IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:16-cr-265
	)	
NICHOLAS YOUNG	)	

Government's Opposition to Motion to Exclude Expert Testimony

Nicholas Young moves the Court to exclude at trial expert testimony by Dr. Daveed Gartenstein-Ross and Arlington County Police Corporal Ian Campbell. The motion is based on a misunderstanding of the applicable law, and should be denied.

Federal Rule of Evidence Rule 702 provides that expert testimony is appropriate when it "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). The rule further provides that a witness qualified as an expert may be permitted to testify where "[1] the testimony is based upon sufficient facts or data; [2] the testimony is the product of reliable principles and methods; and [3] the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d). These requirements have been distilled into two crucial inquiries: relevancy and reliability. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141, 149 (1999). Dr. Gartenstein-Ross's testimony meets both requirements.

The factors relied upon to test reliability must be "tied to the facts of the particular case." *Id.* at 150. The "test of reliability is flexible" and "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id.* The trial court has "broad latitude" to determine which specific factors are or are not appropriate indicia of reliability in a given case. *Id*. at 153.

A "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *United States v. Wilson*, 484 F.3d 267, 273 (4th Cir. 2007). "But at bottom, the court's evaluation is always a flexible one, and the court's conclusions necessarily amount to an exercise of broad discretion guided by the overarching criteria of relevance and reliability." *Oglesby v. General Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999). "In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire,* 526 U.S. at 158.

I. Daveed Gartenstein-Ross

Dr. Daveed Gartenstein-Ross is a prolific scholar, author, lecturer, and public intellectual. The list of his books, monographs, articles, and speeches is lengthy.[1] Young cannot credibly contest that Dr. Gartenstein-Ross is an accomplished academic, researcher, lecturer, and writer. He cannot credibly contest that Dr. Gartenstein-Ross was himself a Muslim who worked at an Islamic charity connected to Al Qaeda, or that Dr. Gartenstein-Ross is supremely well qualified to explain the cultural significance of individuals and items related to jihadist movements and Islamic terrorism. He cannot contest that Dr. Gartenstein-Ross was, in fact, earlier this year accepted in the United States District Court for the District of Columbia as an expert witness in

[1] The list of Dr. Gartenstein-Ross's books, monographs, articles, and speeches is included in the expert witness report previously filed on November 17, 2017. Dkt. 135-4. For ease of reference, pages 1-10 of that report, containing that list, are filed as Exhibit 1 to this pleading.

the evolution of the history of terrorist organizations and their claims of responsibility for acts of terrorism.[2]

Similarly, Young cannot credibly contest that Dr. Gartenstein-Ross has studied, taught, written, testified, and lectured about radicalization processes, including in the context of Neo-Nazis and white supremacists. Finally, he cannot credibly contest that Dr. Gartenstein-Ross is well qualified to explain the background and context of the civil war in Libya.

Instead, Young argues that Dr. Gartenstein-Ross's methodology is not scientific enough to pass muster under *Daubert*. That argument, however, has been repeatedly rejected when made in similar contexts. In short, motions to prevent the presentation of expert testimony to explain aspects of terrorism and radical Islam are uniformly rejected when they attempt to measure applied social sciences in the same way as physical sciences.

"The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony . . . whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Thomas*, 490 Fed.Appx. 514, 520-21 (4th Cir. 2012).[3] *See United States v. Crisp*, 324 F. 3d 261, 266 (4th Cir. 2003) ("Rather than providing a definitive or exhaustive list, *Daubert* merely illustrates the types of factors that will bear on the inquiry"). "Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases.... In other cases,

2 Memorandum Opinion, *Foley v. Syrian Arab Republic*, Civ. No. 11-699 (D.D.C. April 13, 2017), at n.4. The relevant portions of that opinion are attached to this pleading as Exhibit 2.

3 Internal citations and quotations are omitted throughout this pleading.

the relevant reliability concerns may focus upon personal knowledge or experience." *Thomas*, 490 Fed.Appx. at 520-21.

The same arguments that Young makes now with respect to Dr. Gartenstein-Ross previously have been made with respect to terrorism experts such as Evan Kohlmann and Matthew Levitt. In essence, defendants have argued that the research conducted by counter-terrorism researchers such as Kohlmann, Levitt, and Gartenstein-Ross is not based on sufficient facts or data, and is not the product of reliable principles and methods. Time after time, however, this Court, the Fourth Circuit, and other courts have admitted their expert testimony despite such arguments, because such testimony is helpful to the trier of fact - - and as an application of social science, not subject to the type of tests that experts in "hard" sciences are.

For example, in 2004, in the (first) trial of Sabri Benkahla, this Court admitted the testimony of Evan Kohlmann as an expert on the recent history of Afghanistan and related terrorist groups. At the time, Kohlmann was a law student who, as an undergraduate, had written several papers on Afghanistan and the Taliban. Kohlmann engaged in extensive research on his own and in connection with a part-time job. Further, Kohlmann was about to publish a book, his first, on the war in Afghanistan. This Court admitted Kohlmann's expert testimony and found his testimony helpful.

The next year, Ali Al-Timimi moved to bar Kohlmann's expert testimony. Al-Timimi argued that Kohlmann's testimony should not be admitted because the government produced no information that would indicate that his opinions were tested, subject to peer review, whether there are known error rates applicable to his theory or technique, nor whether his technique

enjoys general acceptance within any scientific community. Al-Timimi's Motion in Limine Regarding Expert Witness Proffered by the United States, at p. 9.[4] In making this argument, Al-Timimi missed the same point in 2005 that Young does today: the tests he referenced were ill-suited to Kohlmann's field of expertise. *See Thomas,* 490 Fed.Appx. at 520 ("in considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally").

In response to Al-Timimi's argument, this Court stated:

> The last expert witness in the motion in limine is Mr. Kohlmann. Now, despite the defendant's arguments and despite Mr. Kohlmann's youth, this Court has watched him, I've heard him testify twice.[5] He is in my view qualified to testify as an expert on both the issue of the particular aspects of terrorism in the Middle East and with fundamentalist Islamic groups that he's been proffered for as well as the Internet and how these groups are communicating back and forth.

Transcript of Hearing, *United States v. Timimi*, Crim. No. 1:04cr385 (March 18, 2005), at p.26.[6]

The Court continued, explaining that Kohlmann's testimony would be important because it would help the jury understand the evidence being presented to it:

> [S]ome of that evidence first of all would be outside the ordinary understanding or information of the ordinary juror. I mean, the Court knows it because I've had the previous trial, and also I've done other cases, but Kohlmann may testify that -- he is definitely a useful expert in

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4 Timimi's motion is attached to this pleading as Exhibit 3.

5 Kohlman previously had testified before this Court also in *United States v. Khan, et al.*, 309 F.Supp.2d 789, 812 (E.D. Va. 2004). In that case, Kohlmann testified regarding technical matters regarding the internet, as well as LET materials he had collected himself.

6 The relevant portion of the transcript of the hearing in which this Court ruled on Timimi's motion is attached to this pleading as Exhibit 4.

> talking about those types of matters, that is, the nature of terrorist operations, the need for training camps, and sort of the -- and that range of information.

Id. at p. 28-29.

After this Court admitted Kohlmann's expert testimony at the first *Benkahla* trial, and did so again at the *Al-Timimi* trial, Judge Cacheris admitted Kohlmann's expert testimony at the second *Benkahla* trial. There, the defendant again argued that Kohlmann's testimony did not meet the *Daubert* standard because it was not the product of reliable principles and methods. Judge Cacheris denied the motion, and allowed Kohlmann's testimony on the grounds that it would be helpful to the jury.

Benkahla was convicted, and raised the admission of Kohlmann's expert testimony on appeal. In affirming the conviction, the Fourth Circuit approved the use of Kohlmann's testimony to "“assist the trier of fact to understand the evidence" and provide "background information on radical Islam and jihad generally rather than discussing Benkahla individually." *United States v. Benkahla,* 530 F.3d 300, 308 (4th Cir. 2008). In specific, the Fourth Circuit noted that "Benkahla also attacked Kohlmann's qualifications as an expert, but those qualifications were obviously substantial and the district court acted well within its discretion in determining that they were sufficient." *Id.* at 309, n.2.

In *Benkahla,* the Fourth Circuit wrote that Kohlmann's testimony could well be appropriate to enable the jury to understand the evidence, because the case "by necessity" touched "on a wide variety of ideas, terms, people and organizations connected to radical Islam." *Id*. at 309. "In these circumstances, the trial judge could well conclude that lengthy testimony

about various aspects of radical Islam was appropriate, and indeed necessary, for the jury "to understand the evidence" and "determine [the] fact[s]." *Id.* at 309-10. *See also United States v. Chandia*, 514 F.3d 365, n.3 (4th Cir. 2008) (Hilton, J.) (no error in denying *Daubert* hearing for Kohlmann's testimony as a terrorism expert).

In 2014, the Fourth Circuit again considered a challenge to Kohlmann's expert testimony. In *United States v. Hassan*, 742 F.3d 104, 131 (4th Cir. 2014), the Fourth Circuit ruled that admission of Kohlmann's expert testimony was proper, on the grounds that he possessed "the requisite knowledge, skill, experience, training, and education to testify on various aspects of the trend of decentralized terrorism and homegrown terrorism." Further, it held that "his testimony was "both reliable and relevant, thus satisfying Rule 702's requirements." *Id*. *Accord United States v. Farhane*, 634 F.3d 127, 158 (2d Cir. 2011) (affirming admission of Kohlmann's expert testimony on the grounds that his work had undergone various forms of peer review; his opinions were generally accepted within the relevant community; and his methodology was similar to that employed by experts that have been permitted to testify in other federal cases involving terrorist organizations).

Earlier this year, a judge in the Eastern District of New York considered another *Daubert* challenge to Kohlmann's expert testimony. In *United States v. Hausa*, 12cr0134, the defendant moved to bar Kohlmann's expert testimony for failure to meet the standard for expert testimony under *Daubert*. *Order*, at 1.[7] Judge Brian M. Cogan rejected the challenge, and authorized Kohlmann to testify regarding the background and significance of terrorist organizations, as well

[7] A copy of the *Hausa* opinion is Exhibit 5 to this pleading.

as the common meaning and usage of words and concepts used by members of the global jihadist movement. *Id.*at 2. Judge Cogan wrote that Kohlmann's testimony "will help the jury to understand other evidence in the case. His testimony will place other testimony and documentary evidence in context, explain obscure terms and concepts and the role of specific al Qaeda leaders referenced by other Government witnesses and in defendant's prior statements, and enable the jury to better assess the significance of other evidence." *Id.*

Judge Cogan discussed Kohlmann's methodology, and wrote that Kohlmann demonstrated that he relied on sufficient facts and data in forming his opinions in this case:

> He has reviewed thousands of primary, secondary, and tertiary sources on al Qaeda and terrorism in general, which include open source documents as well as propaganda and other materials from what Mr. Kohlmann has identified as the 'deep and dark web,' and has continuing efforts to collect, analyze, and catalogue relevant terrorism and al Qaeda materials. Mr. Kohlmann further testified that other terrorism experts rely on similar facts and data in forming their opinions. Mr. Kohlmann has also relied on his prior training, education, and experience, including the several interviews he previously the several interviews he previously conducted of individuals affiliated with al Qaeda and other jihadist groups.

Id. at 3. In short, Kohlmann relied on facts and data in *Hausa* very similar to that which is relied upon by Dr. Gartenstein-Ross here.

Judge Cogan then considered a *Daubert* challenge similar to that brought by Young here. He specifically rejected the argument that Kohlmann's reliance on hearsay statements, testimonial statements, and terrorist propaganda violates defendant's Confrontation Clause rights:

> I reject defendant's argument that Mr. Kohlmann's reliance on hearsay statements, testimonial statements, and terrorist propaganda is improper and violates defendant's Confrontation Clause rights. At the *Daubert*

> hearing, Mr. Kohlmann testified that other terrorism experts rely on hearsay statements and similar forms of terrorist propaganda in forming their opinions, and thus Mr. Kohlmann's reliance on such materials is proper under Federal Rule of Evidence 703. *See United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) (holding that "expert witnesses can testify based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions."); *United States v. Daly*, 842 F.2d 1380, 1387-88 (2d Cir. 1988) ("[I]f experts in the field reasonably rely on hearsay in forming their opinions and drawing their inferences, the expert witness may properly testify to his opinions and inferences based upon such hearsay.").

Id. at 3. Just as Kohlman's reliance on hearsay statements and terrorist propaganda was proper, so is Dr. Gartenstein-Ross's.

Further, Judge Cogan agreed that the comparative analysis method of forming Kohlmann's opinions is a reliable methodology generally accepted in the field of international terrorism:

> The Government has established that in forming his opinions in this case, Mr. Kohlmann used and applied a reliable methodology, namely the comparative analysis method, which Mr. Kohlmann testified is generally accepted in the international terrorism field. At the hearing, Mr. Kohlmann explained his methodology, stating that he gathers multiple sources of information, including primary, secondary, and tertiary sources, analyzes whether a particular source has a perceived bias, and juxtaposes and cross-checks the various sources against one another to form a commonly accepted narrative. Mr. Kohlmann testified that he had used this methodology in forming conclusions in prior academic papers and articles, and that such papers and articles were subject to peer review and he did not receive negative comments as to the methodology used. Mr. Kohlmann also testified that he has used this methodology in forming opinions in prior cases where he testified as an expert. Indeed, Mr. Kohlmann's use of the comparative analysis method has previously been approved by the Second Circuit. *See United States v. Farhane*, 634 F.3d 127, 159 (2d Cir. 2011).

Id. at 4.

In *Hausa*, Judge Cogan then focused on the underlying issue: the defendant's challenge to Kohlmann's methodology was not so much a challenge to Kohlmann's qualifications in particular, as it was a challenge to the presentation of expert testimony in a qualitative social science field or historical research in general. *Id.* at 4-5. Judge Cogan reasoned, however, that he did "not see how a social scientist can form the kind of conclusions expressed in Mr. Kohlmann's report without reviewing primary, secondary, and tertiary sources, and then exercising judgment about which are corroborated or otherwise believed to be credible, and which should not be accepted." He concluded:

> That is what Mr. Kohlmann did. It seems to me no different than, for example, the exercise a historian would undertake to determine the precise location of the Battle of Hastings, or the troop size or unit strength of the combatants.

Id. at 5.

Kohlmann's methodology is similar to that used by Dr. Gartenstein-Ross. As Dr. Gartenstein-Ross explains in his report:

> My research and scholarship . . . is consistent with best academic practices. I mainly rely on primary-source information, including statements and social media postings by extremist groups and their supporters, and internal documents intercepted by the United States or other governments. I cross-check all primary sources I read against other primary-source information, against information about events on the ground in relevant theaters, and against relevant secondary-source literature that allows me to determine whether my conclusions are consistent with those of other scholars and practitioners. I also check my analytic track record against unfolding events to determine if my anticipatory analysis is accurate, or if it requires some recalibration.

Exhibit 1, at p. 10. Inasmuch as Kohlmann's methodology is substantially the same as Dr. Gartenstein-Ross's, Young's challenge to the latter's methodology should be rejected just as was the challenge to Kohlmann's.

Evan Kohlmann is not the only terrorism expert whose methodology is similar to that of Dr. Gartenstein-Ross. In *United States v. Damrah,* 412 F.3d 618 (6th Cir. 2005), the Sixth Circuit considered and rejected an argument similar to that which Young makes here. In that case, the defendant sought to bar the expert testimony of Matthew Levitt about international terrorism generally and the Palestinian Islamic Jihad in specific. Levitt was a fellow at a think tank in Washington, D.C., and pursuing a doctorate in international relations; he wrote articles and policy pieces, and testified before Congress. In addition, he lectured at academic and policy conferences, and taught as an adjunct professor. He conducted his research by relying on various sources, including newspapers, books, government documents, and court papers. Order, *United States v. Damrah,* No. 1:03cr484 (N.D. Ohio June 9, 2004), at p. 10-12.[8]

Damrah argued that Levitt failed to rely on the type of underlying facts or data reasonably relied upon by experts in his particular field. *Id.* He further objected to Levitt's testimony on the grounds that "it relied heavily on inadmissible hearsay in violation of Federal Rule of Evidence 703 and that Levitt's testimony did not satisfy the requirements of Federal Rule of Evidence 702." *Damrah,* 412 F.3d at 625.

[8] In short, Levitt's background was somewhat similar to that of Dr. Gartenstein-Ross. A copy of the *Damra* district court opinion is Exhibit 6 to this pleading.

Before trial, District Judge James S. Gwin rejected Damrah's *Daubert* argument, on the grounds that "Levitt's expertise is not scientific. He is a policy wonk, working in what is basically an applied social science. Therefore, many of the reliability factors listed in *Daubert* will likely not aid the Court in its reliability analysis." Exhibit 5, at p. 13. Judge Gwin noted that Levitt used the same methodology in his work for the FBI, and in connection with his testimony in Congress. "If his methodology is good enough for the other two branches of government, the Court sees no reason why it should not be good enough for the judiciary, too." *Id.* at 13-14. Indeed, Judge Gwin wrote that, although "Levitt's methodology appears to be little more than reading copiously, analyzing the data that he reads, and conveying that knowledge to others . . . *it seems to be very much the gold standard in the field of international terrorism." Id.* (emphasis added).

On appeal, the Sixth Circuit affirmed Judge Gwin's conclusion. "Given the secretive nature of terrorists, the Court can think of few other materials that experts in the field of terrorism would rely upon." *Damrah*, 412 F.3d at 625. Indeed, the Sixth Circuit quoted Judge Gwin's conclusion that Levitt's methodology was "the gold standard in the field of international terrorism." *Id.*[9]

The qualifications of Dr. Gartenstein-Ross obviously have to be considered separately from the qualifications of Evan Kohlmann and Matthew Levitt. Nevertheless, it is no slight to

[9] A challenge to Levitt's testimony as an expert witness was rejected in the Fourth Circuit as well. In *United States v. Hammoud*, the Fourth Circuit found that Levitt's testimony about the structure, leaders, and funding of Hizballah was "critical in helping the jury understand the issues before it." 381 F.3d 316, 337-38 (4th Cir. 2004), opinion reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005).

Kohlmann to point out that his qualifications at the time of the trials of Benkahla, Chandia, and Al-Timimi pale besides the qualifications of Dr. Gartenstein-Ross today. Indeed, it is no slight to Levitt to point out that, unlike Dr. Gartenstein-Ross today, Levitt did not possess a doctorate when he testified in *Damra.* Further, it is no slight to either Kohlmann or Levitt that - - unlike Dr. Gartenstein-Ross - - neither had ever converted to Islam, or worked at an Islamic charity connected to Al-Qaeda. That being said, Dr. Gartenstein-Ross's qualifications as an expert are manifest, and his methodology is reliable.

For Dr. Gartenstein-Ross, the relevance inquiry turns on Rule 702: his testimony has to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Benkahla*, 530 F.3d at 309. "Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror." *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993). In the *Benkhala* and *Timimi* cases, this Court saw Kohlmann's testimony to be reliable and helpful. There is every reason to expect the same of Dr. Gartenstein-Ross's testimony in this case.

As was the situation in the *Benkahla* and *Timimi* cases, the evidence in this case includes exhibits, messages, graphics, and conversations involving language, concepts, and clerics common to Islamic extremism; communications referencing jihads in Somalia, Syria, Iraq, and Libya; and videos and written materials possessed by the defendants and published by terrorist groups to promote Islamic extremism. It also includes similar materials common to Neo-Nazi extremism. Much of this evidence falls outside of a person's everyday experience.

The typical juror likely will be unfamiliar with the relevant ideas, terms (such as jihad, kafir, shaheed), people (such as Awlaki, Maqdisi, Zawahiri, Amin al Hussaini, William Pierce), organizations (such as Abu Salim Martyrs' Brigade, al-Shabaab, al-Qaeda in the Arabian Peninsula, the Frikorps, the Waffen SS, the National Alliance), theories, and other aspects of both radical Islam and Neo-Nazi extremism. It is unrealistic to expect that a typical juror could understand much of the evidence in this case without the assistance of expert testimony such as that provided by Dr. Gartenstein-Ross.

Dr. Gartenstein-Ross will not offer an opinion as to whether Young attempted to support ISIS in 2016, or that he ever was predisposed to do so. At no point in his testimony will he opine about the defendant as an individual, or as to his state of mind. Inasmuch as Dr. Gartenstein-Ross only will identify the individuals and explain the concepts depicted or referenced in Young's own communications and documents, his testimony properly should be admitted to help the jury understand an area that likely is foreign to them. His testimony will help the jury to understand the evidence in the case just as an expert witness is expected to do. "In such settings, the relevance of expert testimony is quite evident." *Hassan*, 742 F.3d at 131.

The conclusions previously reached with respect to the methodology used by Kohlmann and Levitt apply equally to that used by Dr. Gartenstein-Ross. Working in the field of applied social sciences, his methodology is equivalent to “the gold standard in the field of international terrorism.” *Damrah*, 412 F.3d at 625.

II. Corporal Campbell

By letter of November 17, 2017, the government notified the defense that it would call as a witness Arlington County Police Corporal Ian Campbell. In that notification, the government stated that it believed Campbell to be a *fact* witness. The letter provided notice of his testimony as an expert, however - - "out of what may be an abundance of caution" - - because the defense might claim him to provide expert testimony.

In specific, the letter stated:

> As you know, when Corporal Campbell was in college with your client, they attended a rally of a Neo-Nazi group. I think that you also know that, in about 2010, your client gifted to Corporal Campbell the book *Serpent's Walk*. Not surprisingly, Corporal Campbell is expected to testify about those events. Accordingly, I believe that Corporal Campbell will be a fact witness. Nevertheless, when he talks about what he has learned about subjects such as William Pierce, the National Alliance, *Hunter*, the *Turner Diaries*, you might claim that he is providing expert testimony. *Out of what may be an abundance of caution*, I am, accordingly, notifying you pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G) and Federal Rules of Evidence 702 and 703, that Corporal Campbell may offer expert testimony. A copy of Officer Campbell's slide presentation that contains the gist of that portion of his testimony is included with this letter.

Discovery Letter #24 (emphasis added).[10]

As noted above, we believe that Corporal Campbell will testify as a fact witness. Regardless of whether he is an "expert" under Rule 702, he can testify about Neo-Nazis, *Hunter*, *Serpent's Walk*, and other indicators of extremism that he looks for in his capacity as a police officer. After all, he attended a Neo-Nazi gathering with the defendant and collected materials

[10] A copy of Discovery Letter #24 is Exhibit 7 to this pleading.

from the Neo-Nazi group when he was at that event. Moreover, ten years later, he received from the defendant a gift of a Neo-Nazi book.

Because we recognized that Corporal Campbell's testimony might be deemed to be "expert" testimony, we provided to the defense the slide presentation that Corporal Campbell uses when he presents training to other police officers.[11] As Corporal Campbell notes in the second slide of that exhibit, the information in his presentation was based solely on his own knowledge and research, and was intended to provide other officers with further information regarding the subject matter for which to conduct more thorough investigations.

As we explained to the defense in Discovery Letter #24, we expect Corporal Campbell to testify as a fact witness. To the extent, however, that his testimony is deemed "expert" testimony, then the defense has been provided with the equivalent of the "expert's" report.

Conclusion

For the reasons stated above, the defendant's motion should be denied.

Respectfully submitted,

Dana J. Boente
United States Attorney

By: /s/

Gordon D. Kromberg
Assistant United States Attorney
Virginia Bar No. 33676
Attorney for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3700
(703) 837.8242 (fax)
gordon.kromberg@usdoj.gov

[11] That presentation was included as Exhibit 1 to the defendant's motion to bar expert testimony.

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, I electronically filed the foregoing Opposition to Motion to Exclude Expert Testimony with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

/s/ .

Gordon D. Kromberg
Assistant United States Attorney
Virginia Bar No. 33676
Assistant United States Attorney
Attorney for the United States
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3700
(703) 837.8242 (fax)
gordon.kromberg@usdoj.gov

Expert Witness Testimony
United States v. Nicholas Young

Dr. Daveed Gartenstein-Ross
Chief Executive Officer, Valens Global
Senior Fellow, Foundation for Defense of Democracies

November 2017

My full name is Daveed Eliahu Ephraim Gartenstein-Ross. I am a scholar, practitioner, and author with around twenty years of professional experience and educational study examining violent non-state actors (VNSAs). My research has led me to consider VNSAs to be a coherent category of actors, where significant insight can be derived from comparing the organizational design, strategies, tactics, financing, recruitment, and ideologies of terrorist groups, insurgencies, cartels, gangs, and other kinds of VNSAs. Within this broad category of VNSAs, my work has focused in particular on the movement that self-identifies as *salafi jihadism*, as well as on U.S.-based militant white separatist groups.

I am the Chief Executive Officer of Valens Global, a private commercial entity that focuses on the challenges posed by VNSAs. I also hold appointments at think tanks in the United States and Europe. I have been a Senior Fellow at the Foundation for Defense of Democracies (FDD), a nonpartisan policy institute in Washington, D.C., for over a decade.[1] I am also an Associate Fellow at the International Centre for Counter-Terrorism – The Hague (ICCT). I have authored several studies for ICCT, some of which required international field research. Studies I wrote for ICCT include reports on the Tunisian jihadist group Ansar al-Sharia, a history of the Libyan civil war, and a review of how the Islamic State's (ISIS) propaganda plays a role in its strategy for global expansion.[2] I also recently served a term as a Fellow at Google's think tank Jigsaw, for which I led several major research projects examining extremists' use of online platforms, and what can be done to counter them.[3]

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[1] For a sense of the work I have done for FDD, see the following books and studies that I authored for the institute, or for which I served as a volume editor: Daveed Gartenstein-Ross et al., *Islamic State 2021: Possible Futures in North and West Africa* (Washington, DC: FDD Press, 2017); Daveed Gartenstein-Ross et al., *China's Post-2014 Role in Afghanistan* (Washington, DC: FDD Press, 2014); Daveed Gartenstein-Ross & Jonathan Schanzer eds., *Allies, Adversaries and Enemies: America's Increasingly Complex Alliances* (Washington, DC: FDD Press, 2014); Daveed Gartenstein-Ross & Daniel Trombly, *The Tactical and Strategic Use of Small Arms by Terrorists and Terrorist Groups* (Washington, DC: FDD Press, 2012); Daveed Gartenstein-Ross & Linda Frum eds., *Terror in the Peaceable Kingdom: Understanding and Addressing Violent Extremism in Canada* (Washington, DC: FDD Press, 2012).

[2] See Daveed Gartenstein-Ross, *Ansar al-Sharia Tunisia's Long Game: Dawa, Hisba, and Jihad* (The Hague: ICCT – The Hague, 2013); Daveed Gartenstein-Ross, Bridget Moreng & Kathleen Soucy, *Raising the Stakes: Ansar al-Sharia in Tunisia's Shift to Jihad* (The Hague: ICCT – The Hague, 2014); Daveed Gartenstein-Ross & Nathaniel Barr, *Dignity and Dawn: Libya's Escalating Civil War* (The Hague: ICCT – The Hague, 2015); Daveed Gartenstein-Ross, Nathaniel Barr & Bridget Moreng, *The Islamic State's Global Propaganda Strategy* (The Hague: ICCT – The Hague, 2016).

[3] Much of the work I undertook for Jigsaw/Google is confidential, but one project, the Redirect Method, has been made public. See Andy Greenberg, "Google's Clever Plan to Stop Aspiring ISIS Recruits," *Wired*, September 7, 2016, at https://www.wired.com/2016/09/googles-clever-plan-stop-aspiring-isis-recruits/. As Greenberg explains, the program

I have experience teaching at the university level, in both graduate and undergraduate programs. From 2013-17, I held an appointment as an Adjunct Assistant Professor in Georgetown University's Security Studies Program, where I taught a course on Violent Non-State Actors. (I was invited to continue teaching in the 2017-18 school year, but declined because my family moved away from the D.C. area.) I previously served as a Lecturer for graduate and undergraduate classes at the Catholic University of America, where I taught courses on Violent Non-State Actors, and on Al-Qaeda and Its Affiliates. I have also taught classes for, or held faculty appointments at, the University of Southern California (teaching from 2013-present for the school's Executive Program in Counter-Terrorism), and the University of Maryland (Faculty Research Assistant in the Institute for Advanced Computer Studies, 2013-14).

I hold a Ph.D. in World Politics from the Catholic University of America, a J.D., *magna cum laude*, from the New York University School of Law, and a B.A. with Honors, *magna cum laude*, from Wake Forest University.

In addition to my education and professional work, I spent the better part of a year immersed in a charity organization that actively propagated salafi jihadist ideas, and was connected to the international salafi jihadist movement. As an idealistic young college student who was seeking deeper spiritual fulfillment, I converted to the Islamic faith in my early twenties. I was looking for employment between college and law school (a period stretching from December 1998 through August 1999), and applied for a position at an Islamic charity organization, the Al Haramain Islamic Foundation, located in my hometown of Ashland, Oregon. When I took the job, I did not realize that it was part of a broader salafi jihadist charitable front with offices throughout the globe, and multiple layers of connection to the al-Qaeda terrorist organization. Both Al Haramain's head office and also the branch that I worked for were designated terrorist organizations.[4] My time working for the charity and my inner struggles with the extremist ideas that Al Haramain was propagating internally are documented in my first book, *My Year Inside Radical Islam*.[5] Though I moved away from extremist Islam, and ultimately from the Islamic faith itself, this experience would do a great deal to shape my future passion for keeping America and its interests safe from

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> places advertising alongside results for any keywords and phrases that Jigsaw has determined people attracted to ISIS commonly search for. Those ads link to Arabic- and English-language YouTube channels that pull together preexisting videos Jigsaw believes can effectively undo ISIS's brainwashing—clips like testimonials from former extremists, imams denouncing ISIS's corruption of Islam, and surreptitiously filmed clips inside the group's dysfunctional caliphate in Northern Syria and Iraq.

The website that Jigsaw set up to explain the Redirect Method can be found at https://redirectmethod.org/. I led Valens Global's efforts to map the counter-extremist narrative space on YouTube for this project.

[4] See U.S. Department of the Treasury, press release, "Treasury Designates Al Haramain Islamic Foundation," June 19, 2008, https://www.treasury.gov/press-center/press-releases/Pages/hp1043.aspx (designation of the head office). In addition to being named a Specially Designated Global Terrorist, the branch that I worked for pled guilty to tax fraud related to a transfer of $150,000 to Chechnya. See U.S. Attorney's Office, District of Oregon, press release, "Specially Designated Global Terrorist Al-Haramain Islamic Foundation, Inc. Pleads Guilty to Tax Fraud," July 29, 2014, https://www.justice.gov/usao-or/pr/specially-designated-global-terrorist-al-haramain-islamic-foundation-inc-pleads-guilty.

[5] Daveed Gartenstein-Ross, *My Year Inside Radical Islam: A Memoir* (New York: Tarcher/Penguin, 2007).

the scourge of terrorism. The experience also provided me with a further, unique window into salafi jihadism and radicalization to violent extremist ideas.

I have three interlocking areas of competency that are relevant to the present case. The first area pertains to violent extremist movements claiming their inspiration from Islam (referred to herein as *Islamist militancy*, indicating these groups' goal of violently imposing their particular version of religious law, or *sharia*). Beginning around 1998, I have frequently traveled overseas to do professional work or conduct field research in multiple countries that are relevant to understanding transnational jihadism, including Iraq, Israel, Nigeria, Tunisia, Turkey, Qatar, and the United Arab Emirates. I have reviewed thousands of open-source documents about Islamist militancy, and I have served as a consultant and expert on terrorism and national security issues for the U.S., Canadian and Dutch governments, the European Union, NATO, and private organizations. In the course of this work, I have been certified by governmental bodies as a subject matter expert (SME) on terrorism and Islamist militant groups on multiple occasions, including for the following projects:

- serving as a co-principal investigator for a three-year, $1.5 million project for the Office of Naval Research, using a big-data approach to analyze relationships among Islamist militants to predict where splits are likely occur within these organizations;
- designing and delivering training for officials and analysts at U.S. Customs and Border Protection (CBP), for which I am currently the lead SME on a contract to deliver training services for CBP for a twelve-month period from 2016-17;
- separate from the training contract, serving as a SME on terrorism and VNSAs for CBP, a contract for which I began performance on May 1, 2017;
- serving as a Senior Advisor to the U.S. Department of Homeland Security's Office for Community Partnerships, which is a leading agency involved in domestic work related to countering violent extremism (CVE);
- designing and delivering training on global terrorism for the U.S. Army Corps of Engineers' Individual Terrorism Awareness Course (INTAC), for which I have been the lead instructor since June 2016;
- lecturing for U.S. Army units about to deploy to countries such as Djibouti, Egypt, Iraq, Jordan, Kuwait and Afghanistan—as well as for foreign militaries, including in Bulgaria, Croatia and Poland—through the Naval Postgraduate School's Leader Development and Education for Sustained Peace (LDESP) program, for which I taught on over 70 occasions from 2009-17;
- serving as a SME providing information and analysis to the Joint Improvised-Threat Defeat Organization (JIDO) on four different occasions, including projecting the aftermath of ISIS's advances in Iraq, and analyzing the future of the Libyan civil war;
- serving as a SME for the U.S. Department of State's Office of Anti-Terrorism Assistance, designing curriculum and leading instruction for that organization;
- leading training for the Anti-Terrorism Advisory Council (ATAC) on four separate occasions;
- organizing and facilitating a conference in Nigeria, as a European Union-appointed Strategic Communication Expert, helping civil society activists understand militant groups' use of social media (particularly that of Boko Haram) and forge a strategic action plan for countering it.

I have also been court-certified to serve as an expert witness on terrorism and Islamist militant groups in the following federal cases:

- *Foley v. Syrian Arab Republic* (D.D.C., 2017), where I served as an expert witness on Abu Musab al-Zarqawi's terrorist organization;
- *In the Matter of Abdul Qadir* (Arlington, Va. Immigration Court, 2015), where I served as an expert witness on Afghanistan's Taliban;
- *In the Matter of B.O. in Removal Proceedings* (Boston Immigration Court, 2012), where I served as an expert witness on al-Qaeda's activities and capabilities in Kenya; and
- *In the Matter of A.D.* (Memphis, Tenn. Immigration Court, 2012), *In the Matter of A.A.W.* (Bloomington, Minnesota Immigration Court, 2012), *In the Matter of A.A.I.* (Colorado Immigration Court, 2011), *In the Matter of the Application for Withholding of A.A.M.* (Boston Immigration Court, 2011), and *In the Matter of the Application for Asylum of M.A.A.* (N.J. Immigration Court, 2009), for all of which I served as an expert witness on the Somali group al-Shabaab.

In addition to the aforementioned work which required certification as an expert, other professional work I have undertaken related to VNSAs and Islamist militancy includes serving as a Subject Matter Consultant to the private security firm Corporate Risk International for a live hostage negotiation with the Iraqi militant group Asa'ib Ahl al-Haq; producing reports for firms in the oil and gas industry that need to make investment decisions related to VNSAs, or protect their facilities and personnel; and designing and leading strategic simulations exploring the competition between VNSAs and state actors for academic institutions like Johns Hopkins University. I have testified about my areas of core competency before the U.S. House and Senate more than a dozen times, as well as before the Canadian House of Commons.

Additionally, I am an author with specialized knowledge in the field of VNSAs and militant Islamism. I am the author or volume editor of twenty-two books and monographs, and I have written on these topics in peer-reviewed academic publications and the mainstream press. This work is outlined in my Curriculum Vitae, but some relevant selections include:

<u>Books and Monographs</u>

- *Islamic State 2021: Possible Futures in North and West Africa* (with J. Zenn and N. Barr), Foundation for Defense of Democracies, 2017.
- *The Islamic State's Global Propaganda Strategy* (with N. Barr and B. Moreng), ICCT – The Hague, 2016.
- *The War between the Islamic State and al-Qaeda: Strategic Dimensions of a Patricidal Conflict* (with J. Fritz, B. Moreng and N. Barr), Valens Global, report produced for U.S. Special Operations Command Central (SOCCENT), 2015.
- *The Crisis in North Africa: Implications for Europe and Options for EU Policymakers* (with N. Barr, G. Willcoxon, and N. Basuni), Netherlands Institute of International Relations Clingendael, 2015.
- *Ansar Bayt al-Maqdis's Oath of Allegiance to the Islamic State*, Wikistrat, 2015.
- *Bin Laden's Legacy*, New York: John Wiley & Sons, 2011.

Book Chapters

- "MENA Countries' Responses to the Foreign Fighter Phenomenon," in A. de Guttry et al. eds., *Foreign Fighters Under International Law and Beyond* (The Hague: T.M.C. Asser Press, 2016).
- "The Evolution of Post-Ben Ali Tunisian Jihadism," in A. Celso & R. Nalbandov eds., *The Crisis of the African State* (Quantico, Va.: Marine Corps University Press, 2016).
- "The Genesis, Rise, and Uncertain Future of al-Qaeda," in R. Law ed., *The Routledge History of Terrorism*, Routledge, 2015.
- "Violent Non-State Actors in the Afghanistan-Pakistan Relationship," in C. Fair & S. Watson eds., *Pakistan's Challenges*, University of Pennsylvania Press, 2015.
- "The Legacy of Osama bin Laden's Strategy," in David Kamien ed., *The McGraw-Hill Homeland Security Handbook*, McGraw-Hill, 2012.

Academic and Technical Publications

- "Violent Non-State Actors in the Age of Social Media: A Twenty-First Century Problem Requires a Twenty-First Century Toolkit," *Georgetown Security Studies Review*, special issue, February 2017.
- "How al-Qaeda Survived the Islamic State Challenge" (with N. Barr), *Current Trends in Islamist Ideology* (Hudson Institute), August 30, 2016.
- "Recent Attacks Illuminate the Islamic State's Europe Attack Network" (with N. Barr), *Jamestown Foundation*, April 27, 2016.
- "Tunisian Jihadism After the Sousse Massacre" (with B. Moreng), *CTC Sentinel*, October 2015.
- "The Role of Iraqi Tribes after the Islamic State's Ascendance" (with S. Jensen), *Military Review*, July-August 2015.
- "A Critical Link between Jabhat al-Nusra and al-Qaeda: Abu Humam al-Suri," *Militant Leadership Monitor* 6:5 (May 2015).
- "Al-Shabaab's Insurgency in Somalia: A Data-Based Snapshot" (with H. Appel), *Georgetown Journal of International Affairs*, April 3, 2014.
- "Perceptions of the 'Arab Spring' Within the Salafi Jihadi Movement" (with T. Vassefi), *Studies in Conflict & Terrorism* 35:12, November 2012.

Commentary, Op-Eds, and Policy Analysis

- "Terrorists Are Using Drones Now. And That's Not the Worst of It," *Fortune*, September 9, 2017.
- "The Manchester Attack Shows How Terrorists Learn," *The Atlantic*, May 23, 2017.
- "Lone Wolves No More," *Foreign Affairs*, March 27, 2017.
- "ISIL's Virtual Planners: A Critical Terrorist Innovation," *War on the Rocks*, January 4, 2017.
- "A Grim Anniversary: 15 Years after 9/11, the War against Radical Islamist Terrorism is not Looking Good," *New York Daily News*, September 11, 2016.
- "Rebranding Terror" (with T. Joscelyn), *Foreign Affairs*, August 28, 2016.
- "Bloody Ramadan: How the Islamic State Coordinated a Global Terrorist Campaign," *War on the Rocks*, July 20, 2016.
- "Boko Haram's Buyer's Remorse" (with J. Zenn), *Foreign Policy*, June 20, 2016.

- "Sunni Tribes Need Arms and Support to Fight ISIS," *New York Times*, June 1, 2015.
- "From Westgate to Garissa, Shabaab's Murderous Wave," *Foreign Policy*, April 10, 2015.
- "Zawahiri's Revenge," *Foreign Policy*, July 31, 2014.
- "The Jihadist Governance Dilemma" (with A. Magen), *Washington Post* (Monkey Cage blog), July 18, 2014.
- "Al-Qaeda in Iraq and the Abu Ghraib Prison Break," *Project Syndicate*, July 23, 2013.

I have also spoken at numerous events and conferences throughout the globe. Presentations and conference papers that I have delivered include:

- "Sixteen Years After 9/11: Assessing the Terrorist Threat" (panel), New America Foundation, Washington, D.C., September 11, 2017.
- "The Jihadist Landscape in South Asia," Near East South Asia Center, National Defense University, Washington, D.C., August 14, 2017.
- "Change or Continuity Since 2014: ISIS in Global Context" (panelist), The Evolving Terrorist Threat conference, The RAND Corporation, Arlington, Va., June 27, 2017.
- "Terrorism in 2020" (panelist), Department of Defense Combating Terrorism Intelligence Conference, Reston, Va., May 9, 2017.
- "What Next?: Regional Trends and Threats," Conference on What the New Administration Needs to Know About Terrorism & Counterterrorism, Georgetown University Center for Security Studies and St Andrews University Handa Centre for the Study of Terrorism and Political Violence, Washington, D.C., January 26, 2017.
- "How Does It All End?" workshop, panelist, National Counterterrorism Center (NCTC), McLean, Va., January 12-13, 2017.
- Keynote speech, After ISIL: Stability and Spillover, sponsored by U.S. Army Special Operations Command and the Laboratory for Unconventional Conflict & Simulation (LUCAS), Duke University, Durham, N.C., December 2, 2016.
- "The Future of Violent Extremism," Executive Program in Counter-Terrorism, CREATE center, University of Southern California, Los Angeles, August 3, 2016.
- "The Competition between the Islamic State and al-Qaeda," Kazakhstan Institute for Strategic Studies, Astana, Kazakhstan, March 2, 2016.
- "The Competition between the Islamic State and al-Qaeda: Implications for Regional States and the Future of the Jihadist Movement," NATO Advanced Research Workshop, Brussels, October 6, 2015.
- "The ISIS Campaign in Anbar," National Defense University, Washington, D.C., October 20, 2014.
- "Terrorism and the United Arab Emirates," National Defense College, Abu Dhabi, September 14, 2014.
- "Tunisia and Ansar al-Sharia: Foreign Fighters and the Evolution of a Jihadist Group," Combating Terrorism Working Group, Brussels, April 24, 2014.
- "Ansar al-Sharia's War with Tunisia," International Centre for Counter-Terrorism – The Hague, Netherlands, February 20, 2014.
- "Violent Non-State Actors: Strategies and Tactics in Addressing the Problem," Centre for Public Policy Research, Kochi, India, December 6, 2013.

- "Afghanistan After the United States Drawdown," O.P. Jindal Global University, Sonipat, India, December 4, 2013.
- "Ansar al-Sharia Tunisia's Long Game: Dawa, Hisba, and Jihad," Association for the Study of the Middle East and Africa Annual Conference, Arlington, Va., November 22, 2013.
- "Ansar al-Sharia Tunisia: *Dawa*, *Hisba*, and *Jihad*," International Centre for Counter-Terrorism – The Hague, Brussels, Belgium, April 19, 2013.
- "Dispatches from Mali," discussion sponsored by *Foreign Policy* and the Pulitzer Center on Crisis Reporting, Washington, D.C., January 30, 2013.
- "Why Are Consensus Views So Often Wrong in Regional Security Studies?," United States Naval Academy Africa Forum, Annapolis, Md., October 17, 2012.
- "The Arab Spring, Organizational Resiliency, and a New Operating Environment: Al-Qaeda's Outlook 2012," Defense Intelligence Agency Speaker Series, Washington, D.C., July 31, 2012.
- "Combating Olympic Terrorism: National and International Lessons," Potomac Institute for Policy Studies, Arlington, Va., July 25, 2012.
- "The Arab Awakening and the Future of al-Qaeda," Woodrow Wilson International Center for Scholars, Washington, D.C., May 10, 2012.
- "Al-Qaeda After bin Laden," School of Advanced International Studies, Johns Hopkins University, Washington, D.C., February 21, 2012.

A second relevant area of competency is my work on the militant white separatist and neo-Nazi movement. My writings on the subject include two technical publications written for the Foundation for Defense of Democracies ("Leadership vs. Leaderless Resistance" and "Assessing the Militant White Separatist Movement"), as well as popular press publications about the alliance between segments of the neo-Nazi and militant Islamist movements (including the article "The Peculiar Alliance" in the *Weekly Standard*, and a review of George Michael's seminal book *The Enemy of My Enemy*).

Work I have performed for government bodies as a certified expert has also covered white separatism and neo-Nazism. I have designed two training courses for the U.S. Department of State's Office of Anti-Terrorism Assistance—"Mitigating Prison Inmate Radicalization" and "Terrorism: Overview, Motives, and Methodologies"—that featured substantive discussion of the white separatist and neo-Nazi movement. And as previously noted, since June 2016 I have been the lead instructor for the U.S. Army Corps of Engineers' Individual Terrorism Awareness Course (INTAC). That course has featured a substantive discussion of white separatism in its unit on the U.S. Department of Defense's Northern Command geographic area (NORTHCOM).

A third relevant area of competency is the work I have undertaken on radicalization processes. My work on radicalization has focused in particular on the role played by the Internet and the online jihadist milieu—a focus that is relevant to the large number of Internet-focused pieces of evidence in the present case. My aforementioned work as a Senior Advisor to the U.S. Department of Homeland Security's Office for Community Partnerships (OCP) fundamentally related to the challenge of radicalization, as the purpose of CVE—which OCP is charged with advancing domestically—is reducing instances of radicalization and empowering communities to recognize

the danger signs. Furthermore, the projects I have undertaken for Jigsaw/Google involve providing technical expertise related to identifying and countering radicalization in the online sphere.

I was the lead author of a study that is frequently cited in the academic literature on the topic (*Homegrown Terrorists in the U.S. and U.K.: An Empirical Examination of the Radicalization Process*, 2009). Brian Michael Jenkins, a senior advisor to the president of the RAND Corporation and one of this country's preeminent scholars of terrorism, wrote about this study:

> Unless we can find ways to blunt the narrative of our terrorist foes, impede their recruiting, and discourage young men (and women) from destructive and self-destructive trajectories, terrorism will drain our resources, drag on our economy, and, yes, ultimately imperil our democracy. But in order to formulate intelligence and appropriate strategies to prevent this, we must understand better the process of radicalization and recruitment to terrorism. With this research, Gartenstein-Ross and Grossman significantly further that understanding.

I have testified before the U.S. House and Senate on the topic of radicalization three times, wrote an academic article (for the German journal *Der Bürger im Staat*) on radicalization in the U.S., and have published reviews of many the major academic works on the topic. Here are relevant publications of mine on radicalization, de-radicalization, and countering extremist ideologies:

- *Homegrown Terrorists in the U.S. and U.K.: An Empirical Examination of the Radicalization Process* (Washington, DC: FDD Press, 2009).
- "Lone Wolf Islamic Terrorism: Abdulhakim Mujahid Muhammad (Carlos Bledsoe) Case Study," *Terrorism and Political Violence* 26:110-28 (2014).
- "Islamistischer Terrorismus in den USA: 'Homegrown Terrorism' in den Vereinigten Staaten: Bedrohung, Ursachen und Prävention," *Der Bürger im Staat* (Germany), Winter 2011.
- "Save the Terrorism Prevention Toolkit" (with G. Selim), *War on the Rocks*, August 28, 2017.
- "Fixing How We Fight the Islamic State's Narrative" (with N. Barr), *War on the Rocks*, January 4, 2016.
- "Prominent European Islamic Terrorist Renounces Extremism," *The Atlantic*, October 19, 2010.
- "The Danger Signs of Terror," *National Post* (Canada), November 24, 2009.
- "How Do They Radicalize Others?," *Washington Times*, June 20, 2009.
- "Changing Minds," *Washington Times*, February 22, 2007.
- Book review, Ramón Spaaij, *Understanding Lone Wolf Terrorism*, in *War on the Rocks*, October 27, 2014.
- Book review, Clark McCauley & Sophia Moskelenko, *Friction*, in *Pragati*, November 2, 2012.
- Book review, Assaf Moghadam, *The Globalization of Martyrdom*, in *Association for the Study of the Middle East and Africa Book Notes*, October 15, 2010.
- Book review, Tore Bjørgo & John Horgan eds., *Leaving Terrorism Behind*, in *Association for the Study of the Middle East and Africa Book Notes*, April 14, 2010.
- Book review, Alan B. Krueger, *What Makes a Terrorist: Economics and the Roots of*

Terrorism, in *Association for the Study of the Middle East and Africa Book Notes*, 2009.
- Book review, Marc Sageman, *Leaderless Jihad*, in *Middle East Quarterly*, Summer 2009.
- Book review, Quintan Wiktorowicz, *Radical Islam Rising*, in *Middle East Quarterly*, Winter 2009.

Here is a selection of relevant presentations I have delivered on radicalization, deradicalization, and countering extremist ideologies:

- "Countering Violent Extremism," presenter and panelist, Homeland Security Training Institute, College of DuPage, Glen Ellyn, Ill., March 29, 2017.
- "Counterterrorism/Extremism and the Internet Challenge," respondent, Quad-Plus Dialogue, hosted at the Heritage Foundation, Washington, D.C., March 1, 2017.
- "The Growing Challenge," keynote address, Social Media Narratives and Extremism Workshop, sponsored by the Near East South Asia Center, National Defense University, Casablanca, Morocco, August 16-17, 2016.
- "As the Rest of the World Gets Online: Implications for Militant Groups, Stability, and Social Change," keynote speech, Transportation Security Administration (TSA) Intel Talk series, Arlington, Va., July 13, 2016.
- "Transnational Terrorism, Foreign Fighters and Youth Radicalization," Developing Strategies to Address Contemporary Security Challenges on Europe's Southern Flank, George C. Marshall European Center for Security Studies, Garmisch, Germany, May 10, 2016.
- "Cyber Technology Roles and Trends in Radicalization," keynote presentation, U.S. Army Special Operations Command Commander's Conference, West Point, N.Y., May 4, 2016.
- "Intellectual Frameworks for Counter-Messaging," U.S. Special Operations Command Central (SOCCENT), January 26, 2016.
- "On Tribalism, Jihadists, and Lone Wolf Political Violence," panel, Understanding the Extremist Threat workshop, Institute for National Strategic Studies, Washington, D.C., March 11, 2015.
- "Africa's Youth in the Age of Extremism," panelist, National Committee on American Foreign Policy, New York City, September 26, 2013.
- "Lone Wolf Islamic Terrorism: Abdulhakim Mujahid Muhammad (Carlos Bledsoe) Case Study," Lone Wolf and Autonomous Cell Terrorism, conference at Uppsala University, Uppsala, Sweden, September 25, 2012.
- "Islamist Radicalization," U.S. Marine Corps Command and Staff College, Quantico, Va., February 22, 2012.
- "Terrorist Use of the Internet," National Counterterrorism Center, Conference on al-Qaeda and the Global Threat, Warrenton, Va., July 28, 2011.
- "Ideas, Identity, and Terror," keynote speech, The Impact of Identity Politics on Violent Extremism: Regional Perspectives, Global Futures Forum, Monterey, Calif., April 7, 2011.
- "Countering Youth Radicalization," Preventing Youth Radicalization Conference, Ottawa Police Service, Ottawa, December 7, 2010.
- "Islamic Radicalization to 2025," Special Operations Command Europe (SOCEUR), Component Commander's Conference, Garmisch, Germany, November 16, 2010.

My research and scholarship in all three of these areas is consistent with best academic practices. I mainly rely on primary-source information, including statements and social media postings by extremist groups and their supporters, and internal documents intercepted by the United States or other governments. I cross-check all primary sources I read against other primary-source information, against information about events on the ground in relevant theaters, and against relevant secondary-source literature that allows me to determine whether my conclusions are consistent with those of other scholars and practitioners. I also check my analytic track record against unfolding events to determine if my anticipatory analysis is accurate, or if it requires some recalibration.[6]

In February 2017, the U.S. Attorney's Office in the Eastern District of Virginia asked me to review evidence gathered during the criminal investigation in the above-entitled case, *United States v. Nicholas Young*, including: digital media seized from the defendant's computer; various texts, documents, and items obtained from the defendant's belongings; records of Internet use by the defendant; photographs of the defendant seized from the defendant's computer; and weapons and combat gear possessed by the defendant. I was thereafter requested to produce a report, based on my expertise and experience, describing the cultural significance of the items seized from the defendant.

This report first examines what an examination of militant Islamism and neo-Nazism, as well as relevant academic research, can tell us about radicalization to violent extremism within these two ideological strains. It begins by explaining the commonalities between radicalization mechanisms in militant Islamism and neo-Nazism, then outlines how there has been a historical convergence between segments of the militant Islamist and Nazi or neo-Nazi movements. Following this exploration of radicalization dynamics, the report examines the cultural significance of evidence that the U.S. Attorney's Office in the Eastern District of Virginia has provided to me.

I. The Commonality Between Radicalization Mechanisms in Militant Islamism and Neo-Nazism

For decades, scholars of political and religious extremism have examined the reasons that some individuals who possess radical beliefs engage in terrorism and political violence to advance their cause. The academic literature has established several pathways that individuals follow from extremism to terrorist violence. Two major radicalization pathways are quite similar for militant Islamists and neo-Nazis. Some scholars emphasize the importance of *radical ideology*, or radical opinion, in driving people to illegally support militant groups.[7] And some scholars emphasize the

[6] For one framework on measuring forecasting, which I have adapted to measure my own work, see Philip E. Tetlock & Dan Gardner, *Superforecasting: The Art and Science of Prediction* (New York: Random House, 2015).

[7] See, for example, Michael Jensen & Gary LaFree, *Final Report: Empirical Assessment of Domestic Radicalization (EADR)* (College Park, MD: University of Maryland, 2016); Daveed Gartenstein-Ross & Laura Grossman, *Homegrown Terrorists in the U.S. and U.K.: An Empirical Examination of the Radicalization Process* (Washington, DC: Foundation for Defense of Democracies, 2009); Assaf Moghadam, *The Globalization of Martyrdom: Al Qaeda, Salafi Jihad, and the Diffusion of Suicide Attacks* (Baltimore: The Johns Hopkins University Press, 2008); Mitchell D. Silber & Arvin Bhatt, *Radicalization in the West: The Homegrown Threat* (New York: New York City Police Department Intelligence Division, 2007); Quintan Wiktorowicz, *Radical Islam Rising: Muslim Extremism in the West* (Oxford: Rowman & Littlefield, 2005).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA L. FOLEY, *et al.*,
Plaintiffs

v.

SYRIAN ARAB REPUBLIC, *et al.*,
Defendants.

Civil Action No. 11-699 (CKK)

MEMORANDUM OPINION
(April 13, 2017)

This case arises from the deaths of three Americans—Laurence Michael Foley, Sr., Keith Matthew Maupin and Kristian Menchaca—in Iraq and Jordan between 2002 and 2006. Plaintiffs—the estates and family members of the deceased—allege that all three were killed by a terrorist organization led by Abu Mus'ab al-Zarqawi (the "Zarqawi Terrorist Organization"). Proceeding under the Foreign Sovereign Immunities Act ("FSIA"), Plaintiffs allege that Defendants Syrian Arab Republic ("Syria"), Syrian Military Intelligence, Syrian President Bashar al-Assad and Syrian General Asif Shawkat, provided material support and resources to the Zarqawi Terrorist Organization and accordingly should be held liable for these deaths. The Court agrees.

Defendants have not answered or otherwise participated in this litigation, with the exception of filing an opposition to a motion filed by Plaintiffs regarding the sufficiency of service. The case accordingly proceeded in a default setting. The Court held a liability hearing on November 16 and 17, 2016. Upon consideration of the pleadings, the relevant legal authorities, and the record as a whole, the Court now determines that Plaintiffs have established their claims by evidence satisfactory to the Court, and will accordingly GRANT default

had to take a bus to Damascus and then got into the network that eventually brought him into [Iraq]"). Congress officially recognized this support that Syria was providing to terrorist groups in the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003. Schenker T2-141-42. In that Act Congress declared that:

> It is the sense of Congress that—
> . . .
> (2) the Government of Syria should—
> (A) immediately and unconditionally stop facilitating transit from Syria to Iraq of individuals, military equipment, and all lethal items, except as authorized by the Coalition Provisional Authority or a representative, internationally recognized Iraqi government;
> (B) cease its support for "volunteers" and terrorists who are traveling from and through Syria into Iraq to launch attacks; and
> (C) undertake concrete, verifiable steps to deter such behavior and control the use of territory under Syrian control;

Ex. 43 (Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, § 3(2), 117 Stat. 2482).

As primarily relevant to this case, the support described above was crucial to the Zarqawi Terrorist Organization. The Zarqawi Terrorist Organization, led by Jordanian born Abu Mus'ab Al-Zarqawi, was a group dedicated to what it viewed as the earliest principles of Islam and committed to a strategy of fomenting unrest in Middle Eastern countries through terrorist acts with the goal of eventually establishing religious governance. Gartenstein-Ross T2-59-62.[4] Although effectively the same organization throughout, the Zarqawi Terrorist Organization operated under various names during the time period relevant to this case, including, among others, "Jamaat al-Tawhid wal-Jihad" ("JTJ"), "al-Qaeda in Iraq" ("AQI") and "Mujahidin Shura

[4] Having considered the requirements set forth in Federal Rule of Evidence 702 for the admission of expert testimony, the Court qualified Daveed Gartenstein-Ross as an expert in the evolution of the history of terrorist organizations and their claims of responsibility for acts of terrorism. Gartenstein-Ross T2-56; Ex. 27 (Gartenstein-Ross Curriculum Vitae).

that Opinion here and accordingly concludes that the Court has personal jurisdiction over Defendants. There are no due process concerns raised by the Court's exercise of personal jurisdiction over the Defendants because "foreign states are not 'persons' protected by the Fifth Amendment." *Price*, 294 F.3d at 96.

C. Damages

Lastly, Plaintiffs have moved this Court for an order authorizing the appointment of a Special Master to administer the damages portion of these proceedings. *See* Mot. for the Court's Appointment of a Special Master to Administer Damages Proceedings, ECF No. 70. Having found in favor of Plaintiffs with respect to jurisdiction and liability, the Court finds it appropriate to now GRANT Plaintiffs' Motion and appoint Mr. Alan L. Balaran as a Special Master to conduct damages proceedings. 28 U.S.C. § 1605A(e) ("The courts of the United States may appoint special masters to hear damage claims brought under this section."). The Court will enter a separate Order and Administrative Plan for these proceedings.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS default judgment against all Defendants in this case and will refer this matter to a Special Master to administer damages proceedings. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 04-385-A**
	)	
ALI AL-TIMIMI,	)	
	)	
Defendant.	)	

MOTION IN LIMINE REGARDING EXPERT WITNESSES PROFFERED BY THE UNITED STATES

COMES NOW Ali Al-Timimi, by counsel, and for his Motion in Limine Regarding Expert Witnesses Proffered by the United States, states as follows:

I. Introduction.

Dr. Al-Timimi was charged in a 10 count Superseding Indictment. Count 1 charges a violation of 18 U.S.C. §§ 2 and 924(n) (Inducing Others to Conspire to Use Firearms); Count 2 charges a violation of 18 U.S.C. § 373 (Soliciting Others to Levy War); Count 3 charges a violation of 18 U.S.C. §§ 2 and 2384 (Inducing Others Conspire to Levy War); Count 4 charges a violation of 50 U.S.C. § 1705 (Attempting to Contribute Services to the Taliban); Count 5 charges a violation of 18 U.S.C. § 2 and 50 U.S.C. § 1705 (Inducing Others to Aid the Taliban); Count 6 charges a violation of 18 U.S.C. §§ 2 and 371 (Inducing Others to Conspire to Violate the Neutrality Act); Counts 7 and 8 charge violations of 18 U.S.C. §§ 924(c) and 2. (Inducing Others to Use

Firearms); and Counts 9 and 10 charge violations of 18 U.S.C. §§ 844(h) and 2 (Inducing Others to Carry Explosives). Dr. Al-Timimi has entered a plea of not guilty to all charges and has requested trial by jury.

The General Allegations section of the Superseding Indictment purports to present the historical background to the charges in this case. Paragraph 2 seeks to define the Taliban. Paragraph 3 seeks to define the Al Qaeda movement with references to the most reviled person in the world, Osama Bin Laden. That paragraph alleges that the Taliban and Al Qaeda were allied as of 1996, a date that precedes every other event listed in the Superseding Indictment by at least 5 years. Paragraph 4 purports to detail the organization known as Lashkar-e-Taiba (LET) but omits the fact that LET was not designated as a terrorist organization by the United States until December 2001. Paragraphs 5 thru 9 detail events in the war against terrorism including the attacks of September 11, 2001 and the United States invasion of Afghanistan in 2001.

The allegations regarding the alleged criminal conduct of Dr. Al-Timimi, however, do not even begin until "on or about September 16, 2001," the date that the government believes a meeting was held at the Kwon residence. (Superseding Indictment Overt Act 2, page 5) Overt Acts 1 thru 6 are alleged to have taken place at this meeting at Kwon's house and involve a number of statements attributed to Dr. Al-Timimi which on some of those present at the meeting claim to have heard. Overt Act 7, page 6, involves an alleged statement made by Dr. Al-Timimi on September 17, 2001. Overt Act 20, page 7, involves oral statements allegedly attributed to Dr. Al-Timimi that individuals were obligated to help the Taliban in the face of an attack by the United States though not

one person identified in that paragraph is alleged to have taken up arms against the United States or been induced by Dr. AL-Timimi to commit any crime. Finally, the government sets forth the "space shuttle" message, an example of extremely unpopular religious and political speech which has nothing to do with the charges in the indictment, in hopes of prejudicing the jury against Dr. Al-Timimi to return an guilty verdict based on emotion. (Overt Act 25, pages 8-9)

With this background, the government has identified three "expert witnesses" who it proffers will testify as to a variety of matters. As is set forth below, these "opinions" are not proper under Fed. R. Evid. 702, are grossly overbroad if admissible, and/or contain statements that should not be admitted under Fed. R. Evid. 403 and Fed. R. Evid. 404.

II. The Testimony Of The Government's Proposed "Experts" Is Not Admissible.

Fed. R. Evid. 702 governs the admissibility of expert opinion testimony:

> 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 the case.

Rule 702 assigns to the district court the role of gatekeeper and charges the court with assuring that expert testimony "rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The Court has articulated a two-step inquiry for determining whether such evidence or testimony is admissible. *United States v. Finley*, 301 F.3d 1000, 1008 (9th

Cir. 2002), *citing Daubert*, 509 U.S. at 591-93, 595. First, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id., quoting Daubert*, 509 U.S. at 592-93. The Court cautioned that the district court must focus "on [the] principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Second, the court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact. *Id.* at 592-93.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court made it clear that the district court's duty to act as gatekeeper and to assure the reliability of expert testimony before admitting it applies to all expert testimony, not merely scientific expert testimony. *See also United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002). The Supreme Court has identified some factors for the trial court to consider when exercising its gatekeeper role: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 592-94.

A. Opinion of Evan Kohlmann.

The government has produced no information or evidence that would indicate that Mr. Kohlmann's opinions have been tested, subject to any peer review, whether there are known error rates applicable to is theory or technique, nor whether his

technique or theory enjoys general acceptance within any scientific or historic community. That opinion is therefore improper as is shown in detail below.

1. <u>The government's "terrorism expert" is not sufficiently qualified</u>.

The government's "terrorism expert" - Evan Kohlmann - is a 25 year old recent law school graduate and a self-proclaimed expert in terrorism[1] who sells himself on the internet as the "The 'Doogie Howser' of Terrorism."[2] His website proclaims:

> Kohlmann has served as an approved expert witness[3] on behalf of federal prosecutors in various terrorism matters, including most recently before Judge Leonie Brinkema in United States v. Masoud Khan, et al.[4] (U.S. District Court for the Eastern District of Virginia).

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[1] While Kohlmann's curriculum vitae includes experience as a Senior Terrorism Consultant for the Investigative Project in Washington, D.C. from February 1998 to present, he testified in the Khan case that he "was getting paid part-time by a think tank in Washington, D.C., known as the Investigative Project" (*Id.* at 1191) where he "worked part-time since February of 1998." (*Id.* at 1203) When he testified in the Khan case Kohlmann "worked as a consultant. [He was] a full-time law student, and that [took] up most of [his] time. . . ."(Khan trial transcript at 1203)

[2] Of course, Doogie Howser was a character in a television show in which an actor portrayed a very young medical doctor. Doogie Howser was not really a doctor.

[3] However, Kohlmann specifically testified only as a fact witness for the government in the Khan case. Khan trial transcript, 1147, 1176. While the government proffered to the Court that Mr. Kohlmann could qualify as an expert in the area of terrorist organizations and searching and tracing information on the Internet it never attempted to do so. *Id.* 1176, 1181-1182.

[4] However, Kohlmann's his testimony concerned various internet sites he had accessed while a "full-time student at Georgetown University. [Kohlmann] was working part-time at a think tank that studie[d] this stuff, but the majority of the work [he] did on the websites was actually at [his] own private expense. . . . [He] was doing [a] course of study at the time at Georgetown which was based on Middle East studies, and part of [his] research for [his] work involved these websites. [He] wrote numerous papers concerning these websites about such groups as [were] mentioned [in the Khan case]. But again [he] was a full-time student." *Id.*

(http://www.globalterroralert.com/about.htm)

Thus, while Kohlmann may have done a considerable amount of research and written papers for his colllege classes on the subject of Middle Eastern dissident groups, (Khan trial transcript at 1192) that does not make him or anyone else who has studied the subject matter in school an expert. Nor does publishing one book necessarily make him an expert.

Kohlmann is only one of many persons who have, in the aftermath of September 11, 2001, attempted to capitalize on the terrorism "cottage industry" by making regular appearances in the media by labeling themselves as experts. While many such individuals have frequented the television[5] and newspaper circuit and have been widely quoted in the media on "terrorism" issues, the undersigned believes that Kohlmann has never been qualified by a Court to testify as an expert on "Al-Qaeda" and/or international jihad in its historical and modern manifestations, including its ideology and infrastructure in recruiting and funding terrorism. Since this case essentially involves a claim that the defendant is a recruiter of young Muslims to fight jihad, and because Kohlmann has disclosed no expertise in that area, he cannot offer the proffered opinions. Moreover, he lacks any necessary experience and training in law enforcement, in the intelligence community or otherwise, which would permit him to offer credible "expert" testimony regarding Al-Qaeda and what the government describes as "international jihad," including the infrastructure associated with recruiting

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[5] Kohlmann's resume indicates that he is a frequent commentator on Fox News and other media outlets. Having one's face appear on television is not a basis for a court to declare someone an expert.

and funding of terrorism. *See United States v. Haro-Espinoza*, 619 F.2d 789, 795 (9th Cir. 1979) ("The question whether a witness may be qualified as an expert is a question of preliminary fact to be decided by the district court."); Fed. R. Evid. 104(a); Fed. R. Evid. 702.

The defense is not absolutely sure even what opinion the witness is expected to offer. This disclosure then is entirely inadequate under Fed. R. Evid. 702 and Fed. R. Evid. 703. In his November 12, 2004 Discovery Letter #3 to the defense, AUSA Kromberg stated:

> I expect Mr. Kohlman to testify as an expert on the origins of the Arab-Afghans, Al-Qaida, the Taliban, and Lashkar-e-Taiba. I expect him to testify as an expert regarding the relationship between jihad fighters in Bosnia, Pakistan, and Afghanistan, and the connections between Lashkar-e-Taiba, the Taliban and Al-Qaida, and the history of Usama bin Laden and Al-Qaeda's war against the United States, before 9/11. I expect Mr. Kohlmann to testify that, from about 1995 until late 2001, the Taliban was the political/military entity headquartered in Kandahar, Afghanistan, that exercised de facto control over portions of the territory of Afghanistan until its defeat in late 2001 and early 2002 by a multi-national coalition that included the United States. I expect him to identify a videotape as a depiction of Usama Bin Laden; I expect an Arabic translator to translate the speech of Bin Laden into English, which I expect will match the translation of the speech made in October of 2001 and found in the house of Masoud Kahn.
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> Mr. Kohlmann is also an expert in accessing and interpreting information found on the internet. I expect him to testify about the information released on the internet by Lashkar-e-Taiba between 1999 and 2001. I expect him to testify that, by September 13, 2001, it was widely reported that the Bush administration won NATO support for a possible strike against Bin Laden and his supporters in Afghanistan. Finally, I expect him to testify that, that same day, newspapers further reported that the Taliban was bracing for an imminent attack by the United States and sent its top leader Mullah Mohammed Omar into hiding. A synopsis of his proposed testimony is enclosed with this letter.

For the reasons set forth above, it would be improper for the Court to allow Mr.

Kohlmann to testify to his "study" of LET and the Internet. Any testimony as to the relationship between LET, the Taliban and Al Qaida could only be based upon pure speculation and bears with it a great risk of guilt by baseless association. The methodology by which these opinions are derived is undislosed entirely.

The government has seized Dr. Al-Timimi's computer and searched every nook and cranny of his home. It has seized or subpoenaed all of his phone records as well and has not identified a single telephone call made by the defendant to Afghanistan or Pakistan in the applicable time period.[6] Other than the alleged incidents set forth in the Superseding Indictment, there is absolutely no evidence that the defendant ever sought to recruit any person for any of these groups.

Finally, putting in LET bulletins that have not been connected to the defendant is not properly accomplished through an expert witness. If the government has LET bulletins that it can trace to him and place in his possession, that information could be used. It would be grossly prejudicial, however, to allow an "expert" to become the means admit these bulletins and much additional evidence without any link to the defendant. It is simply improper to use "expert" testimony to place otherwise inadmissible hearsay before the jury.

1. <u>The government's "terrorism expert" relies upon invalid reasoning and methodology</u>.

It is difficult to understand the actual opinions held by the government's

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[6] Dr. Al-Timimi's wife recalls that on two occasions she failed to dial area code when attempting to call the United Arab Emirates. She immediately hung up when she realized she had dialed the wrong number. In the following month's phone bill she noted that she had mistakenly dialed Afghanistan.

"terrorism expert" given the broad disclosure provided by the government for Mr. Kohlmann. However, it is submitted that any such opinions held by this witness is based upon invalid reasoning and methodology. In short, his opinions regarding Al-Qaeda, LET and the amorphous concept of international jihad as advanced by the government are not opinions or theories which as required by *Daubert/Kumho*: (1) can be tested; (2) subjected to peer review; (3) a known or potential error rate can be established; and (4) are generally accepted within the relevant community. No such support is even proffered and we are instead told that Mr. Kohlmann is well read person who regularly briefs government officials. Thus, in accordance with Rule 702, *Daubert* and *Kumho*, Dr. Al-Timimi respectfully requests that in the event the Court determines such testimony to be admissible, the Court should hold a *Daubert* hearing to conduct a thorough and probing analysis of this "terrorism" evidence before permitting expert testimony on the topic at trial.

Counsel has read Mr. Kohlmann's lengthy submission and the attached documents which, except for one, are papers written for various college classes. Submitting a paper for a grade is not the same as peer review. And, the papers that are produced could not form the basis for the proffered expert testimony. Thus, it is impossible to test the methods that are employed by Mr. Kohlmann in reaching his conclusions since we have no idea what those methods are. It is impossible, as a matter of time, for any of his works or writings to have been subject to peer review. College papers cannot be considered "peer tested" in the sense that a Ph.D. dissertation would be. Finally, we can have no idea what the error rate may be as to this method of analysis, but as is described below, many of the conclusions that have

been reached are subject to dispute and the sources of almost all of the "opinions" are merely hearsay of the worst kind such as untested Indictments.[7]

1. The proposed testimony is irrelevant to the charged offenses and otherwise overbroad.

Al Qaeda, "international jihad," and the vast majority of the matters disclosed by the government as the subject of "expert" testimony have nothing to do with the pending Superseding Indictment and the defense objects pursuant to Rule 403 and 404 to any reference in this case to Osama Bin Laden, Al Qaeda, and "international jihad," and to any references to terrorism. Dr. Al-Timimi is not facing any charges that he was ever engaged in or supported any act of terrorism or that he ever supported any act of terrorism.[8] Unlike John Walker Lindh who was charged with terrorism offenses, *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), Dr. Al-Timimi has not been so charged. Indeed, the government has removed that allegation, which was set forth as a sentencing enhancement in the original Indictment, from the Superseding Indictment. This case needs to be tried upon the facts of the events that occurred in Northern Virginia in September and October of 2001 and nothing else. The government hopes to drown the defendant in a sea of irrelevant allegations about Osama Bin Laden, Al Qaeda and terrorism. This is the true purpose of the proposed testimony.

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[7] Mr. Kohlmann's credentials have omitted his testimony in at least two additional trials as a government witness. We have no idea what opinion was proffered in either of those trials though we do know that both defendants - Benkhala and Al-Husayan - were acquitted.

[8] Terrorism is a term defined in 18 U.S.C. § 2331, Chapter 113B, that includes both international and domestic terrorism. Dr. Al-Timimi is not alleged to have violated any provision of Chapter 113B of Title 18 of the United States Code in this Superseding Indictment.

Moreover, the testimony of the government witnesses on Al Qaeda and Bin Laden and terrorism, will not assist the trier of fact to understand the evidence in this case or to determine a fact in issue as required by Rule 702 and will, as a matter of fact, be unduly prejudicial to the defense under Fed. R. Evid. 403. Stated simply, the topics of Bin Laden, Al-Qaeda, terrorism and "international jihad" fail to meet the relevancy requirements of Fed. R. Evid. 401, which requires the evidence to have the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The government is seeking to use the "aura effect" of expert testimony to lump the defendant in with the most notorious criminals of our time without any evidence of any contact or interaction of any sort between them. Such an "opinion" is inadmissible because it carries with it the risk of prejudice that the jury will see the defendant as part of the Al Qaeda organization or some other terrorist organization, when there is no evidence even cited in the Superseding Indictment that would support admission of such outlandish and prejudicial statements as opinions.

Such evidence must be "strictly relevant to the particular offense charged." *United States v. Anderson*, 933 F. 2d 1261, 1268 (5th Cir. 1991) cited in *United States v. Gutierrez-Arias*, 294 F. 3d 657, 622 (5th Cir. 2002). This testimony is not related in any way to the 10 specific counts in this case. Instead, the government hopes to use this testimony to show that Dr. Al-Timimi has the same "mental state or condition" as Bin Laden and others identified by Mr. Kohlmann, or to show the ultimate issue in this case - that is, that the defendant - like the rest of the terrorists discussed in this case - is a recruiter of jihads. This testimony is the functional equivalent of the government

offering an opinion that the defendant is guilty of the offenses charged because of the alleged "similarities" between the identified persons and the defendant. This is plainly impermissible and prejudicial. *Gutierrez-Arias* at 663.

The government here is counting upon the same effect by seeking to paint Dr. Al-Timimi as a cohort of Bin Laden when there is no evidence to support such a claim much less an issue in the case that requires that testimony.[9] Dr. Al-Timimi is not charged with providing or seeking to provide material support to Al-Qaeda. He is not charged with providing material support to LET because LET was not designated as a terrorist entity until December of 2001, after all of the events at issue in this case took place. And, as to Counts 4 and 5, the jury can simply be told that it was illegal to attempt to provide services to the Taliban. Since there is no evidence of any actual relationship between Dr. Al-Timimi and the Taliban, detailed information about the Taliban would not be helpful to the jury or relevant. *United States v. Johnson*, 952 F. 2d. 565 (1st Cir. 1991)("Evidence about Provisional IRA admissible because of "direct evidence of (defendant's) involvement with Provisional IRA.) That type of link is entirely absent in this case. That Dr. Al-Timimi may have offered scholarly views about the Taliban does not alter this analysis.

More specifically, the topics mentioned by the government in Mr. Kohlmann's "Synopsis of Testimony" ("Synopsis") are not relevant to the charges in the Superseding

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[9] See Letter from Kromberg, dated December 28, 2004, stating that the government intended to tie Dr. Al-Timimi to Bin Laden through Safar Hawali who was Dr. Al-Timimi's former teacher in Saudi Arabia. Bin Laden is alleged to have declared war on the United States on the grounds that Saudi Arabia incarcerated Hawali at the behest of the United States.

Indictment and much of the proffered opinion is for matters well outside of the time-frame of the Indictment. Only footnotes 9, 11, 19, 23, 30, 55-59 reference events within the time-frame of this Indictment. As such, the information in the testimony of the purported expert does nothing to assist the jury in determining whether Dr. Al-Timimi is guilty of the charged crimes and carries considerable risk of guilt by association. *United States v. St. Michael's Credit Union*, 880 F. 2d 579, 602 (1st Cir. 1989)

In furtherance of its effort to show guilt by association, the government wants to put on evidence of others engaged in terrorism and others recruiting terrorists - indeed, Mr. Kohlmann brags in his resume that he "[l]ed undercover investigative missions to interview recruiters for/supporters of al-Qaida, Hamas and other militant Islamic terrorist groups (including notorious UK-based clerics Abu Hamza Al-Masri and Omar Bakri Mohammed.)"[10] (Resume of Kohlmann) The government hopes that by painting a vast picture of Islamic terrorist recruiters, the jury will believe that this defendant must be one as well even though he is not charged with recruiting any terrorists - the word terrorist does not appear anywhere but in the preamble of the Superseding Indictment. At the same time, however, the government refuses to produce any of the information obtained by Kohlmann in his "interviews" of Al-Masri or Mohammed or other terrorist recruiters. Both of these admitted terrorist recruiters are veterans of the Afghanistan/Soviet war with close connections to Bin Laden and Al Qaeda. Dr. Al-Timimi did not fight in Afghanistan or anywhere else and has no connections to Bin

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[10] The defense has requested the information generated by these "undercover investigations" so as to be able to cross-examine Mr. Kohlmann and show that the defendant is not a recruiter of terrorism. That request was rejected.

Laden. Significantly, Dr. Al-Timimi is never even referenced in the Synopsis.[11]

Mr. Kohlmann's proposed testimony also veers far and wide from the issues in this case.[12] The synopsis of his testimony begins essentially with the birth of Osama Bin Laden to a wealthy family and makes reference to the Soviet War in Afghanistan. There is a list of plots that he attributes to Al Qaeda over time. That list is, as was referenced above, highly debatable and inaccurate. For example, most scholars, contrary to Mr. Kohlmann, do not believe that Bin Laden had anything to do with the attacks on U.S. helicopters in Mogadishu in 1993. The 1994 hijack of an Air France plane was the work of Algerian separatists and not Al Qaeda. Project Bojinka was hatched by Ramzi Yousef and Khalid Sheikh Mohammed long before either became involved in any way with Al Qaeda. Published reports indicate that Yousef was not involved with Al Qaeda in any way and that Khalid Sheikh Mohammed had no contact with Bin Laden until after 2000. Mr. Kohlmann's musings about the workings of the government of Pakistan are only musings - he never states that the source of his information is other than from some publication, sometimes a tabloid publication, and he does not have any first hand knowledge of anything in the report. He has never been to Afghanistan. He has never been to Pakistan. He has never met Bin Laden, Azzam, Sayed or most of the people he writes about.

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[11] Because none of the hearsay evidence upon which Mr. Kohlmann intends to rely would be admissible in this case, the government cannot use an expert to gain its admission without violating the confrontation clause.

[12] The synopsis of the proposed testimony of Evan Kohlmann, which is attached hereto as produced, is so unwieldy and unsupported that it is difficult to summarize for the Court's convenience.

He cites to government pleadings and exhibits as gospel, (e.g. Synopsis nn.2, 11, 12) and cites authoritatively from a pleading which was filed by the government as a response to a defendant's position with respect to sentencing factors in a case. (Synopsis n.17) He cites many times to experiences that are attributed to Randall Royer who has plead guilty and is available as a witness. Certainly, it would be improper for the government to attempt to use expert testimony as a substitute for Royer's testimony in this case much less to provide for his review summaries of FBI interviews of a cooperating witness. ("According to his [Royer's] interviews with the FBI...")(Synopsis p. 5) The section on LET shows only that, by his own estimation, Mr. Kohlmann is well read. He cites an article from the Kashmir Herald. (Synopsis n.9). He cites to "LET sources" for details about the assault on the Red Fort in 2000. (Synopsis n.29) He never identifies those sources other than to say that he has read about it on the internet which is not the most reliable source for information. He has almost no first hand information on any of these topics and is merely basing his opinion on information that is itself based as multiple levels of hearsay. He even repeats stories from a book, The Army of Medinah in Kashmir,[13] as if the information in that book cannot be questioned by anyone. (Synopsis p. 8) He cites the Los Angeles Times, the Secretary of State, some e-mails from a source identified as nadqpk@yahoo.com, (a.k.a. Taiba Bulletin) and other media sources. (Synopsis n.23, 30, 55, 56) He cites much information about Bosnia, a place that the government does

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[13] Al-Hindi, Esa, Army of Medinah. The book is published and sold primarily via the internet by Maktabah Al-Ansaar a bookstore in Birmingham, England. According to Kohlmann, the store was raided by British authorities for its links to Al-Qaida. (Synopsis p. 8)

not even allege that Dr. Al-Timimi has ever visited or had any contact with. Mr. Kohlmann does not read Arabic or Urdu and, thus, cannot read any of the original source materials but must rely on the translations of others. This is not an opinion that is helpful in a court of law - it is a Reader's Digest summary of many items of interest to the witness but irrelevant to this case and totally unreliable.

There are citations to postings on several websites that he has read. These postings are hearsay. Many of them predate the time when the government contends that the defendant became aware of the referenced website and others postdate the last events in this case. Some of these postings are even contrary to the government's theory of this case. One posting says that one September 15, 2001, the leader of LET stated that the September 11 attacks were "the doing of the Zionists and no Jihadic organization could be involved in such an **un-Islamic activity.**" (Emphasis added)(Synopsis n.55) This is the same time period in which the government contends that the defendant, as an obligatory follower of LET, was saying exactly the opposite. The "expert" then goes on to provide web pages from June of 2003, long after the conspiracy alleged in this case has ended even by the government's allegations. (Synopsis n.57, 58, 59)

In further support of his opinions, we are referred to several papers written in 1999 and 2000 by Mr. Kohlmann while a college student; A Web of Terror, Spring 2000; A Bitter Harvest: The Soviet Intervention in Afghanistan and its Effects on Afghan Political Movements, December 20, 1999, a paper written for professor Andrew Bennett; The Ideological Evolution of the Committee for the Defense of Legitimate Rights (CDLR), March 2, 2000, a paper written for Dr. Mamoun Fandy; An Afghan

Ghazi: The Modernization and Reforms of Amir Amanullah Khan, December 9, 1999, a paper written for professor Voll; 400 Years of Colonization: the Ottomans vs. the French in Algeria, 1519-1919, December 1, 1999, a paper written for professor Agoston. None of these papers have anything to do with any proffered opinion and certainly have not been subject to any peer review whatsoever.

And most interestingly, and in support of his proffered opinion, he has provided a paper for a Cybercrime Seminar titled Legal and Investigative Loopholes in Modern Cyberterrorism Cases, December 8, 2003. Of course, this defendant is not charged with Cyberterrorism so this paper is entirely meaningless to this case. That paper, however, does show the weakness of these "expert" analyses and methods and shows why this opinion cannot satisfy the Daubert test. In that paper, he cites authoritatively to the Indictment in Idaho of a young Muslim named Sami al-Hussayen for support for his belief that Muslim fundamentalists are using the internet for recruiting. That Indictment, he writes, revealed that Sami al-Hussayen was "giving 'expert computer services, advice, assistance and support' to Islamic organizations in America whose Internet sites 'accommodated materials that advocated violence against the United States.'"[14] (p. 19) Then, Mr. Kohlmann writes that "[t]o demonstrate our unbending resolve to merciless terrorists, we must break precedent and use all means to deter and punish them at our disposal." (p. 25) He then advocates, among other things, the dissemination of "false information" to accomplish those goals.

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[14] Khwaja Hasan also testified in the al-Hussayen case, stating that it was the website that al-Hussayen maintained that cause him to want to commit violent jihad. That testimony is also at odds with the government's theory in this case.

Mr. Kohlmann never discloses on his resume or anywhere else that he testified as a fact witness for the government in the al-Hussayen case and that the defendant was acquitted of all charges. Yet his opinion still relies on the truth of allegations set forth in an indictment that a jury found to be unsupported by evidence. This example alone should give the court great concern in reviewing this proposed testimony.

4. <u>The proposed testimony is unfairly prejudicial</u>.

In addition to invoking Rule 702, Dr. Al-Timimi moves alternatively to exclude such expert testimony under Fed. R. Evid. 403. Evidence that is otherwise admissible under Rule 702 may still be excluded under Rule 403 if its probative value is substantially outweighed by the unfair prejudice it would create. *United States v. Chang*, 207 F.3d 1169, 1172 (9th Cir. 2000); *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003).

If there is any relevance to such testimony, it is substantially outweighed by the danger it presents of unfair prejudice. "Unfair prejudice" within the rule means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an *emotional* one." (Emphasis added) Rule 403 Advisory Committee Notes. As this Court has noted, there is no subject currently more emotional in our country than terrorism in general, and September 11, 2001, and Al-Qaeda in particular. According to its disclosure, the government wants to offer "expert testimony" of "international jihad" and Al-Qaeda. The presentation of any such information would result in the jury's unfair prejudice against Dr. Al-Timimi. In addition, such information would confuse the jury and mislead them from the real issue of the case – whether Dr.

Al-Timimi induced the persons present at Kwon's home to commit various crimes in September and October of 2001. As such, the entire Kohlmann opinion is inadmissable under Rule 403.

No better example of a prejudicial and inflammatory opinion is the government's disclosure that it intends to

> ask Evan Kohlmann to testify regarding the relationship between Hawali and Bin Laden. As you know, Bin Laden based his declaration of war against the United States on the grounds that the Saudis incarcerated Hawali at the behest of the Americans.

(Letter from Kromberg, dated December 28, 2004)

There is no evidence that Kohlmann has ever met Bin Laden or Hawali or that he can provide any information as to their relationship, if any exists. Here the government's case of guilt by association and abuse of the rules of evidence reaches its peak. Dr. Al-Timimi once studied under Hawali and has remained in contact with the Saudi scholar. By using an expert to admit hearsay statements allegedly uttered by Bin Laden regarding Hawali almost 10 years ago, the government wants to connect Dr. Al-Timimi to Bin Laden through Hawali and thus convince the jury that there is a tie between Bin Laden and Dr. Al-Timimi. While this is patently false, such expert testimony cannot be admitted as it is not proper expert testimony and would be irrelevant and unduly prejudicial and would launch a mini-trial into the relationship between Dr. Al-Timimi and Hawali and Hawali and Bin Laden. Meanwhile, the government continues to refuse to produce any of the recorded telephone calls between Hawali and Dr. Al-Timimi.

For the reasons stated above, the Court should grant this motion in limine and

refuse to permit the government from eliciting the proposed testimony of Evan Kohlmann.

B. Opinion of John Miller.

The government has proffered that it intends to offer the expert opinion of John Miller that he had previously met Osama Bin Laden and that it is Osama Bin Laden on a videotape making a statement in October 2001. The government then intends to introduce a document found during a search of Masoud Khan's house in May 2003 which purports to be a translation of the Bin Laden statement which the government incorrectly labels as a "fatwa"[15] in the Superseding Indictment. (Overt Act 26, page 9)

The defense objects to the admission of this "expert opinion" that Miller has met Bin Laden and that the individual depicted on the tape appears to be Bin Laden as there is no basis for the admission of the videotape of Bin Laden making a statement or for the admission of the document containing the purported translation of the Bin Laden statement.

There is no indication that Dr. Al-Timimi knew or should have known that Masoud Khan possessed the translation of the Bin Laden statement. Furthermore,

---

[15] To call the Osama Bin Laden statement made in October 2001 a "fatwa" is to mischaracterize "fatwas." This statement is clearly not a "fatwa" but a speech available to anyone with access to the internet. A "fatwa" is defined as an "authoritative legal opinion given by a mufti (legal scholar) in response to a question posed by an individual or court of law. A fatwa is typically requested in cases not covered by fiqh literature and is neither binding nor enforceable. Its authority is based on the mufti's education and status within the community. If the inquirer is not persuaded by the fatwa, he is free to go to another mufti and obtain another opinion; but once he finds a convincing opinion, he should obey it." The Oxford Dictionary of Islam 85 (John L. Esposito, ed. 2003).

possession by Masaud Khan of the Bin Laden videotape and translation of the statement does not mean that Dr. Al-Timimi knew of the existence of the tape or agreed with the contents of the statement. Again the government is attempting to somehow tie Dr. Al-Timimi to Bin Laden through introduction of this tape and this purported "fatwa" of Bin Laden. The videotape and the translation are irrelevant, extremely prejudicial and inflammatory to Dr. Al-Timimi pursuant to Rules 403 and 404.

The defendant renews his Fed. R. Evid. 403 objection to any evidence about Bin Laden and Al Qaeda being admitted in this case.

A. Opinion of Robert Andrews.

The government has also given notice that it intends to call Robert Andrews to testify as an expert witness. His proposed testimony is as follows:

> Immediately after 9/11, the United States demanded that the Taliban turn over Bin Laden. On September 12, 2001, the Bush Administration won NATO support for a possible strike against Usama Bin Laden and his supporters in Afghanistan, and was pressuring Pakistan for intelligence and logistical backing. That same day, the Taliban was bracing for an imminent attack by the United States and sent its top leader Mullah Omar into hiding.
>
> After the Taliban refused those demands, the United States and allied forces entered Afghanistan and engaged the Taliban in combat to prevent it from allowing Al-Qaeda to use Afghanistan as a base for terrorist acts against the United States and around the world. American troops started a ground war against the Taliban on or about October 20, 2001. On or about October 21, 2001, American commandos seized an airfield in southern Afghanistan and then raided a compound of Taliban leader Mullah Mohammed Omar. On or about November 10, 2001, the Taliban lost the key city of Mazar-e-Sharif, and then the northern provincial capitals of Shibarghan, Aybak, and Maimana. By November 11, 2001, the Taliban was being routed through northern Afghanistan. On or about November 13, 2001, the Taliban withdrew from the Afghan capital of Kabul and Northern Alliance forces allied with the United States took control of the city. By November 15, Taliban forces had retreated to Kandahar.

While Mr. Andrews' service to the nation as a Green Beret and his current position in the Defense Department may make him qualified as an expert in military matters, it is difficult to see how this "opinion" can be offered as expert testimony pursuant to Fed. R. Evid. 702. The defendant incorporates his prior Daubert and Fed. R. Evid. 702 arguments as to Mr. Andrews' proposed testimony.

Moreover, the proposed opinion it is simply irrelevant to the issues in this case and if the government seeks to offer this testimony, the court should reconsider the matters already adjudicated in which the government claimed that most of these issues, or issues related to these facts, were immaterial to the defense of this case. For example, the defense requested many items related to the diplomatic negotiations between the United States and Pakistan relevant to the war plans and negotiations with the Taliban because they would show, that on or about September 16, 2001, there was no certainty whatsoever that the United States would go to war in Afghanistan. If the persons at Kwon's home did not know that war was imminent then it is unlikely that the defendant could have solicited people to levy war against the United States in a war that was potentially avoidable. Such evidence is necessary to defend particularly against Count 2 of the Indictment which charges solicitation to levy war against the United States. *See*, Motion for Access to Material and Exculpatory Witnesses in the Custody and Control of the United States and For Production of Certain Items Referenced by 9/11 Commission. (November 19, 2004) and Motion to Reconsider (December 23, 2004). The materials requested in that motion relate almost entirely to some of the events that this expert is expected to present to the jury. The government has claimed at all times that the defense has no need for any of the information that

shows what actually happened relative to the United States and the Taliban in September of 2001. It should not be allowed to put on its own one-sided and sanitized presentation of those events.

For these reasons, the defendant moves this court to grant his motion in limine regarding the government's proffered "expert" witnesses.

Respectfully submitted,

Ali Al-Timimi
By Counsel

Edward B. MacMahon, Jr. VSB #25432
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20117
540-687-3902

Alan H. Yamamoto VSB #25872
643 S. Washington Street
Alexandria, Virginia 22314
703-684-4700

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was hand-delivered to the U.S. Attorney's box located in the U.S. District Court Alexandria Clerk's Office and sent via facsimile this 28 day of February 2005 to Gordon Kromberg, Esq., Assistant United States Attorney, 2100 Jamieson Ave., Alexandria, Virginia, 22314.

Alan Yamamoto

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	.	Criminal No. 1:04cr385
	.	
vs.	.	Alexandria, Virginia
	.	March 18, 2005
ALI AL-TIMIMI,	.	9:00 a.m.
	.	
Defendant.	.	
	.	
. . . . .	.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:
GORDON D. KROMBERG, AUSA
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
and
JOHN T. GIBBS, ESQ.
Counterterrorism Section
Criminal Division
United States Department of Justice
601 D Street, N.W.
Washington, D.C. 200

FOR THE DEFENDANT:
EDWARD B. MAC MAHON, JR., ESQ.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20118
and
ALAN H. YAMAMOTO, ESQ.
643 S. Washington Street
Alexandria, VA 22314

03 - 18 -05 motions.txt
OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Fifth Floor
401 Courthouse Square
Alexandria, VA 22314
(703)299-8595

(Pages 1 - 49)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

(Defendant present.)

THE CLERK: Criminal Case 2004-385, United States of America v. Ali Al-Timimi. Will counsel please note their appearance for the record.

MR. KROMBERG: Good morning, Your Honor. Gordon Kromberg and John Gibbs for the United States.

THE COURT: Good morning.

MR. MAC MAHON: Good morning, Your Honor. Edward MacMahon and Alan Yamamoto for Ali Al-Timimi.

THE COURT: All right, this matter comes on for pretrial motions that I've had a chance to review. Now, some of these motions have become moot. My understanding is that the government has agreed and I don't know if they have yet succeeded in turning over the cellular telephone records that were at issue.

* * *

the Reuters report from Pakistan occurred on September 16. It didn't come into the newspaper in the Washington Post until September 17.

THE COURT: All right. The last expert witness in the motion in limine is Mr. Kohlmann. Now, despite the defendant's arguments and despite Mr. Kohlmann's youth, this Court has watched him, I've heard him testify twice. He is in my view qualified to testify as an expert on both the issue of the particular aspects of terrorism in the Middle East and with fundamentalist Islamic groups that he's been proffered for as well as the Internet and how these groups are communicating back and forth.

The one area, however, of Kohlmann's proposed testimony about which I have serious concern is the Hawaali testimony, all right, because of other issues that we can probably not resolve today, and I'm considering actually not permitting that testimony to come in. I think that, No. 1, is stretching, and No. 2, it opens a Pandora's box of other issues.

MR. KROMBERG: That's fine, Judge. We'll -- it turns out in looking -- there's some evidence seized from Mr. Timimi that actually explains the relationship between Hawaali and Bin Laden, and we might be able to just do it that way, and we won't --

THE COURT: Well, no, I'm planning to strike anything about Hawaali. I don't think you need it in this case. Hawaali is not named in the indictment. It opens, as I said, a can of

worms that creates problems for the government, creates problems for the defense, creates problems for the record, and I don't think it's critical or necessary.

I think the government has enough other evidence of this sort, and so that would be my plan in that aspect, that Kohlmann's testimony would not be permitted to come in.

MR. MAC MAHON: Can I just ask you one question, Your Honor, please?

THE COURT: Yes.

MR. MAC MAHON: About Bin Laden, since Mr. Kromberg brought it up, and Al-Qaeda, I mean, other than -- I mean, I'm sure that Mr. Kromberg is well read, but our motion also said there isn't anything in this indictment that has him charged with a terrorism offense, helping the Al-Qaeda network do anything, ever speaking to Bin Laden, ever -- if we put Bin Laden in this courtroom, it's going to be, it's going to be very difficult to have a trial where the jury's not going to think of September 11, going to think of Al-Qaeda.

There isn't anything -- I was looking at Mr. -- the response here. Mr. Kohlmann says that I will find Mr. Kohlmann to be an expert in modern Afghan politics, which is not an issue in this case. I don't know of any --

THE COURT: Well, the support of the Taliban certainly would be, and the whole reason why this country went to war with the Taliban was the perception that they were protecting Bin

Laden, and remember, those early calls were for them to immediately --

MR. MAC MAHON: I understand that, Your Honor. That's part of what we were trying to get into in the other motions, but it's illegal to provide services to the Taliban. It doesn't even matter why.

But what I'm saying is if you -- and the reason for the Hawaali thing, which we appreciate the Court seeing was a, you know, trying to tie -- this is the same thing. They're trying to tie him, Dr. Al-Timimi, who's charged with aiding and abetting certain people in Virginia who went to Pakistan, with being a Bin Ladenite.

There's nothing remotely in the record that would say he's ever supported Bin Laden. He's a scholar. He has lots of

things in his house. That doesn't prove -- I mean, he can have to explain that away if they find that he has a -- downloaded an article from the Internet. My office is full of them from my other case. I'm not a supporter of Bin Laden.

And so getting into Al-Qaeda and the history of terrorism seems to me to be just grossly prejudicial when it's not an issue in the case.

THE COURT: Kohlmann's testimony is important and it will help the jury in understanding, for example, how terrorist organizations operate. These training camps are critical to how terrorist organizations operate.

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And the LET camp, as you know from having read the records from the other case, were perceived to be a, a training, sort of a pre-training camp training camp. Some of the evidence that I assume will come in this case that came in the other case was that some folks couldn't get into, I think it was, Chechnya because they didn't have adequate training, and so the LET camp was made available to them as a place to which they could get that training.

MR. MAC MAHON: That's for Mr. Al-Hamdi, who's testified to many of his dreams, but LET at the time all of this happened,

of course, wasn't even designated as a terrorist entity.

THE COURT: But the point is if it's being used as a training camp for other locations -- some of that evidence first of all would be outside the ordinary understanding or information of the ordinary juror. I mean, the Court knows it because I've had the previous trial, and also I've done other cases, but Kohlmann may testify that -- he is definitely a useful expert in talking about those types of matters, that is, the nature of terrorist operations, the need for training camps, and sort of the -- and that range of information.

MR. MAC MAHON: Would the Court consider ordering him, as we asked in our motion, to produce some of this evidence of undercover action with terrorist recruiters? That's essentially the charge against -- if we're going to talk about Al-Qaeda, the government's essentially without doing it charging him with

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recruiting for Al-Qaeda and other terrorists.

Mr. Kohlmann says that he did a full investigation -- it's in his resume -- of Abu Hamza and another gentleman in England, and if he's going to testify to this, I'd like to bring all that information out as to what these terrorist recruiters are really like, what they actually do, what their experiences are.

He put it in his report, and he put it in his resume, and I think if he's going to testify, I should get that in time enough that I could actually use it effectively to cross-examine him to show -- if he's going to tell us everything about terrorist recruiters, well, let him do it.

Abu Hamza was injured in Afghanistan. He is actually a friend of Usama Bin Laden's. I mean, these people have credibility issues. That would be necessary.

THE COURT: All right. Now, Mr. Kromberg, I don't expect you're going to get into that level of detail in this case. We're not trying anyone other than Mr. Timimi in this case.

MR. KROMBERG: Yes, ma'am. I don't --

THE COURT: Are you -- you're not arguing that this defendant is recruiting people for Al-Qaeda?

MR. KROMBERG: No, Your Honor.

THE COURT: No.

MR. KROMBERG: But it is in the indictment -- and I did want to correct the record because I didn't want the Court to be left with Mr. MacMahon's views as to what the case is about.

Mr. Timimi on October 21, 2001, sent an e-mail saying, "As distasteful as it may be to some, we are obligated to support

the Taliban, Mullah Omar, and the Arabs with them with our bodies and our words and our wealth."

Now, who might those Arabs with Mullah Omar and Taliban be? It is reasonable for the jury to conclude that the Arabs Mr. Timimi is referring to that we must support with our bodies on October 21, 2001, is Al-Qaeda.

That being said, we are not seeking to prove that Mr. Timimi was soliciting anybody to go fight directly for Al-Qaeda. He was soliciting them to go to fight for the Taliban, to protect Al-Qaeda but fight -- because the Taliban wouldn't give up Al-Qaeda, but -- we are not seeking Mr. Kohlmann to testify about Abu Hamza in any way or the other gentleman that Mr. MacMahon referred to, who I forgot his name.

THE COURT: I mean, you -- this argument is coming from the expert report that you submitted. I mean, that's a detailed report, but I don't expect you're going to plan to elicit everything that's in that report.

MR. KROMBERG: Your Honor, I expect the testimony to be virtually identical to what occurred -- not identical but very, very similar to what occurred in the Benkahla trial about the background of Lashkar, the background of Taliban, the background of Al-Qaeda.

THE COURT: And there's a transcript of that testimony,

which I'm sure defense counsel have gotten and read.

MR. KROMBERG: That's right.

THE COURT: All right.

MR. KROMBERG: Well, I mean, I assume.

MR. MAC MAHON: If I may, Your Honor, this idea they're not going to put on any evidence in front of this jury that's going to show that he was supporting Al-Qaeda and then he purports to read you a portion of an e-mail which says exactly that, that's exactly what they plan to do in this case just by inference, and that's the whole danger of putting Al-Qaeda into this case.

And if we're going to have Al-Qaeda into the case and, you know, this wink and a nod, yes, he is recruiting, not for Al-Qaeda but for the Taliban so that Al-Qaeda can have some help, and look at this e-mail, and he has a picture of Bin Laden he downloaded from the Internet, I should be able to -- if they're going to put this witness on, it's right in this resume, this undercover report that he did. I should be able to ask -- all I'm asking is for the information. If they open the door, I need it in enough time to be able to use it.

THE COURT: But if they're not using that particular -- you know what he's going to say from what he said at the Benkahla trial.

MR. MAC MAHON: Well, this is a different case, Your Honor. Benkahla was charged with going overseas himself. He's charged with sitting in the United States and soliciting people

just like Abu Hamza did.

THE COURT: But if the government is not eliciting that aspect of -- if they're not eliciting testimony from their expert witness on certain topics, why in the world would you want to go into those topics?

MR. MAC MAHON: Because that's their whole case. They don't want to say that. They don't want to charge him with supporting terrorism. That's the entire case.

If I want to put on evidence from a disclosed expert who says that he did all those investigations and he's now an expert in terrorism, there's substantial differences, massive differences between the people he investigated and for whom he's now an expert on terrorism and what this gentleman did sitting here in the United States studying for a Ph.D.

And the government is just trying to push all this Al-Qaeda stuff on him but leave him out of it at the same time, and I'm just asking for the information if we're going to get into it. He's going to talk about the history of Al-Qaeda? An expert

witness is going -- why does the government need to put on the history of Al-Qaeda if they don't intend to show that the defendant had something to do with that, it has something to do with one of the issues in the case?

THE COURT: All right. Well, I think I've ruled sufficiently on that. As I said, the government has to that degree limited the scope of what they plan to do with Kohlmann to

what he did in the Benkahla trial. So if they go into topics or subjects beyond what he said there, you'll have a right to come up and object to that, and the Court will listen, but I don't think we need to go any further than that, all right?

MR. KROMBERG: Thank you, Your Honor. I do want to note there is that other limited topic of connecting a Lashkar website to -- a Lashkar newsletter to a Lashkar website, which he did not talk about in the Benkahla trial but that --

THE COURT: Well, he was -- he did a lot of website in the first case.

MR. KROMBERG: That was in the initial case.

THE COURT: I understand that. And that again was quite probative and detailed, and the average juror could not figure that out, so that's not an inappropriate area for him to discuss

as an expert. So the motion in limine as to Kohlmann is denied.

The next motion in limine addresses the defendant's expression of approval for September 11, 2001 events. I mean, the problem in this case, and it's going to be -- I recognize the problem for the defendant -- is that there's a lot of rhetoric in this case, and rhetoric is subject to various interpretations, but the rhetoric is what it is, and I think the government has a right to put it on, and then defendant has a right to put on evidence that would undercut what it was or what was intended.

But the reaction of the defendant and statements that he made about those events are clearly relevant again to the state of

All right, are there any other housekeeping matters that we need to address? If not, I'll see you back here on Wednesday, and we'll finish up anything else. All right?

MR. MAC MAHON: Thank you, Your Honor.

MR. YAMAMOTO: Thank you, Your Honor.

THE COURT: Thank you.

MR. KROMBERG: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- against -	:	**ORDER**
ADNAN IBRAHIM HARUN A HAUSA, a.k.a. Spin Ghul a.k.a. Esbin Gol a.k.a. Isbungoul a.k.a. Abu Tamim a.k.a. Joseph Johnson a.k.a. Mortala Mohamed Adam, Defendant.	: : : : : : : : :	12 Cr. 0134 (BMC)

COGAN, District Judge.

1. Defendant has moved to preclude the testimony of Evan Kohlmann as an expert witness for failure to meet the requirements under Federal Rule of Evidence 702 and the standard for expert testimony articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Government has opposed defendant's motion. Because Mr. Kohlmann's expert report did not reference let alone explain his methodology, and because the Government's memorandum in opposition simply relied on the fact that Mr. Kohlmann has previously been admitted as an expert, I held a Daubert hearing on February 3, 2017 and February 6, 2017.

2. Having conducted a hearing, in which I received testimony from Mr. Kohlmann, I find that the Government has shown, by a preponderance of the evidence, that Mr. Kohlmann and his opinions reached in this case satisfy the requirements for expert testimony. Mr. Kohlmann will be permitted to testify as to the following topics: (1) the history of al Qaeda; (2) al Qaeda's infrastructure, leadership, and geographic locations during the time period outlined in

the indictment; (3) the location and operation of certain al Qaeda training camps; (4) terrorist attacks carried out by al Qaeda; (4) the background and the significance of certain individual terrorists and regional al Qaeda affiliates operating in Nigeria, Niger, Libya, and the Sahel desert region of Africa; and (5) the common meaning and usage of words and concepts used by members of the global jihadist movement. Defendant's motion to preclude the expert testimony of Mr. Kohlmann is therefore denied.[1]

3. Mr. Kohlmann possesses sufficient education, training, and experience to testify as an expert on the topics outlined above. Mr. Kohlmann's credentials include, among others, an undergraduate degree in international politics from Georgetown University, a certificate in Islamic studies from the Prince Alwaleed bin Talal Center for Muslim-Christian Understanding at Georgetown University, work as a terrorism consultant for various government agencies and private entities, and the authorship of various academic papers as well as a book on al Qaeda. Defendant's argument that Mr. Kohlmann is unqualified to testify on these topics because he does not speak any languages that are spoken in the Middle East or Africa and because he has never visited Afghanistan or Nigeria go to weight, not to admissibility.

4. Mr. Kohlmann's testimony will help the jury to understand other evidence in the case. His testimony will place other testimony and documentary evidence in context, explain obscure terms and concepts and the role of specific al Qaeda leaders referenced by other Government witnesses and in defendant's prior statements, and enable the jury to better assess the significance of other evidence. Indeed, Mr. Kohlmann's expected testimony on al Qaeda is very similar to expert testimony on the operation, structure, membership, and terminology of crime families or organized crime enterprises that is often given in organized crime cases, which

[1] As stated in my 1/31/2017 Order, I will issue a separate order ruling on the issues raised in defendant's classified addendum to his motion to preclude Mr. Kohlmann.

the Second Circuit has repeatedly approved. See, e.g., United States v. Matera, 489 F.3d 115, 121-22 (2d Cir. 2007); United States v. Locascio, 6 F.3d 924, 936 (2d Cir. 1993).

5. Mr. Kohlmann has demonstrated that he has relied on sufficient facts and data in forming his opinions in this case. He has reviewed thousands of primary, secondary, and tertiary sources on al Qaeda and terrorism in general, which include open source documents as well as propaganda and other materials from what Mr. Kohlmann has identified as the "deep and dark web," and has continuing efforts to collect, analyze, and catalogue relevant terrorism and al Qaeda materials. Mr. Kohlmann further testified that other terrorism experts rely on similar facts and data in forming their opinions. Mr. Kohlmann has also relied on his prior training, education, and experience, including the several interviews he previously conducted of individuals affiliated with al Qaeda and other jihadist groups.

6. I reject defendant's argument that Mr. Kohlmann's reliance on hearsay statements, testimonial statements, and terrorist propaganda is improper and violates defendant's Confrontation Clause rights. At the Daubert hearing, Mr. Kohlmann testified that other terrorism experts rely on hearsay statements and similar forms of terrorist propaganda in forming their opinions, and thus Mr. Kohlmann's reliance on such materials is proper under Federal Rule of Evidence 703. See United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993) (holding that "expert witnesses can testify based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions."); United States v. Daly, 842 F.2d 1380, 1387-88 (2d Cir. 1988) ("[I]f experts in the field reasonably rely on hearsay in forming their opinions and drawing their inferences, the expert witness may properly testify to his opinions and inferences based upon such hearsay."). Mr. Kohlmann's testimony does not violate defendant's Confrontation Clause rights because none of the hearsay statements upon

which Mr. Kohlmann relied will be presented to the jury for the truth of what they assert. Rather, specific hearsay statements, which are otherwise inadmissible, may be disclosed to the jury if their probative value in helping the jury evaluate Mr. Kohlmann's opinion substantially outweighs their prejudicial effect. See Fed. R. Evid. 703. Upon request by defendant as to any specific hearsay statement, I will advise the jury that it must not assume that statement to be true, but may consider it only to determine if the opinion that Mr. Kohlmann offers is sound. This is standard practice with regard to experts who must rely on non-observational evidence in reaching their opinions. Obviously, Mr. Kohlmann will not be allowed to become a mere conduit for hearsay, but I see no difficulty in his basing his opinions, in part, on hearsay.

7. The Government has established that in forming his opinions in this case, Mr. Kohlmann used and applied a reliable methodology, namely the comparative analysis method, which Mr. Kohlmann testified is generally accepted in the international terrorism field. At the hearing, Mr. Kohlmann explained his methodology, stating that he gathers multiple sources of information, including primary, secondary, and tertiary sources, analyzes whether a particular source has a perceived bias, and juxtaposes and cross-checks the various sources against one another to form a commonly accepted narrative. Mr. Kohlmann testified that he had used this methodology in forming conclusions in prior academic papers and articles, and that such papers and articles were subject to peer review and he did not receive negative comments as to the methodology used. Mr. Kohlmann also testified that he has used this methodology in forming opinions in prior cases where he testified as an expert. Indeed, Mr. Kohlmann's use of the comparative analysis method has previously been approved by the Second Circuit. See United States v. Farhane, 634 F.3d 127, 159 (2d Cir. 2011). Although defendant has identified several strong criticisms other terrorism experts have raised against Mr. Kohlmann, such criticisms go to

weight, not to admissibility. If criticism from others in the relevant field was an automatic disqualifier of an expert witness, few social scientists would ever be permitted to testify as experts.

8. Defendant's objection to Mr. Kohlmann's methodology seems to be more of a challenge to qualitative social science and historical research generally than to Mr. Kohlmann particularly. I do not see how a social scientist can form the kind of conclusions expressed in Mr. Kohlmann's report without reviewing primary, secondary, and tertiary sources, and then exercising judgment about which are corroborated or otherwise believed to be credible, and which should not be accepted. That is what Mr. Kohlmann did. It seems to me no different than, for example, the exercise a historian would undertake to determine the precise location of the Battle of Hastings, or the troop size or unit strength of the combatants.

9. I think defendant also overlooks the rather basic nature of Mr. Kohlmann's conclusions. The conclusions themselves seem non-controversial; in fact, defendant has not disputed any of the conclusions themselves. Mr. Kohlmann is merely testifying about the history and evolution of al Qaeda and particular adherents. He has done exhaustive research and analysis to understand that history. Although the straightforward nature of his conclusions do not obviate the need for his qualification and an acceptable methodology, his qualifications seem hard to dispute, and his methodology strikes me as little, if at all, different than most qualitative political science research.

10. Finally, I reject defendant's argument that Mr. Kohlmann's testimony is not relevant pursuant to Federal Rule of Evidence 401, and even if I find that it is, it should be precluded by Federal Rule of Evidence 403 because Mr. Kohlmann's testimony as to specific al Qaeda terrorist attacks, for which defendant has not been charged, and notorious al Qaeda

leaders, is unfairly prejudicial. Although defendant has identified several prior cases where portions of Mr. Kohlmann's testimony were precluded as irrelevant, defendant fails to offer any compelling reason as to why these topics are not relevant to the case at hand. In fact, in its memorandum in opposition, the Government states that "every single terrorist, terrorist organization, or terrorist attack," about which Mr. Kohlmann will testify, "was discussed by the defendant in his three-day, Mirandized statements to the United States Government in Italy and his other interviews with Italian law enforcement." It is not unfairly prejudicial for Mr. Kohlmann's to testify regarding certain al Qaeda terrorist attacks and leaders that defendant himself mentioned in his statements to various government officials, especially because defendant's statements on such topics will be offered into evidence.

11. Accordingly, defendant's motion to preclude Mr. Kohlmann from testifying is denied.

SO ORDERED.

Digitally signed by
Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
February 10, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA, Plaintiff, vs. FAWAZ MOHAMMED DAMRAH, aka FAWAZ DAMRA, Defendant.	:	CASE NO. 1:03-CR-484 ORDER [Resolving Doc. No. 100]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On May 26, 2004, Defendant Fawaz Damrah moved this Court to exclude the expert testimony of government expert witness Matthew A. Levitt [Doc. 100]. On June 2, 2004, the United States ("government") moved this Court to exclude the expert testimony of Damrah's expert witnesses Scott Alexander and Michael Dahan. On June 7, 2004, the Court held hearings as to the admissibility of Alexander's and Levitt's proposed testimony.

After considering the parties' arguments, the Court concludes that the testimony of both experts is admissible. It therefore DENIES both parties' motions to exclude.

STANDARD

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. Under Rule 702, testimony based on specialized knowledge is admissible if it "will assist the trier of fact to

understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The Rule sets three additional prerequisites to admissibility:

(1) the testimony must be "based upon sufficient facts or data,"

(2) the testimony must be "the product of reliable principles and methods," and

(3) the witness must have "applied the principles and methods reliably to the facts of the case."

Id. As commentators have noted, Rule 702 evinces a liberal approach regarding admissibility of expert testimony. *See, e.g., Weinstein's Federal Evidence* § 702.02, at 702-6. Under this liberal approach, expert testimony is presumptively admissible. *Id.* Further, experts need not confine their testimony to matters upon which they have personal knowledge. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

Rule 703 governs the facts or data upon which an expert may base his expert testimony. So long as the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," the basis for an expert's testimony need not be admissible as evidence at trial. In other words, expert witnesses may base their testimony on inadmissible materials, and if those materials are reliable in the expert's field, their inadmissibility does not stop the admissibility of the expert's testimony. Thus, reliability is the cornerstone of Rule 703.

Additionally, Rule 704 governs the scope of expert testimony. Under Rule 704(b), expert witnesses in criminal trials are not permitted to testify to the defendant's mindstate, and are not permitted to offer an opinion on whether the defendant had the requisite mens rea for the offense. Ultimate issues of this sort "are matters for the trier of fact alone." Fed. R. Evid. 704(b).

For the instant motions, the Court restricts itself to determining whether the experts' purported testimony is admissible. To conduct this inquiry, the Court examines the prerequisites listed in Rule 702 and also asks whether the basis underlying the testimony meets the Rule 703 reliability criterion.

THE GOVERNMENT'S MOTION TO EXCLUDE THE TESTIMONY OF PROFESSOR SCOTT ALEXANDER

The government seeks to exclude testimony of two expert witnesses, Michael Dahan ("Dahan") and Professor Scott Alexander ("Alexander"). Because Michael Dahan was not available for a *Daubert* hearing, the Court has conducted a hearing only with regard to Alexander. For this reason, the Court currently addresses the government's motion regarding Alexander now, and holds its motion with regard to Dahan in abeyance, awaiting a future *Daubert* hearing.

Alexander is a tenured professor at the Catholic Theological Union in Chicago, the largest Roman Catholic institution of graduate education in the United States. He received his academic training at Harvard and Columbia, and obtained his doctorate in 1993. He currently focuses his work on the history of religion, with specializations in Islamic history and society and Muslim/Christian dialogue.

Alexander intends to testify that referring to Jews as "apes and swine" is not an invitation to persecute Jewish people. Instead, he says, it is a reference to a Koranic verse addressing God's treatment of oppressors. Moreover, Alexander intends to testify that Muslims (including Palestinian Muslims) often "translate" Koranic verses into new contexts, including the Palestinians' struggle under the Israeli occupation. Alexander bases this testimony upon his knowledge of the Koran and its interpretation in the Palestinian culture, upon his training as a historian of religion with a focus on Islam, and upon his continued studies and the interactions with Palestinians and other Muslims that are a part of his job.

The government argues that this testimony is not relevant, and is thus not helpful to the trier of fact. Next, it argues that Alexander's purported testimony is not reliable. Finally, the government argues that Alexander is not qualified to render the opinions he proposes to offer as testimony. The Court considers these arguments in turn.

A. Relevance

The government's first argument is that Alexander's proposed testimony is not relevant, and thus will not aid the trier of fact in determining any fact in issue. Therefore, the government says, Alexander's testimony is inadmissible under Rule 702.

The government correctly notes that the underlying issue in this case is whether Damrah made false statements in his naturalization application and interview over a decade ago. In those statements, Damrah stated that he had never advocated the persecution of others based on religion.[1/] The government apparently intends to introduce evidence of a speech Damrah made in which he refers to Jews as the "sons of apes and swine." The government says the use of this insulting language is a solicitation of the persecution of Jews based upon their religious background.

Damrah seems to dispute the connection. While seeming to recognize the language as insulting, he contends it did not incite persecution. Alexander offers an analysis of that statement supporting Damrah's argument that the 1991 statement, while insulting and offensive, did not amount to persecution. Tying the statement to Koranic text, Alexander views such statements as political rhetoric in which Palestinians, who

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[1/] More specifically, Damrah answered "no" to the following question: "Have you at anytime, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion?"

view themselves as oppressed, predict how God will treat the oppressor Israelis. The government seems to argue that Damrah's inflammatory 1991 comments are tantamount to persecution or the incitement thereof. If so, then it is all the more likely that Damrah lied on his naturalization application. However, if Damrah's 1991 comments were not tantamount to persecution, then his statement is likely not false. Alexander's testimony will assist finders of fact in determining whether or not Damrah's "apes and swine" comment was tantamount to persecution or an incitement to persecution. The testimony is therefore relevant and will aid the trier of fact. It is admissible under Rule 702.

B. Reliability

The government's next argument is that Alexander's testimony is not reliable. Under Rule 702, expert opinions "must be reliable in an evidentiary sense--that is, trustworthy." *Weinstein's Federal Evidence* § 702.05. In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the Supreme Court held that trial courts are to perform a "gatekeeper" function regarding the admissibility of scientific experts, and created a series of factors for courts to apply in determining reliability. Among these factors are:

- Whether the theory or technique that serves as the basis for the proposed expert testimony can be or has been tested
- Whether the theory or technique has been published and subjected to peer review.
- The known or potential error rate experienced in the application of the particular technique.
- Whether the theory or technique is generally accepted in a definable relevant community.

Id. at 593-94.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court extended the gatekeeper function of district courts to cover non-scientific expert testimony. With regard to the *Daubert* factors, however, the *Kumho Tire* Court stated,

> We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id. at 141-42.

Alexander testified that as a scholar of religion, he considers his work to fall into the category of "humanities" more than that of social science. Applying many of the above factors to the humanities is problematic. Fields of knowledge in the humanities often deal with interpretation of texts--a task unlike scientific causation in that there is no single "right" or "wrong" answer. For instance, the meanings of Shakespeare's Hamlet and particular passages in the Bible have been debated through the ages. Although consensus might emerge, it does not emerge through anything approximating scientific testing. When faced with an expert whose expertise lies in an interpretive field, rather than an empirical one, applying some of the *Daubert* factors is akin to fitting a square peg in a round hole.

For this reason, the Court focuses its analysis on the *Daubert* factors that make sense in the context of Alexander's purported testimony. The Court begins by noting the methodology that Alexander applied. In Alexander's words, he applied the method of "thick description" to arrive at his opinions. (Tr. 13-14). Alexander described "thick description" as follows:

> . . . in order to understand cultural context, you need to develop a thick description of that culture, such that you understand the many levels on which the symbols and ideas in that culture operate and how those symbols convey meaning to the people within those cultures.
>
> It's a long process that involves a lot of hard work, and the application of insights based on thick description, again, have to do with certain methods and standards of rational deduction but there is also an acceptable measure of subjectivity involved.

(Tr. 9-10). Alexander testified that this method is a standard one used in the humanities, that it derived from the work of a notable academic (Clifford Geertz), and that Alexander's own work is subject to peer review prior to publication.

Alexander's work employs a valid interpretative method commonly employed by other humanities scholars. Also, his work is subject to peer review. Simply put, Alexander has employed the tools of his trade to reach his opinions.

Through an effective cross-examination, the Government shows that other experts and other disciplines speak more directly to areas related to Alexander's testimony. However, this showing is not a sufficient basis for the Court to exclude Alexander's testimony. *See Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir.1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir.1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); Charles Alan Wright & Victor James Gold, Federal Practice & Procedure, Federal Rules Of Evidence, Rule 702 ("The [2000] amendment [to Rule 702] does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.").

In coming to his opinion, Alexander employs a rather simple reasoning process. First, he considers the social discourse context given by the Koran. He suggests that this discourse stresses the need to act against injustices, including tyrannical acts, oppression, hypocrisy, materialism, and greed. He then discusses the Koran's reference to the phrase "apes and swine." The Koran apparently says that God transformed Sabbath breakers into apes as punishment. *See* Koran 7:163-66 and 2:65. Alexander then

says that some Islamic tradition, specifically the interpretation given by Sayyed Qutb in his commentary "In the Shadow of the Koran" interprets this as suggesting that God will visit a similar punishment upon any tyrant that transgresses the balance of what is right. From this interpretation, Alexander suggests that there is a Muslim usage of the phrase "apes and swine" that is a prediction that God will punish oppression.

For these reasons, the Court concludes that Alexander's testimony based upon that work is reliable.

C. Qualification

The government's final argument in support of excluding Alexander's testimony is that Alexander is not qualified as an expert with respect to his proffered opinion. Basically, the government's argument amounts to the following: Because Alexander is not a linguist with a focus on Palestinians, he cannot offer testimony on the meaning of Palestinian speech. The Court rejects that argument.

Rule 702 states that experts may be qualified on the basis of "knowledge, skill, experience, training, or education." In this case, Alexander's education, knowledge, and experience all provide bases for his qualification. Alexander holds two master's degrees (an M.A. and an M.Phil.) in the history of religions, as well as a Ph.D. in the history of religions with a concentration in Islamic Studies. Earning these degrees required Alexander to develop a knowledge and skill interpreting scripture, especially the Koran. Additionally, Alexander learned, and developed a fluency in, both Arabic and Persian.

Alexander's current position provides him with relevant experience sufficient to qualify him as an expert on Islamic and Palestinian rhetoric. His CV notes that one of Alexander's fields of specialized study is modern Islam. Further, among his areas of teaching and research expertise, Alexander lists "Interreligious dialogue and especially Muslim-Christian dialogue," "contemporary Islamism (Muslim

'fundamentalism')," and "the ethnographic study of Islam in the contemporary U.S." (Def.'s Exh. L). Each of these areas of expertise provides Alexander some insight into possible interpretations of modern Islamic religious and political rhetoric, as does his ability to speak and understand Arabic.

The Court notes that Alexander is not a linguist. He admitted as much during the *Daubert* hearing. Although a linguist might be able to provide a more authoritative expert opinion in this case, Alexander is still qualified as an expert on contemporary Islamic rhetoric. Because Alexander "has educational and experiential qualifications in a general field related to the subject matter of the issue in question," the Court would abuse its discretion if it found him unqualified merely because he lacks expertise in the specialized area of Islamic linguistics. *Weinstein's Federal Evidence* § 702.04 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 753-54 (3d Cir. 1994)). The Court thus concludes that Alexander is qualified to testify.

For the foregoing reasons, the Court has concluded that Alexander's testimony is admissible. The Court reaches this conclusion with one caveat: Alexander's testimony must be limited to background testimony about Koranic teachings on victimhood and how those teachings have flowed through the Muslim religion. To the extent Alexander desires to testify as to what Damrah meant or what Damrah was thinking when he made the inflammatory comments, he is not qualified as an expert, and he may not testify. Similarly, Alexander may not testify regarding how those statements were received by listeners.

DAMRAH'S MOTION TO EXCLUDE THE TESTIMONY OF MATTHEW A. LEVITT

Defendant Fawaz Mohammed Damrah moves the Court to exclude the testimony of the government's expert witness, Matthew A. Levitt ("Levitt"). Damrah bases this motion on a variety of grounds. For purposes of this order, the Court considers only Damrah's arguments that Rules 702, 703,

and 704 require that the Court exclude Levitt's testimony. Damrah's remaining arguments (based on Rules 401, 402, and 403) are better seen as motions in limine, not as *Daubert* motions; the Court will thus consider these arguments at the time it considers other motions in limine.

Levitt works as a Senior Fellow in Terrorism Studies at the Washington Institute for Near East Policy in Washington, D.C. In this position, he writes articles and policy pieces, and also testifies before Congress. Additionally, he lectures at academic and policy conferences and teaches as an adjunct professor at John Hopkins University's School of Advanced International Studies. Previously, Levitt worked for three years as an intelligence research specialist with the F.B.I.'s International Terrorism Unit. He has received a Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy, and is currently a Ph.D. candidate in international relations at the Fletcher School.

Levitt desires to testify about international terrorism generally, and about the Palestinian Islamic Jihad and Damrah's alleged ties to that organization in specific. Levitt also wishes to testify that in his opinion, Damrah was a high-ranking official in the Palestinian Islamic Jihad and that Damrah "represents a classic case study of a radical Islamic militant with ties to . . . individuals associated with both al-Qaeda and Palestinian Islamic Jihad."

Damrah objects to Levitt's proposed testimony and moves the Court to exclude it. More specifically, Damrah argues that Levitt's proposed testimony is not relevant, that it relies too heavily on inadmissible hearsay, that Levitt seeks to testify about an element of the offense involving Damrah's mindstate, and that Levitt's proposed testimony is not relevant. The Court analyzes these arguments in turn.

A. Relevance

Damrah's brief argues that Levitt's testimony is not relevant under Rule 401. As noted above, Rule

702's requirement that expert testimony be helpful to the trier of fact is really a relevance inquiry. The Court therefore considers Damrah's relevance argument within the ambit of Rule 702.

Here, Damrah is charged with failing to disclose his membership in and/or affiliation with the Palestinian Islamic Jihad ("PIJ") when he applied for citizenship in 1993-94. Levitt wishes to testify that although the PIJ was not a state-designated terrorist group in 1993-94 (because that category had yet to be created), its terrorist activities were well known. Additionally, Levitt wishes to testify that several of Damrah's friends and associates were higher-ups in the PIJ leadership, and that Damrah attended PIJ events and encouraged people to donate to PIJ.

Levitt's testimony is relevant to at least two issues in the case. First, his testimony speaks directly to Damrah's alleged membership in and affiliation with the PIJ. If otherwise admissible and if the trier of fact finds his testimony credible, it will be more likely to find that Damrah was associated with PIJ. Second, Levitt's testimony regarding PIJ's terrorist activities is relevant to the issue of whether Damrah's omission of his PIJ association was material. Had Damrah failed to disclose his membership in a soccer club or even a humanitarian organization, that omission likely would not material to INS' decision whether to grant him citizenship. However, to the extent the organization was involved in terrorist plots, the omission would be material.

For these reasons, the Court finds Levitt's proposed testimony relevant.

B. Underlying Sources

Damrah's next argument is that the Court should exclude Levitt's testimony because Levitt did not rely on the type of underlying facts or data reasonably relied upon by experts in his particular field. Levitt testified that he relies on various sources, including newspapers, books, government documents, and court

papers (indictments, briefs, etc.). Given the secretive nature of terrorists, the Court can think of few other materials that experts in the field of terrorism would rely upon. Indeed, Damrah himself failed to suggest any. For this reason, the Court concludes that Levitt's underlying sources are appropriate for his testimony.

Damrah also asks the Court to bar Levitt from disclosing to the jury any inadmissible hearsay upon which his opinion relies. Rule 703 states, "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." The Court intends to follow the Rule, and will not allow Levitt to disclose any inadmissible hearsay to the jury prior to such a determination by the Court.

C. Damrah's Mental State

Damrah also argues that the Court should strike a portion of Levitt's testimony because it runs afoul of Rule 704(b)'s admonition disallowing expert testimony about a criminal defendant's "mental state or condition constituting an element of the crime charged." The crime charged is unlawful procurement of citizenship under 18 U.S.C. § 1425. To violate this statute, a defendant must *knowingly* provide false information to procure citizenship. Therefore, the only mental state or condition that is an element of the offense is Damrah's mindstate at the time he filled out the naturalization form and received his naturalization interview. Levitt has indicated nowhere that he intends to testify regarding that mental state. Damrah's Rule 704(b) argument therefore fails.

Nonetheless, the Court concludes that Levitt may not testify as to what Damrah knew or did not know. Levitt is qualified as an expert to provide testimony giving jurors background information on PIJ and other Middle Eastern terrorist organizations, including their leaders and activities. Levitt is not,

however, qualified to opine on what Damrah knew or did not know at any point in time. He has no personal knowledge sufficient to give such testimony. The Court therefore limits his testimony.

D. Reliability

Finally, Damrah argues that Levitt's proposed testimony is not reliable under Rule 702. Damrah says that Levitt's testimony is not based upon sufficient facts or data, and that Levitt did not employ reliable principles or methods in reaching his opinions. The Court repeats its prior conclusion that Levitt's testimony does appear to be based on sufficient facts or data.

With regard to Damrah's reliability argument, he run into the same "square peg, round hole" problem noted above. Levitt's expertise is not scientific. He is a policy wonk, working in what is basically an applied social science. Therefore, many of the reliability factors listed in *Daubert* will likely not aid the Court in its reliability analysis. The Court does note, however, that the same factors that led it to conclude Alexander's methodology was reliable lead it to the same conclusion here.

Levitt's methodology appears to be little more than reading copiously, analyzing the data that he reads, and conveying that knowledge to others. Although this methodology lacks a fancy name like "thick description," it seems to be very much the gold standard in the field of international terrorism. It is basically the same methodology that Levitt applied when working for the F.B.I., and it is exactly what he does when he speaks before Congress. If his methodology is good enough for the other two branches of government, the Court sees no reason why it should not be good enough for the judiciary, too. Additionally, the Court notes that Levitt's method has been peer reviewed, as he has authored three books, six chapters in different books, and dozens of editorial and journal articles. Additionally, Levitt testified that when he obtains new facts, he vets them with others in the field of international terrorism policy. For all these reasons, the Court

concludes that Levitt's testimony is reliable.

The Court thus concludes that Levitt may testify as an expert witness. However, as noted above, his testimony must be limited to his area of expertise--Middle Eastern terrorist groups. Levitt may provide the jury with background information regarding these groups, their activities, and their leaders. He may not, however, provide opinion testimony regarding anyone's thoughts at a particular time. Nor may he testify, unless a sufficient foundation is laid, that Damrah is a high-level PIJ operative.

CONCLUSION

For the foregoing reasons, the Court concludes that both Alexander's and Levitt's testimony are admissible, subject to the limits described above. Both parties motions are thus DENIED.

IT IS SO ORDERED.

Dated: June 9, 2004

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

Justin W. Williams United States Attorney's Building
2100 Jamieson Ave
Alexandria, Virginia 22314-5794
(703)-299-3700

Transmitted by email

November 17, 2017

Linda Moreno P.A.
511 Avenue of the Americas, No. 312
New York, New York 10011
lindamoreno.esquire@gmail.com

Re: U.S. v. Young, No. 1:16cr265 Discovery Letter #24

Dear Linda:

1. This is to notify you that the United States is likely to offer testimony from Arlington County Police Corporal Ian Campbell. Corporal Campbell presents training to other police officers on "Ideological Indicators of Extremism." The information in his presentation is based upon his own knowledge and research, and is intended to provide police officers with further information regarding the subject matter for which to conduct more thorough investigations regarding subjects who *may* adhere to extremist ideologies.

As you know, when Corporal Campbell was in college with your client, they attended a rally of a Neo-Nazi group. I think that you also know that, in about 2010, your client gifted to Corporal Campbell the book *Serpent's Walk.* Not surprisingly, Corporal Campbell is expected to testify about those events. Accordingly, I believe that Corporal Campbell will be a fact witness. Nevertheless, when he talks about what he has learned about subjects such as William Pierce, the National Alliance, *Hunter,* the *Turner Diaries,* you might claim that he is providing expert testimony. Out of what may be an abundance of caution, I am, accordingly, notifying you pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G) and Federal Rules of Evidence 702 and 703, that Corporal Campbell may offer expert testimony. A copy of Officer Campbell's slide presentation that contains the gist of that portion of his testimony is included with this letter.

2. The Discovery Order entered in this case on January 18, 2017 directs that we provide you with notice of F.R.E. 404(b) evidence that we intend to use at trial. I suspect that doing so at this point is superfluous because we have extensively litigated the evidence that may be admitted at trial to show your client's predisposition. Nevertheless, I hereby notify you that we intend to introduce all of the items on the exhibit list that we provided you in May 2017 in connection with Discovery Letter #19; as you know, the items on that list *except* for the purchase and

transmission of the gift cards generally are intended to establish your client's intent and predisposition. While much of the listed exhibits consists of evidence that is inextricably intertwined with the crime itself, the remainder consists of evidence that should be admitted as proof of intent and predisposition.

Generally speaking, we do not plan to introduce evidence that your client was a lazy cop unless you introduce evidence suggesting that he was a productive cop. That being said, there likely will be evidence that he watched videos in a "break room" when he should have been out patrolling.

3. Further, pursuant to Paragraph I(6) of the Discovery Order entered in this case on January 18, 2017, I request that you permit me (or a government agent) to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, or copies or portions thereof, which you intend to use in the defendant's case-in-chief at trial.

4. Similarly, pursuant to Paragraph I(7) of the Discovery Order entered in this case on January 18, 2017, I request that you permit me (or a government agent) to inspect and copy any results or reports of examinations, tests, or experiments made in connection with this case which you intend to use in the defendant's case-in-chief at trial, or which were prepared by a witness whom you intend to call at the trial when the results or reports relate to his testimony.

5. With respect to the "Yoda in da house" information, I am surprised that you moved to exclude it as hearsay. It is not included on the list of government exhibits that we provided you, and we never said that it was going to be presented at trial. Regardless of the merits of your hearsay argument, we have no plans to introduce it in our case-in-chief.

In accordance with our discovery obligations, we have provided you all sorts of information of varying utility; the "Yoda in da house" information simply was more information for your consideration. In response to your representation to Judge Brinkema - - that “[t]o date, the government has offered no evidence that the real-life terrorist group does in fact send requests to Virginians, or Americans generally, for petty contributions such as gift cards . . . [and] will never offer that evidence” - - we provided it to you as part of our discovery production.

Thank you for your cooperation.

Sincerely,

Dana J. Boente
United States Attorney

By: _____
Gordon D. Kromberg
Assistant United States Attorney

cc: John Gibbs
Nicholas Caslen