No. 20-

IN THE

Supreme Court of the United States

MUHANAD AL-FAREKH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the plain text of 18 U.S.C. app. 3 §4 of the Classified Information Procedures Act (CIPA) does not require that any motion be determined *ex parte*, was Petitioner denied his right to discovery and to present a defense when the court determined his discovery motion *ex parte* notwithstanding the fact that defense counsel had appropriate security clearances?
2. Where the government's chief evidence against Petitioner was a purported fingerprint identification, was he denied his right to present a defense when the trial court precluded Petitioner from utilizing a Department of Justice (DOJ) report criticizing fingerprint identification procedures particularly in terrorism cases?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASE STATEMENT

United States v. Al-Farekh, 15-cr-268, United States District Court for the Eastern District of New York, Judgment entered March 22, 2018.

United States v. Al-Farekh, 18-943-cr, United States Court of Appeals for the Second Circuit. Judgment entered April 16, 2020

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On April 16, 2020 a panel of the Second Circuit affirmed the Petitioner's conviction in a published opinion, *United States v. Al-Farekh*, 956 F.3d 99 (2d Cir. 2020) and a Summary Order issued that same date, *United States v. Al-Farekh*, 810 Fed.Appx. 21 (2d Cir. 2020) (A1, A13)[1]. A timely motion for rehearing and rehearing *en banc* was denied on August 11, 2020. ((A26).

The District Court issued two written decisions addressing the issues raised in this petition. On August 23, 2016, it granted the government's motion pursuant to CIPA including its request that it be determined *ex parte.* (A18). The District Court granted the government's motion *in limine* to preclude use of a Department of Justice report during Petitioner's cross examination of the government's fingerprint expert on September 11, 2017. (A24).

JURISDICTION

The Court of Appeals' judgment affirming the Petitioner's conviction was entered on April 16, 2020. After an enlargement was granted, a timely petition for rehearing and rehearing *en banc* was filed. The order denying that petition was

[1] "A" refers to the Appendix to this Petition for a Writ of Certiorari. Numbers preceded by "T" refer to the trial transcript.

entered on August 11, 2020 thereby rendering this Petition timely. (A26). Rule 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Sixth Amendment to the United States Constitution provides:

> 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 be previously ascertained by law, and 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.

II. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nit shall be compelled in any criminal case to be a witness against himself, not be deprived of life liberty or property without due process of law, not shall private property be taken for public use without just compensation.

III. 18 U.S.C. app. 3 § 4, "Discovery of Classified Information by Defendants" provides:

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of

Criminal Procedure, to substitute a summary of the information for such classified documents or substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing the entire text of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

IV. Fed.R.Evid. 803(8) provides:

Public Records. A record or statement of a public office if:
(A) it sets out:
(i) the office's activities;
(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness

STATEMENT OF THE CASE

Petitioner Muhanad Al-Farekh respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 16, 2018. That judgment affirmed a judgment of the United States District Court for the Eastern District of New York convicting petitioner Al-Farekh of violating 18 U.S.C. § 844(f)(1)(use of explosives), 18 U.S.C. § 2332a(a)(1) (conspiracy to use weapon of mass destruction), 18 U.S.C. § 2332a(b)(conspiracy to use a weapon of mass destruction by a United States national), 18 U.S.C. § 2332f(a)(2) (conspiracy to bomb a government facility), 18 U.S.C. § 2339A(a)(conspiracy to provide material support to terrorists), 18 U.S.C. § 2339A(a) (provision and attempted provision of material support to terrorists), 18 U.S.C. § 2339B(a)(1) (conspiracy to provide material support to a foreign terrorist organization) and 18 U.S.C. §§ 844(f)(1)(provision and attempted provision of material support to a foreign terrorist organization). Appellant was sentenced primarily to 45 years imprisonment.

Petitioner Muhanad Mahmoud Al-Farekh, was born in 1985 in Houston, Texas. He was raised primarily in Abu Dhabi and attended college at the University of Manitoba in Canada. On January 8, 2015 a one-count Complaint was filed in the United States District Court for the Eastern District of New York. It charged petitioner Al-Farekh with conspiracy to provide material support to

terrorists. It was alleged that in 2007, while appellant was a college student at the University of Manitoba he agreed to travel to Pakistan and be trained to engage in violent *jihad*. On April 2, 2015 petitioner was placed in United States' custody and transported to the Eastern District of New York. An indictment returned on May 28, 2015 charged the same offense. Then, on January 6, 2016 a nine-count superseding indictment was filed. In addition to four material support for terrorism charges, five counts charged appellant with involvement in a January 19, 2009 explosion outside of Forward Operating Base (FOB) Chapman in the Khost region of Afghanistan.

During that attack two trucks armed with explosives approached the entrance to the Base. One truck exploded, the other did not. The contents of the unexploded truck, including explosives, were removed by crime scene personnel and then shipped to the United States for examination. Latent fingerprints were lifted from packing tape. Following petitioner's 2015 arrest by U.S. authorities, his known prints were compared with the latents lifted from the packing tape. FBI fingerprint examiner Karen Sibley opined that 18 of those prints were appellant's.

Petitioner sought admission of a Report prepared by the Justice Department's Office of Inspector General that was critical of the FBI's fingerprint analysis. The Report focused on the case of Brandon Mayfield. Mayfield an

attorney and Muslim working in Portland, Oregon was linked to a terrorist attack in Madrid, Spain through a fingerprint identification that turned out to be wrong. The Report criticized the FBI's result-oriented approach to fingerprint analysis particularly in terrorism cases. Appellant sought to use the Report during his cross examination of Agent Sibley to illustrate that misidentifications are made even when proper procedures are followed. The trial court precluded use of that Report in petitioner's case-in-chief and during the cross examination of Sibley.

During pre-trial proceedings, the government disclosed that some material discoverable under Fed.R.Crim.P. 16 and/or *Brady v. Maryland*, 373 U.S. 83 (1963) had been classified. The government then filed a series of motions pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3 §§1-16 . It sought permission to withhold that material and produce to petitioner's counsel summaries that were themselves classified. The content of the government's motion was filed *ex parte*. Petitioner opposed the government's motion, including its *ex parte* consideration. The District Court granted the government's motion in all respects. (A18-A23).

REASONS FOR GRANTING THE WRIT

I. By Sanctioning *Ex Parte* Determination of CIPA Motions Notwithstanding Defense Counsel's Security Clearance, the Court of Appeals Created, In Violation of the Statute, a Mandatory Requirement that Such Proceedings Shall be *Ex Parte*.

On February 29, 2016, the Government filed a motion pursuant to Section 2 of the Classified Information and Procedures Act (CIPA). It represented that some information ordinarily discoverable might be classified. An *ex parte* motion pursuant to CIPA was filed on June 27, 2016. Petitioner opposed the motion on substantive grounds and because it was filed *ex parte*. On August 23, 2006 the court granted the government's motion in its entirety (A18-A23). It found that the classified summaries that the government proposed to disclose to cleared defense counsel were sufficient and that any withheld material was not helpful to the defense. Defense counsel, who had the appropriate security clearance, were not permitted to view the source documents from which the classified summaries were derived.

The Court of Appeals held that the District Court did not abuse its discretion when it permitted the government, based upon an *ex parte* submission, to substitute those classified summaries for information that would otherwise have been discoverable under Fed.R.Crim.P. 16 and/or *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Al-Farekh*, 956 F.3d 99, 106-108 (2d Cir. 2020) (A3-A5). Its decision represents an unwarranted expansion of the government's ability to

withhold information that might be helpful to defendants in criminal cases. Indeed, its decision could be used to require *ex parte* proceedings in CIPA cases. This Court should grant certiorari in order to clarify the permissible scope of *ex parte* determinations in CIPA cases.

Ex Parte proceedings, especially in criminal cases, are exceedingly disfavored. By their very nature, *ex parte* proceedings impair the integrity of the criminal justice system. As this Court has noted, "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights…No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993).

Fed.R.Crim.P. 16(a)(1)(E)(i) requires that the government produce to the defendant information that is "material" to preparing a defense. Separately, the government is required to disclose information that tends to exculpate the defendant or impeach a prosecution witness. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985). The Classified Information and Procedures Act (CIPA), 18 U.S.C. app. 3 §§ 1-16 permits the government, with the approval of the trial court, to withhold information otherwise discoverable under Rule 16 and *Brady* if disclosure might damage the security of the United States. However, CIPA does not limit the government's disclosure

obligations. *United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009); *United States v. Dumestri*, 424 F.3d 566, 578 (7th Cir. 2005). In fact, when enacting CIPA, Congress warned that if information is withheld "the defendant should not stand in a worse position because of the fact that classified information is involved, than he would without the Act." S.Rep.No. 96-823 at 9 (1980); see also *United States v. Poindexter*, 698 F.Supp. 316, 320, (D.D.C. 1988).

When the government seeks to make deletions to or provide summaries of otherwise discoverable material

> [t]he court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.

18 U.S.C. app. 3 § 4. The Court of Appeals noted that the legislative history of § 4 supported its determination that § 4 proceedings be conducted *ex parte*. *United States v. Al-Farekh*, 956 F.3d at 108 (A4). Clearly, § 4 authorizes *ex parte* submissions. But it does not require them. Had Congress chosen to require *ex parte* submissions in CIPA applications it could have used the word "shall permit" instead of "may permit" when addressing how § 4 proceedings should be conducted. The Court of Appeals was not free to read such mandatory language into the CIPA statute. *Cf. United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994). (Courts are not free to read language into a statute.). By declining to use mandatory language in the statute, Congress envisioned situations where defense

counsel would review classified source material to aid in arguing how that material was "relevant and helpful to the defense of [the] accused." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). As the Sixth Circuit has noted,

> The defendants and their counsel, who are in the best position to know whether information would be helpful to their defense, are disadvantaged by not being permitted to see the information—and thus to assist the court in its assessment of the information's helpfulness.

United States v. Amawi, 695 F.3d 457, 471 (6th Cir. 2012). *See also Alderman v. United States*, 394 U.S. 165, 182 (1969) (observing than an advocate with intimate knowledge of facts are in the best position to determine whether something is relevant). Even where classification of information is proper it "must give way under some circumstances to a criminal defendant's right to present a meaningful defense." *United States v. Hanna*, 661 F.3d 271, 295 (6th Cir. 2011).

The Court of Appeals' concern that disclosure to defense counsel would "defeat the very purpose", of CIPA, *United States v. Al-Farekh*, 956 F.3d at 108, (A4) is not justified in this case. Petitioner Al-Farekh was represented by counsel who had obtained the appropriate security clearance. Counsel were prohibited from disclosing classified information to anyone absent compliance with CIPA §§ 5 and 6. Given that fact, there was no justification for denying them the opportunity to have access to the government's motion so that an effective argument could be made for further disclosure.

II. The Preclusion of a Government Report Critical of the Federal Bureau of Investigation's Fingerprint Identification Process Denied Petitioner Due Process of Law and His Right to Present a Defense.

Whether grounded in the Fifth Amendment's Due Process Clause or the Sixth Amendment's Confrontation Clause, it is well-settled that a criminal defendant has the right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Included in that right is the opportunity to challenge the integrity of law enforcement's investigation into the offense charged. This is so because where "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work till diminish it." *Kyles v. Whitley*, 514 U.S. 419, 448-449, n. 15 (1995). Petitioner was denied that right when the lower court precluded him from utilizing a March 2006 Report of the Justice Department's Office of the Inspector General on the FBI's handling of the Brandon Mayfield case. In that case the FBI erroneously identified fingerprints found at the scene of a terrorist attack as Mayfield's.

Petitioner Al-Farekh was charged *inter alia*, with conspiring to commit a 2009 terrorist attack at a United States military base in Afghanistan. Two vehicles were use in that attack. One of them exploded but the other did not. Latent fingerprints were lifted from packing tape on the unexploded device. At trial, FBI

fingerprint examiner Karen Sibley opined that eighteen of the latent fingerprints lifted from that tape petitioner Al-Farekh's. Sibley first examined the latent fingerprints in 2015, after petitioner was in United States' custody. The thrust of petitioner's cross examination of Examiner Sibley was that fingerprint examination is not an objective science. Rather "identifications" are subjective, and mistakes are made even when proper procedures are followed. (T. 476-79). But Ms. Sibley countered that "research has shown latent fingerprint examinations are accurate in reaching accurate and reliable conclusions." (T.477).

In the Mayfield case terrorists detonated a bomb on several commuter trains in Madrid, Spain killing 200 and wounding 1,400 others injured. The Spanish National Police (SNP) recovered fingerprints on a bag of detonators. The FBI Laboratory provided assistance. (Report, SDNY, 15 Cr. 268, Dkt. 140 hereinafter "Report"). An FBI Examiner who conducted a side-by-side review concluded that one of the images, LFP 17, was the fingerprint of Brandon Mayfield, an attorney in Portland, Oregon who also happened to be Muslim. The SNP did the same comparison and reached a negative conclusion (*Id*.). Then, on May 19, 2004 the SNP informed the FBI that it had positively identified LFP 17 as the fingerprint of a different person, an Algerian named Ouhnane Daoud. Confronted with this identification, the FBI withdrew its identification of Mayfield.

The Office of the Inspector General conducted an investigation. It identified several factors that contributed to the misidentification. The Report concluded that "the [FBI] examiners committed error in the examination procedure and that the misidentification could have been prevented through a more rigorous application of several principles of latent fingerprint examination." (Report, p. 6). For example, the examiners engaged in "circular reasoning" moving "backward" from the known prints of Mayfield to the latent image. Having found 10 points of similarity between the latent image and Mayfield, the examiners then found "murky or ambiguous" details that they also termed similar. (Report, p. 7).

Preliminarily, the Mayfield Report was not hearsay. It was admissible under Fed.R.Evid. 803(8)(A)(iii) as it was a public record containing the factual findings of a legally authorized investigation. As this Court has held, such reports are presumptively admissible. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988).

The Court of Appeals upheld the exclusion of the Mayfield Report finding that it was only "marginally relevant to petitioner and counsel was able to cross examine her about the fingerprint identification process. *United States v. Al-Farekh* 956 F.3d at 115 (A7-A8).

The Mayfield Report was not merely marginally relevant. The Report which criticized the FBI's process of fingerprint identification, especially in terrorism

cases, was highly relevant as there were remarkable similarities between the process used in Mayfield and this case. Petitioner Al-Farekh, a Muslim, was in U.S. custody and charged with a terrorism offense before the fingerprint comparison was conducted. Mayfield is a Muslim who, according to the FBI, had contacts with terrorists.

FBI Examiner Karen Sibley conducted a side by side comparison of the latent images and appellant's fingerprints (T. 429). The same process was used in Mayfield (Report, p. 1). In this case there were ten points of similarity between the known prints and latent images. (T. 485). The same was true in Mayfield (Report, p. 7). The identification here was "confirmed" by another examiner as it was in Mayfield. (T. 480, Report, p. 3).

Assuming *arguendo* that the Report was not admissible on petitioner's case in chief, he should have been able to use it during his cross examination of FBI examiner Sibley. She testified that the FBI's process results in "accurate and reliable conclusions". (T. 477). Given that testimony, petitioner should have been able to confront Ms. Sibley with a government report that found that even when proper procedures are followed, subjective factors can lead to conclusions that are far from reliable. Precluded from using the Mayfield Report, trial counsel could not challenge Sibley's self-serving claim that "research" had shown that fingerprint examinations are universally reliable.

CONCLUSION

For all the foregoing reasons, the Petitioner Muhanad Al-Farekh prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit in this case.

Dated: New York, New York
November 5, 2020

Respectfully submitted,
/s/ Robert J. Boyle

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APPENDIX A

956 F.3d 99
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
MUHANAD MAHMOUD AL-FAREKH, Defendant-Appellant,

No. 18-943-cr
|
August Term 2019
|
Argued: December 12, 2019
|
Decided: April 16, 2020

Synopsis

Background: After government's motion for protective order was granted in the United States District Court for the Eastern District of New York, Brian M. Cogan, J., 2016 WL 4444778, defendant was convicted of, among other things, using explosives, conspiring to murder U.S. nationals, conspiring to use a weapon of mass destruction, conspiring to bomb a U.S. government facility, and providing material support to terrorists. Defendant appealed.

Holdings: The Court of Appeals, Cabranes, Circuit Judge, held that:

Classified Information Procedures Act (CIPA) does not limit in camera, ex parte proceedings on motions for protective orders related to classified information only to cases where defense counsel does not have the requisite security clearance;

procedures that resulted in witness's out-of-court identification of defendant as suspect in terrorist activity were not unduly suggestive; and

district court's limitation on defendant's cross-examination of FBI fingerprint examiner did not violate his rights under Confrontation Clause.

Affirmed.

***102** On Appeal from the United States District Court for the Eastern District of New York (Brian M. Cogan, *Judge*)

Attorneys and Law Firms

Richard M. Tucker, Assistant United States Attorney (David C. James, Douglas M. Pravda, Saritha Komatireddy, Assistant United States Attorneys; Alicia Cook, Trial Attorney, Counterterrorism Section, United States Department of Justice, Washington, D.C., on the brief), for Richard P. Donoghue, United States Attorney, Eastern District of New York, Brooklyn, NY, for Appellee.

Lawrence M. Stern (Robert J. Boyle, on the brief), New York, NY, for Defendant-Appellant.

Before: Cabranes, Lohier, Circuit Judges, and Reiss, District Judge.[*]

Opinion

José A. Cabranes, Circuit Judge:

***103** Defendant-Appellant Muhanad Mahmoud Al-Farekh ("Al-Farekh") is a U.S. citizen who traveled to Pakistan in 2007 to join Al-Qaeda. He became a leader in the terrorist organization and waged violent jihad against the United States and its allies in the Middle East. As a member of al-Qaeda, Al-Farekh conspired to bomb a U.S. military base in Afghanistan. In 2015, agents of the Federal Bureau of Investigation ("FBI") arrested him in Pakistan and brought him to the United States to be prosecuted for his crimes.[**]

Following a jury trial, Al-Farekh was convicted of, among other things, using explosives, conspiring to murder U.S. nationals, conspiring to use a weapon of mass destruction, conspiring to bomb a U.S. government facility, and providing material support to terrorists. The U.S. District Court for the Eastern District of New York (Brian M. Cogan, *Judge*) sentenced Al-Farekh principally to 45 years' imprisonment.

Al-Farekh appeals the District Court's judgment and raises a number of challenges to his conviction and sentence. We decide here three of those challenges, leaving the others to be addressed in a summary order filed simultaneously herewith: (1) whether a district court abuses its discretion where it denies a defense counsel with the appropriate security clearance access to motions filed by the Government *ex parte* pursuant to section 4 of the Classified Information Procedures Act ("CIPA")[1]; (2) whether a custodial interrogation that

takes place overseas over a period of several weeks and involves the display of hundreds of photographs as part of a foreign country's counterterrorism investigation is unduly suggestive, thereby rendering inadmissible an out-of-court photo identification of the defendant; and (3) whether a district court abuses its discretion when it limits the cross-examination of a fingerprint examiner to preclude references to a fingerprint misidentification in a wholly unrelated case that took place 16 years ago—*i.e.*, the Brandon Mayfield incident.[2]

***104** We answer all three questions in the negative. Specifically, we hold that, in the circumstances presented here, the District Court did not err in adjudicating the Government's CIPA motions *ex parte* and *in camera*, admitting the out-of-court photo identification of Al-Farekh, and limiting the cross-examination of the Government's fingerprint examiner.

In the summary order filed today, we decide the other issues raised in Al-Farekh's appeal. In sum, the judgment of the District Court is **AFFIRMED**.

I. BACKGROUND

Al-Farekh is a U.S. citizen who was born in 1985 in Houston, Texas and was raised in the United Arab Emirates. Between 2005 and 2007, Al-Farekh attended the University of Manitoba in Canada. According to the Government, Al-Farekh dropped out of college; traveled to Pakistan; joined al-Qaeda; became a senior leader of the terrorist organization; and was responsible for, among other things, conspiring to perpetrate a violent attack against civilian and military personnel in a U.S. military base in Afghanistan.

On January 8, 2015, Al-Farekh was charged by complaint with conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A. Several weeks later, on February 1, FBI agents arrested Al-Farekh in Pakistan and brought him to the United States.

On May 28, 2015, a grand jury returned an indictment charging Al-Farekh for the same offense, and on January 6, 2016, and January 5, 2017, a grand jury returned superseding indictments. Al-Farekh was tried on the basis of the second superseding indictment for the following counts: using explosives in violation of 18 U.S.C. § 844(f)(1)–(2) (Count One); conspiring to murder U.S. nationals in violation of 18 U.S.C. § 2332(b)(2) (Count Two); conspiring to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(Count Three); conspiring to use a weapon of mass destruction by a U.S. national in violation of 18 U.S.C. § 2332a(b) (Count Four); conspiring to bomb a U.S. government facility in violation of 18 U.S.C. § 2332f (Count Five); conspiring to provide, attempting to provide, and providing material support to terrorists in violation of 18 U.S.C. § 2339A(a) (Counts Six and Seven); and conspiring to provide, attempting to provide, and providing material support to the Foreign Terrorist Organization al-Qaeda in violation of 18 U.S.C. § 2339B (Counts Eight and Nine).

A. Pretrial Proceedings

1. CIPA Materials

The Government's case against Al-Farekh included classified material. On June 30, 2016, the Government filed an *ex parte* classified motion for a protective order pursuant to § 4 of CIPA, which Al-Farekh opposed. On August 23, 2016, after reviewing the classified materials, the District Court granted the Government's *ex parte* motion. On April 28, 2017, the Government filed *ex parte* a supplemental CIPA motion, which the District Court granted on May 24, 2017.

2. Deposition of Overseas Witness

The Government's case against Al-Farekh also included testimony by a former al-Qaeda collaborator and later Government witness residing in the Middle East. On November 8, 2016, the Government filed a motion for leave to take the witness's testimony by deposition pursuant to Federal Rule of Criminal Procedure 15. To protect the witness's safety and that ***105** of his family, the Government also asked the Court to permit the witness to testify under a pseudonym and to limit the cross-examination into the witness's identity, country of origin, nationality, current location, and his ongoing cooperation with authorities. The Government did not, however, seek to limit its disclosures to Al-Farekh on these subjects. On December 9, 2016, the District Court granted the motion.

On March 14, 2017, the witness, who testified under the pseudonym "Sufwan Murad," was deposed. Murad was the driver and bodyguard of al-Qaeda leader Haji Mohammed. Murad testified that he saw a person he knew as Abdullah

al-Shami, a senior official of al-Qaeda's external operations group, on two separate occasions while driving Mohammed to deliver monthly stipends to the members of al-Shami's al-Qaeda brigade. Murad described both encounters in significant detail. Murad also identified a photograph of Al-Farekh as depicting the person he knew as al-Shami.

The able district judge presided over the Rule 15 deposition. On July 8, 2017, Al-Farekh moved to suppress Murad's out-of-court photo identification of Al-Farekh and the related testimony regarding Al-Farekh's membership in al-Qaeda. The District Court denied the motion.

B. Trial and Sentencing Proceedings

The trial of Al-Farekh started on September 12, 2017, and lasted approximately two weeks.

1. The Government's Case

As a student at the University of Manitoba, Al-Farekh joined the Muslim Students Association, where he met and befriended his future al-Qaeda co-conspirators, Ferid Imam and Maiwand Yar. Al-Farekh, Imam, and Yar discussed and exchanged radical jihadist videos, including some lectures by Anwar al-Awlaki, a now-deceased terrorist who was the leader of al-Qaeda in the Arabian Peninsula. On March 8, 2007, Al-Farekh, Imam, and Yar dropped out of college and flew from Canada to Pakistan, where they headed to the Federally Administered Tribal Areas to join al-Qaeda.

On January 19, 2009, two vehicles carrying vehicle-borne improvised explosive devices ("VBIED") approached Forward Operating Base Chapman, an important U.S. military base in Afghanistan. The plan was for the first vehicle to detonate its VBIED at the gate so the second vehicle could detonate its significantly larger and more powerful VBIED inside the base and maximize the number of casualties and damage. The first VBIED exploded as planned, injuring several Afghan nationals and a U.S. soldier; the second vehicle was stuck in the crater caused by the first VBIED and did not explode. The driver of the second vehicle was shot and killed after abandoning the vehicle. Latent fingerprints and a hair follicle were recovered from adhesive packing tape in the undetonated VBIED. According to the Government, 18 fingerprints and the hair follicle were matched to Al-Farekh.

2. Al-Farekh's Case

During the Government's case-in-chief, Al-Farekh's counsel, through rigorous cross-examination, focused on undermining the credibility of the Government's witnesses and the reliability of its evidence. During his own case-in-chief, Al-Farekh did not call any witnesses but introduced a stipulation recounting certain inconsistent, out-of-court statements by Murad and another Government witness.

3. The Verdict and Sentence

On September 29, 2017, the jury found Al-Farekh guilty of all nine counts of the ***106** second superseding indictment. On March 13, 2018, the District Court sentenced Al-Farekh principally to 45 years' imprisonment.

II. DISCUSSION

On appeal, Al-Farekh challenges many of the District Court's evidentiary rulings, as well as the reasonableness of his sentence. As stated above, we address here only three of the challenges to his conviction: (1) whether the District Court erred in reviewing and adjudicating the Government's CIPA motions *ex parte* and *in camera*; (2) whether the District Court erred in admitting Murad's out-of-court photo identification of Al-Farekh; and (3) whether the District Court erred in limiting Al-Farekh's cross-examination of the Government's fingerprint examiner.

For the reasons stated below, we find no error in the District Court's rulings and thus affirm the District Court's judgment.

A. The *Ex Parte* Review and Adjudication of CIPA Motions

Al-Farekh argues that the District Court's *ex parte*, *in camera* review and adjudication of the Government's filings made pursuant to § 4 of CIPA constitutes reversible error. More specifically, Al-Farekh argues that the District Court was required to provide him with access to the Government's filings because his counsel had the requisite security clearance.[3] We review the challenge to the District Court's handling of the CIPA motions for "abuse of discretion."[4]

CIPA establishes procedures for the handling of "[c]lassified information" in criminal cases.[5] The purpose of CIPA is "to protect[ ] and restrict [ ]the discovery of classified information in a way that does not impair the defendant's right to a fair trial."[6] Section 4 of CIPA governs the discovery of classified information by criminal defendants. It provides:

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.[7]

We have read this provision to confirm the "district courts' power under ***107** Federal Rule of Criminal Procedure 16(d)(1) to issue protective orders denying or restricting discovery for good cause, which includes information vital to the national security."[8]

As relevant here, we have held that § 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1) "authorize *ex parte* proceedings" and that a "district court act[s] well within its discretion in reviewing [CIPA] submissions *ex parte* and *in camera*."[9] As such, notwithstanding the rarity of *ex parte* proceedings in criminal matters, there can be no question that a district court's *ex parte*, *in camera* adjudication of CIPA motions falls squarely within the authority granted by Congress.

Al-Farekh argues that this Court "has sanctioned *ex parte* proceedings in CIPA cases" only where defense counsel did not possess the requisite security clearance.[10] Al-Farekh asks us to hold that, where a defense counsel has an appropriate security clearance, the District Court may not adjudicate the CIPA motions *ex parte* and must give defense counsel access to the classified information.

We decline to adopt any such bright-line rule. Nothing in the text of § 4 limits the District Court's authority to review classified information *ex parte* only where defense counsel lacks a security clearance. Nor do our decisions on § 4 of CIPA—*United States v. Aref* and *United States v. Abu-Jihaad*—turn on that fact. To the contrary, as explained below, Al-Farekh's proposed rule cannot be reconciled with CIPA as enacted by Congress and interpreted by our Court.

Starting with the text, the plain language of § 4 makes clear that a district court is required to decide in the first instance whether the Government's classified information is discoverable and the extent and form of any disclosure to the defendant.[11] The structure of the CIPA statute reinforces our reading of § 4. Congress knew how to provide for the participation of defendants in certain *in camera* proceedings, as it did in § 6 of CIPA.[12] Yet, notably, Congress did not require such participation in § 4 proceedings. Instead, § 4 simply provides that an *ex parte* motion by the Government may "be inspected by the court alone."[13]

Section 4 also authorizes the Government to ask a district court to, among ***108** other things, substitute a summary of the classified information or a statement of the discoverable information.[14] And § 7 authorizes the Government to file an interlocutory appeal from a decision denying a motion for a protective order.[15] If a defendant's counsel was required to participate in a § 4 proceeding and be provided access to classified information, as Al-Farekh contends, the alternative relief authorized in these provisions would be rendered insignificant, if not meaningless.

The legislative history also supports our reading of the statute. The House Report states, for example, that "since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules."[16] And our reading is consistent with that of other Circuits that have acknowledged, either explicitly or implicitly, the lawfulness and appropriateness of *ex parte* proceedings under § 4 of CIPA.[17] More generally, it is consistent with the well-settled notion that *ex parte*, *in camera* review can be an appropriate procedure for district judges to rely upon when called to handle particularly sensitive documents.[18]

As a practical matter, because it may well be that the information in a § 4 motion is not discoverable at all, Al-Farekh's theory would permit a defendant represented

by counsel with a security clearance to gain access to classified information that would otherwise be unavailable to the defendant. That possibility could result in the improper disclosure of information that, by its very nature, may put the national security of the United ***109** States at risk.[19]

Here, notwithstanding the District Court's authority to review the CIPA filings without comment by Al-Farekh, the District Court met *ex parte* with defense counsel so that counsel could present Al-Farekh's theory of the case and his potential defenses. Following this meeting, the District Court reviewed the classified information in the Government's CIPA materials to determine whether it was helpful or material to Al-Farekh's defense and whether the Government's proposed summary substitutions were adequate to guarantee Al-Farekh a fair trial. The Government even revised some of its proposed substitutions after meeting with the District Court and before the District Court approved them.

Far from abusing its discretion, the District Court properly exercised its authority under CIPA when it reviewed and adjudicated the Government's CIPA motions *ex parte* and *in camera*. We find no basis in CIPA for vacating Al-Farekh's conviction.

B. Murad's Out-of-Court Photo Identification of Al-Farekh

Al-Farekh also contends that the District Court denied him his due process rights under the Fifth Amendment when it denied his motion to exclude Sufwan Murad's out-of-court photo identification of Al-Farekh as the man Murad knew as "Abdullah al-Shami, external operations official of Al-Qaeda."[20] Specifically, Al-Farekh argues that the photo identification should have been suppressed as the product of an unduly suggestive identification procedure. We review the District Court's admission of identification evidence for clear error,[21] overturning its "findings as to what procedures were used ... only if clearly erroneous" and giving due "deference" to its "assessment of the credibility of the witness[ ]."[22]

Murad, a former al-Qaeda collaborator, testified at his Rule 15 deposition that he saw a person he knew as Abdullah al-Shami on two separate occasions while driving al-Qaeda leader Haji Mohammed to deliver stipends to members of al-Shami's al-Qaeda brigade. [Redacted].[23] [Redacted].[24] [Redacted], authorities in Murad's "home country"[25] again interrogated him [Redacted]. During that interrogation, Murad mentioned al-Shami and provided a detailed description of al-Shami's physical appearance. Murad then worked with a sketch artist to create a computer sketch ***110** of al-Shami. Murad testified that he "would give [the sketch] about 80 percent accuracy."[26]

[Redacted].[27] In his home country, interrogators showed Murad approximately 300 photographs and asked him to identify the person in each picture. [Redacted].[28]

In his home country, Murad identified one photograph of Al-Farekh *after* providing his description of al-Shami and helping to compose the sketch. Murad expressed the view that he had "100 percent" confidence in his identification.[29] At the time of the identification in his home country, Murad wrote a statement on the back of the photograph depicting Al-Farekh, the person Murad knew as "Abdullah al-Shami, external operations official of Al-Qaeda."[30] At his deposition much later, Murad provided a description of al-Shami's appearance that is substantially similar to the one he testified he had provided to the authorities in his home country, and also identified the same photograph of Al-Farekh.

In reviewing Al-Farekh's due process challenge to the admission of Murad's identification, we must first ask whether the identification procedures employed overseas were "unduly suggestive of the suspect's guilt."[31] In conducting this threshold inquiry, we must "examine the procedures employed in light of the particular facts of the case and the totality of the surrounding circumstances."[32] If the procedures were not unduly suggestive, "the trial identification testimony"—here, Murad's testimony at his Rule 15 deposition—"is generally admissible without further inquiry into the reliability of the [out-of-court,] pretrial identification."[33] That is so because, where there is no possible taint of suggestiveness in the identification procedures, "any question as to the reliability of the witness's identifications goes to the weight of the evidence, not its admissibility."[34]

If the identification procedures were unduly suggestive, then we must consider whether the "in-court identification" is "independently reliable rather than the product of the earlier suggestive procedures."[35] An identification that is independently reliable could still be admissible, "although

a strongly suggestive pretrial identification procedure necessarily makes ***111** it difficult for the reviewing court to find such independent reliability."[36]

With this background in mind, we turn to the first step of our inquiry—whether the identification procedures employed by foreign governments during Murad's interrogation were unduly suggestive. A review of our caselaw suggests that identification procedures are unduly suggestive when they involve coercive elements employed to elicit a specific identification. As we have noted in the context of photographic presentations, "[t]he [photo] array must not be so limited that the defendant is the only one to match the witness's description of the perpetrator."[37] For example, it could be unduly suggestive if there is a "display" of "only the picture of a single individual who generally resembles the person [the witness] saw, or ... the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized."[38]

In *United States v. Fernandez*, we held that the use of a six-photo array where only one of the six persons depicted in the photographs even "remotely resemble[d]" the witness's description of the suspect was unduly suggestive.[39] Similarly, in *Dunnigan v. Keane*, we found that a photo array consisting of "more than 30 pictures of one individual using an ATM card, and no pictures of anyone else," was "highly suggestive."[40] And in *United States v. Ciak*, we noted that a witness's identification of a driver's license in the police officer's desk as that of the suspect-defendant was unduly suggestive because the police officer had previously identified a photograph of the defendant in front of the witness.[41]

To be sure, there is no bright-line rule that can be applied to determine whether an identification procedure is unduly suggestive. We have stated, however, that "a court must consider several factors, including the size of the [photo] array, the manner of presentation by the officers, and the contents of the array."[42] Thus, although not an exhaustive summary, we have found identification procedures to be unduly suggestive when they take at least one of three forms: (1) a very small number of photographs, which are in turn presented in a manner that suggests to the witness ***112** that a specific person may be the suspect (as in *Fernandez*); (2) a large number of photographs depicting the same person (as in *Dunnigan*); or (3) the utterance of suggestive comments by interrogators to the witness to obtain an identification that is jointly constructed by supplying the witness with previously unknown facts about the suspect (as in *Ciak*).

By contrast, where, as here, there is a large display of photos arranged in no particular order or format, and the interrogators do not intimate which picture the witness should identify, the identification procedure is not impermissibly suggestive.[43] Specifically, we have held that an array of more than 50 photographs depicting men of the same ethnicity, who appeared to be of the same age and had similar hair color, was not unduly suggestive.[44] We have also held that an array of nine, or even as few as six, photographs was not so small as to suggest the identification of the suspect, where "several of the persons depicted met [the witness's] description of [the suspect], and there was no feature of [the suspect's] photo that made his stand out from all the rest."[45]

On review of the record before us, we conclude that the procedures that resulted in Murad's identification of Al-Farekh were not unduly suggestive.

The totality of the circumstances surrounding the identification of Al-Farekh's photograph in Murad's home country confirm that the identification procedures were not employed to elicit a positive identification of Al-Farekh. To the contrary, Murad was shown approximately 300 photographs and was asked to identify the persons depicted in each photograph as part of the home country's counterterrorism efforts. Out of the 300 photographs that were shown to Murad, only five—each of them different—depicted Al-Farekh. [Redacted]. Finally, Murad provided a detailed description of Al-Farekh's physical appearance and assisted in the creation of a computer sketch *before* he was shown the photograph of Al-Farekh that he identified out of the array.

Unsurprisingly, Al-Farekh does not argue that the identification procedures in Murad's home country were unduly suggestive. Instead, Al-Farekh's challenge is premised on the unsupported assertion that Murad was in fact shown Al-Farekh's photograph while Murad was in [Redacted] custody and was subjected to an interrogation that Murad described as [Redacted].[46] ***113** According to Al-Farekh, because Murad was shown the photograph in a [Redacted] environment in [Redacted] before it was shown to him by officials in his home country, the circumstances surrounding the identification were unduly suggestive and rendered the identification unreliable. But there is no evidence that Murad was in fact shown the photograph by the [Redacted]

authorities. Murad testified that, although possible, he had no memory of that.

Even assuming, for the sake of argument, that Murad were shown Al-Farekh's photograph in [Redacted], there is no basis in the record to conclude that the procedures of the [Redacted] authorities were unduly suggestive. Murad did testify that the interrogation was [Redacted][47] but he did so only in terms of the disorganization of the photo array and interrogation. The photo array was in no way unfair or prejudicial to Al-Farekh, who has not pointed to any evidence in the record suggesting, much less showing, that there were suggestive comments uttered during the interrogation or any other attempts to influence Murad's identification of Al-Farekh. [Redacted].

Finally, Al-Farekh argues that the identification is unreliable because there are some inconsistencies in Murad's testimony relating to when Murad first saw the photograph of Al-Farekh that Murad identified as depicting the person that he knew as al-Shami. That may be so. But none of those arguable inconsistencies relate to the potential suggestiveness of the identification procedures that resulted in the challenged identification. Any remaining "question as to the reliability of [Murad's] identifications [of Al-Farekh] goes to the weight of the evidence, not its admissibility."[48]

In sum, we find no error, let alone "clear error," in the admission of Murad's photo identification and his related testimony.

C. The Cross-Examination of Fingerprint Examiners in Light of the Brandon Mayfield Incident

The evidence against Al-Farekh included the testimony of an FBI fingerprint examiner, Kendra Sibley, who concluded that 18 latent prints recovered from the adhesive packing tape in the undetonated VBIED matched Al-Farekh's fingerprints. Al-Farekh argues that the District Court erroneously precluded him from properly cross-examining Sibley. Specifically, Al-Farekh challenges the District Court's exclusion of evidence relating to the Brandon Mayfield incident of May 2004, where FBI examiners examined one latent print in connection with a terrorist attack on the commuter trains in Madrid, Spain, and erroneously identified the fingerprint to be that of Mayfield, a U.S. citizen residing in Oregon.[49]

Relying on its discretionary authority under Federal Rule of Evidence 403,[50] the District Court prevented Al-Farekh from cross-examining Sibley about the Mayfield incident on the basis that the potential for confusion and undue prejudice greatly exceeded whatever probative value the reference to Mayfield's case might have. Al-Farekh ***114** contends that the District Court's limitation on his cross-examination of Sibley violated his constitutional right to present a defense grounded in either the Fifth Amendment's Due Process Clause[51] or the Sixth Amendment's Confrontation Clause[52] because it prevented him from properly undermining the reliability of Sibley's testimony and the fingerprint examination in this case.

Generally, we review for an abuse of discretion a judge's limitation on the scope of a defendant's cross-examination.[53] "To find such abuse, we must conclude that the trial judge's evidentiary ruling[ ] [was] arbitrary and irrational."[54] But when the limitation directly implicates a defendant's constitutional right, such as his rights under the Confrontation Clause, we review that evidentiary ruling *de novo*.[55] "Even if error is found, 'a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.' "[56]

The Confrontation Clause protects a criminal defendant's right to cross-examine witnesses.[57] An undue limitation on cross-examination may violate the Sixth Amendment's Confrontation Clause if it prevents the defendant from, among other things, exposing a witness's biases, motivation, or incentives for lying, or eliciting testimony that is relevant and material to the defense.[58]

This is not to say, however, that the defendant has the unbridled prerogative of cross-examining witnesses about any topic, or in the manner that the defendant wishes. For example, once a defendant is able to impeach the witness's credibility, the extent to which the defendant is able "to hammer that point home to the jury" is "of peripheral concern to the Sixth Amendment."[59] Trial judges have broad discretion to limit the cross-examination of witnesses as appropriate to minimize the risk of harassment, undue prejudice, confusion of issues to be presented to the jury, redundancy of the evidence, or unnecessary delays in the trial.[60] We have thus recognized that district courts have an independent "responsibility to [e]nsure that issues are clearly presented to the jury"[61] by, for example, imposing reasonable ***115** limitations on cross-examination.[62]

The District Court's limitation on the cross-examination of Sibley does not run afoul of Al-Farekh's rights under the Confrontation Clause. *First*, the misidentification of Mayfield is only marginally relevant to the Government's case against Al-Farekh. The fingerprint examiners in the Mayfield incident were not involved in the instant case. And the Mayfield case involved only one print that was examined 16 years before the trial of Al-Farekh, whereas 18 latent prints were recovered from the undetonated VBIED and examined in this case.

Second, the District Court did not preclude Al-Farekh from highlighting the possible subjectivity of, and potential flaws in, fingerprint evidence through his cross-examination of Sibley. To the contrary, Al-Farekh had the opportunity to do just that. Sibley testified, for example, about the "level of subjectivity in latent print comparisons" and about the potential for mistakes by examiners in making false positive identifications.[63] Other than being unable to rely on the Mayfield case and the report of the Department of Justice's Office of Inspector General prepared *on that case*, Al-Farekh was free to attack Sibley's methodology and fingerprint examinations as a type of evidence.

There are many types of evidence whose reliability and objectivity could be probed through effective cross-examination. By relying on scientific literature, expert testimony, or common-sense experiences, a defendant may highlight the reliability concerns that are sometimes associated with, for example, eyewitness identifications or confessions elicited by police interrogations.[64] In doing so, however, trial judges rarely, if ever, allow defendants to rely on the facts of wholly unrelated cases to make their point. A ruling of that sort might confuse jurors.

Fingerprint evidence is no different. Here, the District Court's limitation on the cross-examination of Sibley is consistent with the understanding that a defendant may attack the subjectivity of fingerprint examinations as a category of evidence, but is not entitled without more to rely on a fingerprint examiner's mistakes in a wholly unrelated case to undermine the testimony of a different examiner.[65]

***116** Since the examiners in the Mayfield case bear no relation to the examiners in Al-Farekh's case, we see no error in the District Court's conclusion that marginally relevant evidence relating to a separate case with no factual connection to Al-Farekh might confuse the jury and, therefore, should be excluded.

III. CONCLUSION

To summarize, we hold that:

(1) The District Court's *ex parte*, *in camera* adjudication of motions filed pursuant to § 4 of the Classified Information Procedures Act ("CIPA") fell squarely within the authority granted by Congress. The District Court therefore properly exercised its authority under CIPA when it reviewed and adjudicated the Government's CIPA motions *ex parte* and *in camera*, notwithstanding defense counsel's security clearance.

(2) The totality of the circumstances surrounding the identification of Al-Farekh's photograph—where he was shown hundreds of photographs arranged in no particular manner and where the interrogators did not utter prejudicial comments on the identification—were not unduly suggestive. Accordingly, the District Court did not err in admitting the out-of-court photo identification of Al-Farekh.

(3) The District Court acted well within its discretion in limiting Al-Farekh's cross-examination of the Government's fingerprint examiner to exclude references to the incident concerning Brandon Mayfield 16 years earlier because the fingerprint examiner here was not involved in the analysis in that earlier case that resulted in the misidentification of Mayfield's fingerprint.

For the foregoing reasons, the District Court's judgment is **AFFIRMED**.

All Citations

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Footnotes

* Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

** Among the various issues raised in this appeal, there are non-classified facts that were filed under seal with leave of Court (and upon consent of both parties) in confidential and redacted briefs (and in a sealed appendix) filed by both the Defendant and the Government. In light of the sensitive nature of this information and upon due consideration of the strong presumption of public access that attaches to judicial documents, on April 6, 2020, we ordered the Clerk of Court to make available to all counsel a copy of our sealed opinion. We also ordered counsel for the parties to confer and jointly propose what, if any, redactions should be made to the sealed opinion before it is made available for public viewing. We note that the limited redactions in this opinion, which relate to information in the sealed record in this case, were jointly proposed by counsel and were accepted and made by this Court.

1 18 U.S.C. app. 3, § 4.

2 In 2004, Spanish authorities recovered various fingerprints in connection with the terrorist attack on the commuter trains in Madrid, Spain, and shared the fingerprints with the FBI. *See Mayfield v. United States*, 599 F.3d 964, 966 (9th Cir. 2010). FBI examiners erroneously identified one of the fingerprints to be that of Brandon Mayfield, a U.S. citizen and lawyer who resided in Oregon. *See id.* The FBI arrested Mayfield in connection with the train bombings. *See id.* at 967. After the Spanish authorities concluded that the fingerprint was a negative match of Mayfield's fingerprint and identified the fingerprints as belonging to an Algerian national, Mayfield was released. *See id.* The Department of Justice's Office of Inspector General prepared an extensive report acknowledging several errors in the FBI's investigation—errors that "could have been prevented through a more rigorous application of several principles of latent fingerprint identification." U.S. Dep't of Justice, Office of the Inspector General, A Review of the FBI's Handling of the Brandon Mayfield Case, at 6 (2006), *available at* https://oig.justice.gov/special/s0601/final.pdf.

3 We have reviewed the source materials underlying the Government's CIPA submissions and conclude that the District Court did not err in determining that the Government's summaries of those materials were adequate.

4 *United States v. Abu-Jihaad*, 630 F.3d 102, 140, 143 (2d Cir. 2010).

5 18 U.S.C. app. 3, § 1(a) (defining "[c]lassified information" as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security").

6 *Abu-Jihaad*, 630 F.3d at 140 (quoting *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008) (alterations in original and quotation marks omitted)).

7 18 U.S.C. app. 3, § 4.

8 *Abu-Jihaad*, 630 F.3d at 140 (quoting *United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009) (quotation marks omitted)). Federal Rule of Criminal Procedure 16(d)(1) provides in relevant part that "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief" and that "[t]he court may permit a party to show good cause by a written statement that the court will inspect ex parte."

9 *Abu-Jihaad*, 630 F.3d at 143; *see also Stewart*, 590 F.3d at 132; *Aref*, 533 F.3d at 81.

10 Appellant's Br. at 39 (noting that defense counsel in *Aref* and *Abu-Jihaad* did not possess the appropriate security clearance).

11 18 U.S.C. app. 3, § 4 (authorizing the deletion of classified information from discoverable materials or the substitution of a summary or statement for the classified information).

12 18 U.S.C. app. 3, § 6(a) (authorizing the Government to "request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding," requiring the court to "conduct such a hearing" upon the Government's request, and providing that any such hearing "shall be held in camera if the Attorney General certifies to the court ... that a public proceeding may result in the disclosure of classified information"); *see also* Sen. Rep. No. 96–823, at 7–8.

13 18 U.S.C. app. 3, § 4.

14 *See id.*

15 *See id.* app. 3, § 7(a) ("An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.").

16 H.R. Rep. No. 96–831, pt. 1, at 27 n.22 (1980); *accord Abu-Jihaad*, 630 F.3d at 143 (quoting *Aref*, 533 F.3d at 81).

17 *See*, *e.g.*, *United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) ("The right that section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel's view."); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (explaining that "*ex parte*, *in camera*

hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the [classified] information"); *accord United States v. Hanna*, 661 F.3d 271, 295 (6th Cir. 2011) (same); *United States v. Mejia*, 448 F.3d 436, 457–58 (D.C. Cir. 2006) (same).

18 *Cf. In re The City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010) (providing guidance to district courts on how to handle especially sensitive materials to analyze a claim for law enforcement privilege) (citing *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,* 318 F.3d 379, 386 (2d Cir. 2003) (describing the presentation of documents for *in camera* review as a "practice both long-standing and routine in cases involving claims of privilege" and citing illustrative cases); *United States v. Wolfson,* 55 F.3d 58, 60–61 (2d Cir. 1995) (noting, in the criminal context, that "the prescribed procedure for resolving [a] dispute [as to whether certain confidential documents are subject to discovery] is to provide the documents to the district court for *in camera* review" and that "[t]he district court normally returns such documents to the party that submitted them *in camera*")).

19 Persons with an appropriate security clearance still may not have access to classified information if they do not have a "need to know" that information. *See* Exec. Order No. 13526, §§ 4.1(a), 6.1(dd), 75 Fed. Reg. 707, 720, 728–29 (Dec. 29, 2009) (internal hyphenation omitted). A defense counsel does not "need to know" classified information that is neither helpful nor material to the defense of his or her client. *See United States v. Libby*, 429 F. Supp. 2d 18, 24 & n.8 (D.D.C. 2006) ("It is axiomatic that even if the defendant and his attorneys had been granted the highest level of security clearances, that fact alone would not entitle them to access to every piece of classified information this country possesses."), *as amended*, 429 F. Supp. 2d 46 (D.D.C. 2006).

20 Appellant's App'x ("App'x") at 112.

21 *See United States v. Ciak*, 102 F.3d 38, 42 (2d Cir. 1996) (citing *United States v. Jakobetz*, 955 F.2d 786, 803 (2d Cir. 1992)).

22 *United States v. Thai*, 29 F.3d 785, 808 (2d Cir. 1994).

23 Sealed App'x at 14–15.

24 *Id.* at 15.

25 Because Murad's country of residence is sensitive information that was filed under seal, we will refer to it as "home country" throughout this opinion.

26 App'x at 108.

27 Sealed App'x at 16.

28 *Id.*

29 App'x at 112.

30 *Id.*. At his deposition, Murad testified that he could not remember if the [Redacted] authorities had shown him that specific photograph, but that he was sure that the authorities in his home country had shown it to him after composing the sketch. Murad also was shown four other photographs of Al-Farekh, but was not able to identify them. Unlike the photograph of Al-Farekh that Murad *did* identify, the other four photographs depicted Al-Farekh at a different time of his life and with a significantly different physical appearance.

31 *United States v. Maldonado-Rivera*, 922 F.2d 934, 973 (2d Cir. 1990).

32 *Thai*, 29 F.3d at 808 (citing *United States v. Concepcion*, 983 F.2d 369, 377 (2d Cir. 1992); *Maldonado-Rivera*, 922 F.2d at 973).

33 *Maldonado-Rivera*, 922 F.2d at 973.

34 *Id.* (citing *Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986)).

35 *Id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Sims v. Sullivan*, 867 F.2d 142, 145 (2d Cir. 1989); *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir. 1982)). Here, the in-court identification consists of Murad's testimony at his Rule 15 deposition, which was admitted into evidence at trial.

36 *Ciak*, 102 F.3d at 42 (citing *Dickerson*, 692 F.2d at 247). In conducting this second-step inquiry into whether an identification is independently reliable, a court must consider the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

37 *Maldonado-Rivera*, 922 F.2d at 974.

38 *Simmons v. United States*, 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

39 *United States v. Fernandez*, 456 F.2d 638, 641–42 (2d Cir. 1972). Notably, we also noted in dictum that if there had been an 11-photo array with two photographs depicting the person who matched the witness's physical description, the identification procedure would have been permissible. *See id.*

40 *Dunnigan v. Keane*, 137 F.3d 117, 129 (2d Cir. 1998), *abrogated on other grounds by Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

41 *Ciak*, 102 F.3d at 42 (noting that "the Government concedes, *as it must*, that [the police] employed unduly suggestive pre-trial procedures with [the witness]" (emphasis added)).

42 *Thai*, 29 F.3d at 808 (citing *Concepcion*, 983 F.2d at 377; *Maldonado-Rivera*, 922 F.2d at 974).

43 *See, e.g.*, *id.* at 810 ("Although repeatedly asking a witness who has selected a certain photo to look again at the array might be troubling in some circumstances, for example if there were a small number of photos and only one perpetrator, the procedure described here, given the large number of photos in the array and the large number of robbers, was not impermissible."); *United States ex rel. Gibbs v. Vincent*, 524 F.2d 634, 637–39 (2d Cir. 1975) (concluding that a procedure involving the display of several hundreds of photographs to witnesses of an armed robbery was appropriate).

44 *See Thai*, 29 F.3d at 809.

45 *Maldonado-Rivera*, 922 F.2d at 974–75 (involving a witness's description of a suspect "as a Puerto Rican man in his 30's who had a small stature, was balding or losing some of his hair, and had a small beard," as well as an array of nine photographs depicting persons whose ethnicity was "indeterminate, and the majority may well be Hispanic," "[a]ll but one or two of the subjects appear to be in their 30's," "[a]ll nine have a small amount of facial hair," and "[t]wo appear to be balding, and two others have hairlines that may be receding"); *see, e.g.*, *United States v. Archibald*, 734 F.2d 938, 940–41 (2d Cir. 1984) (upholding a six-photo array); *United States v. Marrero*, 705 F.2d 652, 655 n.5 (2d Cir. 1983) (same); *United States v. Bennett*, 409 F.2d 888, 898 (2d Cir. 1969) (same).

46 Sealed App'x at 15.

47 *Id.*

48 *Maldonado-Rivera*, 922 F.2d at 973 (citing *Jarrett*, 802 F.2d at 42).

49 *See supra* note 2.

50 Federal Rule of Evidence 403 provides: "The 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."

51 The Fifth Amendment's Due Process Clause provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

52 The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI.

53 *See United States v. White*, 692 F.3d 235, 244 (2d Cir. 2012) (citing *United States v. Figueroa*, 548 F.3d 222, 226 (2d Cir. 2008)).

54 *Id.* (quoting *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (quotation marks omitted)).

55 *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006) (citations omitted).

56 *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L .Ed. 2d 674 (1986)).

57 *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

58 *See id.* at 51–52, 107 S. Ct. 989.

59 *United States v. Groce*, 891 F.3d 260, 267 (7th Cir. 2018) (citations and quotations omitted); *accord Vitale*, 459 F.3d at 195–96.

60 *See Van Arsdall*, 475 U.S. at 679, 106 S. Ct. 1431 (noting that district courts have "wide latitude ... to impose reasonable limits ... on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

61 *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985) (citing *United States v. Vega*, 589 F.2d 1147, 1152 (2d Cir. 1978)); *see also* Fed. R. Evid. 403 (authorizing the court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of ... confusing the issues [or] misleading the jury").

62 *See, e.g.*, *Vitale*, 459 F.3d at 195; *United States v. Sasso*, 59 F.3d 341, 347 (2d Cir. 1995).

63 Gov't App'x at 61.

64 To be clear, the availability of cross-examination as a tool to probe the reliability of evidence does not eliminate the trial judge's obligation to determine the admissibility of the evidence in the first instance, particularly where the defendant's constitutional rights are implicated. As discussed above, judges have an independent obligation to determine if, for

example, an out-of-court identification is the result of unduly suggestive procedures, or if the coercion inherent in custodial interrogations has resulted in an involuntary confession that should be excluded.

65 *See, e.g.*, *United States v. Bonds*, 922 F.3d 343, 344, 346 (7th Cir. 2019) (holding that the exclusion of evidence relating to the Mayfield incident during the cross-examination of an FBI examiner who worked "in the same FBI division that mistakenly identified Mayfield" was appropriate because, among other things, "[g]uilt by association would be a poor reason to deny a district judge the discretion otherwise available under Fed. R. Evid. 403"); *United States v. Rivas*, 831 F.3d 931, 935 (7th Cir. 2016) (holding that "there was no Sixth Amendment violation (or abuse of discretion, to the extent [the defendant] argues it)" in the district court's limitation on the cross-examination of the fingerprint examiner because the examiner "was not the person who conducted the analysis in the Mayfield case[,] ... was not involved in the Mayfield case in any way, and the separate Mayfield case has no relationship to this case").

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APPENDIX B

810 Fed.Appx. 21
This case was not selected for
publication in West's Federal Reporter.
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.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Muhanad Mahmoud AL FAREKH, Defendant-Appellant.

18-943-cr
|
April 16, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of New York, Brian M. Cogan, J., 2016 WL 4444778, of use of explosives, conspiracy to use weapon of mass destruction, and related offenses and was sentenced to 45 years' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

handwritten letters found in USB drive were authenticated and, thus, admissible;

district court's limitation on cross-examination of former foreign terrorist organization collaborator did not violate Confrontation Clause;

district court did not abuse its discretion in refusing to excuse juror and denying defendant's request for mistrial; and

sentence was not substantively unreasonable.

Affirmed.

***23** Appeal from a judgment of the United States District Court for the Eastern District of New York (Brian M. Cogan, *Judge*).

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

Attorneys and Law Firms

FOR APPELLEE: Richard M. Tucker, Assistant United States Attorney (David C. James, Douglas M. Pravda, Saritha Komatireddy, Assistant United States Attorneys; Alicia Cook, Trial Attorney, Counterterrorism Section, United States Department of Justice, Washington, D.C., on the brief), for Richard P. Donoghue, United States Attorney, Eastern District of New York, Brooklyn, NY.

FOR DEFENDANT-APPELLANT: Lawrence M. Stern (Robert J. Boyle, on the brief), New York, NY.

PRESENT: José A. Cabranes, Raymond J. Lohier, Jr., Circuit Judges, Christina Reiss, District Judge.*

SUMMARY ORDER

Defendant-Appellant Muhanad Mahmoud Al Farekh ("Al-Farekh") appeals from a judgment convicting him, following a jury trial, of: use of explosives; conspiracy to murder U.S. nationals; conspiracy to use a weapon of mass destruction; conspiracy to use a weapon of mass destruction by a U.S. national; conspiracy to bomb a U.S. government facility; conspiracy to provide, attempt to provide, and provision of material support to terrorists; and conspiracy to provide, attempt to provide, and provision of material support to the Foreign Terrorist Organization al-Qaeda. The District Court sentenced Al-Farekh principally to 45 years' imprisonment.

On appeal, Al-Farekh challenges a series of evidentiary rulings, as well as the District Court's denial of his request to declare a mistrial. In addition, Al-Farekh challenges the substantive reasonableness of his sentence. We assume the parties' familiarity with the underlying facts, procedural history of the case, and issues on appeal.

In an opinion filed simultaneously herewith, we reject Al-Farekh's challenges to the handling of the Government's motions filed pursuant to the Classified Information *24 Procedures Act, the admission of an out-of-court photo identification of Al-Farekh, and the limitation on Al-Farekh's cross-examination of the Government's fingerprint examiner. We now address the remainder of Al-Farekh's arguments and conclude that the judgment of conviction and sentence should be affirmed.

I. The District Court's Evidentiary Rulings

"We review a district court's evidentiary rulings under a deferential abuse of discretion standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence was 'manifestly erroneous.' " *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (quoting *United States v. Samet*, 466 F.3d 251, 254 (2d Cir. 2006)). Where we find an abuse of discretion, "vacatur is required unless we are 'convinced that the error was harmless beyond a reasonable doubt.' " *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (quoting *United States v. Reifler*, 446 F.3d 65, 87 (2d Cir. 2006)).

In determining whether an erroneous admission was harmless, we consider: "(1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010) (quotation marks and citation omitted).

A. Written Communications by Co-Conspirators Imam and Yar

Al-Farekh argues on appeal that the District Court erred when it admitted into evidence an e-mail by Ferid Imam and two letters by Maiwand Yar, Al-Farekh's co-conspirators. According to Al-Farekh, these statements are irrelevant and contain hearsay that does not fall into any hearsay exception.

On review, we conclude that the District Court did not abuse its discretion in admitting the written communications by Imam and Yar. We do so for substantially the reasons given by the District Court in its thorough September 13, 2017 Decision and Order granting the Government's motion *in limine* to admit Imam's e-mail and Yar's letters. *See* Appellant's App'x ("App'x") at 49–55.

B. Al-Farekh's Handwritten Letters

We also reject Al-Farekh's argument that the District Court abused its discretion by admitting the handwritten letters that were found in a USB drive that was handed to an agent of the Federal Bureau of Investigation in Afghanistan. Al-Farekh contends that these letters should have been excluded because they were not authenticated.

We disagree. Although the Government did not present evidence regarding the circumstances surrounding the seizure of the USB drive, Federal Rule of Evidence 901(b)(4) permits authentication based on "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." The Government satisfied Rule 901(b)(4) here. For example, the letters were signed in Arabic text "Abdullah" or "Abdullah al-Shami," the kunya that the Government witness Sufwan Murad, a former al-Qaeda collaborator, attributed to Al-Farekh. The Government also presented expert testimony that there were considerable similarities between the handwriting in the letters in the seized USB drive and the known samples of Al-Farekh's handwriting. Finally, the content of the letters—namely, the author's desire to wage violent jihad against the United States and the fear for his safety as a *25 leader in al-Qaeda's external operations division—are consistent with Murad's description of Al-Farekh. In light of the totality of the circumstances, the District Court did not abuse its discretion in finding that the proof of authentication was sufficient to pass the relatively low bar for authentication of evidence, *see United States v. Al-Moayad*, 545 F.3d 139, 172–73 (2d Cir. 2008), and that any remaining questions as to the reliability of the letters go to their evidentiary weight, not their admissibility, *see* App'x at 39–40.

C. The Testimony of Professor Lorenzo Vidino, the Testimony of Evan Kohlmann, and the Video of a Controlled Detonation

We similarly reject **Al-Farekh's** challenge to the admission of: (1) expert testimony by Professor Vidino, Director of the Center on Extremism at George Washington University, on the absence of a single jihadist profile and the routes commonly used to travel to join al-Qaeda in the Middle East; (2) testimony by fact witness Evan Kohlmann, founder of a company that collected online information on al-Qaeda and disseminated threat intelligence reports to clients, summarizing certain lectures of Anwar al-Awlaki, as well as the excerpts from certain jihadist materials; (3) a one-minute, 40-second-long video depicting the controlled detonation of a vehicle-borne improvised explosive device, the type of bomb that was used in a terrorist attack against a U.S. military base in Afghanistan and on which **Al-Farekh's** fingerprints were found. We find no error in the admission of this evidence and conclude that the District Court's analysis under Rule 403, which is entitled to considerable deference on appeal, *see* ***United States*** *v. Greer*, 631 F.3d 608, 614 (2d Cir. 2011), was not "manifestly erroneous," *McGinn*, 787 F.3d at 127 (quoting *Samet*, 466 F.3d at 254).

Even if we were to assume, for the sake of argument only, that the District Court erred in admitting the testimony of Professor Vidino, the testimony of Kohlmann, or the detonation video, any such error would have been harmless in light of, among other things, the strength of the Government's case against **Al-Farekh**. *See* ***United States*** *v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018) ("We have repeatedly held that the strength of the government's case is the most critical factor in assessing whether error was harmless." (quotation marks omitted)).

D. Limitations on the Cross-Examination of Sufwan Murad

Al-Farekh also disputes the District Court's decision to permit Murad to testify using a pseudonym and to limit the scope of the cross-examination to preclude **Al-Farekh's** counsel from eliciting testimony about Murad's identity, country of origin, nationality, location, and ongoing cooperation with authorities. **Al-Farekh** contends that this decision violated his rights under the Confrontation Clause.

The Confrontation Clause protects a criminal defendant's right to cross-examine the prosecution's witnesses. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). That right, however, is not absolute. Trial judges have "wide latitude ... to impose reasonable limits ... on ... cross-examination based on concerns about, among other things, harassment, prejudice, ... or the witness' safety." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *accord* ***United States*** *v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006). Although we generally review a limitation on the scope of a defendant's cross-examination of a Government witness for an abuse of discretion, ***26** when the limitation directly implicates the defendant's constitutional rights under the Confrontation Clause, we review the ruling *de novo*. *See Vitale*, 459 F.3d at 195.

We find no error in the District Court's evidentiary ruling. As a threshold matter, **Al-Farekh** does not present any evidence undermining the Government's reasonable assertion that the safety of Murad, a former al-Qaeda collaborator who assisted in counterterrorism investigations, may be in fact jeopardized in the absence of the District Court's protective order. Moreover, the narrowly tailored limitations on **Al-Farekh's** cross-examination are consistent with limitations that this Court has upheld as appropriate to protect the safety of witnesses. *See, e.g.*, ***United States*** *v. Watson*, 599 F.2d 1149, 1157 (2d Cir. 1979) (upholding limitation on cross-examination that precluded, among other things, questions concerning the witness's "employment, whether he was supporting his family, and the price of his automobile," in order to permit the witness "to maintain his concealed identity" as part of his enrollment in Witness Protection Program), *modified on other grounds*, 633 F.2d 1041 (2d Cir. 1980) (en banc); ***United States*** *v. Cavallaro*, 553 F.2d 300, 304–05 (2d Cir. 1977) (upholding limitation on cross-examination that precluded questions concerning the kidnapping victim's current address).

Al-Farekh was aware of Murad's identity in advance of the deposition, as the Government did not seek to limit its disclosures to **Al-Farekh** on this subject. And **Al-Farekh** was permitted to explore Murad's alleged biases and motivations for lying during his cross-examination. Accordingly, we conclude that the District Court's limitation on the cross-examination of Murad's testimony was reasonable and did not violate **Al-Farekh's** rights under the Confrontation Clause.

II. The Denial of Al-Farekh's Request for a Mistrial

Al-Farekh challenges the District Court's denial of his motion to excuse one of the jurors and, in the alternative, for a mistrial. Al-Farekh moved for a mistrial after the first day of deliberations, following an incident in which Juror 4 reported to the District Court that he had heard that Al-Farekh's father had boarded an elevator with another juror, but that Juror 4 was not aware of what, if anything, the father had said to the other juror.

We review the District Court's denial for abuse of discretion. *See* ***United States*** *v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011). Under *Remmer v.* ***United States***, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), we start with a presumption of prejudice from a jury's exposure to extra-record evidence. *See Farhane*, 634 F.3d at 168–69 (citing *Remmer*, 347 U.S. at 229, 74 S.Ct. 450). That presumption, however, may be rebutted by a "showing that the extra-record information was harmless." *Id.* at 168 (quotation marks omitted). To determine if the presumption is properly rebutted, we must consider the "(1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury." *Id.* at 169.

On review, we conclude that the District Court did not abuse its discretion in refusing to excuse Juror 4 and to grant Al-Farekh's request for a mistrial. Juror 4's access to extra-record information in this case—hearing that Al-Farekh's father boarded an elevator in the courthouse with a juror—is "harmless." *Id.* at 168. Juror 4 had no knowledge about any conversation between Al-Farekh's father and any jurors. Moreover, the District Court took several important steps to remedy any potential prejudice, including conducting individualized inquiries of all jurors and alternate jurors and issuing two instructions to the jury that were consented to by both ***27** the Government and Al-Farekh. More importantly, Juror 4 indicated to the District Court that the reported extra-record information will not affect his ability to be a fair juror in the case.

Under the circumstances presented, in light of the innocuous nature of the extra-record information, the District Court's reasonable and precautionary measures to minimize the risk of prejudice, and the juror's assurances to remain impartial, we conclude that the *Remmer* presumption was properly rebutted and thus find no abuse of discretion. *See Farhane*, 634 F.3d at 168–69; *see also* ***United States*** *v. Sun Myung Moon*, 718 F.2d 1210, 1219 (2d Cir. 1983) ("Absent a clear abuse of the trial court's discretion, one that results in manifest prejudice to defendants, the finding made that the jury was fair and unbiased must be upheld.").

III. Substantive Reasonableness of the Sentence

Al-Farekh also challenges the substantive reasonableness of his 45-year prison sentence, which we review "under a deferential abuse-of-discretion standard." ***United States*** *v. Yilmaz*, 910 F.3d 686, 688 (2d Cir. 2018) (citation omitted). Our review of a sentence for substantive reasonableness is "particularly deferential." ***United States*** *v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). We will set aside a sentence as substantively unreasonable only if it is "so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing [it] to stand would damage the administration of justice." *Id.* (internal quotation marks omitted).

Al-Farekh's challenge to his sentence is meritless. Contrary to Al-Farekh's assertion, the District Court specifically considered the letters from Al-Farekh's friends and family and Al-Farekh's own letter. Notably, the letters submitted on Al-Farekh's behalf describe the young teenager who went to college at the University of Manitoba prior to his departure for Pakistan in 2007. These letters provide little, if any, insight into the mindset or character of the adult who traveled to Pakistan to join a terrorist organization to perpetrate violent attacks against military and civilian personnel. Moreover, Al-Farekh's own letter was "not an enthusiastic acceptance of responsibility or expression of remorse." App'x at 565.

In light of the severity of Al-Farekh's conduct, we conclude that a 45-year sentence of imprisonment is simply not substantively unreasonable.

CONCLUSION

We have reviewed all of the arguments raised by Al-Farekh on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

All Citations

810 Fed.Appx. 21

Footnotes

* Judge Christina Reiss, of the **United States** District Court for the District of Vermont, sitting by designation.

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	**MEMORADUM DECISION & ORDER**
-against-	:	
MUHANAD MAHMOUD AL FAREKH, also known as "Abdullah al-Shami," "Abdallah al-Shami" and "Saif al-Shami"	:	15-CR-268 (BMC)
Defendant.	:	

COGAN, D.J.

Defendant Muhanad Mahmoud Al-Farekh is currently awaiting trial on a number of charges relating to his use of a weapon of mass destruction against a U.S. military base in Afghanistan in January 2009, and his conspiracy, attempt, and provision of material support to terrorists and to the foreign terrorist organization al-Qaeda. Before me is the Government's motion for a protective order pursuant to both the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, §§ 1-16, and Federal Rule of Criminal Procedure 16(d)(1). In its classified submission, the Government seeks, in line with CIPA Section 4, to be relieved from its disclosure obligations as they relate to certain classified materials obtained during the Government's investigation. The Government requests that I authorize the substitution of classified summaries for classified source material which the Government believes may contain exculpatory and impeachment evidence that would otherwise have to be disclosed in accordance with the Government's obligations under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972).

Because of the sensitive nature of these materials, the Government's submission was filed *ex parte* and under seal. Defendant has opposed the *ex parte* nature of this submission and

has filed a motion seeking to have the materials disclosed to defense counsel who hold appropriate security clearances. In the alternative, defendant has asked the Court to require the Government to disclose its legal arguments in support of its Section 4 application, and/or provide defense counsel an opportunity to make an *ex parte* presentation to the Court providing information that would help the Court in evaluating the Government's Section 4 submission. See United States v. Mostafa, 992 F. Supp. 2d 335 (S.D.N.Y. 2014). The Government did not oppose defendant's request for an *ex parte* presentation to the Court.

I have reviewed the proposed materials *in camera*. I met with defendant's counsel *ex parte*, as requested, to listen to a presentation defendant's attorneys made about defenses that they anticipate raising in this action. I also met with the Government *ex parte, in camera*, to discuss certain questions I had after reviewing the proposed materials. As a result of this latter meeting, the Government made certain revisions to the proposed summaries.

Based on my review of the parties' submissions, my meetings with defense counsel and the Government, and for the reasons set forth below, I grant the Government's motion in its entirety and deny defendant's motion to disclose the underlying Section 4 materials.

CIPA's Legal Framework

CIPA establishes procedures for handling classified information in criminal cases. The statute provides:

> The [district] court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.

18 U.S.C. app. 3 § 4.

Section 4 presupposes a Government privilege against disclosing classified information. It does not itself create a privilege. See United States v. Aref, 533 F.3d 72 (2d Cir. 2008). Courts evaluating a Section 4 motion must first decide whether the classified information the Government possesses is discoverable. See id. at 80. To be helpful or material to the defense, evidence does not need to rise to a level that would trigger the Government's obligations under Brady. See United States v. Boulos, No. 13 Cr. 612, 2015 WL 502170, at *1 (E.D.N.Y. Feb. 3, 2015).

If it is discoverable material, the district court must next determine whether the state-secret privilege applies. The privilege applies if: "(1) there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged, and (2) the privilege is lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Abu-Jihaad, 630 F.3d 102, 141 (2d Cir. 2010) (citing Aref, 533 F.3d at 80).

Finally, "[i]f the evidence is discoverable but the information is privileged, the court must next decide whether the information is helpful or material to the defense." Aref, 533 F.3d at 80. "'[I]n assessing the materiality of withheld information," a court "considers not only the logical relationship between the information and the issues in the case, but also the importance of the information in light of the evidence as a whole.'" In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 125 (2d Cir. 2008) (citing United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993)).

When the classified materials contain matter that is exculpatory or helpful to the defense, the Government's privilege must "give way" to a "defendant's right to present a meaningful defense." Abu-Jihaad, 630 F.3d at 141. A court, however, may permit the Government to

produce that information in a form that will preserve its sensitivity – such as summaries. See United States v. Zazi, No. 10 Cr. 60, 2011 WL 2532903 (E.D.N.Y. June 24, 2011). A court can authorize this substitution if it finds that the "[substituted] statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." Id. at *4; see also Abu-Jihaad, 603 F.3d at 140.

Suitability of *Ex Parte* Proceedings

Defendant has also challenged the *ex parte* nature of these proceedings. Defendant concedes that Section 4 of CIPA and Rule 16(d)(1) of the Federal Rules of Criminal Procedure both authorize *ex parte* proceedings. See Abu-Jihaad, 630 F.3d at 143. However, he urges the Court to exercise its discretion to deny the Government's request to file its materials *ex parte*.

This argument is contrary to Second Circuit precedent and the practice of other courts within this district. See Abu-Jihaad, 630 F.3d at 143; Zazi, 2011 WL 2532903, at *3; United States v. Babafemi, 13 Cr. 109, 2014 WL 1515277, at *3 (E.D.N.Y. Apr. 18, 2014). As the Second Circuit has observed, "where the government moves to withhold classified information from the defense, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules." Abu-Jihaad, 630 F.3d at 143.

Discussion

First, I find that the Government's Section 4 submission was appropriately filed *ex parte* and under seal. Notwithstanding defendant's lawyers' security clearances, the very purpose of the *ex parte* filing would be defeated by their review of the materials contained within it. My review of the detailed, highly confidential materials confirms this. I did, however, accept defendant's lawyers offer to apprise me, *ex parte*, of their theory of the case and potential

defenses so that I could better understand what kind of material might be helpful to the defense and to help me determine the adequacy of the Government's proposed summaries.

Next, I find that the state secrets privilege has been properly invoked. See Aref, 533 F.3d at 78-79. Upon review of the Government's submission, it is obvious to me that there is a real and palpable danger that compelled production of the evidence "will expose . . . matters which, in the interest of national security, should not be divulged." Id. at 80. Additionally, the Government's submission includes declarations by each appropriate head of the department which has control over the material, asserting the privilege. See Abu-Jihaad, 630 F.3d at 140.

In light of the security concerns presented by the material, the Government has proposed the substitution of classified summaries for a significant amount of source material. I find that the source material which the Government seeks to summarize contains discoverable information. The Government, to its credit, has undertaken a rigorous review of the material and has applied a generous approach to whether material could be considered exculpatory or impeaching. It has properly worked to exclude materials that are duplicative or irrelevant.

I conclude that any information withheld from the summaries (which appears to be almost none) is not helpful to the defense, and consequently, substitution of the summaries does not impinge upon defendant's right to a fair trial. My review of the summaries proposed by the Government confirms that it has offered faithful and often verbatim summaries that disclose, in a streamlined fashion, all arguably relevant portions of the underlying material. I believe that the substituted documents retain whatever potential exculpatory or impeachment value the source materials possess. The Government's diligent efforts notwithstanding, I will note the difficulties faced by defendant in defending a case involving these types of materials. But I find that

providing these summaries to defendant's counsel satisfies the Government's discovery obligations while at the same time protecting national security.

Conclusion

I therefore grant the Government's motion for a protective order pursuant to Section 4 of CIPA. The Government shall produce to defense counsel the summaries described in its submission forthwith.

SO ORDERED.

U.S.D.J.

Dated: Brooklyn, New York
August 23, 2016

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	**ORDER**
MUHANAD MAHMOUD AL FAREKH, also known as "Abdullah al-Shami," "Abdallah al-Shami," and "Saif al-Shami"	:	15-CR-268 (BMC)
Defendant.	:	

COGAN, District Judge.

The Government's motions [131] [132] and [134] are granted for the following reasons:

1. The controlled detonation depicted in the video occurs in an unpopulated field, so there is no risk of inflaming the jury with pictures of casualties, and there is no reference to al Qaeda or Afghanistan, thus making it clear to the jury that the video is for illustrative purposes only. Moreover, the FBI expert through whom the Government intends to offer the video assisted in preparing this controlled detonation. In addition, the size of the explosion depicted provides a reasonable, though smaller, illustration of the explosion that would have been created by the detonation of the TNT contained in the undetonated VBIED recovered from FOB Chapman in January 2009. The fact that the detonation is smaller is favorable to defendant, and where the differences favor defendant, it tends to support admissibility. See United States v. Cromitie, 727 F.3d 194, 225 (2d Cir. 2013).

2. Defendant has consented to that portion of the motion which seeks to exclude evidence of his treatment in a foreign country and the enumerated misdeeds of certain witnesses, subject to the exigencies of trial which defendant could not have reasonably foreseen at the time

the Government filed its motion. Accordingly, the Government's motion as to that evidence is conditionally granted.

3. The Government's motion to preclude cross-examination into the Brandon Mayfield incident is granted over defendant's opposition. Defendant has not made the connection between the Mayfield case and this one. There is little if any probative value in this evidence, and the potential for confusion and undue prejudice greatly exceeds whatever probative value it might have. See United States v. Rivas, 831 F.3d 931, 935 (7th Cir. 2016). There is a very real risk that allowing the cross-examination would create a sideshow in which the jury might be distracted in comparing the facts in the Mayfield case with this one.

SO ORDERED.

_____
U.S.D.J.

Dated: Brooklyn, New York
September 11, 2017

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 11th day of August, two thousand twenty.

United States of America,

Appellee,

v.

Muhanad Mahmoud Al Farekh,

Defendant - Appellant.

ORDER

Docket No: 18-943

Appellant, Muhanad Mahmoud Al Farekh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk