that Abu Hassan planned to take hostages to free Abu Hamza's relatives and maintained that he was a peacemaker who wanted to resolve the situation. (Tr. 3465, 3479).

Similarly, Abu Hamza acknowledged that Kassir and Aswat traveled to the United States. He even acknowledged receiving the October 25, 1999 fax (GX 315) from Ujaama, but claimed that he did not read it:

> Q. So what was your reaction when you received the fax?
>
> A. I just throw it away, throw away.
>
> Q. Were you interested—

> A. I read a couple of lines there and then it just, another hallucination.
>
> Q. Were you interested in pursuing that training camp that Mr. Ujaama had proposed?
>
> A. Just a funny joke. I was throwing it away.
>
> Q. Were you interested in pursuing it?
>
> A. Never.
>
> Q. And what happened to that fax?
>
> A. As I said, I throw it away. I took it, I put it in the rubbish bin and that's it.
>
> Q. Did you ever send Mr. Kassir or Haroon Aswat to the United States to go to that training camp in Bly, Oregon?
>
> A. Never, ever thought about that training camp or any. Once I threw it in the rubbish bin it completely disappeared from my mind.

(Tr. 3305-06). Ultimately, Abu Hamza denied ever instructing Kassir and Aswat to travel to the United States.

Finally, Abu Hamza made the equally incredible claim that Abbasi—someone who lived at the Finsbury Park Mosque and was like a son to Abu Hamza (Tr. 3470; *see also* Tr. 2140 (Ujaama testifying that Abbasi attended religious services at the Finsbury Park Mosque and was living on and off at the mosque))

—simply left the mosque one day for Afghanistan without telling Abu Hamza:

> Q. In late 2000 when Ferroz Abbasi left the Finsbury Park Mosque—
>
> A. Late 2000? Yes, year 2000, yes.
>
> Q. Is it your testimony that he didn't even tell you that he was leaving?
>
> A. He never told me. He was upset from me and he left. I didn't know where he go. Did he go to continue his study? Did he go to marry? Did he go back home? I never knew.

(Tr. 3472). Thus, Abu Hamza admitted that he knew Abbasi went to Afghanistan, but denied that he knew the purpose of the trip was jihad training and to join al Qaeda.

In light of this testimony, during the charge conference, the Government requested that the Court give a conscious avoidance instruction as an alternative theory of Abu Hamza's guilt. The Government contended that there were specific facts in the record about Abu Hamza turning a blind eye to the obviously criminal conduct he orchestrated, such as Abu Hamza's testimony, noted above, the he received the October fax but did not read it. (Tr. 3220-21). Abu Hamza objected to the conscious avoidance instruction in its entirety. (Tr. 3219). After noting that its proposed conscious avoidance instruction stated that the concept of conscious avoidance should not be confused with negligence, the District Court overruled Abu Hamza's objection to the instruction. (Tr. 3221). The District

Court gave the following conscious avoidance instruction at trial:

> Now, in instructing you this far with respect to conspiracy, I have talked to you about the concept of knowledge. I need to say one more thing about that concept.
>
> In determining whether the defendant acted with the necessary knowledge in connection with one of the charged conspiracies or substantive crimes, you may consider whether the defendant deliberately closed his eyes to what otherwise would have been clear. This is called "conscious avoidance."
>
> Acts done knowingly must be the product of a defendant's conscious intent, not the product of carelessness or negligence. A person, however, cannot willfully blind himself to what is obvious and disregard what is plainly before him. A person may not intentionally remain ignorant of facts that are material and important to his conduct in order to escape the consequences of criminal law. "Studied ignorance" of a fact may constitute an awareness of so high a probability of the existence of a fact as to justify the inference of knowledge of it.
>
> In connection with your consideration of a charged conspiracy, if you find beyond

a reasonable doubt that the defendant intentionally participated in a conspiracy, but that the defendant deliberately and consciously avoided learning or confirming certain facts about the specific objectives of the conspiracy, then you may infer from his willful and deliberate avoidance of knowledge that the defendant did understand the objectives or goals of the conspiracy.

There is a difference between knowingly joining and participating in a conspiracy on the one hand, and knowing the object or the purpose of the conspiracy on the other hand. Conscious avoidance cannot be used as a substitute for finding that the defendant knowingly joined the conspiracy and knew that he was becoming a party to an agreement to accomplish an alleged illegal purpose. It is, in fact, logically impossible for a defendant to join a conspiracy unless he knows the conspiracy exists. The defendant must know that the conspiracy is there.

However, in deciding whether the defendant knew the objectives of the conspiracy, you may consider whether the defendant was aware of a high probability that the objectives of the conspiracy were to commit the crime or crimes charged as the object of the conspiracy,

> and nevertheless participated in the conspiracy.
>
> If you do not find that the Government has met its burden of proving that the defendant knowingly and intentionally became a member of the conspiracy that you are considering beyond a reasonable doubt, you must find him not guilty of that conspiracy charge. If you find that he did knowingly and intentionally become a member, you should proceed to consider the next element.

(Dkt. 354, p. 60-61).

B. Applicable Law

1. Jury Instructions Generally

A defendant challenging a jury instruction must demonstrate that (1) he requested a charge that "accurately represented the law in every respect" and (2) the charge delivered was erroneous and prejudicial. *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011); *see also United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). In reviewing jury instructions, this Court does not look only to the particular words or phrases questioned by the defendant, but must review " 'the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." ' *Al Kassar*, 660 F.3d at 127 (quoting *United States v. Bala*, 236 F.3d 87, 94-95 (2d Cir. 2000)). As a general matter, no particular wording is required for an instruction to be legally sufficient, so long as "taken as a whole" the

instructions correctly convey the required legal principles. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (internal quotation marks omitted); *see also United States v. Mulder*, 273 F.3d 91, 105 (2d Cir. 2001) (court must "look to 'the charge as a whole' to determine whether it 'adequately reflected the law' and 'would have conveyed to a reasonable juror' the relevant law" (quoting *United States v. Jones*, 30 F.3d 276, 284 (2d Cir. 1994))). Furthermore, the trial court "has discretion to determine what language to use in instructing the jury as long as it adequately states the law." *United States v. Alkins*, 925 F.2d 541, 550 (2dCir. 1991).

Rule 30 of the Federal Rules of Criminal Procedure provides, in relevant part, that "[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Where a defendant fails to make a specific and timely objection to a district court's legal instructions, those instructions are subject to review only for plain error. *United States v. Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000); *see also United States v. Shaoul*, 41 F.3d 811, 817 (2d Cir. 1994) ("The error must be so plain that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." (internal quotation marks and brackets omitted)).

Where a timely objection was made, this Court reviews the validity of the instruction *de novo*. *United States v. George*, 386 F.3d 383, 397 (2d Cir. 2004). Re-

versal is not warranted, however, if the trial court's error was harmless. *United States v. Gansman*, 657 F.3d 85, 91-92 (2d Cir. 2011); Fed. R. Crim. P. 52(a). In this context, a conviction should be affirmed despite instructional error if it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

2. Conscious Avoidance

"'A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Ebbers*, 458 F.3d 110, 124 (2d Cir. 2006) (quoting *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995)); *see also United States v. Ferguson*, 676 F.3d 260, 277-78 (2d Cir. 2011). That is because "in addition to actual knowledge, a defendant can also be said to know a fact if he is aware of a high probability of its existence, unless he actually believes it does not exist." *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (internal quotation marks omitted). Indeed, the instruction is particularly appropriate where "a defendant's involvement in the criminal offense [is] so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *United States v. Kozeny*, 667 F.3d 122, 134 (2d Cir. 2011).

The Government "need not choose between an 'actual knowledge' and a 'conscious avoidance' theory." *United States v. Ferguson*, 676 F.3d at 278. That is, a conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain." *United States v. Hopkins*, 53 F.3d at 542; *see United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007); *United States v. Kaplan*, 490 F.3d 110, 128 n.7 (2d Cir. 2007); *United States v. Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006). To the contrary, in many cases, the evidence supporting actual knowledge will be the same evidence that supports a conscious avoidance theory. As this Court recently observed, "the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct." *United States v. Kozeny*, 667 F.3d at 133-34.

In a conspiracy case, a conscious avoidance charge is appropriate when the defendant disputes his knowledge of the object of the conspiracy. *See United States v. Svoboda*, 347 F.3d 471, 479 (2d Cir. 2003); *United States v. Tropeano*, 252 F.3d 653, 660 (2d Cir. 2001). This Court has clarified that "the jury may use the conscious avoidance doctrine to establish the defendant's knowledge of the aims of the conspiracy but . . . may not use it to established the defendant's intent to participate in the conspiracy." *United States v.*

Reyes, 302 F.3d at 55. Accordingly, "once the defendant's participation in a conspiracy has been proved, conscious avoidance may properly be used to prove his knowledge of its unlawful objectives." *Id*. at 54-55.

C. Discussion

Abu Hamza first contends that the conscious avoidance instruction was flawed because the phrase "high probability" confused the jury into believing it did not have to find Abu Hamza guilty beyond a reasonable doubt. This argument has no traction because, as noted above, the District Court's "high probability" language has long been approved by this Court. In addition, the instruction made clear that the jury could not convict Abu Hamza based on mere negligence. The instruction also noted that, even on a conscious avoidance theory, the jury needed to find Abu Hamza's guilt beyond a reasonable doubt. Dkt. 65 60-61 ("In connection with your consideration of a charged conspiracy, if you find *beyond a reasonable doubt* that the defendant intentionally participated in a conspiracy, but that the defendant deliberately and consciously avoided learning or confirming certain facts about the specific objectives of the conspiracy, then you may infer . . . that the defendant did understand the objective or goals of the conspiracy") (emphasis added)). At various times throughout the charge, the District Court also emphasized that the jury must find Abu Hamza guilty beyond a reasonable doubt to convict. The conscious avoidance instruction did not confuse the jury as to the applicable burden of proof.

In addition, there was a factual predicate for a conscious avoidance instruction as to the charged conspiracies. For example, there was ample evidence for a rational jury to conclude that Abu Hamza was aware he was involved in a plot with Abu Hassan, given that Abu Hamza and Abu Hassan agreed to take revenge in Yemen for Abu Hamza's sons' arrests, but that Abu Hamza consciously avoided confirming ahead of time that Abu Hassan intended to take hostages.

There was also ample evidence for a rational jury to conclude that Abu Hamza was aware of a high probability that he was involved in a plot with Ujaama, Kassir, and Aswat to set up a jihad training camp in the United States for the purpose of fighting in Afghanistan and support al Qaeda. This evidence includes the fax Abu Hamza received describing the training camp and its purpose, as well as Abu Hamza's knowledge that al Qaeda was the preeminent jihadist organization in Afghanistan at the time.

Abu Hamza was also aware of the high probability that he was involved in a plot with Ujaama and Abbasi for Abbasi to receive jihad training and to support al Qaeda, including Abbasi expressing his desire for Abu Hamza to help him get to Afghanistan and Abu Hamza putting Abbasi in contact with Ibn Sheikh, a known al Qaeda trainer, in Afghanistan. Thus, there was ample evidence that Abu Hamza was aware of the high probability that he was involved in terrorist plots and the conscious avoidance instruction was proper. *See United States v. Ghailani*, 733 F.3d 29, 53 (2d Cir. 2013) ("Based on our independent review of the record,

we agree that there was a proper factual predicate for the issuance of a conscious avoidance charge.")

Finally, even if the District Court somehow erred in providing an instruction on conscious avoidance, any such error was harmless here because there was overwhelming evidence that Abu Hamza actually knew the objects of the three conspiracies he committed. Contrary to Abu Hamza's contention, the Government's case did not rely solely on circumstantial evidence. (Br. 163). As described above, Abu Hamza admitted to helping Abu Hassan during the hostage taking and his comments to Mary Quinn certainly would permit a jury to find he knew the object of the hostage taking conspiracy. In addition, Abu Hamza's statements to Ujaama and his other co-conspirators, Kassir and Aswat, as well as Abu Hamza's own statements in support of terrorism and al Qaeda, show actual knowledge of the objects of the conspiracies charged in Counts Three and Seven. Accordingly, any error in giving a conscious avoidance jury instruction was harmless.

POINT VI

The Indictment Was Not Constructively Amended

Abu Hamza contends that the Bly training camp charges (Count Three through Six) were constructively amended by proof the Government offered at trial about events that occurred in Seattle, Washington after Kassir and Aswat left Bly. (Br. 173). The record does not support his argument. The trial evidence about the terrorist training in Seattle during the

timeframe of the charged conspiracies and in furtherance of these conspiracies was properly admitted as direct evidence of the charged conduct.

A. Relevant Facts

Counts Three through Six of the Indictment charged Abu Hamza with providing material support to terrorists and to a designated foreign terrorist organization, al Qaeda, and conspiring to do the same, in connection with Abu Hamza's role in establishing a jihad training camp in Bly, Oregon, in violation of Title 18, United States Code, Sections 371, 2339A, and 2339B. (Ind. ¶¶ 5-12). The indictment charged that all four of these crimes took place "[f]rom in or about October 1999, up to and including in or about early 2000, in the Southern District of New York and elsewhere." (Ind. ¶¶ 5, 8, 9, 12). The Indictment also cited the following overt acts relevant to these counts:

- On several occasions in or about October 1999, Abu Hamza discussed with Ujaama the creation of that jihad training camp in Bly, Oregon. (Ind. ¶ 7(a)).
- On or about October 25, 1999, Ujaama communicated to Abu Hamza that he and other co-conspirators were stock-piling weapons and ammunition in the United States. (Ind. ¶ 7(b)).
- On or about October 25, 1999, Mustafa received a facsimile proposal regarding the creation of a jihad training camp in Bly, Oregon. (Ind. ¶ 11(a)).

Before trial, the Government produced to Abu Hamza the exhibits it intended to offer, including a shotgun recovered from the Dar Us Salaam Mosque in Seattle in March 2000. (GX 23). The Government also noted that it intended to offer evidence of Kassir and Aswat's conduct at the mosque in Seattle as evidence of Abu Hamza's guilt on Counts Three through Six. During a pretrial conference, Abu Hamza objected to the admission of this evidence, contending that this evidence amounted to a constructive amendment of the Indictment. The District Court ultimately admitted the evidence at trial, just as the court had done in *Kassir*.

As noted above, at trial, the Government offered evidence that after Kassir and Aswat grew frustrated with the lack of men to train at Bly, they relocated to the Dar Us Salaam Mosque in Seattle in early 2000. (Tr. 293). At the mosque, Kassir taught men how to make silencers, how to assemble and disassemble an AK-47 assault rifle, how to convert an AK-47 into a fully automatic firearm, and how to modify an AK-47 so it can launch grenades. (Tr. 409-18). Kassir also met with men from the Dar Us Salaam Mosque at one of their homes, where Kassir said he was only concerned about his martyrdom and that he had come to the United States to destroy. (Tr. 422). The training at the mosque took place after Kassir entered the United States on or about November 26, 2009, but before Kassir left the country on or about March 1, 2000, as noted in the immigration documents admitted at trial. (GX 2).

B. Applicable Law

A constructive amendment to the indictment occurs where "the presentation of evidence [or] jury instructions . . . so modif[ied] essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Vilar*, 729 F.3d 62, 81 (2d Cir. 2013) (internal quotation marks and emphasis omitted); *accord United States v. Ionia Mgmt.*, 555 F.3d 303, 310 (2d Cir. 2009). The prohibition against constructive amendments rests upon two concerns: "first, that [the indictment] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (internal quotation marks omitted). "The issue in determining whether an indictment has been constructively amended, then, is whether the deviation between the facts alleged in the indictment and the proof adduced at trial undercuts these constitutional requirements." *Id.*

In light of that standard, "not all modifications constitute constructive amendments." *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003). For example, where "the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment" the result is a variance, not a constructive amendment. *Id.* (internal quotation marks omitted);

see United States v. Dupre, 462 F.3d 131, 140 (2d Cir. 2006). To obtain relief on appeal, a defendant must establish that a variance created "substantial prejudice." *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990) (internal quotation marks omitted); *see United States v. Frank*, 156 F. 3d 132, 137 n.5 (2d Cir. 1998) ("[A] constructive amendment of the indictment is considered to be a per se violation of the grand jury clause, while a defendant must show prejudice in order to prevail on a variance claim."). A variance is not prejudicial "where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." *United States v. Mucciante*, 21 F.3d 1228, 1236 (2d Cir. 1994) (internal quotation marks omitted).

Applying that distinction, this Court has "consistently permitted significant flexibility in proof, provided that the defendant was given notice of the 'core of criminality' to be proven at trial." *United States v. Rigas*, 490 F.3d at 208 (quoting *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992)). In assessing whether a constructive amendment has occurred, "[t]he critical determination is whether the allegations and the proof 'substantially correspond.'" *United States v. Danielson*, 199 F.3d 666, 670 (2d Cir. 1999) (quoting *United States v. Patino*, 962 F.2d at 266).

C. Discussion

At trial, the Government presented evidence of conduct in Seattle because it was direct evidence of Abu Hamza's participation in a conspiracy to establish a jihad training camp in the United States. The actions of Abu Hamza's co-conspirators Kassir and Aswat at the mosque in early 2000 were also during the timeframe of the charged conspiracies in Counts Three and Five. Abu Hamza contends that the Government was required to specify the Seattle conduct in the Indictment. (Br. 176). This is incorrect. The indictment did not need to mention the Seattle conduct, because "[w]hen the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself." *United States v. Thai,* 29 F.3d 785, 812 (2d Cir.1994); *accord United States v. Bagaric,* 706 F.2d 42, 64 (2d Cir.1983) ("It is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy."); *United States v. Concepcion,* 983 F.2d 369, 392 (2d Cir.1992) ("An act that is alleged to have been done in furtherance of the alleged conspiracy . . . is not an other act within the meaning of Rule 404(b); . . . it is part of the very act charged." (internal quotation marks omitted)).

The evidence admitted about the Seattle mosque conduct was also clearly in furtherance of the conspiracy. The jihad training Kassir and Aswat gave in Seattle was similar to the training they provided in Bly, Oregon. In both places, Abu Hamza's co-conspirators taught men how to fight, use weapons, and kill. In both places, Abu Hamza's co-conspirators also urged others

to participate in violent jihad. As the district court in *Kassir* noted in admitting evidence of the Seattle conduct at trial, "[d]efendant's activities at the Seattle mosque were also in furtherance of the charged conspiracies." *United States v. Kassir*, 2009 WL 976821, at *4 (S.D.N.Y. April 9, 2009).

The Indictment was not constructively amended by the proof the Government offered at trial about the co-conspirator's jihad training at the Seattle mosque. Nor was there any variance in proof, since the evidence of the Seattle mosque conduct occurred during the time-frame of the conspiracies charged related to jihad training in the United States.

POINT VII

The District Court Properly Sentenced Abu Hamza

Abu Hamza contends that the District Court imposed a procedurally and substantively unreasonable sentence because the District Court did not recommend that Abu Hamza be designated to a prison other than the United States Penitentiary, Administrative Maximum, located in the Florence, Colorado ("ADX Florence"), in light of Abu Hamza's medical conditions. (Br. 182). Abu Hamza is wrong. As an initial matter, and as the District Court recognized at sentencing, Abu Hamza's designation to a particular prison facility is left to the discretion of the Bureau of Prisons. His sentence therefore could not be unreasonable because the District Court had no authority to order that Abu Hamza be detained at a particular facility. In addition, the District Court's refusal to recommend that Abu

Hamza not be designated to ADX Florence did not violate the rule of specialty because, in extraditing Abu Hamza, the United States never represented that Abu Hamza would not be housed at ADX Florence, and the United Kingdom recognized as much at the time of extradition. To the extent Abu Hamza claims that the District Court failed to consider his medical issues at sentencing, he is also wrong. As noted below, at sentencing, the District Court fully and carefully considered all of Abu Hamza's medical issues in fashioning a sentence.

A. Relevant Facts

1. Abu Hamza's Extradition and Arrival in the United States

On May 27, 2004, pursuant to an extradition request from the United States, Abu Hamza was arrested in London by the Metropolitan Police at New Scotland Yard. Abu Hamza was subsequently prosecuted for various British offense. After serving time in British prison, Abu Hamza challenged his extradition to the United States.

On April 10, 2012, the European Court of Human Rights ("ECHR") issued a decision in Abu Hamza's case addressing challenges raised by Abu Hamza and some other defendants pending extradition to the United States. (A. 173-254). The ECHR rejected Abu Hamza's challenge to his extradition. As is relevant here, the ECHR also declined to consider Abu Hamza's challenge to the conditions of his confinement at ADX Florence. In summary, the ECHR found that the physical conditions of ADX Florence met the requirements

of Article 3 of the Convention on Human Rights. (A. 240-243). The ECHR also found that, the U.S. authorities "have proved themselves willing to revise and to lift the special administrative measures which have been imposed on terrorist inmates thus enabling their transfer out of ADX to other, less restrictive institution." (A. 241).

After a panel of five ECHR judges declined to refer Abu Hamza's case to the Grand Chamber of the ECHR, the ECHR judgment became final and Abu Hamza was extradited to the United States on October 4, 2012.

Once Abu Hamza arrived in the United States, he was detained at the Metropolitan Correctional Center ("MCC"), and his medical needs were closely monitored by the District Court. The Court received frequent updates from the Government and defense counsel about Abu Hamza's medical care at MCC. The Court also received updates directly from the Bureau of Prisons about Abu Hamza's medical care in jail. (Dkt. 168). In response to Abu Hamza's medical needs, in March 2014, the BOP appointed a prosthetist to craft new prosthetic devices and an occupational therapist to advise the MCC staff and legal department as to necessary accommodations for Abu Hamza. (Dkt. 457, p. 21). After trial, the District Court approved of the appointment of a lawyer to assist in addressing Abu Hamza's medical and disability issues. (Dkt. 471).

2. Sentencing

The issue of Abu Hamza's medical care was carefully considered at Abu Hamza's sentencing. Abu

Hamza highlighted the issue in his sentencing submission and the District Court directed the Government to include in its sentencing submission information regarding ADX's ability to accommodate Abu Hamza's medical needs. (Dkt. 451).

In his sentencing submission, Abu Hamza urged the District Court to order the Bureau of Prisons ("BOP") to designate Abu Hamza to a medical facility and not ADX Florence. (Dkt. 457 at 21-28). Abu Hamza further argued that representations made by the United States during extradition proceedings precluded Abu Hamza from being designated to ADX Florence. (Dkt. 457, at pages 28-37). Abu Hamza specifically pointed to the declaration of ADX Florence Warden Wiley, which discussed the prison designation process. (A. 86-98). The declaration stated that "[i]f it is determined that Abu Hamza cannot manage his activities of daily living, it is highly unlikely that he would be placed at the ADX but, rather, at a medical facility." (A. 86). The declaration also noted that an ADX designation is not permanent, and that an inmate has opportunities to prove that a less restrictive institution is appropriate. (A. 92 ("It is the goal of the ADX to transfer inmates to less secure institutions when the inmate demonstrated that a transfer is warranted and he no longer need the controls of ADX.")).

The Government argued in its sentencing submission that the BOP should be afforded its broad discretion in evaluating Abu Hamza—including the appropriate security level and his medical condition—and determining the proper designation for him. Moreover, the Government also included a submission from BOP

about the adequate procedures BOP has in place to ensure that Abu Hamza received necessary medical care and an appropriate prison designation. In particular, the BOP noted that Abu Hamza would be designated based on a classification determination that considers the most appropriate security level institution and also takes into consideration BOP's mission to protect society. (*See* Dkt. 459, Ex. A at 1). In light of Abu Hamza's medical conditions, the BOP noted that he would be evaluated first at a medical facility, which would include an assessment by a prosthetic specialist. *Id.* After that medical evaluation was conducted, the BOP would make a designation determination based both on Abu Hamza's medical needs and any security concerns. (*Id.*). In the event that the BOP determined that Abu Hamza should be incarcerated at ADX Florence, Abu Hamza would be afforded additional opportunities to challenge such a determination. (*Id.* at 2). Further, if the BOP ultimately determined that Abu Hamza should be housed at the ADX, the BOP noted that ADX is equipped to address Abu Hamza's medical concerns. (*Id.* at 2-3).

The Government also noted that there were no assurances made during extradition that Abu Hamza would not be designated to ADX Florence. Indeed, as the Government noted in its sentencing submission, Abu Hamza's own citations to the record before the ECHR made clear that the ECHR acknowledged the possibility that Abu Hamza might be detained at the ADX. (*See* Dkt. 457 at 31, 33, 34).

At the sentencing proceeding, Abu Hamza's medical needs were explored at length by the parties and

the District Court. As to the rule of specialty, the District Court pressed Abu Hamza on whether there were any commitments by the United States, other than what was contained in Warden Wiley's letter. (A. 614-15)). Abu Hamza conceded that he was referring to Warden Wiley's representation, as interpreted by the U.K. courts. After hearing from Abu Hamza, the District Court then proceeded to explain the reasoning behind its sentence, noting that "[h]ere there has been a great deal of time in the court's consideration with respect to the medical aspects that are present here." (A, 628). After noting the importance of BOP tending to Abu Hamza's important medical conditions and disabilities, the District Court also noted that Abu Hamza had these disabilities when he committed the crimes in this case. (A. 632). The District Court then provided a lengthy analysis of Abu Hamza's medical conditions and his designation:

> I am not going to prejudge the failure of the BOP. The BOP has procedures in place. It has a process in place . . . I decline to make a particular recommendation to the BOP, and I will explain why.
>
> First, the BOP has dealt with Mr. Hamza for a couple of years now. I also have dealt with the MCC in connection with Mr. Abu Hamza's medical conditions a number of times and spoken with them about it and spoken with the warden about it on a number of occasions of the last several years. I have toured the medical facilities

> over at the MCC and I met with the medical staff over at the MCC because issues have been brought to me over time.
>
> . . .
>
> [BOP knows] the capability of each facility, and I am not prepared today to distrust their representations as to their process. I have every reason to believe they will undertake the process that they are committing to undertake . . .
>
> I would note that it is particularly difficult to grapple with both the medical concerns and the security concerns, and I feel that the BOP is particularly expert at understanding those concerns. They have evaluated those concerns together.

(A. 643-45).

As to the extradition proceedings, the District Court noted:

> There are a number of issues relating to the extradition proceedings, and I have looked very carefully at the record of the extradition proceedings and I have read the papers of the extradition proceedings very carefully. I read them differently than counsel. I don't read them as, by any means, even coming close to a certain commitment that Abu Hamza would not be housed at any particular facility or would be housed at a medical facility.

> . . . And in 2007, as Wiley said, if the evaluation is [the defendant] cannot perform his activities of daily living, then it's very unlikely he would be housed at ADX. And that Wiley statement was then transferred into the subsequent statements of Workman's opinion and then Sullivan [ECHR]. But no one said that there would be no housing ever under any circumstances at ADX. That was just simply not a commitment that was ever made.

(A. 646).

At the end of sentencing, although the District Court did not order that Abu Hamza be placed in a medical facility, it recommended that BOP consider Abu Hamza's doctor's report submitted at sentencing, and that Abu Hamza receive an evaluation by an independent occupational therapist. (A. 649).

B. Applicable Law

1. Procedural and Substantive Reasonableness

This Court's review of a district court's sentence "encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 187 189 (2d Cir. 2008) (en banc). A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calcula-

tion, treats the Guidelines as mandatory, does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact. *Id.* at 190.

If there was no procedural error, the Court considers "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). In conducting such review, this Court must "take into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts." *United States v. Cavera*, 550 F.3d at 190. This Court cannot "substitute [its] own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case," and should "set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *Id.* at 189 (internal quotation marks omitted).

2. Prison Designations

In the context of prison designations, it is well established that, while the BOP is required to consider, among other things, statements by the sentencing court when considering the appropriate designation, *see* 18 U.S.C. § 3621(b)(4), a district court lacks authority to order the BOP to designate a defendant to a specific facility, *see* 18 U.S.C. § 3621(b); *United States v. Williams*, 65 F.3d 301, 307 (2d Cir. 1995) ("A sentencing court has no authority to order that a convicted defendant be confined in a particular facility, much less

placed in a particular treatment program; those decisions are within the sole discretion of the Bureau of Prisons."); *Levine v. Apker*, 455 F.3d 71, 83 (2d Cir. 2006) ("The BOP is the sole agency charged with discretion to place a convicted defendant within a particular treatment program or a particular facility").

Indeed, the Supreme Court has repeatedly recognized that courts are "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). As the Supreme Court observed in *Turner*:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

Id. at 84-85; *see also Sandin v. Conner*, 515 U.S. 472, 482-83 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment. Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life . . . ." (internal citations omitted)); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("[T]he problems that arise in the day-to-day operation of a

corrections facility are not susceptible to easy solutions. Prison administration therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

3. The Rule of Specialty

The rule of specialty "generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country," *United States v. Baez*, 349 F.3d 90, 92 (2d Cir. 2003), and ensures that an extradited defendant is not tried on counts for which extradition was not granted. *See United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992).

"Typically, the rule of specialty is invoked to circumscribe the specific crimes for which a defendant may be tried following extradition." *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007). It may also have relevance at sentencing when "substantive assurances" on sentencing have been "made by the United States to an extraditing nation." *United States v. Baez*, 349 F.3d at 93 (perceiving no violation of the rule of specialty where nothing "obligate [d] the court to sentence [the extradited defendant] to a term of years" rather than life imprisonment).

C. Discussion

The District Court's sentencing recommendation cannot render Abu Hamza's sentence unreasonable, either procedurally or substantively. As noted above,

Abu Hamza's prison designation is the BOP's prerogative and courts lack authority to direct that Abu Hamza be designated to a particular facility.

Nor did the District Court's sentence violate the rule of specialty. As the above record indicates and as Abu Hamza conceded at sentencing, the United States never promised that Abu Hamza would not be designated to ADX Florence during the extradition process. The representation by Warden Riley that if Abu Hamza's medical conditions warranted, Abu Hamza would not be housed at ADX was exactly that. It was not a guarantee that Abu Hamza would never be designated to ADX Florence, as the District Court recognized. For its part, the United Kingdom was not under the impression that Abu Hamza would never be designated to ADX Florence. As noted in Abu Hamza's appeal, the United Kingdom believed that there was a possibility that, after a medical evaluation, Abu Hamza would be designated to ADX Florence.

The United States made representations that Abu Hamza's medical needs would be carefully evaluated and treated, and the United States lived up to these assurances. After sentencing, Abu Hamza was sent for a medical evaluation. Only after this evaluation was he sent to ADX Florence. Abu Hamza's assertion that he is not currently receiving adequate medical care (*see* Br. 192) is not supported by the record, and to the extent Abu Hamza has an issue with his current medical care, his proper remedy is through the BOP. *See United States v. Perko*, 694 F. App'x 25, 29 (2d Cir. 2017) (rejecting defendant's claim that his sentence is substantively unreasonable because "[a]lthough Perko

complains that he cannot now receive the care he needs at his placement in New Jersey, the Bureau of Prisons is the proper recipient of an application for transfer, as it—not the District Court—controls Perko's placement.")).

Finally, to the extent Abu Hamza claims that the District Court failed to consider Abu Hamza's medical needs in fashioning his prison sentence (rather than his designation), he is wrong. (*See* Br. 197). The District Court specifically addressed Abu Hamza's medical issues at sentencing. The court also granted Abu Hamza's request for a medical recommendation in its judgment.

Ultimately, the gravity of Abu Hamza's horrendous crimes outweighed any sentencing consideration in terms of the length of incarceration that Abu Hamza should receive as a result of his medical conditions and conditions of confinement. As the District Court recognized, to reduce Abu Hamza's sentence in a case of this nature due to Abu Hamza's health was not appropriate. *See United States v. Stewart*, 590 F.3d 93, 183 (2d Cir. 2009) (Walker, J., concurring) ("Advancing age and treatable medical conditions are not normally a ticket to overwhelming leniency, and this case is no different from the norm in that respect.")

POINT VIII

The Cumulative Error Doctrine Does Not Warrant Reversal

Abu Hamza's final point is that even if this Court concludes that a particular error does not warrant reversal of Abu Hamza's conviction, the cumulative effects of these purported errors warrants a retrial on all counts. (Br. 207-209). As none of the alleged errors actually constitutes error, however, Abu Hamza cannot successfully avail himself of the cumulative error doctrine. *See, e.g., United States v. Rivera*, 900 F.2d 1462, 1469-71 (10th Cir. 1990) ("[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Because Abu Hamza cannot make out a claim of cumulative error by aggregating a host of individually meritless claims, *see, e.g.*, *United States v. Rahman*, 189 F.3d 88, 145 (2d Cir. 1999); *United States v. Hurtado*, 47 F.3d 577, 586 (2d Cir. 1995), his cumulative error claim must be rejected. Moreover, as discussed above, even if any of the challenged rulings or statements were erroneous, and even viewed in the aggregate, when weighed against the overwhelming evidence of Abu Hamza's guilt on all counts, they are not of a kind that supports a conclusion that Abu Hamza was denied a fair trial. *Cf. United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
January 11, 2018

Respectfully submitted,

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

IAN MCGINLEY,
KARL METZNER,
Assistant United States Attorneys,
Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with this Court's order granting the Government leave to file a response brief of no more than 35,000 words. As measured by the word processing system used to prepare this brief, there are 32,525 words in this brief.

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York

By: KARL METZNER,
Assistant United States Attorney