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

AHMED OMAR ABU-ALI, Petitioner, **UNITED STATES OF AMERICA,** Respondent.	Case No. 1:05-CR-00053-GBL 1:12CV474

MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255

AHMED OMAR ABU-ALI, through the undersigned counsel hereby states as his Motion to Vacate pursuant to 28 U.S.C. § 2255 as follows:

1. This is a motion pursuant to 28 U.S.C. § 2255 to vacate an amended judgment of this Court dated July 27, 2009 under Indictment 05-CR-53 of this Court convicting petitioner-movant Ahmed Omar Abu-Ali of the nine counts alleged in that indictment, to wit, Count 1, 18 U.S.C. § 2339B (conspiracy to provide material support to a foreign terrorist organization (Al-Qaeda), Count 2, 18 U.S.C. § 2339B (providing material support and resources to a designated foreign terrorist organization (Al-Qaeda)), Count 3, 18 U.S.C. §§ 2339A and F (conspiracy to provide material support to terrorists), Count 4, 18 U.S.C. §§ 2339A and F (providing material support to terrorists), Count 5, 50 U.S.C. § 1705 and 31 C.F.R. § 595.204 (contribution of services to Al-Qaeda), Count 6, 50 U.S.C. § 1705(b) and 31 C.F.R. § 595.204 (receipt of funds and services from Al-Qaeda), Count 7, 18 U.S.C. § 1751 (conspiracy to assassinate the President), Count 8, 49 U.S.C. §

46502(a)(2)(conspiracy to commit aircraft piracy) and Count 9, 18 U.S.C. § 32(b)(4)(conspiracy to destroy aircraft).

2. Petitioner Abu-Ali was sentenced to an aggregate term of imprisonment of life without parole.

3. This case has resulted in two appeals to the United States Court of Appeals for the Fourth Circuit. The first judgment was entered on April 17, 2006. In that judgment, petitioner was sentenced to an aggregate term of thirty years' imprisonment. Petitioner filed a timely notice of appeal challenging both the conviction and sentence. The government filed a cross notice of appeal from the sentence.

4. On June 6, 2008 the Fourth Circuit issued an opinion and order rejecting petitioner's legal challenges to the conviction and sentence. Pursuant to the government's cross-appeal the Court vacated the sentence and remanded for a new sentencing hearing. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

5. The resentencing was held on July 27, 2009 and resulted in the trial court's imposition of an aggregate term of life without parole.

6. Petitioner Ali appealed from the new judgment. On February 1, 2011, the Fourth Circuit affirmed the new sentence. *United States v. Abu Ali*, 410 Fed.Appx. 673 (4th Cir. 2011).

STATEMENT OF FACTS

7. The facts of the case have been set forth in opinions of this Court *See United States v. Abu Ali* 395 F.Supp.2d 338 (E.D. Va. 2005) and the decisions of the United States Court of Appeals for the Fourth Circuit identified *supra*. The facts are

summarized in this petition and the accompanying memorandum of law and are only set forth in detail where relevant to the claims raised in this motion

8. Petitioner-movant Ahmed Omar Abu-Ali, an American citizen then 21 years old, was arrested on June 8, 2003 in Medina, Saudi Arabia by agents of the Saudi security forces, the "Mabahith". A student at the Islamic University there, he was found in a classroom taking a final examination.

9. The agents first transported Mr. Abu-Ali to his dormitory room where they conducted a search of his belongings. He was then taken to the prison in Medina and housed there for the next few days.

10. At the October 2005 suppression hearing and in his interviews with medical experts, he stated that while jailed in Medina, he was beaten, whipped and deprived of food and sleep by the Mabahith. It was only when he agreed to confess membership in an al-Qaeda cell that the beatings ceased.

11. Transferred to Riyadh a few days later, the torture continued, albeit in a different form. Mr. Abu Ali was interrogated by the Mabahith for 40 straight days while housed in solitary confinement and deprived sleep.

12. The product of the Mabahith's work was a 40-page written "confession" created during those long hours and a videotaped reading by petitioner of a summary of that confession prepared by his Mabahith interrogators. Those statements provided virtually the only evidence that any "conspiracy" existed and that the movant-petitioner Abu-Ali was part of that conspiracy.

13. Prior to trial, Abu-Ali moved to suppress his statements as involuntary and as a violation of his rights under *Miranda v. Arizona*. Later at trial, it was the gravaman of

his defense that the statements were the product of torture and should be disregarded because the statements were involuntary.

14. At both hearing and trial defense experts testified that marks on Abu-Ali's back and the psychological stress he exhibited were consistent with the torture he described to them.

15. The government's experts disputed those findings, concluding instead that Abu-Ali was malingering. The trial court denied the motion to suppress and the jury convicted Mr. Abu-Ali, apparently finding that the statements were voluntary. *See United States v. Abu Ali* 395 F.Supp.2d 338 (E.D. Va. 2005).

16. Critical evidence corroborating Abu-Ali's claim of torture was excluded from the suppression hearing, the trial and the Record on Appeal. The defense sought to introduce a Report prepared by the United States Department of State setting forth its findings about Human Rights violations in Saudi Arabia. The February 2004 Human Rights Report (covering the year 2003) found that Saudi Arabian security officials utilized physical and psychological coercion to extract confessions from detainees (See Report attached hereto as Exhibit 1).

17. The Report notes that among the tactics used to extract confessions from detainees were beatings, whippings and sleep deprivation. Over petitioner's objection, this Court granted the government's motion *in limine* to exclude the report, reasoning that the report was irrelevant in that it did not address what had happened to Abu-Ali (See Order Dated October 11, 2005; docket #249).

18. In July 2005 Fed.R.Crim.P. 15 depositions were conducted in Riyadh. During its direct examination of Mabahith officials, the government elicited testimony

about Saudi interrogation practices generally. The Mabahith officials testified that Saudi security never engages in any form of coercion, that physical violence is prohibited and that anyone who engages in that sort of conduct would lose his job and be disciplined.[1]

19. During the October 2005 suppression hearing, Consular Official Charles Glatz, who visited with petitioner and other detained Americans including Sabri Benkhala, testified that he had never received a complaint of mistreatment from anyone detained by the Saudi government.

20. Based on the foregoing testimony trial counsel moved for reconsideration of the October 11, 2005 order arguing that the government had "opened the door" to admission of the Report.

21. He also proffered testimony from Sabri Benkhala, a defendant in Case no. 03-296A (the "Paint-Ball 6" case) of this Court who would testify about his own mistreatment in Saudi custody and would also explain why it was dangerous to complain about mistreatment while under his captors' power. (See Document 250 ¶¶ 19-24).

22. On October 28, 2005, this Court denied the motion for reconsideration (See Order Dated October 28, 2005; docket #286). The exclusion of the State Department report and the preclusion of the foregoing witnesses from the suppression hearings and trial was not raised on direct appeal.

23. At the Fed.R.Crim.P. 15 depositions that were admitted at trial, Saudi officials were permitted to give testimony that should have been excluded under the Confrontation Clause, the rule against hearsay and/or Fed.R.Evid. 601's requirement that all testimony be based upon personal knowledge.

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[1] This testimony is detailed in the accompanying memorandum of law.

24. The improper testimony includes the following:

i. Mabahith officials were permitted to testify that arrested members of the purported al-Qaeda cell identified a photograph of petitioner Abu-Ali as a member of that al-Qaeda cell (See 7-11-05, p. 68; 7-14-05, p. 38-39; 7-19-05, p. 19-22);

ii. testimony that petitioner was not mistreated while detained in Medina (7-13-05, p. 54, 7-13-05, p. 56);

iii. testimony concerning the alleged acts of members of the al-Qaeda cell (7-14-05, p. 19).

25. Trial counsel lodged timely objections to the foregoing testimony thereby preserving the issues for appellate review. However, these issues were not raised on appeal.

26 During his rebuttal summation, the prosecutor asked the jurors, in violation of the so-called "golden rule" to place themselves in the position of petitioner Abu-Ali when determining whether he would have complained of mistreatment.

27. Although trial counsel objected to that comment, appellate counsel did not include that remark in the point in the brief that challenged the summation.

28. The jury returned its verdict convicting petitioner on all counts submitted to them. On April 17, 2006 petitioner Abu Ali was sentenced to an aggregate term of 30 years' imprisonment.

29. Petitioner Abu-Ali filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. He was represented by newly-retained counsel. That counsel raised the following issues on petitioner's behalf:[2]

> i. whether the trial court erred when it admitted petitioner Abu-Ali's post-arrest statements as they were involuntary and were insufficiently corroborated?
>
> ii. whether petitioner's post-arrest statements were inadmissible because they were elicited in violation of his rights under *Miranda v. Arizona* and the Fourth Amendment because they were the product of a "joint venture" between Saudi officials and the United States?
>
> iii. Whether petitioner's rights under the Confrontation Clause were violated by admission of the Fed.R.Crim.P. 15 depositions?
>
> iv. Whether the government's summation denied petitioner a fair trial?
>
> v. Whether the lower court erroneously concluded that it lacked the authority to address the Special Administrative Measures ("SAMs")?

30. On June 6, 2008 The Fourth Circuit affirmed petitioner's conviction but remanded for resentencing. On July 27, 2009, the trial court re-sentenced petitioner to life without parole and a new judgment was entered.

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[2] The brief is attached as Exhibit 2 to this Petition.

31. Petitioner filed a timely notice of appeal from the new judgment wherein he challenged the legality of his sentence. The judgment was affirmed on February 1, 2011.

32. Petitioner did not file a petition for a writ of certiorari to the United States Supreme Court from the Fourth Circuit's February 1, 2011 opinion and order.

TIMELINESS OF PETITION

33. A motion to vacate must be filed within one year after a petitioner's conviction becomes final 28 U.S.C. §2255. Where, as here, a petitioner does not file a petition for a writ of certiorari, the conviction becomes final when the time for filing a timely petition for certiorari expires, or 90 days after affirmance by the Court of Appeals. *Clay v. United States*, 537 U.S. 522 (2003).

34. Petitioner Abu-Ali's conviction became final on May 1, 2011, or 90 days after the Court of Appeals issued its opinion.

35. A 28 U.S.C. §2255 petition filed on or before May 1, 2012 is timely.

CLAIMS

I.. Petitioner Abu-Ali was denied his right to effective assistance of appellate counsel under the Sixth Amendment when his appellate counsel failed to raise the following clearly meritorious appellate issues:

i. that the lower court erred when it excluded the 2004 State Department Human Rights Report on Saudi Arabia and precluded petitioner from calling witnesses who had experienced torture when held in Saudi custody;

ii. that petitioner's rights under the Confrontation Clause were violated when the lower court admitted declarations allegedly made by other detainees stating, *inter alia*, that petitioner Abu-Ali was a member of the alleged al-Qaeda cell;

iii. that the lower court erred when it admitted testimony from Saudi officials that was not based upon personal knowledge in violation of Fed.R.Evid. 602.

iv. that the prosecutor committed misconduct during summation when he asked the jury to place themselves in the shoes of the petitioner.

II. Alternatively, should this Court determine that any of the foregoing issues were not properly preserved, trial counsel was ineffective for failing to lodge a proper objections.

PRAYER FOR RELIEF

WHEREFORE, this Court should issue an order vacating Petitioner's conviction and granting such other and further relief as this Court deems just and proper.

Dated: April 26, 2012

Yours, etc.,

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Petitioner,	)	Case No.
UNITED STATES OF AMERICA,	)	
Respondent.	)	

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO VACATE SENTENCE
PURSUANT TO 28 U.S.C. §2255

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TABLE OF CONTENTS

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AHMED OMAR ABU-ALI,	)	
Petitioner,	)	Case No.
UNITED STATES OF AMERICA,	)	
Respondent.	)	

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255

PRELIMINARY STATEMENT

This memorandum is respectfully submitted in support of Petitioner-Movant Ahmed Omar Abu-Ali's ("Abu-Ali") motion to vacate his sentence pursuant to 28 U.S.C. §2255. Mr. Abu-Ali is incarcerated pursuant to a Judgment of this Court under Indictment 05-CR-00053 (GBL) dated July 31, 2009, convicting him of all nine counts alleged and sentencing him to an aggregate term of imprisonment of life without parole. The judgment was affirmed on direct appeal. *See United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) and *United States v. Abu Ali*, 410 Fed.Appx. 673 (4th Cir. 2011).

STATEMENT OF FACTS

The facts of the case have been set forth in opinions of this Court. *See United States v. Abu Ali* 395 F.Supp.2d 338 (E.D. Va. 2005), and the decisions of the United States Court of Appeals for the Fourth Circuit identified *supra*. The procedural history of

this case is set forth in the accompanying §2255 petition. Only the facts relevant to the claims raised in this petition are incorporated into the argument *infra*.

ARGUMENT

DEFENDANT-PETITIONER ABU-ALI WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL

1. The Standard under 28 U.S.C. §2255.

28 U.S.C. §2255 permits a person held in federal custody to petition the sentencing court to vacate, set aside, or correct a sentence. A defendant is entitled to relief under 28 U.S.C. §2255 if he establishes, *inter alia*, that the sentence was imposed in violation of the Constitution or laws of the United States. *Hill v. United States*, 368 U.S. 424, 428 (1962).

2. Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused the effective assistance of counsel in all criminal prosecutions. The Sixth Amendment "'stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not be done.'" *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). An accused is entitled to effective assistance of counsel not only at trial but at all critical stages of the proceedings, including an appeal as of right. *Smith v. Robbins*, 528 U.S. 259 (2000).

To establish a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner must first show that his counsel's

representation fell below "an objective standard of reasonableness" under "prevailing professional norms." *Id.* at 688. *Strickland's* second prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This prong may be satisfied "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland v. Washington*, 466 U.S. at 694.

Errors by counsel must be considered cumulatively. *Henry v. Scully*, 78 F.3d 51 (2[d] Cir. 1996). However, even a single error by counsel can qualify as ineffective representation if it compromises a petitioner's right to a fair trial. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986), citing *United States v. Cronic*, 466 U.S. 648, 657, n.20 (1984). The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *Lawrence v. Branker*, 517 F.3d 700 (4[th] Cir. 2008).

The performance of appellate counsel for petitioner Abu-Ali fell below professional norms when he failed to raise the following meritorious issues: 1) that the trial court abused its discretion when it precluded i) the 2004 State Department Report concerning Human Rights violations in Saudi Arabia and ii) testimony from former detainees who were, in fact, tortured, 2) the erroneous admission, in violation of the rule against hearsay and the Confrontation Clause, of out of court declarations allegedly made by alleged al-Qaeda cell members, 3) the erroneous admission of evidence about alleged cell members that was not based upon personal knowledge and 4) prosecutorial misconduct during summation.[1] Had any of the foregoing issues been raised it is

[1] Appellate counsel's opening brief is attached to the Petition as Exhibit 2. In it he raised the following issues 1) that petitioner's post-arrest statements should have been suppressed as either i) involuntary or ii) obtained in violation of the Fifth and Fourth

reasonably probable that the result of the appeal would have been more favorable to petitioner Abu-Ali. Alternatively, should this Court determine that trial counsel did not properly preserve any of the foregoing issues, they were ineffective for failing to do so.[2] Under either or both theories, this Court should vacate the instant judgment and dismiss the indictment or, alternatively, order a new trial.

3. Exclusion of the State Department Report and Evidence of Torture.

i. Introduction

At the suppression hearing and in his interviews with medical experts, petitioner Abu-Ali testified that after his June 8, 2003 arrest in Medina, he was beaten, whipped and deprived of food and sleep by the Mabahith. Transferred to Riyadh a few days later, the torture continued, albeit in a different form. Mr. Abu Ali was interrogated by the Mabahith for 40 straight days while housed in solitary confinement and deprived of sleep. To further support evidence of torture, trial counsel sought to admit a 2004 Report prepared by the United States Department of State. (Petition, Exhibit 1). In it, the State Department found, *inter alia*, that Saudi security officials regularly engaged in torture

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Amendments, 2) that admission of the Fed.R.Crim.P. 15 depositions violated his rights under the Confrontation Clause 3) that petitioner's confession was not corroborated, 4) that the prosecutor committed reversible error during summation and 5) that the lower court erred when it ruled that it could not alter the "Special Administrative Measures" (SAMs) imposed on Mr. Abu-Ali.

[2] Trial counsel preserved the exclusion of the State Department Report and other witnesses who were tortured by the Saudi police (See Docket #250). Counsel objected to admission of the out-of-court declarations of arrested al-Qaeda cell members (7-11-05, p. 68; 7-19-05,p.20). While he did not initially object to the testimony not based on personal knowledge, he did attempt, through cross examination, to demonstrate that the witnesses lacked personal knowledge but was precluded from doing so. (7-18-05,p. 24-26).

tactics to extract confessions. This Court granted the government's motion *in limine* to preclude admission of that Report reasoning that the report was irrelevant in that it did not address what had happened to Abu-Ali (See Order Dated October 11, 2005, docket #249).

At the July 2005 Fed.R.Crim.P. 15 depositions in Riyadh, Mabahith officials testified to their organizations' general practices, to wit, that they never mistreat detainees and that any improper conduct by their agents results in swift punishment. Then, during the October 2005 suppression hearing, Consular Official Charles Glatz testified that he had never received a complaint of abuse from anyone detained by the Saudi government, including another American detainee Sabri Benkhala. Based on the foregoing testimony trial counsel moved for reconsideration of the October 11, 2005 order arguing that the government had "opened the door" to admission of the Report. He also proffered testimony from Sabri Benkhala, who, he represented, would testify about his own mistreatment in Saudi custody and would also explain why it was dangerous to complain about mistreatment while under his captors' power. (See Document 250 ¶¶ 19-24). On October 28, 2005, this Court denied the motion for reconsideration. The exclusion of the State Department report and the foregoing witnesses from the suppression hearings and trial was not raised on direct appeal.

ii. The Government Opened the Door to Admission of the State Department Report and Other Evidence of Abuse.

Assuming *arguendo* that the Report and testimony were irrelevant when first offered by the defense, they became relevant when evidence of the Mabahith's general practices was presented by the government. Evidence that is otherwise inadmissible should be admitted where an opposing party "opens the door" by eliciting evidence on

the same issue that creates an unfair inference in the minds of the jurors. *United States v. Blake*, 571 F.3d 331, 348 (4th Cir. 2009). This rule of "curative admissibility",

> gives a court the discretion to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence.

United States v. Rosa, 11 F.3d 315, 335 (2d Cir. 1993), citing *United States v. Brown*, 921 F.2d 1304, 1307 (D.C. Cir. 1990) and *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988). The rebuttal evidence is admissible so long as it is "reasonable tailored to the evidence it seeks to refute." *United States v. Stitt*, 250 F.3d 878 (4th Cir. 2001). Independently, the Due Process Clause places limits upon restriction of the right to introduce evidence. "[T]he right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case." *Taylor v. Illinois*, 484 U.S. 400 (1988).

The Mabahith witnesses' direct examinations were replete with assertions, carefully elicited by the prosecution, that physical and psychological coercion by interrogators is non-existent in Saudi Arabia. The "Lieutenant Colonel" testified that he was the Assistant Warden of the Mabahith prison in Medina. Over petitioner's objection (7/13/05, p. 33), he was permitted to testify that at the time petitioner was housed in Medina, all detainees were given three meals per day from local restaurants, a blanket, pillow, prayer rug and books from the prison library (7/13/05, p. 32, 35).[3] Concerning whipping, the government elicited the following:

> Q. Sir, were any whips kept at the prison?

[3] References in parenthesis refer the transcript page numbers for that day of testimony.

A. No, there are none.

Q. Sir, at the time you were the warden, Colonel, were whips ever used on a prisoner? During the time you were the warden, Colonel, were any whips ever used on a prisoner?

A. No, never. Nobody ever done that.

(7/13/05, p. 36-37). He swore that the "general policy" of the Mabahith regarding violence toward prisoners is that it is "forbidden...not permitted whatsoever" (7/13/05, p. 40). The government continued,

Q. Sir, how many times did you authorize prison officers or guards to use physical force or violence against a prisoner?

A. Not once.

Q. How many times did your officers or guards use physical force against a prisoner without your authorization?

A. This is impossible. This is actually not permissible. And if there are the cameras and people who could watch what is going to happen and...what is the guard going to benefit? What is the guard going to benefit from hurting the prisoner? The guard is put there to guard the prisoners and to make sure of his safety.

Q. Colonel, how many times to your knowledge was a prisoner whipped?

A. Not once. It has not happened even once.

Q. Colonel, how many times to your knowledge was a prisoner's beard pulled?

A. Not once.

Q. Colonel, how many times was a prisoner deliberately deprived of sleep by an officer or guard?

A. Not once has this happened.

(7/13/05, p. 42). The testimony asserted that a prisoner who claims abuse can make a complaint and if that complaint is verified, the offender will be fired from his job (7/13/05, p. 43). Petitioner Abu-Ali, the Lieutenant Colonel claimed, was "treated humanely similar to any other prisoner in accordance with the rules and regulations of the prison." (7/13/05, p. 56).

The prosecution elicited similarly broad characterizations of the Saudi interrogation system when it examined the "Brigadier General" and "Captain" the two officials who interacted with Abu-Ali in Riyadh. "General", the prosecutor asked, "what is the Mabahith policy on the use of physical force or violence in interrogation?" He replied "Violence is forbidden or is punishable by law." Asked if he ever authorized any officer to use physical force, he responded, "No. Using force or violence is the meaning of whipping or beating, of course not." (7/14/05, p. 11).

The "Captain" testified unequivocally on direct that "[t]here are no laws that would permit use of force [against prisoners]. It is forbidden." (7/19/05, p. 29). In his entire tenure with the Mabahith, he had heard of only one incident where an officer mistreated a prisoner and that officer was immediately fired (7/19/05, p. 30). To hammer home further the point that physical coercion of any suspects is virtually unheard of in Saudi Arabia, (and therefore did not happen to petitioner Ali), the prosecutor elicited the following:

Q. Other than the incident you just recounted from two years ago, have you ever heard of any other mistreatment of prisoner (sic) by Mabahith officers?

A. No, none.

Q. What if anything have you heard about the whipping of prisoners in Mabahith custody?

A. No, never.

Q. Have you ever whipped a prisoner?

A. No, never.

(7/19/05, p. 31).

State Department consular official Charles Glatz testified that he first visited petitioner Abu-Ali on July 8, 2003 or about one month after his arrest and made several visits over the next year. He claimed that Abu-Ali did not exhibit any indication of physical discomfort and never complained of mistreatment. But he also testified about his visits with American detainees arrested in 2000 and 2003, including Sabri Benkhala. None of those Americans, Glatz testified, complained of any mistreatment (10-12-05, p. 37-39). Challenged on cross-examination Glatz maintained that none of the Americans he had interviewed were tortured and that Saudi officials "were very cautious about treating American citizens correctly." (10-12-05, p. 77).

By having their witnesses testify about Mabahith practices generally, the government created an unwarranted inference that petitioner Abu-Ali was treated in accordance with those practices, thereby opening the door to admission of contrary evidence. *United States v. Mohr*, 318 F.3d 613, 626 (4th Cir. 2003); *United States v. Williams*, 106 F.3d 1173, 1177 (4th Cir. 1997). In *Williams*, defense counsel elicited on cross examination of the government case agent that he had "no personal knowledge" of prior drug transactions between the defendant Williams and one "Angel". The Fourth Circuit held that the misimpression created by that testimony permitted the prosecution to

elicit on re-direct that Angel had told the case agent that he had engaged in "numerous" uncharged prior transactions with Williams. *Id.* at 1177. *See also United States v. Miraless*, 442 Fed. Appx. 988 (5th Cir. 2011) (defendant Border Patrol agent charged with immigration violations opened door to prior unrelated violation of Border Patrol policy when counsel, in opening, stated that the defendant would never risk losing his job).

The 2004 U.S. State Department Report on Human Rights abuses in Saudi Arabia would have directly refuted the distortion, created by the government that detainees in Saudi Arabia are never mistreated. The February 25, 2004 Report, attached to the Petition as Exhibit 1, addressed issues that arose during 2003, the very year when petitioner Abu-Ali was arrested and interrogated by the Mabahith. In the category entitled "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", the State Department found, *inter alia* the following:

> The [Saudi] Criminal Procedure law prohibits torture and Shaqr'ia (Islamic law) prohibits any judge from accepting a confession obtained under duress; however, there were credible reports that the authorities abused detainees, both citizens and foreigners. Ministry of Interior officials were responsible for most incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of torture, including allegations of beating with sticks and suspension from bars by handcuffs. There were reports that torture and abuse were used to obtain confessions from prisoners (see Section 1.e).[4] Canadian and British prisoners that were released during the year reported that they had been tortured during their detention.
>
> The [Saudi] Government continued to refuse to recognize the mandate of the U.N. Committee Against Torture to investigate alleged abuses. A government committee

[4] Section 1.e of the Report states that "[t]here were reports during the year that the authorities tortured detainees and pressured then to confess by isolation and blindfolding over a period of weeks."

> established in 2000 to investigate allegations of torture still had not begun functioning at year's end.

(Petition, Exhibit 1, p. 2).

Thus, far from being the squeaky-clean paragon of human rights portrayed by the government at the hearing and trial, the Saudi security officials were found by the State Department to have used torture techniques for the very purpose of extracting confessions. And contrary to the claim of the Brigadier General that any claims of abuse are promptly investigated and perpetrators disciplined, the State Department reported that the Saudi government had refused to even investigate allegations of abuse. Clearly, if the government's testimony about Mabahith's lack of torture was relevant to the government's efforts to prove that petitioner Abu-Ali's allegations of torture were *false* and his statements voluntary, the findings of our own State Department that whippings, beatings and sleep deprivation are, in fact, techniques used by the Mabahith to extract confessions were relevant to proving that his allegations were *true* and his statements involuntary.

United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993), is illustrative. The defendant in that case was charged with involuntary manslaughter arising out of the death of his infant daughter through shaken baby syndrome. The main issue at trial was whether the defendant intended to injure his daughter when he shook her. On direct examination, the government's expert testified that shaking a baby in a forceful manner is beyond normal child care as "[w]e are all taught to support the baby's head. It's fragile. You don't want to shake a baby's heads [sic]." *United States v. Gaskell*, 985 F.2d at 1062. The defense sought to call its own medical expert to testify about "the general lack of public awareness of the dangers of shaking an infant" and about cases where children

had been shaken for resuscitative purposes. The trial court precluded the witness, holding that the testimony would not relate to the defendant's own state of mind and would require discussion of cases not before the court. *Id.* The Eleventh Circuit reversed the conviction holding that exclusion of the evidence was an abuse of discretion. Of relevance to this petition, the court held that "[i]t is an abuse of discretion 'to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary on the same issue.'" *United States v. Gaskell*, 985 F.3d at 1063 quoting *United States v, Lankford*, 955 F.2d 1545 (11th Cir. 1992) and *United States v. Sellers,* 566 F.2d 884, 886 (4th Cir. 1977).

In *Sellers*, a bank robbery prosecution, a defense expert testified about the differences between the facial features of the robber depicted in a surveillance photograph and the defendant's facial features. But the court precluded him from opining that the defendant was not the robber in the photograph. On rebuttal the trial court permitted the government's expert to offer his conclusion that identification of the robber from the surveillance photographs would be "impossible". The Fourth Circuit reversed the judgment of conviction holding that preclusion of the defense expert was an abuse of discretion:

> Under different circumstances, Rule 403 might sustain the ruling of the district court. But this rule may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary on the same issue. The discretion allowed by Rule 403 must be applied evenhandedly. We hold, therefore, that the district court abused its discretion in not permitting the defendant's expert to testify that in his opinion the photographs showed Sellers was not the bandit while permitting the government's expert to express his opinion that it was impossible to determine from the photographs whether Sellers was the bandit.

Id.

Likewise, it was an abuse of discretion to exclude an otherwise admissible Report that found that Saudi security officials torture detainees to extract confessions while permitting those same officials to testify that physical and psychological coercion is never used against detainees. Indeed, the Report was relevant and should have been admitted even in the absence of evidence that "opened the door." *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411 (9th Cir. 1995) (State Department Human Rights Report admitted to show that defendant would not be accorded Due Process in Iranian courts); *Bridgeway Corp v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (same, concerning Liberian justice system). Sabri Benkhala's testimony was relevant in that it would have directly refuted the Brigadier General's and Captain's testimony concerning the blindfolding and shackling of prisoners and other forms of psychological coercion. Moreover, in light of Glatz' testimony that Benkhala never complained of mistreatment, he should have been permitted to explain why it was dangerous to complain while still in Saudi custody.

iii. The Report Was Admissible Under Fed.R.Evid. 803(8)

Fed.R.Evid. 803(8) is the statutory hearsay exception for "Public Records and Reports." It provides, *inter alia* as follows

> Records, reports, statements, data compilations, in any form of public officers or agencies setting forth...(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.

Rule 803 is premised on "the assumption that a public official will perform his duty properly." *Ellis v. Int'l. Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984) (quoting Fed.R.Evid. 803 Advisory Committee Note). Courts presume the admissibility of public reports "because of the reliability of the public agencies usually conducting the investigation and 'their lack of any motive for conducting the studies other than to inform the public fairly and adequately.'" *Id.*, quoting *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 619 (8th Cir. 1983). "The party opposing admission has the burden to establish unreliability." *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.* 190 F.3d 238, 241 (4th Cir. 1999). Rule 803(8) "'is not a rule of exclusion but rather is a rule of admissibility' so long as the public record meets the requirement of the rule." *Id.* at 241.

The 2004 U.S. State Department Report on Saudi Arabia satisfies the requirements of the Rule. The Reports are mandated by Congress. Sections 116(d) and 502Bb of the Foreign Assistance Act of 1961 and section 504 of the Trade Act of 1974 requires the United States Department of State transmit to Congress

> a full and complete report regarding the status of internationally recognized human rights...in countries that receive assistance under this part and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.

See 22 U.S.C. §§ 2151n(d), 2304(b).

The government previously argued that the reports were inadmissible because their reliability are at best, uncertain. However, the human rights abuses documented by the State Department are not mere allegations posted on an unreliable website, but a public reporting system in which our government has invested extensive financial and human resources in order to promote human rights. The foreign services officers who

drafted the report "dr[a]w on their own sources of information...reports by other human rights organizations, by foreign governments and officials,...documentation from the United Nations and regional organizations and institutions and from experts in academia and the media." See Statement of Gretchen Birkle, Senior Coordinator from the Bureau of Democracy, Human Rights and Labor in the Department of State, available at *http://fpc.state.gov/fpc/42855.htm* (noting at the public release of the 2004 State Department Reports that "[o]ur embassies and Washington staff network with human rights organizations and advocates from every corner of the globe to *identify, investigate and verify* data in order to produce these reports') (Emphasis added).

As this issue was properly preserved, had it been raised on appeal, the trial court's ruling would have been reviewed for abuse of discretion. *United States v. Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996) (*en banc*). That standard is easily satisfied. The report was relevant to rebut the government's evidence of the Mabahith's general interrogation practices. Sabri Benkhala would have described his own experiences and rebutted and, in response to Glatz testimony, explained why it was dangerous to make complaints. As the Fourth Circuit held in *United States v. Sellers supra.*, a trial court's discretion must be applied evenhandedly. In this case, it was not.

iv. Exclusion Of The Report Was Not Harmless

The voluntariness, *vel non*, of petitioner Ali's purported confession to the Mabahith was the critical issue for this Court to determine during the motion to suppress and the critical issue for the jury to determine at trial. Based upon their physical examinations and interviews with him, his medical experts concluded that petitioner Ali

had been tortured by the Mabahith.[5] The government's experts opined that he was not. The Mabahith officials testified that not only was the petitioner not tortured, he and all prisoners in their custody are treated "better than children" (7/12/05, p. 112). In addition, they were able to give a self-serving account of their interrogation practices, to wit that all physical force is forbidden, no one is ever whipped and sleep deprivation is never practiced.

The 2004 Report would have revealed the Saudi officials' testimony as fraudulent and perjurious. Had it been admitted, this Court and the jury would have had before it a report prepared by the highest levels of our government that found that Saudi security officials did, in fact, whip, beat and otherwise abuse detainees in order to extract confessions. The Report's findings would have been provided powerful corroboration of petitioner Ali's own account, i.e., that he was whipped, beaten and deprived of sleep until he agreed to give his captors what they wanted: a statement wherein he admitted membership in a terrorist cell. Sabri Benkhala and the other witnesses would have provided first hand accounts of their treatment at Riyadh that would have been both consistent with the State Department Report, corroborated petitioner Abu-Ali, and provided an explanation as to why it was dangerous to disclose mistreatment while still in Saudi custody.

Had the jury found that the government had not proven that Abu-Ali's statements were voluntary, it would have been barred from considering them. Without those statements, the government would not have been able to establish a *prima facie* case on any of the charges let alone proven its case beyond a reasonable doubt. It is, at a

[5] The record of the suppression hearing also includes Mr. Ali's testimony.

minimum, reasonably probable that had the issue been raised, the result of the appeal would have been more favorable to Mr. Abu-Ali.

4. Denial Of Confrontation Clause Rights

i. Introduction

Fed.R.Evid. 801(b) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless it falls within exceptions recognized by the Supreme Court or the Rules of Evidence. Fed.R.Evid. 802. Separate and apart from the rule against hearsay, the Sixth Amendment to the United States Constitution provides, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." "Testimonial" statements by out-of-court declarants are inadmissible under the Sixth Amendment's Confrontation Clause even if such statements fall within a "deeply rooted" hearsay exception. *Crawford v. Washington*, 514 U.S. 36 (2004).

The Confrontation Clause as well as the rule against hearsay was repeatedly violated at the trial when Mabahith witnesses were permitted to relate the substance of statements made to them by members of the purported al-Qaeda cell arrested in May 2003. The detainees' statements to Mabahith investigators were unquestionably "testimonial" as they were made after their respective arrests as part of the Saudi Arabian prosecution process. *Crawford*, 541 U.S. at 52 ("Statements taken by police officers in the course of investigations are ... testimonial even under a narrow standard."). Trial counsel lodged timely objections to the following testimony thereby rendering the issue

preserved for direct appeal. Appellate counsel's failure to raise the issue on direct appeal was conduct falling below professional norms.[6]

ii. Crawford/Hearsay Violations

The "Arresting Officer" testified that in May 2003 he participated in searches of various locations in Medina that were suspected of being used by terrorist cells (7-11-05, p. 36). He listed by name individuals arrested during those searches (7-11-05, p. 56). Some arrestees claimed that a student named "Reda" was part of that cell. He then sent the pictures of some 400 individuals to Riyadh where the arrestees were being held. His testimony continued as follows:

> [BY MR. LAUFMAN]: Now were you advised by the Mabahith with respect to the identification of a particular individual from the photographs you had sent?
>
> [MR. WAHID]: Objection, hearsay.
>
> MR. LAUFMAN: Conversation that he was a party to, Your Honor.
>
> THE COURT: The objection's overruled
>
> ...
>
> A. That the person that is referenced to, his name is Reda – Reda is Ahmed Omar Abu Ali.

(7-11-05, p. 68).

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[6] Trial counsel objected on "hearsay" grounds and did not specifically argue that admission violated the Confrontation Clause. Should this court determine that this failed to preserve the Confrontation Clause claim, appellate counsel was nonetheless ineffective because the error would have warranted reversal even under "plain error" review. Alternatively, given the obvious nature of the error, trial counsel was ineffective for failing to object on the additional ground that admission of the statements violated the Confrontation Clause. *United States v. Cronic*, 466 U.S. 648, 657, n.20 (1984) (a single error, if sufficiently egregious, can constitute ineffective assistance).

The "Brigadier General" (the warden of the prison in Riyadh) testified that he was in charge of interrogating the men arrested during the Medina raids. He testified that

> During the interrogation, some of the cells in the – cells of the Faqasi in the Medina that there is an individual who joined the cell. And his alias is Ashraf or Reda. Ashraf and Reda are his aliases. And he is a student at the Islamic University in Medina. And he is either Jordanian or Palestinian origin.

(7-14-05, p. 38). Pictures were then showed to the arrestees. "And they actually pointed out Omar Ahmed Abu Ali [*sic*] and that he is the one who has the name Reda and Ashraf. And he's the one who have joined the cell." (7-14-05, p. 39).

The "Captain," or interrogating officer, testified that he had "heard" that arrested cell members had stated that there was a member of the cell named Reda who was of American or European origin. Over petitioner's hearsay objection, he was permitted to testify that cell members were identified Ahmed Omar Abu Ali as "Reda" (7-19-05, p. 19-20). The prosecutor then asked who among the cell members identified petitioner Ali. Trial counsel objected again, prompting the court to state "well, if he observed the identification, how would it be hearsay, Mr. Wahid?" (7-19-05, p. 20). The testimony continued:

> Q. Captain, would you repeat the name of the individuals who identified the picture of Ahmed Omar Abu Ali as Reda
>
> A. Mohammed Salem Al-Ghandi
>
> Q. Captain did you personally speak to Mohammed Salem Al-Ghandi about the individual known as Reda?
>
> A. Yes. And, were you present when Mohammed Salem Al-Ghandi identified the photograph of Abu Ali as Reda?

A. Yes.

(7-19-05, p. 21-22).

From the foregoing the jury learned that those arrested during the May 2003 raids in Medina – none of whom testified at trial - identified petitioner Abu-Ali as "Reda" a member of their al-Qaeda cell. These testimonial declarations, all admitted over petitioner Abu-Ali's timely objection and without a limiting instruction, violated petitioner his rights under both the Confrontation Clause and the rule against hearsay. *Crawford v. Washington, supra.*

The testimony was not admissible for a non-hearsay purpose such as "background" or to show the course of the investigation. *See, e.g., United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). To be admissible under that theory, the background evidence must be relevant to a disputed issue at trial. *United States v. Reyes*, 18 F.3d 65, 70-71 (2d Cir. 1994). Moreover, even where background is relevant, the jury should be instructed that the declarations are admitted only for that purpose and not for their truth. *United States v. Hines*, 407 Fed. Appx. 732 (4th Cir. 2011). Arguably, the fact that an order to arrest petitioner Ali had been obtained may have been admissible to show why the Mabahith detained him. But it was not necessary for the jury to hear the substance of those conversations. As the United States Court of Appeals for the Seventh Circuit specifically noted:

> Context and background can be established and are properly established without the admission of the confidential informant's hearsay declaration...A police officer or government agent may reconstruct the steps taken in a criminal investigation, may testify about his contact with an informant, and may describe the events leading up to a defendant's arrest, but the officer's testimony must be limited to the fact that he spoke to an informant without

> disclosing the substance of that conversation. *See [United States v.] Lovelace*, 123 F.3d at 652; *United States v. Reyes*, 18 F.3d 65, 70 (2nd Cir. 1994); *United States v. Walker*, 636 F.2d 194 (8th Cir. 1980); *United States v. Campbell*, 466 F.2d 529 (9th Cir. 1972). There is a clear distinction between an agent testifying about the fact that he spoke to an informant without disclosing the contents of the conversation and the agent testifying about the specific contents of the conversation—which is inadmissible hearsay.

United States v. Williams, 133 F.3d 1048, 1052 (7th Cir. 1998).

That is what happened here. The Arresting Officer, Brigadier General, and Captain each told the jury that arrested members of an al-Qaeda cell identified petitioner Abu-Ali as one of their members. As the government argued in summation:

> Mohammed Salem al-Ghandi was the first person to identify the defendant to the Mabahith as a member of the Medina Faq'asi cell

(11-7-01, p. 175).

The wrongful admission of the out of court statements was prejudicial and would not have been deemed harmless error if raised on appeal. As the issue involves an error of constitutional dimension, it would require reversal unless the government could show that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The declarations of admitted members of an al-Qaeda cell naming the petitioner as a co-member of that same cell undoubtedly influenced the jury. Other than the equivocal e-mails between petitioner Abu-Ali and Sultan Jubron, the only other evidence linking him to the crimes charged was his alleged confession. These inadmissible co-conspirator statements provided powerful corroboration for the substance of Mr. Abu-

Ali's statements and bolstered the government's argument that the statements were voluntary.

5. Testimony Elicited in Violation of Personal Knowledge Requirement

Fed. R. Evid. 602 requires that a witness "may not testify to a matter unless evidence is sufficient to support a finding that a witness has personal knowledge of the matter." Evidence is inadmissible under the rule if the witness "could not have actually perceived or observed that which he testified to." *M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.*, 681 F.2d 930, 932 (4th Cir. 1982). The rule was violated at petitioner Ali's trial when Saudi witnesses were permitted to testify about matters that were clearly not within their personal knowledge. Trial counsel's failure to object and/or appellate counsel's failure to raise the issue on direct appeal denied Mr. Ali effective assistance of trial and appellant counsel.[7]

i. <u>Testimony Concerning Petitioner's Treatment</u>

The "Lieutenant Colonel" testified that he spent no more than two minutes with the petitioner Abu Ali during the time the latter was housed in Medina (7-13-05, p. 53). Yet he was permitted to testify, without objection from trial counsel that Mr. Abu-Ali "was given everything he wanted" (7-13-05, p. 54). According to the Lieutenant Colonel, Abu-Ali "was treated humanely similar to another other prisoner in accordance with the rules and regulations of the prison, in accordance with the planning regulations" (LC: 7/13/05, p. 56). Having spent no more than two minutes with Abu-Ali, and that on

[7] As will be noted *infra*. trial counsel did object to some of the testimony on hearsay grounds. To the extent that his objection preserved the issue for direct appeal, appellate counsel's failure to raise it denied petitioner effective assistance of appellate counsel.

his arrival at the prison, the Lieutenant Colonel could not have known how Abu-Ali was treated. Thus, his testimony was inadmissible under Rule 602.

ii. Testimony Regarding Other Arrestees

Several of the Saudi witnesses were permitted to testify, often in narrative form, concerning the roles of other arrestees, their alleged ties to and positions within the alleged al-Qaeda cell, and the actions that members of that cell allegedly committed.

The Brigadier General testified that based upon threats of terrorist attacks, a list of 19 "wanted" suspects was prepared (7-14-05, p. 18). Among the names on the list were Sultan Jubron and Ali al-Faqasi, also known as Abu Bakr Elazdi. (7-14-05, p. 19). When asked why both were wanted, the witness testified that al-Faqasi "was one of the leaders of the organization of the al-Qaeda in the Kingdom" and that the security police had information that tied Jubron with the al-Faqasi "and he was also one of those that are to carry out terrorism acts" (7-14-05, p. 19). While the witness was competent to testify that al-Faqasi and Jubron appeared on a "wanted" list, he lacked the requisite personal knowledge under Rule 602 to testify that both al-Faqasi and Jubron were members of al-Qaeda and that Jubron had committed acts of terrorism. Continuing, the Brigadier General testified that on May 12, 2003 there were three explosions in the Riyadh area that resulted in significant loss of life and injuries. Although no one had yet to be convicted of those actions, the witness was permitted to testify that "the intentions and threats" of al-Qaeda "became a fact" with those explosions. Once again, absent record evidence that the Brigadier General had personal knowledge of who committed those bombings, Rule 602 barred admission of that testimony.

Although counsel did not lodge an objection to the foregoing testimony he did attempt during cross examination to show that the witness lacked personal knowledge and that his testimony was hearsay. However, that line of inquiry was precluded by the court:

> Q. On direct examination you said you arrested Faqasi?
>
> A. No, I did not.
>
> Q. He is under arrest, though?
>
> A. He turned himself in.
>
> Q. But, he's not gone before the Court yet?
>
> MR. CAMPBELL: Your Honor, I'm going to object to the relevance of this question.
>
> THE COURT: Relevance?
>
> MR WAHID: Goes toward whether or not the statements on direct that Faqasi is a member of al-Qaeda, whether or not that's support by anything other than his hearsay impressions or media. Some personal knowledge is required for that statement.
>
> THE COURT: Objection sustained.
>
> BY MR. WAHID:
>
> Q. Mr. Faqasi has not been found guilty of a member (sic) of al-Qaeda by the courts, right?
>
> MR. CAMPBELL: Your Honor, I'm going to object again on the same grounds.
>
> THE COURT: Objection sustained.
>
> ...

> MR. CAMPBELL: Your Honor, I think defense counsel's question was if he's being prosecuted right now, and I still object on relevance grounds.
>
> MR. WAHAD: Your Honor, the question was has he pled guilty to be al-Qaida. Is there a conviction.
>
> MR CAMPBELL: Your Honor, I'm going to object on hearsay grounds, too. This issue can also be addressed in suppression.
>
> MR WAHID: That's not my point. I think it is hearsay, quite frankly. And it should be kept from the testimony if the witness is saying that Mr. Faqasi is al-Qaida based on hearsay.

(7-18-05, p. 24-26).

During the "Captain's" testimony, defense counsel took a different approach. Because the court precluded him from inquiring into the factual basis of the Brigadier General's assertions that the arrestees were all members of al-Qaeda, he lodged hearsay objections when the same type of questions were posed to the Captain on direct. For example, the prosecutor asked who al-Faqasi Al-Ghandi, was. Trial counsel lodged a hearsay objection. It was overruled with the prosecutor stating that "these objections are starting to taking an obstructionist tone". The Captain then answered that al-Faqasi "is the leader of a terrorist cell which is affiliated with al-Qaeda who was placed under arrest in Medina." (7-19-05, p. 23). He added that al-Faqasi turned himself in to authorities a few months after petitioner Ali's arrest (7-19-05, p. 26).

Neither the Brigadier General nor the Captain had personal knowledge that either Jubron or al-Faqasi were members of a terrorist cell, that the cell was part of al-Qaeda or that the cell was responsible for the May 12, 2003 explosions in Riyadh. Accordingly, the testimony was barred under Rule 602.

6. Prosecutorial Misconduct In Summation

Appellate counsel did argue that the prosecutor committed reversible error when, during rebuttal summation, he told the jury that petitioner Abu-Ali was coming back to the United States to "kill us". (See Brief attached to Petition as Exhibit 2, p. 50). The Fourth Circuit rejected that argument holding, *inter alia* that it was isolated and did not deprive petitioner of a fair trial. Inexplicably, appellate counsel did not argue that additional improper arguments were made that would have established a pattern of misconduct and, accordingly, reversible error. His failure to do so denied petitioner Abu-Ali effective assistance of appellate counsel.

Improper remarks during a summation warrant reversal and a new trial where they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *U.S. v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002). Remarks that are calculated to "incite the passions and prejudices of the jurors," *United States v. Davis*, 177 F. Supp.2d 470, 478 (E.D. Va. 2001), and arguments that ask the jurors to put themselves in a party's shoes are improper, because they encourage the jury to "depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *U.S. v. Susi*, 378 Fed. Appx. 277, 283 FN5 2010 WL 1936378 (4th Cir. 2010) (quoting *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir.1978)) *See also Ins. Co. of N. Am., Inc. v. U.S. Gypsum Co.*, 870 F.2d 148, 154 (4th Cir.1989). This so-called "golden rule was violated by the prosecutor during his rebuttal summation when he asked the jury to put themselves in petitioner's place. He argued as follows:

MR. LAUFMAN: Ask yourself this question - - put yourself in the position of an American citizen, overseas, in the position he was in.

MR. WAHID: Objection

THE COURT: Objection sustained

MR. LAUFMAN: If you were an American citizen overseas –

THE COURT: The jury will judge the evidence based upon what they seen here.
Go ahead.

MR. LAUFMAN: If you were an American citizen overseas, and you were arrested and tortured, and an official from the U.S, Embassy - -

(11/17/2005) p. 240.

When considered together with the prosecutor's comment that the petitioner was coming back to the United States to "kill us", the "golden rule" violation established a pattern of misconduct that denied petitioner Abu-Ali a fair trial. *United States v. Scheetz,* 293 F.3d 175, 186 (4th Cir. 2002). Other than petitioner's coerced statements and the erroneously admitted evidence discussed *supra.*, no evidence linked petitioner Abu-Ali to the crimes charged. Thus, the prosecutor's remarks cannot be considered harmless. *See United States v. Wilson*, 135 F.3d 291, 302 (4th Cir. 1998) (unsupported remarks warrant new trial even where evidence against defendant was strong) and *Leathers v. General Motors Corporation*, 546 F.2d 1083, 1086 (4th Cir. 1976) ("golden rule" warrants new trial).

7. Appellate Counsel Was Ineffective

There is a presumption that an appellate counsel acts reasonably when he/she selects the issues to be argued in the appellate court. *Jones v. Barnes*, 463 U.S. 745, 749 (1983). However, ineffective assistance may be established where counsel ignores issues that were "clearly stronger" that those presented. *Lawrence v. Branker*, 517 F.3d at 709 quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). The issues addressed *supra*, were far stronger than the issues they did raise and would not have detracted from them.

The voluntariness of petitioner Abu-Ali's statements to the Mabahith was raised on direct appeal as was his claim that those interrogations were part of a "joint venture" with the Federal Bureau of Investigation. Appellate counsel also argued that the evidence was legally insufficient because the purported confession was not sufficiently corroborated. While all of those issues were appropriately raised, they were fact-intensive. Thus, the Court of Appeals was required to give deference to the trial court's findings and could only reject them if found them to be "clearly erroneous." *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005).

This burden is especially onerous where, as here, the trial court's factual findings turn on issues of witness credibility as a District Court is in the best position to make that determination. *Id.* at 543. The exclusion of the State Department Report and other evidence of Saudi torture raised properly preserved issues of law. The facts surrounding admission of the evidence were not disputed. Similarly, the *Crawford* and Fed. R. Evid. 602 violations also involved issues of law. All of these issues were, therefore, stronger legally than the issues counsel did raise since they did not involve review of factual determinations. But these issues were not only independently strong. They would have bolstered the issues counsel did raise. Independent evidence that the Saudi police

engaged in torture would have enhanced petitioner's argument that his confession was involuntary and unreliable. Had the appellate court found a *Crawford* violation, it would have enhanced the argument that petitioner's "confession" was insufficiently corroborated. Moreover, the *Crawford* violations would be evaluated under *Chapman's* "harmless beyond a reasonable doubt" prejudice standard.

While appellate counsel seemed to recognize that comments made during the government's summation were prejudicial, he failed to appreciate the degree of prejudice of the 'golden rule" violation. Instead he focused solely on the remarks that "expressly included the jurors themselves as potential victims..." His focus only on that error was fatal to the claim of summation error since it is well-settled that summation errors require reversal only when a "pattern" of misconduct has been established. *See, e.g. Arnold v. Evatt*, 113 F.3d 1352, 1358 (4th Cir. 1999). Inclusion of the obvious "golden rule" violation was essential to establishing that pattern.

In sum, appellate counsel's failure to raise the foregoing issues constituted conduct falling below professional norms. Had the issues been raised, it is "reasonably probable" the judgment would have been reversed on appeal thereby denying petitioner effective assistance of appellate counsel.

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should issue an order: vacating the judgment of conviction and ordering a new trial and granting such other and further relief as this Court deems just and proper.

Dated: April 26, 2012

Respectfully submitted,

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