No. _____

IN THE

Supreme Court of the United States

ABID NASEER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 18, 2019

QUESTION PRESENTED

1. Whether the Second Circuit Court of Appeals applied an incorrect standard in concluding that Petitioner knowingly and intelligently waived his Sixth Amendment right to counsel, even though the District Court never advised him of any specific risks and disadvantages of self-representation.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals appears in Westlaw as 775 Fed. Appx. 28(2nd Cir. 2019) and in the Appendix as 1a-4a. In that Order, which was entered on August 20, 2019, the Second Circuit affirmed the judgment of the United States District Court, Eastern District of New York, entered on January 28, 2016, which convicted the Petitioner, after a jury trial, of conspiring to provide and providing material support to a foreign terrorist organization, in violation of 18 U.S.C. § 924(c)(1)(B)(ii) and 924(o), and sentenced him to forty years of imprisonment and a lifetime of supervised release. The Second Circuit rejected Petitioner's argument, *inter alia,* that the District Court had failed to ensure that his waiver of his Sixth Amendment right to counsel was knowing and intelligent.[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. C. § 1254. The Order of the Court of Appeals sought to be reviewed was filed on August 20, 2019. Accordingly, this Petition for a Writ of

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[1] References preceded by the letter "A" are to the Appendix submitted to the Second Circuit.

Certiorari is timely, pursuant to U.S. Sup. Ct. Rule 13, 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

This case raises important and recurring questions concerning the Sixth Amendment right to counsel. Specifically, this case presents this Court with an opportunity to clarify whether a District Court must inform a defendant of *any* particular risks of self-representation before granting a waiver of the right to counsel. In doing so, this Court will resolve a split among the circuits concerning the appropriate test for evaluating whether the Sixth Amendment waiver is knowing and voluntary.

The factual background to this case is relatively straightforward. Prior to trial, Petitioner submitted numerous *pro se* letters, including one that summarily and incoherently referred to the Fifth Amendment, extraterritorial jurisdiction, Rule 12,

defects in the indictment, and motions to dismiss and suppress. A83. Other letters indicated that he sought to proceed *pro se*. At a subsequent conference, the following colloquy occurred (A89-91):

The Court:	Proceeding *pro se* has its obvious problems for you, not to mention for the Court, but you have that right to do it. But I want you to understand your choice isn't current counsel or *pro se*. If other counsel is provided to you, would you – you want to be represented by a lawyer or do you want to represent yourself? It's that simple.
Petitioner:	I want to represent myself, sir.
The Court:	No matter what?
Petitioner:	Yes sir.
The Court:	Well, I have to caution you, admonish you against it. It's a very unwise course of action. You have that right and I will respect it. And I want you to consider it carefully before I finally confirm your decision to proceed *pro se*.
Petitioner:	Sir, I've given it considerable consideration. So I would like you to make a judgment on it now that I want to proceed *pro se*.
The Court:	And you're clear that no other lawyer would be appropriate for you?
Petitioner:	I understand that.
The Court:	No, I'm asking you.
Petitioner:	Yes, sir.
The Court:	Well, I'm going to keep counsel to stand by. Who would you prefer, Mr. Neuman or Mr. Brounstein?
Petitioner:	I don't want to be represented by any of them.
The Court:	You're not going to be represented. You're going to have an advisor.
Petitioner:	Mr. Neuman.
The Court:	And you can either use Mr. Neuman or not, but if you proceed *pro se* you will be the lawyer, so to speak.
Petitioner:	All right.
The Court:	I'm not going to have a sort of hybrid of a little bit of you and a little bit of Mr. Neuman. He is there to advise you. You understand that?
Petitioner:	Yes sir.

Without any further discussion of any disadvantages of self-representation, the Court granted Petitioner's application. Thereafter, the prosecutor estimated that the trial would last 3 weeks to a month, observed that the discovery had not yet been completely disclosed, and noted it included a hard drive with four terabytes of information. A97-98. Nevertheless, Petitioner demanded a quick trial date, remarking that the amount of discovery was "irrelevant." A98-99.

At a conference months later, on September 19th, the Court remarked, "You're obviously a bright guy, but not bright enough to appreciate the fact that your welfare would be in far better hands if you had legal counsel." A144. After Petitioner reiterated his desire to proceed *pro se*, the Court added, "given your understandable lack of familiarity with both procedure as well as, to some extent, substance, you're going to be handicapped." A145. Aside from the oblique reference to "procedure" and "substance," the Court made no attempt to illustrate the disadvantages of self-representation by identifying any specific problems that could occur. Towards the end of the conference, the Court returned to the topic by asking Petitioner, "what has persuaded you to proceed pro se? As I say, you don't have to answer." Petitioner replied by saying, "okay sir, so I won't answer the question." A156.

Thus, the trial proceeded with Petitioner acting *pro se*, assisted by "standby counsel." For much of the trial – especially

the early stages– Defendant objected to virtually all of the government's exhibits as well as much testimony, typically in an untimely fashion, without specifying any basis or authority for the objections, and without even asking for appropriate remedies. *See e.g.,* A330, 336-37, 340-41, 354, 367, 381, 387, 390-91, 402, 446-51, A772, 1568, A1441-42, 1568.

Further, several times during the trial the Court and Petitioner made clear that Petitioner was firmly in control of his defense. During his direct testimony, Petitioner acknowledged that he had determined what questions to ask the witnesses and made all the decisions himself, even though he had received no legal training and was not conversant with federal laws and procedures. A2181-82. When the legal advisor once attempted to clarify objections, the Court admonished him that it was up to Defendant to present the arguments. A955.

A somewhat comical moment occurred during the cross-examination of Petitioner, when the legal advisor (who conducted the direct questioning of Petitioner) objected to the prosecutor's questions about his knowledge of various terrorist events. During the ensuing sidebar, the advisor asked if he could make a record, to which the Court replied, "No, he elected to represent himself." A2702. Petitioner's complete control of the proceedings was reiterated at a post-verdict conference by counsel, when agreeing

to take over the case as the attorney for purposes of sentencing and appeal. A3137-38.

On appeal to the Court of Appeals for the Second Circuit, Petitioner raised three principal arguments: (1) the District Court failed to ensure that he knowingly and intelligently waived his right to counsel; (2) the District Court erred by admitting various evidence of terrorism in which he did not participate; and (3) the District Court committed procedural error at sentencing in applying a four-level aggravating role enhancement.

The Second Circuit rejected each of those arguments. With regard to the self-representation issue, the Second Circuit's full discussion was the following:

> "The totality of the circumstances surrounding Naseer's waiver confirm that he fully understood the ramifications of his decision to waive the Sixth Amendment right to counsel at trial. *See, United States v Fore,* 169 F.3d 104, 108 (2nd Cir. 1999) ('Whether a defendant's waiver is knowing and intelligent depends upon the particular facts and circumstances of the case and characteristics of the defendant himself'); *see also, Hausa,* 922 F.2d at 134-34) ('Although there is no talismanic procedure to determine a valid waiver, the district court should engage the defendant in an on-the-record discussion to ensure that [he] fully understands the ramifications of [his] decision' (internal question marks omitted).
>
> "The record amply establishes that Naseer had the capacity to make a knowing and intelligent decision; that he was aware of the seriousness of the charges he faced; and that he was aware that he had the choice between proceeding *pro se* and retaining court-

appointed counsel. The record is also replete with admonitions from the experienced and careful District Judge about the risks of self-representation, including an express warning to Naseer that he would be disadvantaged in areas of trial procedure and discovery review. Finally, Naseer was repeatedly informed before trial that he could reconsider his decision to waive his right to counsel. Accordingly, Naseer's waiver was knowing and intelligent, and he suffered no constitutional deprivation as a result of the District Court's acceptance of his decision to represent himself."

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD REVIEW THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO THE SCOPE OF THE EXAMINATION A TRIAL COURT MUST UNDERTAKE BEFORE GRANTING A DEFENDANT'S WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Since at least 1938, this Court has made it clear that trial courts must be vigilant when considering a defendant's request to represent himself or herself and that the discourse with the defendant is far from a "mere procedural formality." *Johnson v Zerbst*, 304 U.S. 458, 465 (1938). Nevertheless, in practice the Circuit courts have applied widely divergent approaches in evaluating the validity of waivers of the right to counsel. Thus, it is now unclear what type of examination a trial court must undertake before allowing such waiver.

In *Johnson*, this Court described the responsibilities a judge confronts when faced with requests to waive counsel. The judge must:

> "investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all

> other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination under which such a plea is rendered ****
>
> "This case graphically illustrates that a mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel – may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." *Van Moltke v Gillies*, 332 U.S. 708, 723-24 (1948) (emphasis added).

Decades later, this Court summarized that the defendant must be "made aware of the dangers and disadvantages of self-representation so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v California,* 422 U.S. 806, 835 (1975)(citations omitted).

Interpreting this language, the state and federal courts have agreed that trial courts need not abide by any particular script and that it is insufficient merely to inform the defendant that he or she has a constitutional right to counsel. *See e.g., United States v Mitchell,* 788 F.2d 132, 1235 (7th Cir. 1986); *Hart v State,* 79 N.E.3d 936, 939 (Indiana 2017), *citing Johnson,* 304 U.S. at 1126, *supra.* "The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." *United States v Sandles,* 23 F.3d at 1121, 1126 (7th Cir. 1994). "Warnings of the pitfalls or

proceeding to trial without counsel *** must be rigorously conveyed." *Iowa v Tovar,* 541 U.S. 77, 89 (2004). Courts also generally agree that the adequacy of the waiver depends upon "the totality of circumstances." *See, Edwards v Arizona,* 451 U.S. 477, 482; *accord, United States v Hurtado,* 47 F.3d 577, 583 (2nd Cir. 1995).

But despite this superficial consensus, genuine and significant differences have emerged in how courts approach and analyze waivers of the right to counsel. For example, the Second Circuit has essentially emphasized whether the defendant: understood that he had a choice between proceeding *pro se* and with assigned counsel; recognized the advantages of being represented by one trained in the law; and had the capacity to make an intelligent choice. *See, United States v Fore,* 169 F.3d 104, 108 (2nd Cir. 1999); *United States v Calabro,* 467 F.2d 973, 985 (2nd Cir. 1972). That Circuit also notes that relevant factors include the defendant's education, family, employment history and general conduct. *See, United States v Schmidt,* 105 F.3d 82, 88 (2nd Cir. 1997); *see also, United States v Culbertson,* 670 F.3d 183, 193 (2nd Cir. 2012); *United States v Hurtado,* 47 F.3d at 583, *supra*. In certain cases, the Second Circuit has also observed that it may be important to explain that self-representation could vitiate the Fifth Amendment right to remain silent. *See e.g., United States v Tracy,* 12 F.3d 1186, 1193 (2nd Cir. 1993).

The Tenth Circuit similarly purports to eschew "formalism in favor of pragmatism," in a manner that seems consistent with the approach of the Second Circuit. *See, United States v Hansen,* 929 F.3d 1238, 1251-55 (10th Cir. 2019)

The Third Circuit, in contrast, has underscored the need for the judge to advise a defendant "both of the technical problems he may encounter in acting as his own attorney and of the risks he takes if the defense efforts are unsuccessful." *United States v Welty,* 674 F.2d 185, 188 (3rd Cir. 1982). Thus, according to that approach, judges should inform defendants that they would have to abide by the Federal Rules of Evidence and Criminal Procedure, as well as explain that the effectiveness of a defense may be hampered by their lack of knowledge of the law. *United States v Stubbs,* 281 F.3d 109, 118 (3rd Cir. 2002). The Third Circuit has also endorsed a series of questions derived from the *Benchbook for US District Court Judges* §1.02 (published by the Federal Judicial Center). *See, United States v Peppers*, 302 F.3d at 136, *supra.*[2]

The Ninth Circuit in turn has emphasized that "suggesting that there are consequences in the abstract is not enough; there must be some instruction or description, however minimal, of the specific dangers and disadvantages of proceeding *pro se.*" *United States v*

[2] Those questions include asking the defendant whether: he had ever studied law; represented himself in a criminal action; understood the particular charges and statutory sentences he was facing; understood the impact of the Federal Sentencing Guidelines; was familiar with the Federal Rules of Evidence; understood potential defenses; and recognized that it might be easier for counsel to contact witnesses, gather evidence and question witnesses.

Hayes, 231 F.3d 1132, 1138(9th Cir. 2000). Thus, the Ninth Circuit has approved language warning the defendant that he or she may not know the complexities of jury selection, the admissibility of evidence, or what would be appropriate cross-examination, summations and post-trial motions. *Id* at 1138-39. *See also, United States v Audette,* 923 F.3d 1227 (9th Cir. 2019).

The Eleventh Circuit also requires trial courts to ensure that the defendant is aware of the nature of the charges, possible punishments, basic trial procedure, potential defenses, the rules of evidence, and the hazards of self-representation." *United States v Turner,* __Fed. Appx. __, 2019 WL 4200259, *3 (11th Cir. 2019).

Applying these various approaches, federal appellate courts have reversed judgments and ordered new trials where, for example:

> -the judge inquired whether the defendant understood possible defenses, discussed potential problems obtaining evidence and locating witnesses, and made him aware of the Federal Rules of Evidence; but did not state the range of possible punishments. *United States v Booker,* 684 F.3d 421 (3rd Cir. 2012);
>
> -the court made the defendant aware of the charges and possible penalties, and said there were "consequences" of not having an attorney, but did not describe those consequences or explain the specific dangers and disadvantages of self-representation in a way that satisfied *Faretta. United States v Hayes*, *supra*;
>
> -when the defendant asked to proceed *pro se* midway through the defense case, the judge warned him about the need to abide by the Rules of Evidence and Criminal Procedure, but

did not tell him about the possibility of rebuttal, warn him of the pitfalls of playing the dual role of attorney and accused or correct the defendant's impression that he could bring certain matters to the jury's attention without testifying, *United States v Stubbs, supra*;

-the judge warned the defendant that federal criminal procedure was "very technical" and "not a simple matter," but never explained the dangers and disadvantages of self-representation, asked the defendant his reasons for proceeding *pro se,* or whether he actually understood the consequences of his decision. *United States v Taylor,* 113 F.3d 1136, 1141-42 (10th Cir. 1997) (even assuming that the pro se representation was "exemplary" and that the defendant was intelligent, "we do not believe we can conclude [that he] knowingly and intelligently waived his right to counsel without engaging in impermissible speculation");

-the judge warned the defendant that the charges were very serious and complicated, but did not apprise him of the full range of risks and structural limitations he would face, let alone ascertain the extent of the defendant's *understanding. United States v Peppers, supra.*

Similarly, state courts applying both federal and state constitutions have found reversible error where, for example:

-the judge read the charges and maximum penalties to the defendant, but did not inform him of the statutory offenses included within them, the range of allowable punishments, any possible defenses, or the dangers and disadvantages of representing himself. *Ohio v Wamsley,* 64 N.E.3d 489 (Ohio 2016);

-the judge failed to ask a single question to determine whether the waiver of counsel was knowing and intelligent, and did not offer any advice about the dangers and disadvantages of

self-representation. *Wilson v State,* 94 N.E. 3d 212, 323 (Indiana 2018);

-the judge asked a series of questions relating to the defendant's background and pedigree, as well as his mental capacity to represent himself, but never warned of the risks of proceeding *pro se,* which was compounded by laudatory comments about defendant's aptitude for self-representations, thereby giving the impression that his interest to proceed without counsel was in his best interest. *People v Myers,* 160 A.D.3d 1028, 1033 (3rd Dept. 2018);

-the judge told the defendant that he would be required to abide by evidentiary and procedural rules without the court's assistance, but did not make him aware of the dangers of representing himself. *Martin-Argaw v State,* 343 Ga. App. 864, 870 (2017);

-the judge discussed the defendant's criminal history and education, warned him of the need to follow the court's rules, addressed challenges of having a trained attorney as an adversary, but did not inform him of the nature of the charges, the range of allowable punishments, possible defenses or dangers of the dual roles of being an attorney and accused. *Morrison v Delaware,* 135 A.3d 69, 74 (Del. 2016) (following Third Circuit precedent);

-the judge never warned the defendant of the disadvantages of self-representation, and although he was familiar with the criminal justice system, such past experience alone did not support finding that he adequately understood the risks. *Oregon v Guerrero,* 277 Or. App. 837, 850 (Or. 2016).

See also, Hart v State, 79 N.E.2d at 941, *supra*; *Silva v State,* 190 So.3d 151 (Florida Third Dist. 2016); *People v Brodeur,* 55 Misc.3d 37 (App. Term 2nd Dept. 2017); *Scott v Florida,* 241 So. 3d 977

(Florida 5th Dist. 2018); *Slinger v State*, 219 So.3d 163 (Florida 5th Dist. 2017)(*Faretta* hearing was merely three pages); *Ohio v Ross*, 86 N.E.2d 44 (Ohio 2017).

The current case demonstrates how the Second Circuit's analysis differs from other appellate courts. At the pivotal conference when the judge granted Petitioner's application to represent himself, the judge merely expressed "great concern" about Petitioner's request, opined that such an approach was not "prudent" and would pose "obvious problems" for Petitioner and the Court, and admonished him that it was "a very unwise course of action." But the judge made no effort to identify or explain even a single disadvantage of self-representation, let alone create a record demonstrating that Defendant actually understood such risks and was making his choice with "eyes open." *See, Faretta*, 422 U.S. at 835, *supra*.

For example, the Court did not discuss with Defendant the nature of the charges or range of potential penalties. *Compare, Ohio v Wamsley, supra; Morrison v Delaware, supra.* The Court did not advise Defendant that he would be at a disadvantage in gathering and presenting evidence. *Compare, United States v Booker, supra.* The Court did not warn Defendant about "technical issues" such as the need to abide by the Federal Rules of Evidence and Criminal Procedure. *Compare, United States v Peppers, supra; United States v Taylor, supra; United States v Welty, supra.* The Court

did not explain the pitfalls of acting in the dual role of accused and attorney. *Compare, United States v Stubbs, supra.* The Court did not mention how certain defenses might be impacted by his self-representation. *Compare, United States v Booker, supra.* The Court did not inquire into Defendant's reasons for declining counsel. The Court did not tell Defendant that self-representation may undercut his Fifth Amendment right to remain silent. *Compare, United States v Tracy, supra.* Nor did the Court make any inquiry into Defendant's education, employment or other aspects of his background. *Compare, United States v Culbertson, supra.*

Indeed, a thorough review of the record makes clear that Petitioner had no appreciation of the importance of reviewing extremely voluminous discovery (estimated at four terabytes) nor understanding of the most rudimentary procedural rules (as evidenced by his summary, incoherent pre-trial motions). A83-85, 98-99. Although the judge later noted that Petitioner lacked familiarity with "procedure" and "substance," the judge did not expound upon those general terms and never made any attempt to illustrate the disadvantages of self-representation by identifying any specific problems that could occur. Nor did the judge require Petitioner to explain his reasons for proceeding *pro se.* A156. And Petitioner's performance at trial – which was marked by unspecified, often-untimely, objections to virtually all of the government's exhibits as well as much testimony, *see e.g.*, A330,

336-37, 340-41, 354, 367, 381, 387, 390-91, 402, 446-51, 778, 1441-42, 1568, underscored that he did not comprehend trial strategy or the need for citing authority.

In short, had this record been reviewed by other appellate courts, it is quite probable that they would have determined that the record was insufficient to establish that Petitioner's waiver of his right to counsel was knowing and voluntary.

Accordingly, review of this case is warranted to resolve a conflict among the appellate courts as to the scope of the examination a trial court must undertake before granting a defendant's waiver of the Sixth Amendment right to counsel.

CONCLUSION

THE PETITION SHOULD BE GRANTED

Respectfully submitted,

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APPENDIX

16-373-cr
United States v. Naseer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of August, two thousand nineteen.

PRESENT: DENNIS JACOBS,
JOSÉ A. CABRANES,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee, 16-373-cr

v.

ABID NASEER,

Defendant-Appellant,

ADIS MEDUNJANIN, ZAREIN AHMEDZAY, AKA OMAR, FERID IMAM, AKA YOUSEF, AKA FARID IMAM, TARIQ UR REHMAN, AKA TARIQ UL-RAHMAN, FNU LNU, AKA AHMAD, AKA ZAHID, ADNAN EL SHUKRIJUMAH, AKA HAMAD,

Defendants.[*]

FOR APPELLEE: DAVID K. KESSLER (David C. James, *on the brief*), Assistant United States Attorneys, *for* Richard P. Donoghue, United States Attorney, Eastern District of New York, Brooklyn, NY.

FOR DEFENDANT-APPELLANT: JAMES E. NEUMAN, New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Raymond J. Dearie, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED**.

Defendant-Appellant Abid Naseer ("Naseer") appeals from a judgment, entered on January 28, 2016, convicting him, after a jury trial, of conspiring to provide and providing material support to a foreign terrorist organization, namely al-Qaeda, in violation of 18 U.S.C. § 2339B(a)(1), and conspiring to use a destructive device, in violation of 18 U.S.C. §§ 924(c)(1)(B)(ii) and 924(o). He was sentenced to forty years' imprisonment and a lifetime of supervised release.

On appeal, Naseer principally argues that: (1) the District Court failed to ensure adequately that Naseer's waiver of his Sixth Amendment right to counsel was knowing and intelligent; (2) the District Court erred by admitting evidence regarding terrorist activity in which Naseer did not directly participate; and (3) the District Court procedurally erred by applying a four-level "aggravating role" enhancement pursuant to § 3B1.1(a) of the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

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[*] The Clerk of Court is directed to amend the caption as set forth above.

I. Standards of Review

"We review conclusions regarding the constitutionality of a defendant's waiver of counsel de novo, and supporting factual findings for clear error." *United States v. Hausa*, 922 F.3d 129, 134 (2d Cir. 2019) (internal quotation marks and alterations omitted). We review a trial court's evidentiary rulings for "abuse of discretion." *See United States v. Hendricks*, 921 F.3d 320, 326 (2d Cir. 2019); *see generally In re City of New York*, 607 F.3d 923, 943 n.21 (2d Cir. 2010) (recognizing that "abuse of discretion" is a nonpejorative term of art that implies no misconduct on the part of the district court). Finally, in evaluating the procedural reasonableness of a district court's Guidelines calculation, we review underlying factual findings as to the defendant's role in the offense for clear error. *United States v. Szur*, 289 F.3d 200, 218 (2d Cir. 2002).

II. Waiver of Right to Counsel

The totality of the circumstances surrounding Naseer's waiver confirm that he fully understood the ramifications of his decision to waive his Sixth Amendment right to counsel at trial. *See United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999) ("Whether a defendant's waiver is knowing and intelligent depends upon the particular facts and circumstances of the case and characteristics of the defendant himself."); *see also Hausa*, 922 F.3d at 134–35 ("Although there is no talismanic procedure to determine a valid waiver, the district court should engage the defendant in an on-the-record discussion to ensure that [he] fully understands the ramifications of [his] decision." (internal quotation marks omitted)).

The record amply establishes that Naseer had the capacity to make a knowing and intelligent decision; that he was aware of the seriousness of the charges he faced; and that he was aware that he had the choice between proceeding *pro se* and retaining court-appointed counsel. The record is also replete with admonitions from the experienced and careful District Judge about the risks of self-representation, including an express warning to Naseer that he would be disadvantaged in areas of trial procedure and discovery review. Finally, Naseer was repeatedly informed before trial that he could reconsider his decision to waive his right to counsel. Accordingly, Naseer's waiver was knowing and intelligent, and he suffered no constitutional deprivation as a result of the District Court's acceptance of his decision to represent himself.

III. Evidentiary Rulings

Naseer principally argues that the District Court should have excluded as unduly prejudicial, inflammatory, and cumulative, select testimony from several of the Government's cooperating and expert witnesses, as well as al-Qaeda training video clips and documents recovered from Osama bin Laden's compound. We have considered each of Naseer's evidentiary arguments and conclude that they are without merit.

Under Federal Rule of Evidence 403, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, . . . or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "In reviewing Rule 403 challenges, we accord great deference to the district court's assessment of the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007) (internal quotation marks omitted).

Here, the challenged evidence helped establish the existence of a terrorism conspiracy, as well as the conspiracy's purpose and its *modus operandi*. Further, some of the challenged testimony provided necessary background that was critical to understanding Naseer's coded communications with al-Qaeda and his role in the broader terrorism conspiracy. Even assuming *arguendo* that it was error to admit some of the contested evidence, any such error was harmless, since the evidence of Naseer's guilt was overwhelming. *See Hendricks*, 921 F.3d at 326 ("Even where we conclude that a district court erred in admitting evidence under Rule 403, the error will nonetheless be deemed harmless if we conclude with fair assurance that the jury's judgment was not substantially swayed by the error." (internal quotation marks omitted)).

IV. Section 3B1.1(a) Enhancement

Naseer contends that the District Court erred in applying a four-level role enhancement pursuant to U.S.S.G. § 3B1.1(a), which provides that a defendant's offense level should be enhanced if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Here, the District Court based the enhancement on the fact that Naseer regularly updated al-Qaeda leadership about ongoing attack preparations, and that a hierarchical organization like al-Qaeda would have trusted only a leader with direct communications. We conclude that the District Court's findings of fact—made after presiding over Naseer's two-week trial—were not clearly erroneous. Accordingly, the District Court did not procedurally err in applying a four-level role enhancement pursuant to § 3B1.1(a) of the Guidelines.

CONCLUSION

We have reviewed all of the remaining arguments raised by Naseer on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the January 28, 2016 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court