NOS. 13-50572, 13-50578, 13-50580, 14-50051

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

V.

BASAALY SAEED MOALIN,
MOHAMED MOHAMED MOHAMUD,
ISSA DOREH,
AHMED NASIR TAALIL MOHAMUD,

DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JEFFREY T. MILLER, SENIOR U.S. DISTRICT JUDGE

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

Defendants Basaaly Saeed Moalin ("Moalin"), Mohamed Mohamed Mohamud ("Mohamud"), Issa Doreh ("Doreh"), and Ahmed Nasir Taalil Mohamud ("Ahmed Nasir") conspired to support the violent activities of al-Shabaab, a foreign terrorist organization. The defendants received a fair trial and, as the district court found in denying a motion for new trial, the evidence against them was "strong and compelling." ER86.[1]

In this appeal, the defendants seek to challenge a since-discontinued counterterrorism program in an effort to suppress evidence. The district court correctly held that that program was lawful. ER77-83. Moreover, there is no evidence that could have been suppressed because the government did not introduce at trial any evidence obtained from that program, nor any evidence that was the "fruit" of that program. Finally, suppression would be unavailable in any event because the government acted in good faith, relying on court orders authorizing the program, and the program has since been discontinued, eliminating any deterrence rationale.

[1] "ER" refers to the defendants' Excerpts of Record; "SER" refers to the government's Supplemental Excerpts of Record; "D.Br." refers to the defendants' Opening Brief; "CR" refers to the Clerk's Record; and "RT" refers to the reporter's transcript of trial, with the leading number referring to the transcript volume.

The defendants' other arguments are similarly without merit. Their convictions should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The defendants filed timely notices of appeal (ER 103-08), and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly denied the defendants' motion for a new trial, in which they claimed that the FBI's investigation in this case stemmed from a tip from the National Security Agency's telephony metadata collection program.
2. Whether the district court correctly found that the government had complied with its obligations pursuant to *Brady v. Maryland*.
3. Whether the district court's evidentiary rulings constituted an abuse of discretion that affected the defendants' substantial rights.
4. Whether the district court erred when it denied defendant Doreh's motion for acquittal as a matter of law.

CUSTODY STATUS

Three of the four defendants are currently serving prison sentences. Moalin is scheduled for release on July 6, 2026. Mohamud is scheduled for release on February 27, 2022. Doreh is scheduled for release on July 20, 2019. The fourth defendant, Ahmed Nasir, has completed his sentence.

STATEMENT OF THE CASE

I. Factual Background

In 2008, the defendants, four men who had immigrated to the United States and resided in southern California, conspired to raise and send funds to al-Shabaab, a foreign terrorist organization in Somalia. The defendants sent money to al-Shabaab first through Aden Hashi Ayrow and then, after Ayrow's death, through Omer Mataan. The money was sent using Shidaal Express, a hawala (*i.e.*, a money remitting business) where defendant Doreh worked. The money transfers were split into smaller amounts to avoid suspicion, and they frequently involved the use of fake sender and/or recipient names and fake sender phone numbers. Defendant Moalin also provided a house he owned in Somalia for the use by al-Shabaab forces.

A. Aden Hashi Ayrow and the Emergence of al-Shabaab

In approximately 2002 or 2003, Aden Hashi Ayrow returned to Somalia from his training in Afghanistan. 3RT 491-92. By 2005, Ayrow was leading a network of extremists in Somalia that was protecting members of "another foreign extremist group"[2] and had been involved in the killing of aid workers. 3RT 490. That year,

[2] The government agreed not to use the name "al-Qaeda" in the presentation of its evidence to the jury in deference to the defendants' concern that this might be prejudicial. *See* 2RT 128-29. In other cases concerning material support for al-Shabaab where the quoted expert witness, Matthew Bryden, was not subject to this restriction, he testified about "al Shabaab's connections to al Qaeda." *United States v.*

(continued . . .)

Ayrow led a group that seized control of an Italian colonial-era cemetery in Somalia, disinterred the bodies, and established a training center and mosque on the grounds. *Id.* Ayrow turned this center into a base for a militia of approximately 200 to 300 fighters under his command. 3RT 497-98.

Ayrow's militia engaged in a campaign that involved identifying, hunting down, and killing individuals participating in a U.S.-backed counterterrorism effort. 3RT 499. His militia killed at least a dozen counterterrorist fighters as well as two journalists. 3RT 501. In addition, Ayrow's militia was involved in the July 2005 killing of Somalia peace activist Abdulkadir Yahya, an act that was widely perceived as an effort to intimidate Somalia's intellectual civil society. 3RT 499-500. The result of this campaign of terror was to create a "state of fear" and "chilling effect" on international agencies dealing with Somalia. 3RT 501.

Ayrow and his group became a part of the emerging al-Shabaab militia network. 3RT 513. The network was in existence by 2005, taking the name al-Shabaab, which is Arabic for "the youth," in 2006. 3RT 513-14. While Somalia had no shortage of militias, al-Shabaab distinguished itself through the routine use of types of violence that other militias used only occasionally, if at all. *Id.* at 514. These tactics

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(. . . continued)
Omar, 786 F.3d 1104, 1112 (8th Cir. 2015); *see also United States v. Ali*, 799 F.3d 1008, 1028 (8th Cir. 2015).

included the use of improvised explosive devices, rocket-propelled grenades, land mines, suicide bombings, and beheadings. 3RT 530-38.

In early 2008, the U.S. Secretary of State designated al-Shabaab as a Foreign Terrorist Organization ("FTO"). *See* 73 Fed. Reg. 14550-02 (Mar. 18, 2008). On the day that designation became effective, the Department of State explained that "Al-Shabaab (The Youth) is a violent and brutal extremist group with a number of individuals affiliated with al-Qaida." *Designation of al-Shabaab*, U.S. Department of State (Mar. 18, 2008), *available at* www.state.gov/j/ct/rls/other /des/143205.htm. Led by men believed to have "trained and fought with al-Qaida in Afghanistan," al-Shabaab "used intimidation and violence to undermine the Somali government and threatened civil society activists working to bring about peace through political dialogue and reconciliation." *Id.* The State Department noted that al-Shabaab "has claimed responsibility for shooting Deputy District Administrators, as well as several bombings and shootings in Mogadishu targeting Ethiopian troops and Somali government officials," and that "Al-Shabaab's leader, Aden Hashi Ayrow, has ordered his fighters to attack African Union (AU) troops based in Mogadishu." *Id.*

In response to the designation, al-Shabaab's spokesman, Mukhtar Roobow, stated that al-Shabaab welcomed the terrorist designation and considered it a badge of honor. 3RT 525.

B. The Conspiracy to Fund al-Shabaab's Violent Activities

Both before and after al-Shabaab's designation as an FTO, the four defendants conspired to send money to al-Shabaab to support its violent activities. Referred to as "Sheikalow" and "Majadhub" in telephone conversations, the defendants' contact in Somalia–the initial recipient of their funding–was the terrorist leader Ayrow. *See* 5RT 973-74 (witness testimony); ER27 (district court finding that "the translated conversations themselves indicate that the 'Sheikalow' taking part in the conversation is Aden Ayrow"); 13RT 1809-33 (government closing argument describing extensive evidence that "Sheikalow" was Ayrow); *cf.* 13RT 1919(defense closing argument asserting that the primary question for the jury was whether "Sheikhalow" was Ayrow). Even after Ayrow's death, the defendants continued to fund al-Shabaab through money transmissions to Omer Mataan.

C. The Defendants, at Ayrow's Request, Provide Money for al-Shabaab Fighters

On December 20, 2007,[3] Ayrow called Moalin seeking money, which Ayrow said was "needed for Bay and Bakool, as their rations for these ten days." SER19.

[3] Each of the call transcripts contains the date and time that the call was initiated. These times are noted based on Coordinated Universal Time ("UTC") rather than the time zone where the participants were located. Pacific Standard Time is eight hours behind UTC. 5RT at 877-78. Somalia is three hours ahead of UTC. *Id.* at 877. Thus, the call discussed in the text above is marked 6:54 on December 21, 2007 UTC. That was 10:54 p.m. on December 20th in San Diego, and 9:54 a.m. on the 21st in Somalia.

The Bay and Bakool area was where Roobow's al-Shabaab forces were stationed. 6RT 1072. "Leave that matter to me," Moalin assured Ayrow. SER19.

Almost immediately after hanging up with Ayrow, Moalin called defendant Issa Doreh to tell Doreh that he had just spoken with the "cleric whom [Doreh] spoke with the other day," SER21, who was seeking "[o]ne dollar a day per man . . . for our forces" in "the places where the fighting [is] going on." SER22. Moalin then asked Doreh to pass word of the request to defendant Mohamud, which Doreh agreed to do. *See* SER24-25.

The following day, Moalin called defendant Ahmed Nasir and told him that "the young men who are firing the bullets" had requested money for the "forces there in Bur Hakaba," a town in the Bay region. SER26-27. Moalin told Ahmed Nasir that these young men had "cut the throats of 60 lice-infested," by which he meant Ethiopians, and destroyed a number of vehicles. SER27. Moalin then told Ahmed Nasir that these men needed $3,600 – "a dollar a day . . . is what they need." SER28. Ahmed Nasir responded that this "is good news, things are going good; let them also experience the pain" and "[t]hey will run away on their own." SER29.

On January 1, 2008, the defendants sent $3,900 to Somalia. SER15. They used fake sender and recipient names and split the transaction into two pieces of $1,950. *Id.*; *cf.* 4RT 717, 743-45 (explaining transaction "structuring" to avoid recordkeeping requirements that applied to transactions of $3,000 or more). That same day, Moalin

called Ayrow to tell him that they had sent money, providing Ayrow with the fake recipient name and number, which, he said, were the same as had been used in a previous transaction.[4] SER30-31. The two men then spoke about operations in Somalia, with Ayrow bragging that "these two nights we gave the non-Muslims a holiday to remember." SER31-32. Moalin laughed and said that "they have to die because they don't know where to run to." SER32. Ayrow said that groups of Burundians–a reference to African Union peacekeepers–had also been attacked. *Id.* Moalin observed that "the mission was amazing," laughed, and remarked on "[t]he damage inflicted to those men." *Id.* Later, Moalin assured Ayrow, "you have been successful in the matters you undertook; like tax collections, road blocks, the attack you conducted on big puppets in their own camps," and Moalin promised to try to send more money. SER34-35.

D. Moalin Provides His House in Somalia for al-Shabaab's Use

In a call on January 3, 2008, Moalin offered Ayrow the use of Moalin's house in Somalia. SER40. Moalin explained that "[i]t has a big fence [and] a lot of trees" and "you can use it for anything you want – I mean – if you want to hide stuff in there."

[4] In a subsequent phone conversation, Ayrow informed Moalin that "we received the three." SER36. Ayrow then told Moalin about the "[v]ery heavy fighting" that was ongoing at Adaado, Somalia against forces loyal to a man named Abdullahi Yusuf. SER37. Less than an hour later, Moalin would tell another acquaintance that "I was talking to the man who is in charge of the youth [and he] told me that the fighting that took place in that place was between Abdullahi Yusuf's men and a group of men who belong to the youth." SER45.

Id. Moalin advised Ayrow to bury his "stuff" on Moalin's property and said that he would ask his brother to deliver trees that could be placed on top. SER41. Moalin advised that the house had "a place that is accessible by a ladder [where] I used to store things like documents and weapons." SER43.[5]

E. Moalin and Ayrow Discuss al-Shabaab's Ongoing Use of Terror and Violence

On January 20, 2008, Moalin and Ayrow discussed al-Shabaab's role in the ongoing conflicts in Somalia. SER46-54. Moalin suggested that politics and "military matters" should be handled by different groups, SER48, but Ayrow insisted that "secular politics" are incompatible with Islamic "political principles," under which "the fighter, the politician and the missionary must all come together in a single unit." SER49. Ayrow added that "we, the Shabaab, have a political section, a military section and a missionary section." *Id.* Ayrow dismissed other aspiring Somali leaders, saying that they were living in relative safety outside Somalia while he and his men "sacrifice our most precious belonging, our lives," as his men were "blowing themselves up . . . and killing three to four hundred Ethiopians." SER51. Ayrow continued to boast of the violence that his group had conducted: "The other day, we planted a land mine for Abdi Qaybdiid who was travelling on that road; he was almost

[5] Lending one's house to a terrorist organization carries obvious risks, and, a few months later, Moalin's Somalia home was attacked. *See* SER139-41. According to Moalin, the house was destroyed, but the attackers were then "ambushed" and "decimated." SER139.

hit." SER52. At this time, Abdi Qaybdiid was the police commissioner of the Somali Transitional Federal Government. 3RT 466; *cf. id.* at 461-75 (testimony about the Transitional Federal Government).

Later in the call, Ayrow turned to the topic of funding. SER52-53. Ayrow instructed Moalin to tell defendant Mohamud that "he must let us know the amount of money we can expect every month," explaining that "we want to support the insurgent with it." SER53. Ayrow then bragged that he had fired mortar shells at the Somali Presidential compound, forcing the Prime Minister and Deputy Prime Minister to flee. *Id.*; see also 3RT 446-47. Moalin responded approvingly: "It is something to be thankful of the fact that you are capable to deny them the opening of new offices and to work as a functioning government." SER54.[6]

F. The Defendants Send More Money to al-Shabaab

On February 13, 2008, the defendants sent $2,000 to Somalia. SER15. They split the transaction into two and, again, used fake sender and recipient names as well as a fake sender telephone number. *Id.*; *see also* 7RT 1158-59 (testimony regarding

[6] Later that day, in a call with an individual named Hassan, Moalin described his earlier call with Ayrow, saying that he and Ayrow had "had a heated debate" and "a deep discussion about issues." SER55. Moalin further stated that Ayrow had told him that "[w]e will use what you give us for bullets and drinking-water for the people." *Id.* Moalin explained that Ayrow "uses different names [and] each time he calls from a different phone[;] he never calls from the same place." SER56. Hassan responded that Moalin should be less explicit in explaining this subterfuge on the telephone–"it is not nice to spell out everything like you are spelling out." *Id.*

telephone number). In this instance, the fake sender name that they used was "Dhunkaal Warfaa," SER15, and that same day (Pacific time; the next day in Somalia), Moalin asked Ayrow: "Did you receive Dhunkaal's stuff," adding that "Dhunkaal is asking whether you received two pieces." SER59. Ayrow had not received the money, and so Moalin told him the fake recipient name and the amount ($2,000). SER60.[7]

G. After al-Shabaab Is Designated as a Foreign Terrorist Organization, the Defendants Again Send Money

When the U.S. government designated al-Shabaab as a foreign terrorist organization, Moalin learned about it immediately. At about midnight on March 18, 2008, he explained to an acquaintance that "the American spy agency . . . has added [a]l-Shabaab group to the terrorist list." SER65 ("The Americans can do an economic embargo to anyone it desires."). He explained that the United States "listed names" including "Aden" and "Ro[o]bow." SER66.

On April 11, 2008, Moalin received a call from Ayrow seeking more money. SER68-75. "The help for the drought is over," Ayrow told Moalin, "so now it is the

[7] In that call Ayrow used a telephone number that ended in 57. SER59. In a subsequent call, with an individual named Abdirahman, Moalin made clear that the number that ends in 57 is that of "teacher Aden," *i.e.*, Aden Ayrow. *See* SER63. When Abdirahaman stated that "teacher Aden" "does not have any specific known phone number where he can be reached," Moalin responded that he "calls me from numerous ones that belong to him" and that "currently he has one that ends with 57." SER64.

time to finance the jihad." SER69. Moalin admitted that "[w]e did neglect you," SER70, presumably by temporarily fundraising for drought relief rather than terrorist operations. *See* SER71 (Moalin stating that "we have been very busy dealing with the drought emergency these last few days"). Moalin also offered tactical advice, explaining that Ayrow should "finish" the Ethiopian forces stationed in Adaado, Somalia and advising Ayrow to "prepare" to attempt to shoot down an American helicopter. SER70.

The next day, Moalin and Ayrow again discussed tactics and financing. SER76-83. Ayrow told Moalin that the enemy was "not that far." SER78. Moalin advised that "inflict[ing] more losses" on the enemy "is important." *Id.* Moalin also advised moving forces to "the other side" in order to "ambush them." *Id.* Ayrow complained that while he had "many soldiers," he had "no money" for things such as "bullets to shoot at the enemy." SER81 ("[I]f we had bullets for this enemy we would have destroyed them."). Moalin acknowledged that "the finance can affect everything" and agreed to try to raise more money. SER82-83.

On April 23 and 25, 2008, the defendants did send more money. SER15. The total of $3,000 was split into two transactions – $1,900 and $1,100 – again with fake sender and recipient names and a fake sender telephone number. *Id.*; *see also* 7RT 1159 (testimony regarding telephone numbers). When Moalin and Ayrow spoke, however, Ayrow had received only the $1,900 transaction. SER101. Moalin called

defendant Mohamud to investigate. SER102-06. "[H]ow many stones did we send him?" Moalin asked. SER102. "It was three stones," Mohamud replied, referring to the $3,000 that had been sent. *Id.* When Moalin replied that only "[t]wo stones minus one" ($1,900) had been received, Mohamud explained that "[i]t was sent in installments." SER102-03.

A couple of days later, defendants Mohamud and Moalin spoke again about the missing $1,100 transaction, coming to the apparent conclusion that there had been confusion about which fake recipient name had been used. SER107-13. During the call, they joked about the difficulty of communicating "since everyone uses codes . . . and you will hear many names." SER108. The confusion in this instance had arisen because the same person (Ayrow) was using two different fake names, "Sheikhalow" and "Majadhub." *Id.*

H. After Ayrow Is Killed, the Defendants Seek Out a New Contact to Continue Their Funding of al-Shabaab

On May 1, 2008, Aden Ayrow was killed in a U.S. missile strike in Dhusamareeb, the same Somali city where the defendants had sent money in February and April 2008. 3RT 547; SER15. Al-Shabaab issued an official communique denouncing the strike and acknowledging Ayrow's death. 3RT 548. That day, Moalin called defendant Mohamud and told him that "Majadhub is among th[ose]" referred to in al-Shabaab's statement. SER114. Moalin then called defendant Doreh to explain that "that man is gone," killed by "a huge missile." SER115-16. Moalin

briefly eulogized Ayrow, observing that "he taught the non-Muslims a lesson." SER117.

In the immediate wake of Ayrow's death, Moalin decided to reduce his profile, stopping his calls and "just hiding from them." SER118; *see also* SER118-19 (expressing concerns about surveillance). This hiding phase did not last long, and within a week of Ayrow's death, Moalin was at work looking for a new contact to facilitate funding. *See* SER120-22. On May 8, Moalin explained to an acquaintance named Ali Mahad that "the man that we used to deal with is gone," and that Moalin and others wanted to continue "the assistance." SER120. Specifically, they were looking for a man named "Muqtar" from "the Arab family of the Isaaq clan," who was the "superior" of Moalin's former contact. SER121. This was a reference to Mukhtar Abdirahman Abu Zubeyr, the then-emir of al-Shabaab, who was from the Arab subclan of the Isaaq clan. 6RT 1085.

Moalin subsequently got in touch with a man known as Kay. Moalin explained to Kay that he was looking for a contact who would allow him to fund those "participating in the fighting." SER123. Kay offered the name of Mahad Karate, whom Kay called a "man who is a leader in charge of the operations that are going on in Mogadishu." SER124-25. Mahad Karate was a senior al-Shabaab figure who was responsible for targeted killings and assassinations. 4RT 660. After Ayrow's death,

Karate was among a new generation of al-Shabaab leaders who took on more visibility. *Id.*

In mid-July, Kay facilitated a call between Moalin and Karate. SER129-34. Moalin told Karate of his fundraising activity, saying "I have a small amount that I allocated for the men in Galgaduud, who conducted the operations there," and explained that he had been unable to send money because of Ayrow's death. SER130. Karate gave Moalin the name and telephone number of a new contact, Omer Mataan, SER131, a member of the al-Shabaab forces. SER162-63.

Moalin immediately called Mataan, who informed Moalin that he was in Dhuusamareeb. SER136. On July 23, 2008, the defendants sent $1,650 to Omer Mataan in Dhuusamareeb, using a fake sender name. SER15. On August 5, 2008, they sent $350 to Mataan using a different fake sender name and fake telephone number. *Id.*; *see also* 7RT at 1159-60 (testimony regarding telephone number).

I. The Defendants Resolve to Disguise Their al-Shabaab Support as Charity for the Needy

On July 18, 2008, Moalin expressed his concern to defendant Ahmed Nasir that they were being "closely watched." SER144. He determined that "we will lay low for a while." *Id.* He noted, however, that while laying low, "[w]e can still support the orphans and you know? – people in need and . . . we will conduct our actions along that method; we will go under that pretense now." SER145. Ahmed Nasir

responded: "Yes, we are helping the poor. They do not know it is bullets; that is the way it is you know?" *Id.*

J. Government Assessments

Based on a review of these and other telephone calls, the FBI's San Diego Field Intelligence Group ("FIG") made an assessment of Moalin:

> The San Diego FIG assesses that Moalin, who belongs to the Hawiye tribe/Habr Gedir clan/Ayr subclan, is the most significant al-Shabaab fundraiser in the San Diego Area of Operations (AOR). Although Moalin has previously expressed support for al-Shabaab, he is likely more attentive to Ayr subclan issues and is not ideologically driven to support al-Shabaab. The San Diego FIG assess that Moalin likely supported now deceased senior al-Shabaab leader Aden Hashi Ayrow due to Ayrow's tribal affiliation with the Hawiye Tribe/Habr Gedir clan/Ayr [s]ubclan rather than his position in al-Shabaab. Moalin has also worked diligently to support Ayr issues to promote his own status with the Habr Gedir elders. The San Diego FIG assesses, based on reporting that Moalin has provided direction regarding financial accounts to be used when transferring funds overseas that he also serves as a controller for the US-based al-Shabaab fundraising network.

CR 345-2. This FIG assessment was provided to defendants in discovery, as were the underlying telephone recordings.

The interpreter who translated the telephone calls filled out a general assessment questionnaire (which the defendants refer to in their brief as a "psychological profile") based on his review of the calls. 5RT 930. A redacted version of the questionnaire was disclosed to the defendants. SER147-49. After the defendants moved for disclosure of additional material, the district court reviewed the unredacted questionnaire *in camera* and concluded that the

relevant portions had been produced and that no additional disclosure was necessary. CR279, at 2; 3RT 892 ("there's no Brady, there's no Jencks, there's nothing that needs to be provided"); *see also* CR 273, at 2-3 (ordering *in camera* production).

II. Procedural Background

A. The Charges Against the Defendants

On October 22, 2010, defendants Moalin, Mohamed, and Doreh were indicted, and warrants were issued for their arrest. CR1-4. On January 14, 2011, a first superseding indictment added defendant Ahmad Nasir and, on January 20, 2011, he was ordered detained. CR38; CR40. On June 8, 2012, the government filed a second superceding indictment. ER1-12.

This indictment contained five counts. Count I charged all four defendants with conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A(a), which criminalizes the provision of "material support or resources" with the knowledge or intent that they will be used to prepare for or to carry out a criminal terrorist act. ER3-8; *cf. United States v. Omar*, 786 F.3d 1104 (8th Cir. 2015) (affirming conviction for providing material support to al-Shabaab). This count alleged a conspiracy to provide money, knowing and intending that it was to be used in preparation for and to carry out violations of 18 U.S.C. § 956 (conspiracy to kill persons in a foreign country) and 18 U.S.C. § 2332a(b) (conspiracy to use a weapon of mass destruction outside the United States). ER3.

Count II charged all four defendants with conspiracy to provide material support to a designated foreign terrorist organization ("FTO") in violation of 18 U.S.C. § 2339B. ER9; *cf. United States v. Ali*, 799 F.3d 1008 (8th Cir. 2015) (affirming convictions for conspiring to provide funds to al-Shabaab). This count alleged a conspiracy from March 2008 until approximately August 2008 to provide money to a designated FTO, al-Shabaab.

Count III charged all four defendants with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(a)(2)(A). ER10-11. This count alleged a conspiracy to transfer money out of the United States with the intent to promote the carrying on of unlawful activities. ER10.

Count IV charged defendant Moalin with a substantive violation of 18 U.S.C. § 2339A(a), for providing his house to be used in preparation for and in carrying out a conspiracy to kill persons in a foreign country. ER11. Count V charged defendants Moalin, Mohamud, and Doreh with a substantive violation of 18 U.S.C. § 2339B(a), for providing approximately $3,000 to al-Shabaab in late April 2008, after al-Shabaab had been designated as an FTO. ER11-12.

Four of these counts involve prohibitions on providing material support for terrorism. Congress enacted these provisions in order to "strictly prohibit terrorist fundraising in the United States" and to prevent the United States from being "used as a staging ground for those who seek to commit acts of terrorism against persons in

other countries." H.R. Rep. No. 104-383, at 43 (1995). Congress found that "[s]everal terrorist groups ha[d] established footholds within ethic or resident alien communities in the United States" and many were operating "under the cloak of a humanitarian or charitable exercise." *Id.* Congress thus saw prohibition of material support for foreign terrorists as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat." *Id.* at 45.

The material support provisions prohibit the "knowing[]" support of terrorism. Thus, Section 2339A applies when a defendant provides support "knowing or intending" that his support will be used to prepare for or to carry out a terrorist act. Section 2339B applies when a defendant provides support to an FTO, knowing either that the entity is an FTO or that it has engaged in or engages in terrorist activity. A defendant's motive, however, is not an element of either offense, and it is immaterial whether a defendant shares the ideology of the terrorist group he supports. Motive is similarly not an element of the money laundering statute which criminalizes, *inter alia*, the transfer of money to another country with the intent to promote specified unlawful activity. 18 U.S.C. § 1956(a)(2)(A).

B. Pretrial Proceedings

On March 30, 2012, approximately a year and a half after the defendants' initial indictment, the defendants raised the prospect of taking trial depositions of "multiple

witnesses in Somalia." CR140. At a status hearing less than a week later, the district court addressed this "cryptic passage" of the defendants' filing by instructing defense counsel to set up a conference with the magistrate judge to pursue the issue. CR144, at 4. Immediately following the hearing, counsel for the defense and the government discussed the issue with the magistrate judge's staff. CR161, at 3. The staff asked when the defendants expected to file their motion. *Id.* When defense counsel declined to provide a specific date, the magistrate judge's clerk asked defense counsel to contact chambers for a hearing date before filing their motion. *Id.*

Rather than follow this instruction, the defendants waited more than three months and then, without a obtaining a hearing date, filed a motion to depose eight witnesses in Mogadishu, Somalia. CR152. Three days later, the district court struck the motion for failure to obtain a hearing date as required by the local rules. CR153. On July 20, 2012, the defendants again moved to take the depositions of eight Somali nationals in Mogadishu, Somalia. CR154. The defendants claimed that the putative witnesses were "people to whom Mr. Moalin transferred money, or who possess direct knowledge of how money that the defendants transferred to Somalia was spent." CR154-1, at 2. The government opposed, arguing that the defense motion was untimely, the unavailability of the witnesses had not been established, the testimony would not be reliable given the lack of any realistic perjury sanction, the

potential testimony would not be helpful to the defendants, and Somalia was an unsafe place for prosecutors. CR161.

The district court denied the motion. ER20-30. The court first found that the defendants had made "no showing as to unavailability." *Id.* at 23. The court next found that the defendants' motion was untimely:

> This court strongly counseled the parties that the matter of depositions would be managed by Magistrate Judge Gallo. Unfortunately the record demonstrates that Defendants never pursued this matter before Magistrate Judge Gallo and some 3 ½ months later filed a Rule 15 motion to be heard in late August and in such a manner that were the depositions allowed the trial date would, as Defendants acknowledge, have to be continued yet again. In light of Defendants' longstanding knowledge about the interactions between the proposed deponents and themselves, such a request has not been timely brought.

Id. at 23-24.

The court next found that a factor that weighed "decisively" against the defendants' motion was the "substantial risks" to life and safety that would be presented by depositions in Somalia: "For this court to order, encourage, or condone United States prosecutors traveling to a lawless and proven violent state–with advance notice to those who might contemplate harming these individuals–would be reckless and indefensible." *Id.* at 28. Finally, the district court found that the factor of "reliability and trustworthiness of the proposed depositions strongly disfavors Rule 15 depositions in Somalia," given that the defendants had made no showing that an oath

in Somalia has the same meaning as in the United States or that such an oath is subjected to "penalties of perjury and judicial process." *Id.* at 29.

Despite the deficiencies in the defendants' motion, the district court denied the motion without prejudice to the filing of a further request for alternative procedures to obtain testimony. *Id.* at 20. The district court, "once again," ordered the parties to immediately appear before the magistrate judge for further discussions. *Id.* at 29 n.6. After several conferences with the parties, on September 6, 2012, the magistrate judge entered an order for depositions to occur in Djibouti. ER31-32. The order specified that "depositions will be taken only of the witnesses who voluntarily present themselves" and warned the defendants that "[t]here will not be another opportunity for these witnesses to be deposed." *Id.* at 31.

On October 26, 2012, the defendants moved for an order requiring the government to provide "safe passage" to seven witnesses who planned to travel from Somalia to Djibouti for depositions. CR213. By "safe passage," the defendants meant a "guarantee that the United States government would not arrest or otherwise detain" a witness "because he appeared at the deposition in Djibouti." 213-1, at 2. The magistrate judge denied the motion three days later, finding that the court lacked "authority to order the executive branch to provide safe passage to defense witnesses." ER34.

The defendants sought reconsideration by the district court. CR220. The defendants noted that one of the witnesses, a citizen of Djibouti named Farah Shidane, who was also known as Farah Yare and who had been identified by the government as an unindicted co-conspirator of the defendants, had, through counsel, informed the defendants that he would not travel to Djibouti in the absence of a "guarantee" of "safe passage" to and from Djibouti. CR220-2. Relying primarily on *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008), the defendants argued that the district court had the authority to order the government to provide a letter of "safe passage" to the prospective witnesses. CR220, at 4. The district court disagreed with the defendants and affirmed the magistrate judge's conclusion that the court lacked the "authority to compel the executive branch to provide 'safe passage'" for a foreign citizen travelling between foreign countries. ER39 (suggesting that such an order would raise "separation of powers problems"). The district court further found that even if *Straub*, which concerned a grant of immunity to a witness within the United States, applied, the defendants had failed to satisfy the test set forth in that case. *Id.* at 40.

Between November 12 and November 15, 2012, with prosecutors present, defense counsel took videotaped depositions of seven defense witnesses in Djibouti. ER43. Shidane, however, refused to appear, consistent with what his counsel had told

the defendants the previous month. *Id.* On November 22, 2012, the defendants filed a renewed motion to take a Rule 15 deposition of Shidane in Mogadishu. CR224.

The district court denied the motion. ER42-46. The court first found that the defendants had not been denied the opportunity to take Shidane's deposition and that "[t]here is no evidence before the court to suggest that the Government interfered in any manner with Mr. Shidane's ability to appear at his deposition." *Id.* at 44. The court found that Shidane was a citizen of Djibouti who did not need a visa to travel there. *Id.* The court next found that, for the reasons stated in the denial of the defendants' initial motion for depositions, "the request for a video deposition is untimely." *Id.* Indeed, the court found this request was even more untimely than the earlier untimely motion, "coming about seven weeks before trial and one week before the filing of the motions in limine." *Id.* Finally, the court found that "[p]rinciples of reliability, trustworthiness and fundamental fairness weigh against the videotaped deposition" as Shidane, were he to testify from Somalia, would be "able to provide false testimony without any repercussions," while the government would be unable to directly observe the witness. *Id.* at 45.

C. Trial

The trial began on January 28, 2013. ER73. The government presented thirteen witnesses, and the defense presented eleven witnesses, including the video-taped depositions described above. *Id.* The principal evidence relied on by the

government included excerpts from approximately 80 intercepted telephone calls, including those described in Part I above. On February 22, 2013, the jury found the defendants guilty on all counts charged. 14RT 2010-13.

D. Post-Trial Proceedings

On September 30, 2013, the defendants filed a motion for a new trial. CR345. This motion, the district court observed, "raise[d] no typical arguments for a new trial," such as a claim of insufficient evidence. ER75. Instead, the defendants focused on two sealed pretrial orders from the district court: "the order denying the motion to suppress [Foreign Intelligence Surveillance Act] intercepts [of Moalin's telephone calls] and the order granting the Government's motion for a protective order under [the Classified Information Procedures Act]." *Id.* Specifically, the defendants argued that those earlier decisions should be revisited in light of intervening revelations regarding the NSA's collection of telephony metadata, as well as statements by a government official that the telephony metadata collection program had played a role in identifying Moalin as a subject for further investigation. *See id.* at 76. The defendants contended that the telephony metadata collection was unlawful and tainted the subsequent use of FISA-authorized surveillance of Moalin's telephone calls. *Id.* at 77. The defendants further argued that defense counsel should be granted access to classified FISA and CIPA materials. *Id.* Finally, the defendants argued that the government had failed to provide certain discovery. *Id.*

The government opposed the motion for a new trial in a partly classified response. *See* CR387. The district court rejected the defendants' motion in an unclassified, public order. *See* ER77 & n.4. The district court found that the defendants' challenge to the collection of telephony metadata from third-party companies was foreclosed by "persuasive and binding authorities" from the Supreme Court and this Court. *Id.* at 80. The district court rejected the defendants' invitation to cite "the recent rise of the digital era" as an excuse to ignore binding precedent. *Id.* Noting that the challenged NSA activity was functionally identical to a pen register, which can be lawfully used without a warrant, the district court observed that "the use of pen register-like devices—going back to Samuel Morses's 1840 telegraph patent—predates the digital era and cannot be considered a product of the digital revolution like the internet or cell phones." *Id.* at 80-81. "[M]ore importantly," the district court held, "the Supreme Court specifically and unequivocally held in *Smith* [*v. Maryland*, 442 U.S. 735, 744 (1979),] that retrieval of data from a pen register by the Government without a search warrant is not a search for Fourth Amendment purposes." *Id.* at 81. In sum, "when Defendant Moalin used his telephone to communicate with third parties, whether in Somalia or the United States, he had no legitimate expectation of privacy in the telephone numbers dialed" because he (or the other party) voluntarily conveyed those numbers to "the communications company [for use] in the ordinary course of business." *Id.*

The district court next rejected the defendants' effort to gain access to the classified CIPA and FISA materials, observing that "[l]egal authorities that have addressed this precise issue have uniformly rejected this argument." *Id.* at 84. The district court noted that it had "reviewed all materials submitted under seal and concluded that such *ex parte* proceedings are authorized." *Id.*

Finally, the district court rejected the defendants' discovery challenges. *See id.* at 85-86. The district court found that the "Defendants fail to identify any evidence not produced by the Government pursuant to Rule 16, the Jencks Act, or *Brady*." *Id.* at 85. The court further stated that, "[b]ased upon the court's careful review of all materials provided by the Government under FISA and CIPA, as well as the myriad of intercepted communications provided to the defense, the court has no reason to suspect or speculate that the Government may have faltered in its *Brady* obligations." *Id.* at 86.

III. Statutory Background

FISA was initially enacted by Congress in 1978 in order "to regulate the use of electronic surveillance within the United States for foreign intelligence purposes." *See* S. Rep. No. 95-604, at 7 (1977). The Act created a specialized Article III court, the Foreign Intelligence Surveillance Court ("FISC"), composed of federal district court judges designated by the Chief Justice, to adjudicate government applications for ex

parte orders authorized by FISA. *See* 50 U.S.C. § 1803(a); *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.).

As subsequently amended, FISA contains five titles (Titles I, III, IV, V, and VII) that provide foreign intelligence investigatory tools. Two of these tools are relevant to this appeal. Key evidence of the defendants' guilt—intercepted telephone communications of the defendants and others discussing their provision of support for al-Shabaab's violent activities—was acquired by the government pursuant to orders issued under FISA Title I. *See* 50 U.S.C. §§ 1801-1812. On appeal, however, the defendants do not bring a Title I challenge, but rather seek to challenge the acquisition, from a third-party company, of business records pursuant to FISA Title V. *See* 50 U.S.C. § 1861.

A. FISA Title I

Title I is part of the originally enacted act and, along with Title III, is often referred to as "traditional FISA." Title I permits the government to seek a judicial order approving electronic surveillance of (for example) a telephone. *See* 50 U.S.C. § 1804. An order will issue if the FISC finds that the government has established probable cause to believe that the target of the FISA application is a foreign power or an agent of a foreign power and that each of the facilities or places at which the electronic surveillance will be directed (*e.g.*, a telephone number) is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C.

§ 1805(a)(2). The term "foreign power" includes "group[s] engaged in international terrorism or activities in preparation therefor." 50 U.S.C. § 1801(a)(4). A U.S. person is an "[a]gent of a foreign power" if, for example, he "knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power," or "knowingly aids or abets any person in the conduct of," or "knowingly conspires with any person to engage in," such activities. 50 U.S.C. § 1801(b)(2)(C), (E).

B. FISA Title V

The tool provided in FISA Title V is very different from the electronic surveillance authority provided in Title I. *See* 50 U.S.C. § 1861. As amended by Section 215 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 287 (2001), the relevant version of Title V is entitled "Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations." This provision authorizes the government to apply to the FISC "for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." *Id.* § 1861(a)(1). It applies only where the records or other tangible things sought could "be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a

court of the United States directing the production of records or tangible things." *Id.* § 1861(c)(2)(D).

Title V requires that the application include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." *Id.* § 1861(b)(2)(A). Title V also includes other requirements to obtain an order to produce business records or other tangible things. *See, e.g., id.* § 1861(a)(2)(A) (investigation must be authorized and conducted under guidelines approved by the Attorney General under Executive Order No. 12,333 or a successor thereto); *id.* § 1861(b)(2)(D) (application must "enumerat[e] . . . minimization procedures adopted by the Attorney General . . . that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available" under the order); *see also id.* § 1862 (requiring reports to Congress to facilitate congressional oversight). If the government makes the requisite factual showing, a FISC judge "shall enter an ex parte order as requested, or as modified, approving the release of tangible things." *Id.* § 1861(c)(1).

Title V thus provides the government with the ability, in national security investigations, to obtain business records in a way similar to a grand jury subpoena in a criminal case, or an administrative subpoena in a civil investigation. *See, e.g.*, To Permanently Authorize Certain Provisions of the USA PATRIOT Act, S. Rep. No. 109-85, at 20 (2005). The significant distinction is that a Title V order for business

records or other tangible things can only be issued by a judge, while similar law enforcement authorities can be used unilaterally by the Executive Branch. *See id.* ("[A] federal prosecutor need only sign and issue a grand jury subpoena to obtain similar documents in criminal investigations, yet national security investigators have no similar investigative tool."). Title V is thus "designed to ensure not only that the government has access to the information it needs for authorized investigations, but also that there are protections and prohibitions in place to safeguard U.S. person information." *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, 2013 WL 5741573, at *3 (FISA Ct. Aug. 29, 2013) ("*In re Application I*").

C. The Former Telephony Metadata Collection Program

Beginning in 2006 and continuing until November 2015, the NSA operated a bulk collection program that involved acquiring telephony metadata records from certain telecommunications companies for use in certain counterterrorism investigations. These records were acquired pursuant to orders issued by the FISC under FISA Title V, each of which lasted approximately 90 days. *See* CR345-3, at 6. During its existence, the program was approved 43 times by nineteen different Article III judges, five of whom wrote publicly available opinions of relevance here. *See In re Application I*, 2013 WL 5741573 (Eagan, J.); *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. No. BR 13-158 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.) ("*In re Application II*"), *available at* www.fisc.uscourts.gov/sites/

default/files/BR%2013-158%20Memorandum-1.pdf; *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. No. BR 14-01 (FISA Ct. Mar. 20, 2014) (Collyer, J.) ("*In re Application III*"), *available at* www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion%20and%20Order-1.pdf.; *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, 2014 WL 5463290 (FISA Ct. June 19, 2014) (Zagel, J.) ("*In re Application IV*"); *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, 2015 WL 5637562 (FISA Ct. June 29, 2015) (Mosman, J.) ("*In re Application V*").

The NSA program helped "the government close [an intelligence] gap by enabling the detection of telephone contact between terrorists overseas and operatives within the United States." CR345-3, at 4 (testimony of Director of National Security Agency). Deputy Attorney General James Cole described the program to Congress in 2013:

> [It collected] metadata. These are phone records. These—this is just like what you would get in your own phone bill. It is the number that was dialed from, the number that was dialed to, the [date] and the length of time. [Metadata is] all we get under [the program]. We do not get the identity of any of the parties to this phone call. We don't get any cell site or location information as to where any of these phones were located and, most importantly . . . we don't get any content under this. We don't listen in on anybody's calls under this program at all.

Id. at 5. At no point did the program collect all call detail records pertaining to persons in the United States. *In re Application I*, 2013 WL 5741573, at *1 n.5.

The FISC orders authorizing the program required the government to "strictly adhere" to a set of comprehensive minimization procedures limiting the government's use of the telephony metadata. *See id.* at *11-*12. Those procedures required that the metadata be maintained by the NSA with access strictly limited "to authorized personnel who have received appropriate and adequate training." *Id.* at *11; *see also* CR345-3, at 6 (Deputy Attorney General testimony that the "limited number of people . . . who are allowed to access [the data] have to have special and rigorous training about the standards under which they can access it"). It could be queried for purposes of obtaining foreign intelligence information only where one of a limited number of specially-trained NSA officials determined that there was a reasonable articulable suspicion that a particular selection term (*e.g.*, a telephone number) was associated with one of certain designated terrorist organizations (whose identities remain classified). *In re Application I*, 2013 WL 5741573, at *12; CR345-3, at 6. Such queries could be conducted only "for purposes of obtaining foreign intelligence information" through "contact chaining information." *In re Application I*, 2013 WL 5741573, at *11. Thus, the phone number of a suspected overseas-based terrorist might be queried to determine what numbers had been in contact with it, what numbers had been in contact with those numbers, and what numbers had been in contact with the those numbers.[8]

[8] For most of its duration, the program was limited to three such "hops." In 2014,
(continued . . .)

No U.S. person information obtained from the program could be disseminated outside the NSA (except for oversight purposes, or to meet *Brady* or Jencks Act requirements) unless a trained NSA official "determine[d] that the information identifying the U.S. person is in fact related to counter terrorism information and that it is necessary to understand the counterterrorism information or assess its importance." *Id.* at *12. The program was subject to oversight by the Department of Justice, the FISC, and Congress. *See id.* at *13; CR345-3, at 2 (statement of House Permanent Select Committee on Intelligence Chairman Rogers that "[t]he committee has been extensively briefed on these efforts over a regular basis as part of our ongoing oversight responsibility" and that "collection efforts under the business records provision [of FISA] are legal, court-approved and subject to an extensive oversight regime"); *id.* at 3 (statement of Ranking Member Ruppersberger that "[t]hese laws are strictly followed and layered with oversight from three branches of government, including the executive branch, the courts and Congress").

In 2007, the program, whose purpose was to alert the government to persons inside the United States who might be connected to foreign-based terrorists, "tipped" the government to the fact that a particular San Diego-area telephone number "had

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the limit was changed to two "hops," and a requirement was imposed that the reasonable articulable suspicion determination be approved by the FISC. *See In re Application V*, 2014 WL 5463290, at *2 & n.2.

indirect contacts with a known terrorist overseas." CR345-3, at 9-10; *see also* CR345-6, at 14 (NSA program determined that "a number in San Diego was in [indirect] contact with an Al-Shabaab . . . Al Qaida East Africa member in Somalia"). It would later be determined that this San Diego-area telephone number was used by defendant Moalin. *See* CR345-6, at 14. Further discussion of the role of this tip is contained in the government's classified supplemental brief.

D. The USA FREEDOM Act

On June 1, 2015, the statutory provision underlying the NSA program (Section 215 of the USA PATRIOT Act, which amended 50 U.S.C. § 1861) expired. *See In re Application V*, 2015 WL 5637562, at *1. On June 2, 2015, Congress enacted the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, which "effectively restored the version of [50 U.S.C. § 1861] that had been in effect [prior to] the June 1 sunset." *In re Application V*, 2015 WL 5637562, at *4. It did so, however, for a limited time.

The FREEDOM Act provided statutory authority for a new telephony metadata program, one where the NSA does not collect call detail records in bulk. *See* Pub. L. No. 114-23, § 101(b)(3) (codified at 50 U.S.C. § 1861(c)(2)(F)). The Act effectively required the NSA to transition to this new program by proscribing further bulk collection of call detail records. *See id.* § 103 (codified at 50 U.S.C. §§ 1861(b)(2)(A), 1861(c)(3)). To allow the NSA time to transition to the new

program without losing important counterterrorism capabilities, the FREEDOM Act delayed the effective date of both of these changes until 180 days after enactment. *See id.* § 109. The former program thus continued with FISC approval, *see In re Application V*, 2015 WL 5637562, until November 29, 2015. As of that time,[9] the NSA was required to proceed under the new statutory framework established by the FREEDOM Act. Under the new framework, the government does not collect telephony metadata in bulk, but instead may apply to the FISC for "production on an ongoing basis of call detail records created before, on, or after the date of the application" for a "specific selection term" (such as a telephone number) where there is "a reasonable, articulable suspicion" that the specific selection term is associated with a foreign power, or an agent of a foreign power, engaged in international terrorism." 50 U.S.C. § 1861(b)(2)(C); *see also id.* § 1861(c)(2)(F).

SUMMARY OF ARGUMENT

The defendants' attack on the NSA's discontinued telephony metadata collection program, through their challenge to the district court's denial of their motion for a new trial, misses the mark. Not only are their arguments challenging the legality of that program meritless, as the district court correctly found, but the

[9] With FISC approval, the NSA continued to maintain access to the bulk call detail records for certain limited, non-analytic, technical purposes for only three additional months, until February 29, 2016. *See Smith v. Obama*, __ F.3d __, 2016 WL 1127087, at *1 (9th Cir. Mar. 22, 2016) (holding that civil claim for injunctive relief against the program was moot).

evidence of the defendants' guilt was neither obtained from the program nor was it the "fruit" of that program. Moreover, the high societal costs of suppression could not be justified in a case where the government acted in good faith in reliance on orders repeatedly issued by Article III courts and where the challenged program has ceased. Denial of the new trial motion was not an abuse of discretion.

The defendants' other arguments fare no better. The district court correctly found that the government had met its *Brady* and other discovery obligations. The district court's evidentiary decisions were well within that court's discretion, and they afforded the defendants a full and fair opportunity to place their defense before the jury. Finally, the evidence was sufficient to support the convictions of all of the defendants, including Issa Doreh, the only defendant who raises this challenge on appeal.

ARGUMENT

I. The District Court's Denial of the Defendants' Motion for a New Trial Was Correct and Not an Abuse of Discretion

The defendants first raised a challenge to the NSA telephony collection program in their September 2013 motion for a new trial. CR345. Their argument for a new trial was complex. They claimed that (1) information about a San Diego-based telephone number was obtained from the allegedly unlawful NSA program; (2) this information prompted a "tip" to the FBI; (3) the FBI then opened an investigation; (4) the FBI's investigation determined that the San Diego-based telephone number

was used by Moalin; (5) the FBI then obtained authorization from the FISC, pursuant to Title I of FISA, to engage in electronic surveillance of Moalin; (6) this FISC-authorized electronic surveillance resulted in the interception of telephone conversations that inculpated the defendants in the conspiracy to support al-Shabaab; and (7) those conversations formed key evidence of the defendants' guilt at trial.[10] The defendants' legal argument was essentially that the NSA program was what is known in Fourth Amendment law as a "poisonous tree," and that the evidence of guilt introduced at trial was its "fruit," and therefore was subject to suppression. Because the trial involved the use of what the defendants argued was "fruit" of a "poisonous tree," they claimed that they were entitled to a new trial. The district court rejected this argument, and this Court should as well.

Moalin's[11] argument contains numerous flaws. For one thing, there is no "poisonous tree." The NSA program was legal. As the district court correctly held,

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[10] Steps 5, 6, and 7 accurately summarize what occurred. Relevant foreign intelligence investigatory activity that preceded the FISC Title I authorization for electronic surveillance is summarized in the government's classified supplemental brief.

[11] The defendants' brief purports to bring this challenge on behalf of all four defendants. However, defendants Mohamud, Doreh, and Ahmed Nasir lack even a colorable basis to join this challenge as there is no evidence in the record indicating any collection of metadata concerning their calls or, more importantly, that any such collection had any connection whatsoever to the prosecution of the defendants. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (only a person whose rights were violated can pursue remedy); *Alderman v. United States,* 394 U.S. 165, 171-75 (1969) (same); *see also Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. 2015) (holding that plaintiffs who

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Moalin's Fourth Amendment challenge runs squarely against clear, binding precedent from both the Supreme Court and this Court holding that there is no reasonable expectation of privacy in telephony metadata records held by the phone company. Moalin's statutory suppression argument is also without merit, and, in any event, there is no suppression remedy for the statutory violation that Moalin alleges.

But this Court need not even reach these questions because, for at least three separate reasons, the evidence introduced at trial in this case was not "fruit" of the challenged NSA program. *See United States v. Crawford*, 372 F.3d 1048, 1053-59 (9th Cir. 2004) (en banc) (finding that attenuation doctrine precluded suppression without deciding whether there was an underlying constitutional violation); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). First, an investigative lead or tip does not taint the entire subsequent investigation, as the intervening investigative steps serve to attenuate the evidence. *United States v. Smith*, 155 F.3d 1051, 1063 (9th Cir. 1998). Second, by themselves, the FISC orders authorizing the Title I surveillance attenuate the evidence from the initial "tip." *Segura v. United States*, 468 U.S. 796, 813-16 (1984). And, third, the classified record

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(. . . continued)
merely speculated that metadata relating to their calls had been collected by NSA lacked standing to maintain civil challenge to collection).

provides an additional reason why the trial evidence was not "fruit" of the NSA program.

Moreover, there are two additional reasons why suppression was unavailable in this case. First, suppression is precluded where government agents were acting based on facially valid court orders such as those that authorized the NSA program. *See United States v. Leon*, 468 U.S. 897, 925 (1984); *cf. United States v. Craig*, 861 F.2d 818, 820 (5th Cir. 1988) ("Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of the evidence under the good-faith exception of *Leon* will resolve the matter."). And, second, suppression is not appropriate where, as here, it could serve no deterrence function because the challenged program has ended and there is no prospect of it restarting. *United States v. Dreyer*, 804 F.3d 1266, 1280 (9th Cir. 2015) (en banc).

A. Standard of Review

A district court's decision not to grant a new trial is reviewed for abuse of discretion. *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994). The district court's factual findings are reviewed for clear error. *United States v. Orman*, 486 F.3d 1170, 1173 (9th Cir. 2007). Questions of law relating to suppression are reviewed *de novo*. *Id.*

B. The Evidence Presented at Trial Was Not "Fruit" of the Challenged NSA Program Because an Investigatory Lead Cannot Taint an Entire Investigation

Even assuming that there was a causal chain linking the NSA program and the evidence introduced at trial, there is no doubt that the trial evidence was attenuated from the tip generated by the telephony metadata program. But-for causation is a "necessary, [but] not a sufficient, condition for suppression." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006); *see also United States v. Ankeny*, 502 F.3d 829, 837 (9th Cir. 2007). Indeed, the Supreme Court has repeatedly held that "but-for cause, or 'causation in the logical sense alone,' . . . can be too attenuated to justify exclusion." *Hudson v. Michigan*, 547 U.S. at 592 (quoting *United States v. Ceccolini*, 435 U.S. 268, 274 (1978)); *accord United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) (reaffirming "the courts' consistent rejection of a 'but for' causation standard in 'fruit of the poisonous tree' doctrine"). Thus, even where but-for causation has been established, a court must further determine "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see also Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

As the defendants concede, the relevant product of the NSA program was merely a "tip," D.Br. 115, that provided law enforcement with the impetus to look into a phone number that turned out to have been used by Moalin. As a matter of

law, such a tip or lead, even where (unlike here) it is unlawfully obtained, cannot taint an entire criminal investigation or the resulting criminal conviction. *United States v. Smith*, 155 F.3d 1051, 1063 (9th Cir. 1998). A holding to the contrary would "grant life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be." *United States v. Cella*, 568 F.2d 1266, 1285-86 (9th Cir. 1977) (quoting *United States v. Friedland*, 441 F.2d 855, 861 (2d Cir. 1971) (Friendly, J.)); *accord United States v. Ortiz–Hernandez*, 427 F.3d 567, 577 (9th Cir. 2005) ("[A] criminal defendant cannot suppress his identity, even when there has been some prior illegality on the part of the government.").

In *United States v. Smith*, this Court found that the government had illegally accessed a voicemail message from the defendant that suggested that he was involved in insider trading. 155 F.3d at 1053-54. This voicemail led the Securities and Exchange Commission to investigate the defendant, and he was eventually convicted of securities laws violations. *Id.* at 1054. The defendant argued that because the unlawfully obtained voicemail "was the impetus for starting the investigation," therefore "the evidence obtained in the subsequent investigation of [defendant] should have been suppressed." *Id.* at 1060-61 (quoting defendant's brief).

This argument, which is similar to the argument advanced by Moalin in this case, was squarely rejected by this Court: "Contrary to Smith's suggestions, under

Ninth Circuit precedent, the baseline inquiry in evaluating taint is not whether an unlawful search was the 'impetus' for the investigation or whether there exists an unbroken 'causal chain' between the search and the incriminating evidence." *Id.* at 1061. Quite the opposite, "it is *not* sufficient in demonstrating taint . . . that an illegal search uncovers the alleged perpetrator's identity, and therefore directs attention to a particular subject." *Id.* (emphasis in original) (quotation marks omitted). Thus, while the unlawfully acquired voicemail message may have "tipped off the government to the fact that a crime had been committed and to the probable identity of the perpetrator," that was not enough to establish taint through the fruit-of-the-poisonous-tree doctrine. *Id.* at 1063. Rather, the voicemail was "a 'lead'," and a lead "is simply not enough to taint an entire investigation." *Id.*; *accord Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978) ("[T]he mere fact that [a] Fourth Amendment illegality directs attention to a particular suspect does not require exclusion of evidence subsequently unearthed from independent sources."). The lead in this case was even more limited than the voicemail in *Smith*, as it did not even include Moalin's first or last name, but rather "revealed only the slimmest of leads: [a telephone] number." *United States v. Hassanshahi*, 75 F. Supp. 3d 101, 113 (D.D.C. 2014). Thus, the government "was required to take an additional investigative step just to find a name associated with the [telephone] number, as compared to the typical 'unlawful

lead' case in which the defendant's full identity is discovered through the illegal search or seizure." *Id.*

The law in other circuits is the same. *E.g.*, *United States v. Carter*, 573 F.3d 418, 423 (7th Cir. 2009) ("Few cases, if any, applying the attenuation exception hold that evidence . . . is inadmissible because an illegal search first made a particular person a suspect in a criminal investigation."); *United States v. Najjar*, 300 F.3d 466, 478-79 (4th Cir. 2002) (documents from illegal search led to a subsequent investigation, but additional and independent investigatory steps sufficiently attenuated evidence from initial search); *United States v. Watson*, 950 F.2d 505, 508 (8th Cir. 1991) ("[W]here a law enforcement officer merely recommends investigation of a particular individual based on suspicions arising serendipitously from an illegal search, the causal connection is sufficiently attenuated so as to purge the later investigation of any taint from the original illegality."); *United States v. Hassanshahi*, 75 F. Supp. 3d 101, 112 (D.D.C. 2014) ("Federal courts consistently have held that the exclusionary rule does not apply to subsequently discovered evidence when an initial limited piece of information—typically the name of a potential target for investigation—is obtained through an illegal search or seizure because substantial intervening investigative steps still are required to uncover the necessary incriminating evidence.").

For example, in *United States v. Friedland*, agents illegally bugged the offices of an acquaintance of the defendant. 441 F.2d at 856-57. The agents who conducted the

bugging informed other agents that the defendant was worth investigating, and this triggered further investigation, which uncovered the defendant's involvement in bond forgery. *Id.* at 857. In refusing to suppress the evidence, Judge Friendly held that it "would stretch the exclusionary rule beyond tolerable bounds" to suppress the results of an investigation because an illegal search had led police to focus on the defendant. *Id.* at 861.[12]

Because the NSA program provided a mere tip or lead, it did not taint the evidence that was subsequently uncovered using independent investigatory techniques.

C. The Valid FISC Orders Issued under FISA Title I Attenuated the Trial Evidence from the NSA Program

Evidence seized pursuant to valid judicially-issued process that was based upon information obtained independently from the alleged illegality is not subject to suppression. *See Segura v. United States*, 468 U.S. 796, 813-16 (1984); *United States v. Bosse*, 898 F.2d 113, 116 (9th Cir. 1990); *see also Johnson v. Louisiana*, 406 U.S. 356, 365

[12] The cases relied on by Moalin do not involve tips that provided the impetus for further investigation; they involve the use of illegally obtained substantive evidence to further investigations. *United States v. Perez*, 506 F. App'x 672 (9th Cir. 2013), involved the illegal seizure of a telephone containing "incriminating photographs and text messages." *Id.* at 674. *United States v. Thomas*, 211 F.3d 1186 (9th Cir. 2000), involved an illegal automobile search that uncovered approximately 60 pounds of marijuana and a shotgun. *Id.* at 1188-89. *Commonwealth v. Keefner*, 961 N.E.2d 1083 (Mass. 2012), like *Perez*, involved an unlawful seizure of a telephone. *Id.* at 1092. And *Staples v. United States*, 320 F.2d 817 (5th Cir. 1963), concerned an unlawful automobile search that uncovered a hotel room key. *Id.* at 820.

(1972) (bail hearing before magistrate purged the taint of unlawful arrest such that subsequent lineup was not fruit of poisonous tree).

The trial evidence that Moalin sought to suppress by way of his new trial motion (*i.e.*, the intercepted phone calls) was obtained pursuant to FISC orders issued under Title I of FISA. This intervening judicial authority fully attenuates the trial evidence from the NSA "tip." *See Segura*, 468 U.S. at 814, 816 (even if alleged illegality "could be considered the 'but for' cause for discovery of the evidence," valid intervening search warrant "purge[d] the evidence of any 'taint' arising from the entry").

A different conclusion regarding attenuation might be warranted if information from the telephony metadata program had been necessary for the FISC's probable cause finding. *See Franks v. Delaware*, 438 U.S. 154 (1978). But that is not the case here. The telephony metadata program allowed the government to learn that a telephone number that turned out to be Moalin's had "had indirect contacts with a known terrorist overseas." ER74 (quoting FBI Deputy Director). The program collected no communications content, and the mere fact that Moalin had talked to one or more people who had in turn talked to a known terrorist could not, by itself, support a probable cause finding that Moalin was "a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(2)(A). More importantly, in this case, it did not and was not necessary to support the requisite probable cause showing for the FISA

Title I application. This is demonstrated by the classified record available to this Court, which contains the relevant FISC applications. *See also* Gov't Classified Supp. Br. Thus, trial evidence obtained through use of FISA Title I authority in this case was not the "fruit" of the challenged NSA program. *United States v. Karo*, 468 U.S. 705, 719 (1984); *see also United States v. Forrester*, 512 F.3d 500, 513 (9th Cir. 2008); *United States v. Salas*, 879 F.2d 530, 537-38 (9th Cir. 1989).

D. There Is an Additional Reason Why the Evidence Was Not the "Fruit" of the NSA Program

The government's classified supplemental brief provides an additional basis for finding that the evidence admitted at trial was not the "fruit" of the telephony metadata program.

E. There Is No Suppression Remedy for the Statutory Violation that Moalin Posits

Statutory violations do not lead to suppression of evidence unless (1) suppression "is clearly contemplated by the relevant statute," *United States v. Forrester*, 512 F.3d 500, 512 (9th Cir. 2007); *accord United States v. Donovan*, 429 U.S. 413, 432 n.22 (1977) (holding that the availability of a suppression remedy for "statutory, as opposed to constitutional, violations . . . turns on the provisions of [the statute] rather than the judicially fashioned exclusionary rule"), or (2) "the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth

Amendment interests." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). Neither condition applies here.

First, FISA's text makes clear that Congress did not intend for there to be a suppression remedy for a violation of Title V of FISA—the source of authority for the telephony metadata program. As described above, there are five FISA titles that provide information gathering tools for use in foreign intelligence investigations. In four of the titles, Congress provided that a criminal defendant is entitled to notice and an opportunity to move for suppression. *See* 50 U.S.C. §§ 1806(e), 1825(f), 1845(e), 1881e. In Title V, however, Congress elected not to provide for a suppression remedy. *See* 50 U.S.C. § 1861. This omission must be understood to be intentional, *Russello v. United States*, 464 U.S. 16, 23 (1983), particularly given that Congress, cognizant of the very NSA program Moalin challenges, recently amended Title V and again opted not to add a suppression remedy, *see* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015). Given this legislative determination, the Court "would 'encroach upon the prerogatives of Congress were [it] to authorize a remedy not provided for by statute.'" *Forrester*, 512 F.3d at 512 (quoting *United States v. Frazin*, 780 F.2d 1461, 1466 (9th Cir. 1986)).

Second, FISA Title V's "relevance" requirement was not a statutory provision that implicated Moalin's constitutional rights. In the absence of an express suppression provision enacted by Congress, the Supreme Court has found a

suppression remedy only three times, in cases "decided in the 1940s and 1950s, [each of which] concerned a statute that prophylactically protected Fourth Amendment or Due Process rights at a time when the judiciary had not fully fleshed out those constitutional protections."[13] *United States v. Hassanshahi*, __ F. Supp. 3d __, 2015 WL 7303515, at *6 (D.D.C. Nov. 19, 2015) (quotation marks omitted). This Court has observed that "the Supreme Court has approved of using the [exclusionary] rule to remedy statutory violations only in rare circumstances," *Dreyer*, 804 F.3d at 1278, and has itself found suppression for a statutory or regulatory violation to be an available remedy only once, in a case where the statute at issue was found to be "deeply grounded in constitutional principles," *id.* at 1281 (Berzon, J., concurring); *see also id.* at 1279 & n.7; *accord United States v. Adams*, 740 F.3d 40, 43-44 (1st Cir. 2014) ("[S]tatutory violations untethered to the abridgement of constitutional rights are not sufficiently egregious to justify suppression.").

In contrast, FISA Title V's relevance requirement does not implement constitutional principles. That provision exists to delineate the circumstances in

[13] These three cases are *McNabb v. United States*, 318 U.S. 332 (1943), *Mallory v. United States*, 354 U.S. 449 (1957), and *Miller v. United States*, 357 U.S. 301 (1958). The holdings of *McNabb* and *Mallory* were based on "considerations of Fifth Amendment policy" that were more fully crystalized in *Miranda v. Arizona*, 384 U.S. 436, 463 (1966). *Miller* involved the application of a statute that is now understood to have codified Fourth Amendment law. *See United States v. Southerland*, 466 F.3d 1083, 1085-86 (D.C. Cir. 2006) (observing that the statute at issue in *Miller* "and the Fourth Amendment have merged both in the standards governing entries into the home and in the remedy for violations of those standards").

which the government (with FISC approval) can seek business records or other tangible things. While it might provide a protection to the recipient of the FISC's order (who has a right to challenge it, 50 U.S.C. § 1861(f)(2)), it does not protect a constitutional right. More importantly, it is not a protection of Moalin's constitutional rights, as he "can assert neither ownership nor possession" of the telephone company's business records. *United States v. Miller*, 425 U.S. 435, 440 (1976).

Applying this principle, this Court has held that there is no suppression remedy for the acquisition of computer metadata, including to/from e-mail addresses and records of websites visited, in violation of statutory requirements because such metadata were analogous to the telephony metadata at issue in *Smith v. Maryland*, 442 U.S. 735 (1979). *See Forrester*, 512 F.3d at 509-11. This holding forecloses the possibility of a suppression remedy for any alleged statutory violation here, as the information at issue in this case is not merely analogous to telephony metadata, it *is* telephony metadata. *See id.* at 512-13 (citing *United States v. Fregoso*, 60 F.3d 1314, 1320 (8th Cir. 1995), and *United States v. Thompson*, 936 F.2d 1249, 1249-50 (11th Cir. 1991)); *cf. United States v. Ani*, 138 F.3d 390, 392-93 (9th Cir. 1998) (no suppression remedy for violation of regulation governing opening of international mail).

Thus, even if Moalin's statutory argument were correct (and it is not), it could not lead to the suppression of evidence, much less a new trial.

F. Moalin's Statutory Challenge Is Meritless

Moalin's statutory challenge is squarely foreclosed by this Court's holding in *United States v. Plunk*, which held that a defendant cannot challenge the statutory basis by which the government obtained telephone records from a third party. 153 F.3d 1011, 1020, *amended on other grounds*, 161 F.3d 1195 (9th Cir. 1998). In *Plunk*, the government had obtained the defendant's telephone records from a telecommunications provider pursuant to administrative subpoena authority that permits the Attorney General to require the production of records that he finds to be "relevant or material to [a controlled substances] investigation." *Id.* at 1019 (quoting 21 U.S.C. § 876(a)). The defendant argued that the government's record demand exceeded its statutory authority. *Id.* at 1020. This Court found that the defendant lacked standing to raise what were, in effect, the purported rights of the telecommunications provider. *Id.* (Section 876 "provides no express right [for a defendant] to challenge the Attorney General's subpoenas issued under it") (quoting *United States v. Moffett*, 84 F.3d 1291, 1293 (10th Cir. 1996)); *accord United States v. Phibbs*, 999 F.2d 1053, 1076-78 (6th Cir. 1993).

That Moalin cannot raise a challenge to the statutory authority by which the government obtained his telephone records from a third party is simply an application of the broader rule that "the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant." *United States v. Miller*,

425 U.S. 435, 444 (1976). Because Moalin had no legal interest in a telecommunications provider's records, he cannot raise a statutory challenge to the authority by which the government obtained those records from the company. *See id.* at 445-46 (where defendant lacks a Fourth Amendment interest in the third-party records, he cannot "challenge the validity of the subpoenas"); *United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995); *United States v. Cella*, 568 F.2d 1266, 1279 (9th Cir. 1977).

This rule is particularly applicable in this case as the call detail records at issue here–the records that suggested that a particular U.S.-based telephone number may have been associated with a foreign terrorist—were clearly relevant to a counterterrorism investigation. Moalin's argument that *other* call detail records, ones that did not play any role in identifying Moalin or in this prosecution, were also collected by the same program has no place in this criminal appeal.

Moreover, even if it did, such an argument would run into the fact that the FISC, the Article III court vested by Congress with responsibility for interpreting and applying Title V of FISA, repeatedly (43 times by nineteen different judges) found that the NSA program complied with FISA, including the "relevance" provision relied on by Moalin. *See, e.g.*, *In re Application I*, 2013 WL 5741573, at *6-*9; *cf.* 50 U.S.C. § 1861(a)(1), (b)(2)(A) (2006) (provision in effect at relevant time that provided that the government could obtain a FISC order for the production of business records (or

other tangible things) where the FISC determined that the government had made a "showing that there are reasonable grounds to believe that the tangible things sought [we]re relevant to an authorized investigation . . . to protect against international terrorism.").

Moalin relies on *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) ("*ACLU I*"), where a panel of the Second Circuit found, contrary to the FISC, that the government had failed to demonstrate that bulk telephony metadata was relevant to an authorized counterterrorism investigation. In the Second Circuit's view, "the government effectively argue[d] that there is only one enormous 'anti-terrorism' investigation, and that any records that might ever be of use in developing any aspect of that investigation are relevant to the overall counterterrorism effort." *Id.* at 815 (citations omitted).

Joining the FISC, the government "respectfully disagrees with [the Second Circuit's] analysis" in *Clapper*. *In re Application V*, 2015 WL 5637562, at *7. The characterization that there was only one counterterrorism investigation is inaccurate. There were in fact multiple specified counterterrorism investigations for which the FISC, in repeatedly approving the program, found reasonable grounds to believe the telephony metadata would be relevant. The specifics of those investigations were and remain classified, and thus were not available to the Second Circuit. The FISC, which is intimately familiar with both the classified and unclassified details of the former

program, has explained that, "[t]o a considerable extent, the Second Circuit's analysis rests on mischaracterizations of how [the NSA] program work[ed]," and that the Second Circuit's "description [of the program] bears little resemblance to how the government actually use[d] the records." *Id.* at *8.[14]

G. The District Court Correctly Held that the NSA Program Did Not Violate the Fourth Amendment

Moalin's Fourth Amendment challenge to the telephony metadata program as part of his new trial motion was also meritless because "the Government's metadata collection program [was] entirely consistent with the Fourth Amendment." *Klayman v. Obama*, 805 F.3d 1148, 1148 (D.C. Cir. 2015) (Kavanaugh, J., concurring). The district court correctly found that acquisition of business records from a third-party company is not a Fourth Amendment search. ER 80-81. And the program in this case was not unreasonable because the compelling interest in protecting national security by preventing terrorism outweighed the minimal privacy intrusion occasioned by a program that collected no communications content and was subject to strict controls and oversight.

[14] It is also noteworthy that, in 2010 and 2011, Congress reauthorized Title V after being provided with information demonstrating that both the Executive and Judicial Branches had interpreted Title V of FISA to permit the NSA program. *See In re Application I*, 2013 WL 5741573, at *8-*9. And it is axiomatic that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009).

1. Clear Precedent from the Supreme Court and this Court Hold that the Acquisition of Business Records from a Third-Party Company Is Not a Fourth Amendment Search

The record in this case reflects that, at most, the government was tipped to Moalin's telephone number as a potential counterterrorism target by the fact that international calls to and/or from that number had been in contact with one or more numbers that, in turn, had been in contact with the number of a known or suspected terrorist. Under longstanding precedent, the acquisition of such call records from a telecommunications provider is not a Fourth Amendment search.

Indeed, the Supreme Court has squarely held that, for Fourth Amendment purposes, an individual has no reasonable expectation of privacy "regarding the numbers he [has] dialed on his phone" in order to place a call. *Smith v. Maryland*, 442 U.S. 735, 742 (1979). In *Smith v. Maryland*, the Court held that the government's recording of the numbers dialed from an individual's home telephone, through the installation of a pen register at a telephone company, is not a search under the Fourth Amendment. *Id.* at 743-44. Telephone users "typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Id.* at 743. When he made phone calls, the defendant in *Smith* "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the

ordinary course of business," thus assuming "the risk that the company would reveal to police the numbers he dialed." *Id.* at 744. The Court observed that it "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-44.

In reiterating this third-party doctrine, the Supreme Court relied on prior precedents such as *United States v. Miller*, 425 U.S. 435 (1976). In *Miller*, the government had obtained, pursuant to subpoena, almost four months of the defendant's bank account records, including checks and deposit slips. *See id.* at 437-38. The Supreme Court held that the defendant had no Fourth Amendment rights in these documents because "these are the business records of the banks." *Id.* at 440. The Court held that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443; *see also SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984); *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012).

Even before *Smith* and *Miller*, this Court had applied the third-party doctrine to call detail records like the ones at issue here. *See United States v. Baxter*, 492 F.2d 150, 167 (9th Cir. 1973); *United States v. Fithian*, 452 F.2d 505, 506 (9th Cir. 1971). More recently, this Court has applied *Smith* and held is that there is no Fourth Amendment

expectation of privacy in "data about the call origination, length, and time of call" of phone calls, *United States v. Reed*, 575 F.3d 900, 914 (9th Cir. 2009), or similar data regarding e-mails, *Forrester*, 512 F.3d at 510, and text messages, *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008), *rev'd on other grounds sub nom. City of Ontario v. Quon*, 560 U.S. 746 (2010). Thus, clear precedent from this Court and the Supreme Court establishes that Moalin had no Fourth Amendment right in the call detail records that the government obtained from a third-party telecommunications provider. *See, e.g.*, *Smith v. Obama*, 24 F. Supp. 3d 1005, 1009-10 (D. Idaho 2014) ("[t]he Supreme Court's decision in *Smith*, supplemented by the Circuit's decisions in *Reed*, *Forrester*, and *Golden Valley*, and the two District Court decisions on point, *Clapper*[15] and *Moalin*, support a finding that there is no Fourth Amendment violation" committed when NSA collects telephony metadata from a telecommunications provider), *vacated on other grounds*, __ F.3d __, 2016 WL 1127087 (9th Cir. Mar. 22, 2016) (remanding in light of cessation of the NSA program).

Contrary to Moalin's argument, the fact that the NSA telephony metadata program was in place for a greater length of time does not distinguish *Smith v. Maryland*, which held that individuals lack a privacy interest in *any* of the telephony metadata voluntarily transmitted to a telephone company because the company's

[15] *See ACLU v. Clapper*, 959 F. Supp. 2d 724, 751 (S.D.N.Y. 2013), *rev'd on other grounds*, 785 F.3d 787 (2d Cir. 2015).

customers "voluntarily convey[] those numbers to the telephone company" and because "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" *California v. Greenwood*, 486 U.S. 35, 41 (1988) (quoting *Smith*, 442 U.S. at 743-44).[16] Similarly, the fact that the NSA program also involved call records relating to other people (including what Moalin refers to as his "*contacts'* contacts," D.Br.85 (emphasis in original)) is irrelevant because Fourth Amendment rights, being "personal in nature," cannot be raised vicariously. *Steagald v. United States*, 451 U.S. 204, 219 (1981); *accord Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Moreover, "where one individual does not have a Fourth Amendment interest, grouping together a large number of similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence *ex nihilo*." *In re Application I*, 2013 WL 5741573, at *2.

Moalin seeks to rely on *United States v. Jones*, 132 S. Ct. 945 (2012). But *Jones* was not a third-party doctrine case at all—it held that a "physical intrusion" onto a defendant's property for the purpose of obtaining information (placing a global positioning system device on a car) is a search, *Jones*, 132 S. Ct. at 949—and it certainly

[16] Moalin also seeks to distinguish *Smith* by arguing that the pen register in that case did not record "the duration of calls." D.Br.84. It is far from clear that duration information played any role at all in this case. But, in any event, any record of the duration of a call would be a business record created by the telephone company based on its own business activity, similar to the "time of call" information at issue in *Reed*. 575 F.3d at 914.

did not overrule *Smith* and *Miller*. In a concurrence, a single justice suggested that "it may be necessary to reconsider" the third-party doctrine but concluded that "[r]esolution of these difficult questions in this case is unnecessary." *Id.* at 957 (Sotomayor, J., concurring). The concurrence thus makes clear that the third-party doctrine remains the law, and thus it "remains binding on lower courts in our hierarchical system of absolute vertical stare decisis." *Klayman*, 805 F.3d at 1149 (Kavanaugh, J., concurring); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Nor does *Riley v. California*, 134 S. Ct. 2473 (2014), which concerned the search of a cell phone incident to arrest, support Moalin's position. There, the Supreme Court explicitly stated that, as *Riley* involved "*searches* incident to an arrest," it did "not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances." *Id.* at 2489 n.1 (emphasis in original). The Supreme Court in *Riley* did observe that advances in technology had heightened privacy concerns with searching cell phones, but those concerns are not present here. Advances in technology mean that cell phones now contain a "cache of sensitive personal information" such as text messages and photographs. *Id.* at 2490. But the program that Moalin seeks to challenge did not acquire any such information; it only involved telephony metadata. And telephony metadata, just as in 1979 when *Smith v. Maryland* was decided, contains no communications content and has been voluntarily disclosed by telephone users to

their telecommunications providers. Thus, the concerns expressed in *Riley* have no application here.[17]

Moalin next argues that the government's "aggregation, retention, and review" of the third-party records constituted a search. D.Br.100. But retaining, aggregating, or reviewing lawfully obtained information within the government's own databases is not a Fourth Amendment search. *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006); *see also United States v. Joseph*, 829 F.2d 724, 727-28 (9th Cir. 1987).

Finally, Moalin argues that, even if not a search, the collection nevertheless was a Fourth Amendment seizure. D.Br.102. But it is no more a seizure than the acquisition of bank records in *Miller*. The relevant records did not belong to Moalin; rather, as in *Miller*, the government obtained business records that belonged to a third-party company. *See Segura v. United States*, 468 U.S. 796, 810 (1984) ("[A] seizure affects only possessory interests, not privacy interests.").

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[17] The same is true of the concerns regarding cell site information that were expressed by a divided Fourth Circuit panel in *United States v. Graham*, 796 F.3d 332, *reh'g en banc granted*, 624 F. App'x 75 (4th Cir. 2015). Moalin repeatedly cites *Graham* without even mentioning that the panel opinion is under review by the *en banc* court. *See* 624 F. App'x 75. Nor does he mention that two other circuits, applying *Smith* and *Miller*, have held that the acquisition of cell site records is not a Fourth Amendment search. *See United States v. Davis*, 785 F.3d 498, 511-12 (11th Cir. 2015) (en banc); *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 611-13 (5th Cir. 2013). After the filing of the defendants' brief, another circuit held that the acquisition of cell site records is not a Fourth Amendment search. *See United States v. Carpenter*, __ F.3d __, 2016 WL 1445183, at *4-*7 (6th Cir. Apr. 13, 2016).

The acquisition of business records from a third-party company was neither a search nor a seizure. Moalin's Fourth Amendment claim is thus without merit.

2. The NSA's Acquisition of Telephony Metadata Business Records Related to Moalin's Telephone Calls for Limited, Counterterrorism Purposes Was Reasonable

In addition to not constituting a search, the telephony metadata collection did not violate the Fourth Amendment because it was not unreasonable. To the contrary, "the Government's metadata collection program readily qualifies as reasonable under the Supreme Court's case law." *Klayman*, 805 F.3d at 1149 (Kavanaugh, J., concurring).

Foreign intelligence collection generally, and terrorism prevention specifically, constitute "special needs" apart from ordinary law enforcement, thus allowing for reasonable searches in the absence of a warrant. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (holding that "the Government's interest in combating terrorism is an urgent objective of the highest order"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (holding that "no governmental interest is more compelling" than national security); *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1001, 1012 (FISA Ct. Rev. 2008) (holding that "the relevant governmental interest—the interest in national security—is of the highest order of magnitude"); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) ("Foreign security wiretaps are a recognized exception to the general warrant requirement."). Indeed, the NSA program served "a

critically important special need—preventing terrorist attacks on the United States."[18] *Klayman*, 805 F.3d at 1149(Kavanaugh, J., concurring).

The reasonableness standard entails balancing "the promotion of legitimate governmental interests against the degree to which [any search] intrudes upon an individual's privacy." *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (quotation marks omitted). Here, the "critical national security need outweighs the impact on privacy" given that the "program [did] not capture the content of communications." *Klayman*, 805 F.3d at 1149 (Kavanaugh, J., concurring). Moreover, the limited information that was collected was subject to strict minimization procedures. Thus, "the Government's program fits comfortably within the Supreme Court precedents applying the special needs doctrine." *Id.*

Moalin's suggestion that the government could not obtain telephony metadata without a warrant and individualized suspicion is particularly anomalous given the broad discretion that the Fourth Amendment provides the government to compel the

[18] While the government, at Congress' direction, has replaced the challenged program with a different program aimed at identifying potential terrorist suspects within the United States through use of telephony metadata held by phone companies, it remains the case that the former program served an important national security need. The Supreme Court "has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment." *Quon*, 560 U.S. at 763 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)). Rather, it is sufficient that the program was a "reasonably effective means" of advancing the government's paramount interest in preventing terrorism within the United States. *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

production of documents pursuant to statutory authorization. Grand jury subpoenas and administrative subpoenas, which can compel production of business records without a warrant or probable cause, or even judicial review, have repeatedly been upheld. *E.g.*, *Golden Valley*, 689 F.3d at 1115-16. Production orders issued under FISA Title V include greater privacy protections than administrative and grand jury subpoenas. Title V orders are issued by Article III judges, and the information may be used and disseminated only in accordance with minimization procedures approved and supervised by the FISC.

H. Suppression Is Unavailable Where, as Here, Government Officials Relied on Objectively Reasonable Court Orders

Even where, unlike here, there has been an unlawful search, a defendant has no automatic right to suppression. *Herring v. United States*, 555 U.S. 135, 141 (2009) (suppression is "not an individual right"); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (suppression is neither a "personal constitutional right" nor meant to "redress the injury"); *United States v. Janis*, 428 U.S. 433, 454 n.29 (1976) (suppression would be "unsupportable as reparation or compensatory dispensation to the injured criminal") (internal quotation marks omitted).

Rather, exclusion is appropriate only where it would "result in appreciable deterrence" of future Fourth Amendment violations. *Herring*, 555 U.S. at 141 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)). Moreover, a plausible deterrent effect is a "necessary condition for exclusion," but it is not "a sufficient

one." *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (internal quotation marks and citation omitted). Because suppression imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty . . . defendants go free," a court must also find that "the benefits of deterrence . . . outweigh the costs," which are heavy. *Herring*, 555 U.S. at 141 (quotation marks omitted); *Davis*, 131 S. Ct. at 2427; *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364-65 (1998) (exclusionary rule's cost "presents a high obstacle for those urging [its] application"). Accordingly, while "society must swallow this bitter pill when necessary," the Supreme Court has cautioned that suppression of evidence should be used "only as a last resort." *Davis*, 131 S. Ct. at 2427 (citations and internal quotation marks omitted).

It is well-established that "when the police act with an objectively reasonable good-faith belief that their conduct is lawful . . . the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427-28 (internal citations and quotation marks omitted). Thus, the Supreme Court developed the "good faith exception" in *Leon*, 468 U.S. at 922, and its companion case, *Massachusetts v. Sheppard*, 468 U.S. 981, 987-90 (1984), where the Court declined to exclude evidence obtained from searches conducted in "objectively reasonable reliance" on ultimately invalid warrants. The Supreme Court has since applied the good-faith exception in a number of other scenarios in which government agents had a good-faith basis for believing

that their conduct was lawful. *See Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (no suppression where searches were conducted in reasonable reliance on a statute that was later invalidated); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (no suppression where search was based on erroneous information in court arrest warrant database); *Herring*, 555 U.S. at 137 (no suppression where search was conducted in reliance on error in police warrant database); *Davis*, 131 S. Ct. at 2428-29 (no suppression where search was conducted in reliance on binding precedent that was later overturned).

Even if Moalin could demonstrate (and he cannot) some initial violation of the law in the use of the telephony metadata program to provide a "tip" to the FBI, this case would fall squarely within the good-faith exception. *Leon* and *Sheppard* involved reliance on warrants issued by state-court judges. The NSA's telephony metadata collection was conducted pursuant to the authority of multiple court orders issued by Article III federal judges. The government's reliance on these court orders is sufficient to defeat suppression. *See Leon*, 468 U.S. at 921 (where government officials rely on a court order, "there is no police illegality and thus nothing to deter").[19]

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[19] *See also United States v. Graham*, 796 F.3d 332, 361-63 (4th Cir. 2015), *reh'g en banc granted*, 624 F. App'x 75 (2015). As discussed above, *supra* note 17, Moalin cites the *Graham* panel opinion repeatedly for its holding that the acquisition of cell site location data is a Fourth Amendment search. But that opinion's reasoning would preclude suppression here, as the panel in that case held that suppression was not available because the government had acted on orders issued by magistrate judges. 796 F.3d at 362. Notably, while the *en banc* court has granted rehearing as to the holding regarding violation of the Fourth Amendment, the *en banc* court denied the

(continued . . .)

Moreover, the government's reasonable reliance on the third-party doctrine set forth in the cases described above from the Supreme Court and this Court provides an independent reason to deny suppression. *See Davis*, 131 S. Ct. at 2428.

I. Because the Challenged Program Has Ended and There Is No Prospect that It Will Be Restarted, Suppression Would Not Serve Any Deterrence Function

Finally, an additional reason to reject Moalin's argument is that suppression is not appropriate where, as here, it could not serve any deterrence function. *See United States v. Dreyer*, 804 F.3d 1266 (9th Cir. 2015) (en banc). In *Dreyer*, this Court found that the Naval Criminal Investigative Services ("NCIS") had engaged in "systemic" legal violations by using a computer program "to conduct a statewide audit of all computers engaged in file sharing." *Id.* at 1275-76 ("Here, [the agent] set RoundUp to cast a net across the entire state of Washington, knowing the sweep would include countless devices that had no ties to the military and thus did not fall under the jurisdiction of the Uniform Code of Military Justice."). Nevertheless, all eleven judges on the en banc panel concluded that suppression of resulting evidence was not warranted. The eight-judge majority opinion found that suppression was not available because "the military is already in the process of changing its practices." *Id.* at 1280

(. . . continued)
defendants' petition to reconsider the panel's holding that the good-faith doctrine precluded suppression. 624 F. App'x 75.

("[T]he Government should have the opportunity to self-correct before we resort to the exclusionary rule.").

In this case, the NSA is not merely "in the process of changing its practices." It has, in accordance with Congress' directive, ended the challenged program and replaced it with a different program. *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, §§ 101, 103. Moreover, as Congress has modified the relevant statute, the NSA could not return to the earlier practice even if it wanted to. Thus, to an even greater extent than in *Dreyer*, suppression could have no deterrent effect here. As suppression is warranted only where "its deterrence benefits outweigh its substantial social costs," *Dreyer*, 804 F.3d at 1280 (quoting *Hudson*, 547 U.S. at 591), it is inappropriate here.

II. The District Court Correctly Found that the Government Satisfied Its *Brady* Obligations

A. Standard of Review

This Court reviews discovery questions, including rulings about *Brady v. Maryland*, 373 U.S. 83 (1963), for abuse of discretion. *United States v. Alvarez*, 358 F.3d 1194, 1210 (9th Cir. 2004). To prevail, the defendants must show that the district court abused its discretion in failing to order the government to produce material and that this prejudiced the defendants' substantial rights. *Id.* This Court reviews alleged *Brady* violations *de novo*. *United States v. Doe*, 778 F.3d 814, 821 (9th Cir. 2015).

The proponent of a *Brady* claim bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it. *United States v. Price*, 566 F.3d 900, 910 (9th Cir. 2009). Once the defendant produces such evidence, the burden shifts to the government to demonstrate that it has met its duty of disclosure under *Brady*. *Id.* Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Mincoff*, 574 F.3d 1186, 1199 (9th Cir. 2009).

B. The Government Did Not Withhold Exculpatory Evidence

In order to establish a *Brady* violation, a defendant must show (1) there was evidence that was exculpatory or impeaching, (2) it should have been but was not produced, and (3) it was material to his guilt or punishment. *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011). Evidence is material "only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense." *Id.* There is no *Brady* violation so long as the evidence is disclosed to the defense "at a time when it still has value." *Id.* (no violation where notes of witness interview were provided to defense while cross-examination of that witness was ongoing); *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) (no violation where impeaching evidence was disclosed after witness's testimony

concluded because the witness could have been recalled for further cross-examination).

Here, the defendants cannot meet their burden to show that there was any exculpatory or impeaching evidence withheld, let alone that such evidence would have been material. The district court concluded that the government met its obligations. ER86 ("Based upon the court's careful review of all materials provided by the Government under FISA and CIPA, as well as the myriad of intercepted communications provided to the defense, the court has no reason to suspect or speculate that the Government may have faltered in its *Brady* obligations."). The defendants claim that the government did not produce "the underlying bases for the [Field Intelligence Group ("FIG")] Assessment, the 2008 FBI personality profile, and the FISA interception/collection and the underlying information related to the previously terminated investigation of Moalin." D.Br.137. But the government did provide the source material for the FIG Assessment and the "personality profile"– these documents were based on a review of the intercepted telephone calls provided to the defense. The basis for the FISA collection was contained in the classified FISA applications and orders, which did not contain any undisclosed exculpatory or impeaching information. And the investigative file concerning the earlier investigation of Moalin similarly did not contain exculpatory or impeaching information.

1. The Material Underlying the FIG Assessment and the "Personality Profile" Was Produced

The FIG assessment, CR 345-2, is a highly inculpatory assessment by the FBI's San Diego Field Intelligence Group that found Moalin to be "the most significant al-Shabaab fundraiser in the San Diego Area of Operations" who "also serves as a controller for the US-based al-Shabaab fundraising network." *Id.* at 1-2. The assessment further concluded that Moalin's motivation was likely clan affiliation and a desire "to promote his own status with [clan] elders," *id.*, a conclusion that Moalin presented at trial, *see* 5RT 934-35. As the government informed the district court below, "the FIG assessment is an opinion by an analyst" based on the audio intercepts of Moalin's phone calls, all of which were provided in discovery to the defense. CR167, at 32; *see also id.* (district court stating that this clarification "in a sense moots the defense request for discovery").

What the defendants refer to as the FBI "2008 personality profile" is a general assessment questionnaire that was prepared by the linguist who translated the intercepted calls and who testified as a witness at trial. It too was based on the underlying intercepted calls, as described during the cross-examination of the linguist. *See* 5RT 930.

Because the material underlying the FIG Assessment and the general assessment questionnaire was the intercepted phone calls themselves, which were provided to the defense, the defendants cannot demonstrate that there exists any

exculpatory information that was not produced. *See* ER85 (district court finding that the "Defendants fail to identify any evidence not produced by the Government pursuant to Rule 16, the Jencks Act, or *Brady*").

2. There Was No Exculpatory Evidence in the Classified FISA Applications and Orders or in the File Relating to the Earlier Investigation of Moalin

As the government's classified supplemental brief explains, the district court correctly found that there was no exculpatory evidence in the classified FISA applications and orders or in the file relating to the earlier investigation of Moalin.

C. The Government Was Not Required To Notify the Defendants of Any Use of the FISA Business Records Authority

In their opening brief, the defendants argue, for the first time on appeal, that the government was required to provide notice of the use of Title V of FISA in connection with the investigation of Moalin. D.Br.143-55. Because the defendants did not raise this argument below, it is forfeited. *United States v. Suarez*, 682 F.3d 1214, 1219 n.1 (9th Cir. 2012). It is also meritless.

Unlike other parts of FISA, Title V does not contain a notice requirement, and there is no constitutional basis for reading in such a requirement. In any event, even if there were such an obligation, it would not have been triggered in this case because the government did not use evidence that was derived from, or the "fruit" of, the use of FISA Title V. Finally, the defendants could be due no relief as they suffered no

prejudice; they had the opportunity to raise their challenges to the government's use of Title V in the district court, and they are raising those arguments in this appeal.

1. There Is No Statutory Notice Requirement

While the defendants argue that the government was required to provide notice of the use of FISA Title V by "[v]arious [s]tatutory [a]uthorities," D.Br.145, they fail to cite any such authority. That is because there is no statutory requirement to provide notice of the use of Title V of FISA.

FISA contains several notice provisions. For example, Title I of FISA provides that where "the Government intends to enter into evidence or otherwise use or disclose in any trial . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter [*i.e.*, Title I of FISA], the Government shall . . . notify the aggrieved person and the court . . . that the Government intends to so disclose or so use such information." 50 U.S.C. § 1806(c).[20] Title III of FISA has a similar provision requiring notice of the intended use of certain "information obtained or derived from a physical search" pursuant to that title's authority. 50 U.S.C. § 1825(d). Title IV of FISA contains a provision requiring notice of the intended use of certain "information obtained or derived from the use of a pen register or trap and trace device." 50 U.S.C. § 1845. And Title VII of FISA effectively incorporates Title I's

[20] The defendants were provided with Title I FISA notice in this case. CR12.

notice requirement for acquisitions conducted pursuant to Sections 702 and 703 of FISA. *See* 50 U.S.C. § 1881e.

Congress determined, however, not to enact a notice requirement in Title V of FISA. *See* 50 U.S.C. §§ 1861-1862. Where, as here, Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted). This presumption has particular force here given that Congress recently amended Section 501 (in response to publicity surrounding the very metadata collection program that Moalin seeks to challenge) and, once again, declined to adopt a notice requirement. *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

Congress had good reason to conclude that notice of use of Title V authority should not be required. Title V provides a tool for foreign intelligence investigations that is analogous to the grand jury subpoena in criminal law enforcement investigations and administrative subpoena authority for many civil investigations. *See* To Permanently Authorize Certain Provisions of the USA PATRIOT Act, S. Rep. No. 109-85, at 20 (2005). There is no requirement that a defendant be notified every time a grand jury subpoena or administrative subpoena has been used at some point

in the government's investigation. It is thus logical that Congress found no need for a notice requirement in the analogous provision for foreign intelligence investigations.

Finally, it is not clear what relevance to the defendants' argument the document they call the "[a]nother [a]gency" e-mail has. *See* D.Br.145-46. That January 2008 e-mail from a person at the FBI, which was produced to the defendants, states:

> We just heard from another agency that Ayrow tried to make a call to Basaaly today, but the call didn't go through. If you see anything today, can you give us a shout? We're extremely interested in getting real-time info (location/new #'s) on Ayrow.

CR345-7. Contrary to the defendants' argument, this e-mail does not suggest that "another agency" was surveilling Moalin, who was under FISC-authorized FBI surveillance at the time. Rather, the e-mail suggests that the other agency was monitoring Ayrow, as (1) that agency was aware that Ayrow tried to make a call even though the call did not go through, (2) the author of the e-mail was "extremely interested" in getting information concerning Ayrow, including Ayrow's location (and did not ask for any information about Moalin), and (3) Ayrow was a foreign-based associate of al Qaeda and a leader of al Shabaab, who was killed by a U.S. missile strike a few months later. In any event, the e-mail does not provide grounds for an argument that the government violated any discovery or notice obligation.

2. There Is No Due Process Notice Requirement

The defendants also err in claiming that there was a constitutional due process requirement to provide them with notice that the government acquired business

records as part of its investigation. *Brady* does not apply because the use of a particular investigatory authority is not material to "guilt or punishment," let alone exculpatory or impeaching. *Houston*, 648 F.3d at 813; *accord Skinner v. Switzer*, 562 U.S. 521, 536 (2011) ("*Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment."). Indeed, the district court specifically found that "[t]he mere existence of the NSA program has no evidentiary value in and of itself" in this case. ER76.

Nor can the defendants point to any other support for their assertion that the Due Process Clause requires notice to a defendant of the acquisition of records from a third party. Despite the fact that Federal Rule of Criminal Procedure 17 and myriad administrative subpoena statutes authorize the government to acquire third-party records for investigatory purposes, the defendants can point to no court decision finding a constitutional requirement to give notice to a defendant of the use of such an authority.[21]

The paucity of support for the defendants' position is evident from the fact that the lead case they cite, *Lambert v. California*, 355 U.S. 225 (1957), has nothing at all to do with notice of investigatory techniques. Rather, *Lambert* concerns notice of substantive law prior to commission of the allegedly criminal act. *See id.* at 243-44

[21] Even in the context of first-party electronic surveillance of a defendant, there is no absolute right to notice. *See United States v. Waters*, 627 F.3d 345, 364 (9th Cir. 2010).

("Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."). That holding has no application to pretrial discovery or notice.

Other cases cited by the defendants are similarly inapposite as they deal with the Fourth Amendment question of when the government must give notice of the execution of a warrant to search a premises or to intercept telephone calls.[22] These cases, which concern traditional law enforcement authorities, are not applicable to foreign intelligence authorities, as the Fourth Amendment requirements for the latter are different. *See, e.g.*, *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987) (Kennedy, J.). They also do not relate to the acquisition of business records, which, as described above, is not a Fourth Amendment search. And, finally, none of these cases relied on by the defendants (which concern the Fourth Amendment) even address Fifth Amendment due process rights relating to pretrial discovery or notice.

[22] *See Berger v. New York*, 388 U.S. 41, 60 (1967) (referring to the notice that is generally given to a person before a "conventional warrant[ ]" is executed on that person's property); *Dalia v. United States*, 441 U.S. 238, 247-48 (1979) (holding that "[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment"); *United States v. Frietas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (warrant for a surreptitious search of a person's home was invalid where it did not provide for notice to the homeowner, as such a search "strike[s] at the very heart of the interests protected by the Fourth Amendment").

The defendants' assertion that the Due Process Clause requires pretrial notice of the use of a statutory authority to obtain business records from a third party is without support and without merit.[23]

3. Notice Would Not Have Been Appropriate in this Case in Any Event

Even if there were a requirement for notice where evidence was acquired through use of a FISA Title V order, the requirement would not apply in this case. As described above, none of the trial evidence used in this case constituted "fruit" of the telephony metadata collection program. *See supra* Parts I.B-I.D. The trial evidence was therefore not "derived" from the program as that term is used in FISA, as the term "derived," which is used both in FISA and in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, incorporates "fruit of the poisonous tree" principles. *United States* v. *Smith*, 155 F.3d 1051, 1059-63 (9th Cir. 1998) (noting that the Ninth Circuit has "long recognized" that Title III's suppression provision "codifies the 'fruits of the poisonous tree' doctrine with respect to violations that trigger application of the section") (quoting *United States v. Spagnuolo*,

[23] To the extent that the defendants argue that they were entitled not only to notice of the legal authority used, but also to detailed disclosure of the particular classified foreign intelligence collection program utilized by the government, their argument, in addition to being unsupported by any legal authority, would intrude on the inherent national security powers of the President "to classify and control access to information bearing on national security." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

549 F.2d 705, 711 (9th Cir. 1977)); *United States* v. *Koyomejian*, 946 F.2d 1450, 1456 (9th Cir. 1991) (observing that FISA's procedural requirements are "nearly identical to the provisions of Title III"). Thus, for the same reasons that the evidence in this case was not "fruit" of the telephony metadata program for constitutional purposes, that evidence was similarly not "derived" from the program for statutory purposes.

4. The Defendants Cannot Demonstrate Prejudice

Finally, the defendants have not been prejudiced. They had the opportunity to pursue their legal challenge in the district court, and they continue to advance it in this appeal. The ability to have asserted their challenge earlier in the proceedings below would not have made it any more meritorious.

III. The District Court Neither Erred Nor Abused its Discretion in Its Evidentiary Rulings

A. Standard of Review

This Court reviews a district court's evidentiary decisions made at trial for abuse of discretion. *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). A district court's decision to exclude or to admit evidence under Federal Rule of Evidence ("FRE") 403 is "reviewed with considerable deference" and will be reversed "only if manifestly erroneous." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (quotation marks omitted); *see also id.* at 1172 ("FRE 403 favors admissibility, while concomitantly providing the means of keeping distracting evidence out of the trial.").

B. The Exclusion of Evidence Concerning Moalin's Post-Offense Conduct Was Correct and Not an Abuse of Discretion

The defendants challenge the district court's decision to exclude testimony about Moalin's attendance at a conference in Somalia in 2009 well after the time period covered by the case. The district court, however, was correct to exclude this evidence because it had little or no relevance to the case and was cumulative of other evidence presented to the jury.

The defendants contend that Moalin believed in "advancing the rights of women," and that this was antithetical to al-Shabaab's beliefs. D.Br.156. The district court permitted the defendants to present evidence that, during the relevant period of 2007 to 2008, Moalin supported women's advancement. Indeed, the very record citation that the defendants offer for the proposition that they "sought" to introduce testimony of this belief is to the actual, admitted testimony of a defense witness. 10RT 1441. There, character witness Halima Ibrahim testified that she headed a charitable organization called IIDA (a "powerful organization," still in existence as of the time of trial) whose mission was to "[e]mpower wom[e]n politically, educationally, and economically, and support children." *Id.* Later, Ibrahim testified that IIDA's goals were antithetical to al-Shabaab's. *Id.* at 1463-64. And she repeatedly testified that Moalin provided financial support to IIDA. *Id.* at 1455-56 (money for water, food, and medicine), 1460 (money for an orphanage for girls), 1466 (support for

IIDA); *see also* SER150-51 (testimony of Abukar Mohamed regarding Moalin's financial support for ILEYS, another charity in Somalia).

The district court permitted this evidence but restricted testimony about irrelevant time periods, thereby excluding testimony about the 2009 conference. ER49-51. The district court found that "[w]hat demonstrates [Moalin's] intent was his activity during '07 and '08, during the relevant period of time and his personal involvement there." *Id.* at 50.[24]

The district court's ruling was correct. To the extent Moalin's motives were relevant, what was relevant was his thinking at the time of the charged crimes. Moreover, even if the post-conduct evidence had some minimal relevance, it was merely cumulative of the more pertinent evidence that was admitted that showed that Moalin supported IIDA, an organization that promotes women's advancement and empowerment, a goal that is antithetical to al-Shabaab. "The exclusion of relevant, but cumulative, evidence is within the sound exercise of the trial court's discretion." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984).

Finally, the defendants' assertion in their brief that in or after 2009, Moalin was "targeted for assassination by al-Shabaab," D.Br.157, is not supported by any

[24] *See also id.* at 51 ("[I]t's [Moalin's] personal involvement, his commitment to this organization, and it's not limited to funding; if there were other things he was doing during that period of time, that's fine, as long as it comes in through the personal knowledge of the witness and it's confined to the period in question.").

admissible evidence. The citation the defendants provide is to an unsupported assertion by Moalin's attorney made in a discussion with the district court. ER51 (which the defendants cite as 10RT 1432). The district court immediately corrected defense counsel, pointing out that this "conclusion" was based on nothing more than the defense witness's "speculation." *Id.* at 52.

C. The Denial of the Defendants' Motions for "Safe Passage" of a Witness to Djibouti and for a Videotaped Deposition from Somalia Was Correct and Not an Abuse of Discretion

The defendants next challenge the district court's decision declining to order the government to provide "safe passage" to witness Farah Shidane, as well as that court's subsequent decision not to allow a videotaped deposition from Somalia. Both of the district court's decisions were correct. That court had no authority to order the Executive Branch to provide "safe passage" to an unindicted coconspirator travelling abroad. And it correctly found that a videotaped deposition from Somalia, where prosecutors would not be able to attend and there would be no real possibility of sanctions for perjury, would not serve the ends of justice.

1. The Denial of a "Safe Passage" Order Was Correct

As the district court observed, the defendants did "not define the term 'safe passage.'" ER37 n.2. It is clear, however, that whatever "safe passage" meant, it included a form of immunity to be granted to an unindicted coconspirator. But this Court has long held that a criminal defendant has no "power to demand immunity for

co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute." *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008) (quoting *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir. 1976)). Indeed, any other rule "would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *Id.* Thus, a district court is empowered to compel use immunity only if (1) the prosecution intentionally caused a defense witness to refuse to testify, or (2) the prosecution granted immunity to a favorable witness while denying immunity to a witness who would directly contradict that particular witness. *Id.* at 1156-57.

Neither of these conditions applied here. There is no claim or evidence that the government deliberately caused Farah Shidane to refuse to attend his deposition in Djibouti. Indeed, the district court specifically found that "[t]here is no evidence [in the record] to suggest that the Government interfered in any manner with Mr. Shidane's ability to appear at his deposition." ER44. Nor did the government grant immunity to any other witness in this case, much less one who would have directly contradicted Shidane. As such, the district court had no power to order the immunity that was clearly contemplated as part of the request for a "safe passage" order.

Moreover, even the limited exceptions set forth in *Straub* should not apply where, as here, the defense seeks not mere testimonial immunity but immunity from

arrest abroad. *See United States v. Santtini*, 963 F.2d 585, 594 (3d Cir. 1992). Such an order would be a clear infringement on the Executive Branch's authority to arrest international fugitives. *See id.* "Safe passage" within a foreign country would also conflict with the President's "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); *accord* ER39 (district court's holding that deference to the Executive "is particularly appropriate in light of what all parties describe as an unstable political situation in Somali[a] and the existence of terrorism elements in the region"). Indeed, in *Santtini*, the court of appeals found an order similar to the one sought by the defendants in this case to be such a clear and indisputable error of law that it warranted a writ of prohibition against the district court. 963 F.2d at 594.

Finally, even if the district court had the power to order "safe passage," such an order likely would not have produced any reliable evidence in this case. Had the district court ordered "safe passage," it would have had to determine whether that order provided immunity from arrest only for past crimes or whether it also included immunity for perjury committed in this case. If "safe passage" did not apply to perjury, it likely would not have been sufficient to prompt Shidane to testify. *See* CR161, at 17-19 (noting the government's position that "the defense proffer for Shidane['s testimony] raises serious reliability concerns"). On the other hand, if "safe

passage" immunity applied to perjury as well, then there would have been no basis to believe that Shidane's testimony was reliable. Either way, no reliable, admissible evidence would have resulted.

2. The Denial of the Defendants' Request To Conduct a Videotaped Deposition of One Witness in Somalia Was Correct and Not an Abuse of Discretion

The Federal Rules of Criminal Procedure allow for depositions taken abroad only in "exceptional circumstances [where] it is in the interest of justice that the testimony of a prospective witness be taken and preserved for possible use at trial." *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998). The burden of proof rests upon the party seeking the deposition, *United States v. Zuno-Arce*, 44 F.3d 1420, 1424-25 (9th Cir. 1995), and the district court has "broad discretion" in deciding the motion. *Omene*, 143 F.3d at 1170; *United States v. Puchi*, 441 F.2d 697, 701-02 (9th Cir. 1971).

Exceptional circumstances exist if "the prospective deponent is unavailable for trial and the absence of the testimony would result in an injustice." *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998). Among the relevant considerations are the timeliness of the defense request, *Zuno-Arce*, 44 F.3d at 1424, and "whether the safety of United States officials would be compromised by going to the foreign location." *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir. 2000).

The district court's finding that "[p]rinciples of reliability, trustworthiness and fundamental fairness" would be disserved by a videotaped deposition of Shidane from Somalia, ER44, is amply supported by the record. The government submitted a declaration from a State Department official demonstrating that, at the time, Somalia had virtually "no organized system of criminal justice" or "any recognized or established authority to administer a uniform application of due process." CR161-2, ¶ 10. Thus, there would have been no likely prospect of any "adverse consequence to testifying falsely under oath." *Id.* With no prospect of a prosecution for perjury, there would be "no way to ensure truth-telling" and the oath would be "nothing more than an empty recital." *United States v. Banki*, 2010 WL 1063453, at *2 (S.D.N.Y. Mar. 23, 2010) (denying defendant's motion to present live video testimony from Iran); *see also United States v. Alvarez*, 837 F.2d 1024, 1029 (11th Cir. 1988) ("Foreign deposition testimony, because of the absence of a sanction for perjury, is suspect.").

Furthermore, the Somali Transitional Federal Government had "no national identification system," and "it would be extremely difficult, if not impossible, to establish the identit[y]" of the witness. CR161-2, ¶ 11; *compare Omene*, 143 F.3d at 1169-70 (affirming denial of Rule 15 deposition where the defendant had presented insufficient evidence about the identities of the witnesses to be deposed and the witnesses did not present themselves to the American Embassy with identification that could be validated by Nigerian authorities).

Moreover, because prosecutors could not safely travel to Somalia, "the Government would [have been] deprived of the ability 'to directly observe the witness['s] demeanor, body language, and interactions in order gauge the truth of [his] statements." ER45 (quoting *Banki*, 2010 WL 1063453, at *3); *see also United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."); *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) ("There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony."). Thus, the district court correctly concluded that, by testifying remotely from Somalia, Shidane would have been "able to provide false testimony without any repercussions," and that the defendants had failed to "establish the trustworthiness and reliability" of Shidane's proffered testimony. ER45.

A second, independent basis for affirming the district court's order is that, although the court and the government made significant efforts to accommodate the defendants (and, indeed, the defendants were able to obtain and present testimony from seven of the eight Somali-resident witnesses they sought), the defendants were repeatedly dilatory in seeking the testimony. *See Zuno-Arce*, 44 F.3d at 1424-25 (affirming denial of Rule 15 motion in part because defendant offered insufficient "justification for making such a motion so close to trial"). The defendants had no persuasive justification for these delays.

In their first motion for depositions, filed on July 20, 2012, the defendants suggested that they could not have known what witnesses they needed, an assertion the district court found not to be credible. ER23 (finding that the defendants had the information they needed "in 2011 at the latest"). The defendants waited until April 2012 to raise the issue at a status hearing, whereby the district court referred the defendants to a magistrate judge. *Id.* Despite this clear direction, the district court subsequently observed that "the record demonstrates that Defendants never pursued this matter before Magistrate Judge Gallo and some 3 ½ months later filed a Rule 15 motion to be heard in late August [2012] and in such a manner that were the depositions allowed the trial date would, as Defendants acknowledge, have to be continued yet again." *Id.* The district court found the July 2012 motion to be both untimely and deficient in other ways, but still offered the defendants an additional opportunity to seek testimony by immediately appearing before the magistrate judge to discuss possible arrangements. *Id.* at 29 & n.6. After discussions between the parties, the magistrate judge entered an order allowing the defendants to take depositions (including of Shidane) in Djibouti, and explicitly ordered that "[t]here will not be another opportunity for these witnesses to be deposed." ER31.

The defendants were informed on October 30 that, in the absence of a government grant of "safe passage," Shidane would not appear for his scheduled deposition, *see* CR220-2, yet they waited until November 19, "about seven weeks

before trial and one week before the filing of the motions in limine," to file their renewed motion to depose Shidane in Somalia. ER44. The district court concluded again that the motion was untimely. *Id.*

Both because the motion was untimely due to the defendants' repeated delays, and because the defendants did not demonstrate that a videotape deposition from Somalia would produce reliable evidence, the district court's denial of the deposition was correct and certainly not an abuse of discretion.

D. Permitting an Expert Witness To Briefly Describe an Important Historical Event that Involved the U.S. Military's Role in Somali History Was Correct and Not an Abuse of Discretion

The prosecution presented important contextual evidence through Matthew Bryden, an expert on Somali history, culture, and language. *See* 3RT 420. Bryden's testimony included a history of Somalia from before its independence in 1960 through the 2007-2008 period in which the charged crimes took place. *See* 3RT 451-520. This chronology included Somalia's establishment as an independent nation, the assassination of its first president in 1969, the rise and fall of the Barre military dictatorship, the collapse of civil authority in the 1990s, the establishment of Somalia's Transitional Federal Government ("TFG") in 2000, and the rise of al-Shabaab and its violent opposition to the TFG and to Ethiopia. *See id.*

An important part of Somalia's recent history concerns the events that led to the departure in the mid-1990's from Somalia of U.S. and United Nations ("U.N.")

forces that had been working to provide stability and humanitarian assistance. These departures, which led to the chaotic situation that would ultimately give rise to al-Shabaab, were prompted by what the defendants' brief calls "'the Black Hawk Down' incident." D.Br.170.

Bryden testified that forces loyal to Somali warlord General Mohammed Aideed attacked Pakistani soldiers operating as part of a U.N. mission, killing approximately 25 of them. 3RT 459. When U.S. forces attempted, in response, to apprehend Aideed, they were encircled and attacked by Aideed's militia. *Id.* This line of questioning prompted a defense objection:

> [Gov't counsel:] And then – I'm sorry. What was the – what occurred after that?
>
> [Defense counsel:] I would object, your Honor, as [FRE] 403, relevance at this point.
>
> THE COURT: The objection's overruled. It's part of the chronology, part of [the] chronology of the conflict, but we certainly don't need to dwell on it, sir, so just don't give any undue time to it, let's just move through this area and get the chronology down and then get to more pertinent parts of the testimony.
>
> [Gov't counsel:] Yes, your Honor.
>
> THE WITNESS: Well, 18 American soldiers were killed, several dozen injured, an estimated 1,000 Somalis were casualties of that clash, and it was the event that led the United States government to withdraw its forces the following year.

3RT 460. That was the extent of Bryden's "Black Hawk Down" testimony on direct examination.

> On cross-examination, defense counsel brought the subject up again:
>
> Q. You talked yesterday a little bit about 1993 in Somalia, in particular what was described as the Black Hawk Down, and you said there were a thousand Somali casualties. How many deaths among those casualties?
>
> A. That was – there was never an official death toll. The International Committee of the Red Cross made some estimates in the hundreds, but I don't think anyone knows for sure.

4RT 590. That was the extent of Bryden's "Black Hawk Down" testimony on cross-examination.

The district court's decision to allow this very limited testimony while admonishing the witness to not "dwell on it" was a proper exercise of discretion. As with other parts of Bryden's chronology, this testimony excluded "any kind of gruesome detail" or "photographs." 3RT 506 (conclusion of district court). It was, in short, merely factual and devoid of any appeal to emotion. *See United States v. Kadir*, 718 F.3d 115, 121 (2d Cir. 2013) (terrorism expert's testimony was not unduly prejudicial where it was "dry and academic, devoid of vivid imagery that might excite the jury"); *Omar*, 786 F.3d at 1113 (same holding in a case concerning testimony by Bryden); *Ali*, 799 F.3d at 1028 (same). This case is thus quite unlike the principal case on which the defendants rely, where the district court allowed "highly charged and emotional . . . testimony" in which the victim of a terrorist attack "testified at considerable length about the attack." *United States v. Al-Moayad*, 545 F.3d 139, 152, 160 (2d Cir. 2008). Additionally, the district court's attention to the substance of the

testimony (as well as that testimony's anodyne nature) distinguish this case from *United States v. Waters*, cited by the defendants in a footnote, where this Court reversed a district court for admitting "highly prejudicial" anarchist reading material without even reviewing the challenged material. 627 F.3d 345, 355-57 (9th Cir. 2010).

Bryden's testimony about this incident did not, as the defendants' brief to this Court suggests, D.Br.170, reference al-Qaeda.[25] Nor did Bryden's testimony state, as the defendants misleadingly suggest, that there were "18 American soldiers – medal of honor winners – who got murdered and had their bodies desecrated by a Somali mob in Mogadishu." D.Br.171. To the contrary, "Bryden's matter-of-fact testimony," *Omar*, 786 F.3d at 1113, was merely that there was a military attack that resulted in the deaths of 18 American soldiers and many more Somalis. Indeed, the defense was so confident that the term "Black Hawk Down" did not prejudice the jury that defense counsel used that very term on cross-examination, and defense counsel also used that term again in an unrelated and unnecessary reference during closing argument. *See* 13RT 1875.

[25] The defendants' suggestion that the district court acted improperly during *voir dire* by mentioning al-Qaeda lacks any basis in the record. The district court's instruction in this manner was clearly done to ensure that jurors did *not* unfairly draw inferences against the defendants from any mention of al-Qaeda. To that end, the district court explicitly told the jurors that "[t]here will be no evidence in this case that the defendants, or any of them, were members of al-Qaeda or sponsored al-Qaeda activity" or that any defendant "support[ed] al-Qaeda in any way, shape, or form." 1RT 63. Unsurprisingly, the defendants did not object to this instruction.

Even on appeal, the defendants contend that "this case requires an understanding of Somalia's recent history," D.Br.12, and provide ten pages (largely relying on extra-record and inadmissible hearsay evidence, and uncited assertions) detailing the history of Somalia from 1960 to 2009. *Id.* at 12-21. And, unsurprisingly, the defendants' history includes the "infamous 'Black Hawk Down' incident in October 1993," an important event that led to the withdrawal of U.S. and U.N. personnel from Somalia. *Id.* at 15.

A district court has broad discretion in assessing the relevance and reliability of expert testimony. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). Here, the district court found that Bryden's testimony was helpful to the jury. *See* 3RT 505-06. And the relevance of this historical event was not "substantially outweighed" by the risk of unfair prejudice. Fed. R. Evid. 403. Indeed, a review of the actual testimony shows no such risk.

The defendants did not object to Bryden's designation as an expert, and they concede that a historical timeline was relevant to the issues in the case. Instead, they sought to pluck out of that timeline a pivotal event in Somali history, one which their own description of Somali history includes. The district court was well within its discretion to overrule this objection and to permit the brief testimony about this event as part of a relevant historical chronology.

E. Any Evidentiary Error Was Harmless

Even where a district court errs in ruling on evidentiary matters, this Court will not reverse if "it is more probable than not that the error did not materially affect the verdict." *United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) (quotation marks omitted). Here, there is no basis to conclude that any of the purported evidentiary errors raised by the defendants could have affected the verdict in this case.

The exclusion of the proposed testimony regarding Moalin's participation at a 2009 conference had no relevance to Moalin's conduct during 2007 and 2008. Moreover, the point that the defendants wanted to establish–that Moalin supported the advancement of women–was made by undisputed testimony that concerned the relevant time period.

The testimony that the defendants claim Farah Shidane (also known as Farah Yare) would have offered would also have been merely cumulative.[26] The defendants contend (without citation) that Shidane would have testified "that he was part of a local administration of the Galgaguud region and actively fought against al-Shabaab" and that the money he "received from the defendants was used for humanitarian purposes." D.Br.159-60. There was substantial testimony in the record as to these points. *See* 10RT 1452, 1454, 1456-57, 1462-63, 1478 (testimony of Halima Ibrahim);

[26] As described above, Shidane was one of eight Somali-resident witnesses that the defendants sought to depose. They obtained and offered videotaped testimony from the other seven, in addition to the live testimony from IIDA leader Halima Ibrahim.

12RT 1668, 1686, 1688-1703 (testimony of Abdisalam Guled); SER152-61 (testimony of Abukar Mohamed).

Moreover, the money transfers to Farah Shidane/Yare were not necessary to the verdict. The case, as the government submitted it to the jury, was based on the defendants' six money transfers to Aden Ayrow in January, February, and April 2008, their two transfers to Omar Mataan in July 2008, and Moalin's provision of his house to Ayrow. Indeed, the government's initial closing statement, which set forth the evidence the government was relying on, did not even mention Shidane/Yare. 13RT 1807-57. After defense counsel pointed to this omission in his closing statement, 13RT 1883, the government, in rebuttal, told the jury that "the government is not alleging that Farah Yare was part of al-Shabaab." 13RT 1965; *see also* 13RT 1981 (prosecutor's statement to district court that he "specifically said that the government could not claim [Farah Yare] was al-Shabaab").

As the district court observed in denying the defendants' motion for a new trial, the defendants' convictions "were supported by strong and compelling evidence." ER86. The strength of that evidence was not at all dependent on the Shidane/Yare transactions nor on Bryden's anodyne description of a historical battle, and it would not have been undermined at all by repetitive evidence about Shidane or Moalin's support for charity.

IV. The Evidence Against Defendant Doreh Was Sufficient To Support His Convictions

A. Standard of Review

This Court reviews *de novo* a district court's determination that sufficient evidence supports a conviction. *United States v. Chung*, 659 F.3d 815, 823 (9th Cir. 2011).

This Court will uphold a jury's conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt from the trial evidence, both circumstantial and direct, as viewed in the light most favorable to the prosecution. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc); *United States v. Lindsey*, 634 F.3d 541, 552 (9th Cir. 2011) (logical inferences from circumstantial evidence may support conviction). The Court "must presume . . . that the trier of fact resolved any . . . conflicts [concerning inferences to be drawn from evidence] in favor of the prosecution, and must defer to that resolution." *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *see also Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (per curiam) (court may not engage in "fine-grained factual parsing" to undermine jury's inferences).

B. Argument

The defendants do not deny that there was sufficient evidence to establish a conspiracy to fund al-Shabaab, and, indeed, the evidence of the existence of this conspiracy was "strong and compelling." ER86. "Once the government has

established the existence of a conspiracy, evidence of only a slight connection is necessary to support a conviction of knowing participation in that conspiracy." *United States v. Torralba-Mendia*, 784 F.3d 652, 663 (9th Cir. 2015) (quotation marks omitted). To be convicted, a defendant "need not have known all the conspirators, participated in the conspiracy from its beginning, participated in all its enterprises, or known all its details." *Id.* at 664. Here, the jury's verdict is supported by substantial evidence, including evidence of Doreh's membership in the charged conspiracy, and thus Doreh's argument fails. *See also* 10RT 1250 (district court ruling denying motion for judgment of acquittal).

The government's presentation of the defendants' intercepted conversations began with a call between Ayrow and Moalin in which the two discussed the funding Ayrow's group needed. SER16-20. After that call, Moalin immediately called Doreh, who worked at Shidaal Express, the hawala the coconspirators used to send money to Ayrow. SER21-25. The transcript of that phone call makes clear that (a) Doreh had previously spoken to Ayrow; (b) Doreh was going to assist in raising $3,600 ("[o]ne dollar a day per man" for the "forces"); and (c) Doreh was going to pass the message on to defendant Mohamud. *Id.*

In February 2008, Moalin and Doreh discussed the "Dhunkaal" money, which Doreh said was "two," (*i.e.*, the $2,000 sent in two separate transactions on February 13 through the hawala where Doreh worked, SER15). SER57-58.

In April 2008, confusion arose over $3,000 (again split into two transactions, SER15) sent to Ayrow. Moalin called Doreh to learn the fake sender name that was used, and Doreh told him "we used the name that was used before as the sender." SER90. That did not seem to stem the confusion, and Moalin and Doreh had another conversation shortly thereafter. SER91-96. Moalin was under the impression that "Dhunkaal" was the fake sender name (which it was for the February transactions), but "Dhunkaal" had been changed to be the fake *recipient* name for the April transactions. SER92-93; SER15. Doreh then told Moalin that the money was sent to the Bakara market in Mogadishu. SER95. Moalin asked Doreh to change the location to Dhuusamareeb, Somalia, because "[h]e said that he is there." *Id.* Doreh said that he would do so. *Id.* The next day, Moalin told Ayrow that the money had been sent to Dhuusamareeb and that the transfer would likely be broken into two "because they [*i.e.*, Doreh and his coworker] do not want to show that the transfer was one." SER98.

Also in April, in a conversation between Doreh, Moalin, and another individual, Doreh voiced his support for attacks against "non-Muslims," saying that "there is no better cause for a person . . . than to be martyr for his country, land and religion." SER84. Doreh further said that the fighting "will not stop" and told Moalin to "forget about that reconciliation talk." SER86.

When Ayrow was killed, Moalin called Doreh to tell him that "that man is gone." SER115. Doreh responded: "You mean Aden?" *Id.* Doreh then lamented that Ayrow's death "is the work of spies," while praising Ayrow by saying "the important thing is what he died for" and that his death would not "diminish him." SER116-17.

In sum, there was a conspiracy to send money to al-Shabaab via Aden Ayrow. Doreh knew that the purpose of this funding was to support al-Shabaab fighters, and Doreh explicitly endorsed the violence that al-Shabaab conducted. Doreh had even spoken personally with Ayrow. Moreover, through his position at Shidaal Express, Doreh facilitated the structuring of the monetary transactions to conceal their nature.

The evidence, particularly when drawing all inferences in favor of the jury's verdict, establishes far more than the "slight connection" to the conspiracy that was required to support Doreh's conspiracy convictions (Counts I – III). Moreover, the evidence is sufficient to support Doreh's participation in the April transactions, which form the basis for his substantive conviction on Count V.

CONCLUSION

For the reasons stated above, the district court's judgment should be affirmed.

DATED this 15th day of April 2016.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, the United States represents that it knows of no cases related to this appeal.

CERTIFICATE OF COMPLIANCE
Circuit Rule 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the government's brief is:

Proportionately spaced, has a typeface of 14 points in Garamond font, and contains 24,556 words according to Word 2010.

s/Jeffrey M. Smith
JEFFREY M. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing Answering Brief of Plaintiff-Appellee and attached Supplemental Excerpts of Record with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Jeffrey M. Smith
JEFFREY M. SMITH