No._____

IN THE SUPREME COURT OF THE UNITED STATES

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MUHANAD ELFATIH M.A. BADAWI,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether graphic evidence of terrorism, admitted without the balancing test required by Fed. R. Evid. 403 and *Old Chief v. United States*, 519 U.S. 172, 180 (1997), should have been excluded at Petitioner's trial for providing material support to a foreign terrorist organization.

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Petitioner Muhanad Badawi respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed Petitioner's convictions for, *inter alia*, conspiring and attempting to provide material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. As relevant to this petition, the Court found that the district court did not abuse its discretion in admitting at trial certain inflammatory images found on Petitioner's digital devices and social media accounts. *See United States v. Elhuzayel*, 807 Fed. Appx. 621, 622 (9th Cir. 2020) (unpublished) (attached as Appendix A).

JURISDICTION

On March 18, 2020, the Ninth Circuit affirmed petitioner's convictions via memorandum disposition. *See* Appendix A. This petition is timely filed within 150 days of the Ninth Circuit's decision, in accordance this Court's March 19, 2020 Order Re: Filing Deadlines. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

Fed. R. Evid. 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

This case began after a federal grand jury returned an indictment charging Petitioner with one count of conspiracy to provide material support to a foreign terrorist organization, one count of aiding and abetting an attempt to provide material support to a foreign terrorist organization, and one count of financial aid fraud. The government claimed that Petitioner conspired with co-defendant Nader Elhuzayel to provide personnel (namely Elhuzayel himself) to the Islamic State of Iraq and Levant ("ISIL"). According to the government, the alleged "material support" consisted of Petitioner's purchase of a plane ticket so that Elhuzayel could travel to Israel and from there find a way to join ISIL's forces in Syria.

At trial, the government relied extensively on photographs, images, videos, and posts recovered from Elhuzayel's and Petitioner's social media accounts and cellular phones. The government presented Twitter posts from Elhuzayel showing that he endorsed a speech of Abu Bakr al-Baghdadi, the head of ISIL, who declared a Caliphate or Muslim state in the summer of 2014. The government used these posts to show that, in November 2014, Elhuzayel expressed support for the goals of the Islamic State, including violence, and spoke of his respect for "mujahidin" who fight and terrorize on behalf of ISIL.

Moreover, Elhuzayel's Twitter account contained numerous photographs of atrocities committed by ISIL, many with loathsome captions. The government displayed over fifteen gory photographs of beheadings; a half dozen photographs of bound men thrown to their death from rooftops, purportedly for being gay; and photographs of executions, one apparently committed by a child. *See* Government Trial Exhibits 304, 310, 311, 312, 335, 356, 357, 361. Many of the captions in the posts celebrated the horrific deaths.

The government also introduced a series of tweets and retweets from Petitioner's Twitter account. Like Elhuzayel's, they affirmed the views of the Islamic State, supporting their fighters, praising the martyrdom of Abu Malik al-Tamimi, and noting the actions of the holy fighters. He asked Allah's protection of "our sisters from these filthy kuffar [non-believers]." Elhuzayel Excerpts of Record ("ER") at 667-72.

The government presented evidence that Petitioner retweeted some of the tweets from Elhuzayel's account, including "May Allah free [the Muslim prisoners] and replace them with real criminals." ER 679. Other tweets referenced al-Baghdadi and the caliphate and repeated the words of others about fighting and dying as Muslims and joining the righteous. ER 686-88. The government presented messages showing that in July 2014 Petitioner speculated that he might have to go

to Syria and join ISIS. ER 714-717. The government also argued that Petitioner tweeted to Elhuzayel that he could not wait to make "hijra" with him. ER 665.

The government further introduced a series of grisly photographs found on Petitioner's iPhone. ER 868- 70, 872-73; Trial Exhibits 36, 37, 43-45, 48-49, 58-59. One photograph showed four black-clad, masked men holding guns standing over four bound, lifeless men lying face down on the ground. ER 889, 2445; Trial Exhibit 36. Another showed a man carrying an ISIL flag walking by pile of severed heads. ER 889-90,2447; Trial Exhibit 41. Yet another showed a man kneeling over prone victim, lifting the victim's head by his chin with one hand and slicing his neck open with the other, with blood pooling on the ground and neck. ER 889, 2447; Trial Exhibit 37. Other photographs showed a masked man holding a knife (Exhibit 47), followed by a man holding the knife to the neck of a victim clad in orange jumpsuit (Exhibit 48), and concluding with a close up of the knife slicing through the victim's flesh (Exhibit 49). ER 893, 2457, 2459, 246. The government also showed photographs of dead people lying on the ground in the desert. ER 893, 2469, 2471; Exhibits 58, 59. All objections to this evidence were overruled. ER 684.

Finally, the government presented photographs from Petitioner's Facebook account and iPhone of Osama bin Laden, of the World Trade Center aflame on

9/11, and of other 9/11 attackers. ER 730-31; Trial Exhibits 51-55, 419. Both defendants objected that the photographs were inadmissible under Rule 403 of the Federal Rules of Evidence as more prejudicial than probative. ER 730. Both defendants also moved to sever their trial. The court overruled the objections, finding the photographs admissible on Petitioner's state of mind and denied the severance motions. ER 743-44, 756.

Predictably, the jury convicted Petitioner on all counts. The district court ultimately imposed a sentence of 360 months' imprisonment.

Petitioner appealed, arguing *inter alia* that the trial court erred in admitting the inflammatory and unduly prejudicial evidence from his social media accounts and digital devices. But the Ninth Circuit affirmed the convictions, finding that "[t]he images, typically accompanied by commentary approving their depictions, were relevant to the contested issue of intent including because they rebutted defendants' arguments that the purpose of Elhuzayel's planned travel to the Middle East was not to join the Islamic State, but rather simply for a wedding." *Elhuzayel*, 807 Fed. Appx. 621 at 622. The Court also observed that "because defendants did not object to introduction of many of the more graphic images, we cannot conclude that the district court abused its discretion in holding that the probative value of the

items that were objected to was not 'substantially outweighed' by the danger of undue prejudice." *Id*. This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted because the graphic evidence of terrorism was inadmissible, prevented Petitioner from obtaining a fair trial, and the Ninth Circuit's interpretation of Fed. R. Evid. 403 in this case conflicts with the approach of other Circuits in similar circumstances.

I. The evidence was inadmissible under Rule 403.

Evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. As this Court observed in *Old Chief v. United States*, 519 U.S. 172, 180 (1997), "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief* makes clear that in conducting the Rule 403 balancing test, the trial court's "the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives." *Id*. at 184-185. "If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially

outweighed by unfairly prejudicial risk." *Old Chief*, 519 U.S. at 172.

A. The evidence should have been excluded because it had no probative value, created unfair prejudice, tainted the trial, and the government had viable evidentiary alternatives.

The elements of the material-support offense are: 1) the defendant provided material support or resources; 2) the defendant provided this support to a foreign terrorist organization; 3) the defendant acted knowingly; 4) the defendant knew that ISIL was a designated terrorist organization or had engaged or was engaging in terrorist activity or terrorism; and 5) the offense occurred in whole or in part in the United States. 18 U.S.C. § 2339B. But the inflammatory evidence here had little bearing on any of these elements.

None of the messages and images—particularly those of Osama bin Laden, the World Trade Center, and 9/11—tended to prove that Petitioner knowingly provided material support or resources to ISIL. Petitioner conceded via stipulation that ISIL was a designated terrorist organization and made no attempt to rebut the claim that its members committed terrorist activities. ER 2242. In terms of evidentiary alternatives, the government had access to numerous messages and postings from Petitioner's social media accounts showing that he knew that ISIL engaged in terrorist activities. And in any case, evidence about Osama bin Laden and 9/11 was irrelevant to whether Petitioner knew that ISIL committed acts of

terrorism because those terrorist activities were perpetrated by al-Qaeda, not ISIL. ISIL had no role in the attack on the World Trade Center or any other terrorist act committed on 9/11 and none of the evidence at trial showed to the contrary.

Similarly, the government's repeated exhibition of graphic photographs of beheadings and executions unfairly prejudiced Petitioner. Prejudice is "unfair" if it has an "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, advisory committee notes. The government clearly intended the parade of vile photographs to elicit disgust and revulsion toward Petitioner. But Petitioner was not being tried for any offensive political and religious opinions, no matter how far beyond the norms of accepted decency and morality. Their admission was unfairly prejudicial. *See, e.g., United States v. Harvey*, 991 F.2d 981, 995-96 (2d Cir. 1993) (in a child pornography prosecution, admission of testimony that videotapes seized from the defendant's residence depicted people performing gross acts involving human waste and bestiality created unfair prejudice); *United States v. Grimes*, 244 F.3d 375, 385 (5th Cir. 2001) (in a child pornography prosecution, admission of vile narratives possessed by the defendant that related violent rape and moderate torture created unfair prejudice).

Here the government repeatedly showed photographs of graphic executions

and mutilated bodies. The government's display of those images shattered any possibility that the jury could fairly consider Petitioner's guilt or innocence. In that respect, this case is similar to *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008). Like Petitioner, the defendants there were charged with conspiracy and attempt to provide material support to a designated terrorist organization (Hamas) and convicted following a jury trial. The government presented the testimony of a witness who had survived a suicide bombing by Hamas of an Israeli bus. The witness provided details of the bombing and about his cousin, who had died aboard the bus. The defendants were neither charged nor implicated in the bus bombing, but the government asserted the evidence was necessary to prove their knowledge of Hamas's terrorist activities. *Id*. at 160.

The Second Circuit reversed, finding that the district court abused its discretion in admitting the evidence. Like here, it had little probative value because the defendants never denied their knowledge of the organization's terrorist activities. Instead, "the government's extended presentation of [the witnesses'] testimony, supplemented by photos and videos, amounted to a blatant appeal to the jury's emotions and prejudices." *Id*. at 161. Like here, its admission unfairly prejudiced the defendants.

In sum, the government's repeated reliance on evidence of atrocities—

including the destruction of the World Trade Center—unfairly associated Petitioner to the pain, suffering, and horror caused by those events and necessarily compelled the jury to convict Petitioner for his political beliefs. It was error to admit these highly inflammatory images and the Ninth Circuit erred in finding to the contrary.

B. The Ninth Circuit failed to require the balancing test established in *Old Chief* and repeatedly relied upon by other Circuits in similar cases.

In allowing the gruesome and inflammatory images to be presented to the jury, the district court failed to balance the minimal probative value of the evidence with its highly prejudicial impact. The trial court overruled some objections to the images without explanation. ER 892. As to others, the district court found that the evidence was admissible merely because it had been found on "on a different communication module." ER 907-09. *See also* ER 910-11 (allowing photographs of beheading because they were recovered from a thumb drive instead of a Twitter post). Not once did the trial court balance the prejudice with the probative value, and the Ninth Circuit failed to address the lack of balancing in affirming Petitioner's convictions.

That was error. *Old Chief* makes clear that the Fed. R. Evid. 403 balancing test extends to the twin tendencies of the evidence itself and to any available

evidentiary alternatives. "On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk." *Old Chief*, 519 U.S. at 183.

Circuit courts have repeatedly emphasized the importance of the *Old Chief* balancing test in terrorism-related cases in determining whether a trial court abused its discretion under Rule 403. For example, in *United States v. Duka*, 671 F.3d 329, 352 (3d Cir. 2011) the Third Circuit found no abuse of discretion in admitting evidence of beheading videos because the district court reasonably assessed their relevance and probative value and took appropriate steps to mitigate their prejudicial impact, including requiring the government to sanitize them by replacing the beheadings with "antiseptic" descriptions of what happens. The district court did none of that in this case. Similarly, in *United States v. Mehanna*, 735 F.3d 32, 62-63 (1st Cir. 2013), the First Circuit found that the district court did not abuse its discretion in admitting "dozens of terrorist videos, writings, and

images," including a video where the defendant referred to the remains of American soldiers as "Texas BBQ," because the trial judge "entertained arguments on both the importance of the evidence to the government and its potential to inflame the jury" and determined that "describing the more gruesome elements through witness testimony, rather than publishing the video to the jury, would go 'a great distance to minimizing unfair prejudice' and would render the video 'significantly less inflammatory.'" Finally, in *United States v. Hassan*, 742 F.3d 104, 132 (4th Cir. 2014), the Fourth Circuit found that no Rule 403 error occurred in admitting testimony of the defendants' ties to a foreign terrorist organization because the "district court carefully balanced—both before and during trial—the relevance of [the] testimony against the potential prejudice arising therefrom."

None of that happened in this case. The district court failed to carefully consider the admissibility of the prejudicial evidence, and the Ninth Circuit failed to require the careful balancing relied upon in other Circuits in similar cases. The fact that the images were purportedly relevant to the "contested issue of intent" was not dispositive, insofar as the 403 analysis also requires a consideration of the prejudicial impact of the evidence. The Ninth Circuit erred in affirming the admission of this inflammatory evidence in the absence of a showing that the trial court duly considered its prejudicial nature. Certiorari should be granted

accordingly.

C. The errors were harmful.

Reversal is required unless the government proves the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Where the error is of non-constitutional magnitude, reversal is required "unless there is a 'fair assurance' of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict." *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir.1997) (en banc) (*quoting United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir.1996)). The government bears the burden of showing harmlessness, and there is "a presumption of prejudice." *United States v. Bailey*, 696 F.3d 794, 803 (9th Cir. 2012).

Two factors preclude any showing of harmlessness. First, the photographs and images certainly provoked powerful emotional responses, generating revulsion for the defendants. The government's identification of the defendants with the barbaric acts foreclosed any possibility of a fair trial or verdict other than guilty.

Second, and related to the first, the evidence—although barely probative on any disputed issue—suffused the government's case on the material-support charges, occupying a central role. In its first remarks to the jury, the government tied Petitioner to "the gruesome and heartless beheadings of innocent aid workers

and journalists." And unlike decent people, "the defendants praised the attacks, sent pictures of the bodies on the Internet," and "celebrated" beheadings. ER 404.

After inundating the jury with the promised photos, the government doubled down on them, urging the jury to convict, because the defendants "like it" that ISIS kills innocent people, kidnaps aid workers, "cut their heads off on video," "line Christians up on the shore and slaughter them," and burn people alive." ER 2278. And, of course, the government showed the jury the bloody photographs of all these acts; they occupied the emotional core of its case. Their introduction could not be harmless.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: July 31, 2020

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APPENDIX

A

NOT FOR PUBLICATION

FILED

MAR 18 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NADER SALEM ELHUZAYEL, Defendant-Appellant.	No. 16-50374 D.C. No. 8:15-cr-00060-DOC-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MUHANAD ELFATIH M.A. BADAWI, Defendant-Appellant.	No. 16-50392 D.C. No. 8:15-cr-00060-DOC-2

Appeals from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted March 4, 2020
Pasadena, California

Before: TASHIMA, HURWITZ, and FRIEDLAND, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Nader Elhuzayel and Muhanad Badawi appeal their convictions for, inter alia, conspiring and attempting to provide material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. Elhuzayel also challenges his 360-month prison sentence. We have jurisdiction over these appeals under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We affirm.

1. The district court did not abuse its discretion in admitting various images, including images of terrorist acts, found on defendants' social media accounts and digital devices. *See United States v. Lloyd*, 807 F.3d 1128, 1151 (9th Cir. 2015) (stating standard of review). The images, typically accompanied by commentary approving their depictions, were relevant to the contested issue of intent including because they rebutted defendants' arguments that the purpose of Elhuzayel's planned travel to the Middle East was not to join the Islamic State, but rather simply for a wedding. *See United States v. Curtin*, 489 F.3d 935, 952 (9th Cir. 2007) (en banc) ("We routinely have held that circumstances surrounding an alleged crime become *more* relevant when the defendant makes his intent a disputed issue.").

Moreover, because defendants did not object to introduction of many of the more graphic images, we cannot conclude that the district court abused its discretion in holding that the probative value of the items that were objected to was not "substantially outweighed" by the danger of undue prejudice. *See* Fed. R. Evid. 403;

see also United States v. Ganoe, 538 F.3d 1117, 1124 (9th Cir. 2008) (observing that the district court "is not required to scrub the trial clean of all evidence that may have an emotional impact" (internal quotation marks omitted)).

2. Even assuming defendants did not forfeit appellate review of the denial of their severance motions by failing to renew them at the close of evidence, *see United States v. O'Neal*, 834 F.2d 862, 866 (9th Cir. 1987), the district court did not abuse its discretion in denying the motions, *see United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (per curiam) (stating standard of review). Elhuzayel and Badawi did not present mutually antagonistic defenses. Although Badawi claimed he was manipulated by Elhuzayel into financing the latter's trip to the Middle East, Badawi "did not seek to gain acquittal by implicating" his codefendant. *United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir. 1999). Rather, both claimed that the purpose of the trip was innocent. The district court also provided requested limiting instructions, gave separate jury instructions as to each defendant, and cautioned the jury to consider the case of each defendant separately. *See United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004).

3. The proposed jury instructions that Elhuzayel contends were erroneously declined by the district court were "adequately covered by other instructions." *See United States v. Barragan*, 871 F.3d 689, 710 (9th Cir. 2017). The instructions given required the jury to find that Elhuzayel had agreed to work

under the direction and control of the Islamic State, a finding that obviated a separate determination of whether he was engaged in protected First Amendment activity.[1]

4. Elhuzayel's constitutional challenge to the in camera, ex parte review process authorized by the Foreign Intelligence Surveillance Act ("FISA") is foreclosed by our opinion in *United States v. Ott*, 827 F.2d 473, 476–77 (9th Cir. 1987). Based upon our independent review of the classified record, we conclude that the FISA warrant was supported by probable cause. *See* 50 U.S.C. §§ 1805(a)(2), 1824(a)(2). We also conclude that disclosure of the FISA materials to Elhuzayel was not "necessary to make an accurate determination of the legality" of the surveillance and searches authorized by the warrant. *Id*. §§ 1806(f), 1825(g).

5. Elhuzayel's 360-month sentence, which is at the low end of the Guidelines range, although plainly long, was not substantively unreasonable. *See United States v. Carty*, 520 F.3d 984, 988 (9th Cir. 2008) (en banc) ("[W]e recognize that a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal."). The record "reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Ressam*, 679 F.3d 1069, 1089 (9th Cir. 2012) (en banc) (internal quotation marks omitted). The court thoroughly analyzed the circumstances of the offense, found no

[1] In light of this conclusion, we need not reach the government's additional argument that Elhuzayel's proposed instructions erroneously stated the law under *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

indication of remorse, and determined that the sentence was necessary to protect the public. The other terrorism-related prosecutions cited by Elhuzayel involved circumstances which were meaningfully different from this case. *See id.* at 1094–95. The district court was not obligated to vary downwards based on policy disagreements with the Guidelines, even if doing so would have been within its discretion. *United States v. Carper*, 659 F.3d 923, 925 (9th Cir. 2011).

AFFIRMED.