IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

YASSIN AREF,

Petitioner, Case No. 1:04-cr-402

UNITED STATES OF AMERICA, 28 USC. 2255

Respondent.

REPLY MEMORANDUM

The Instant Motion Should not be Considered 'Second or Successive'

The government argues in its response that this Petition should be considered a second or successive 2255 motion and thus should be transferred to the Second Circuit. Contrary to the claims of the government, *not all* petitions attacking the same underlying conviction as a previous petition are considered "second or successive," and this term is not defined in the AEDPA. The Second Circuit has held that "a petition is considered 'second or successive' when 'it raises a claim that was, or could have been, raised in an earlier petition.'" *Urinyi v. United States*, 607 F.3d 318, 320 (2nd Cir. 2010), quoting *James v. Walsh*, 308 F.3d 162, 167 (2nd Cir. 2002).

In *James*, the Second Circuit held that the petition therein was *not* "second or successive," stating, at 168,"Denial of habeas relief in the present case may implicate the Suspension Clause, because it would constitute a complete denial of any collateral review of a claim that arose only after James filed the 1997 petition."

The instant petition is raising claims – chiefly that Aref's conviction was predicated on a misidentification of him as an Al Qaeda agent – which could not have

been raised in his prior petition because the underlying facts were not discoverable until after that petition had been filed and denied. Therefore this Court should not transfer this motion to the Second Circuit.

In the Alternative, if this Court does Transfer the Motion to the Second Circuit, it Should not be Dismissed

If, *arguendo*, this Court does hold that the instant petition is "second or successive" and does transfer it to the Second Circuit, the Circuit should not dismiss it – and should return it to this Court - because its factual predicate could not have been discovered sooner. *Quezada v. Smith*, 624 F.3d 514 (2nd Cir. 2010). In *Quezada*, cited by the prosecution herein, the Second Circuit did just that where the petitioner's claims relating to perjury and related *Brady/Giglio* violations could not have been raised previously with the exercise of due diligence, stating:

> "AEDPA permits a court of appeals to authorize the filing of a second or successive habeas corpus application 'only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.' ...The relevant requirements ... are:
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> Quezada endeavors to meet these requirements by alleging newly discovered evidence in support of two constitutional errors. First, he contends that constitutional error occurred because the State has left in place a conviction that rests on material perjured testimony. Second, he contends that constitutional error occurred because the State violated its *Brady/Giglio* obligations by not disclosing prior to trial the police coercion of Salcedo to identify Quezada as the shooter.
>
> The State does not dispute that Quezada's claims rest on newly discovered evidence that could not have been previously discovered through the exercise of due diligence. The alleged facts concerning Salcedo's recantation and his coercion came to Quezada's attention long after his conviction became final. Thus, the first requirement ... has been met. We then turn to Quezada's assertion of constitutional errors without which no reasonable factfinder would have found him guilty.

> *(a) perjury unknown to the prosecution* Quezada ... relies on Salcedo's admission that his crucial testimony was false...
>
> ...Our gate-keeping responsibilities require determination only of whether the applicant has made a prima facie showing that his application 'satisfies the requirements of *this* subsection...'
>
> ***
>
> ...[W]e understand the 'prima facie' standard ... to mean, as the phrase normally does, that *the applicant's allegations are to be accepted as true*, for purposes of gate-keeping, unless those allegations are fanciful or otherwise demonstrably implausible. In the pending case, the recantation, whether or not ultimately credited by a fact-finder, satisfies Quezada's burden of making a prima facie showing of constitutional error...
>
> *(b) Quezada's Brady/Giglio claim* ...We are satisfied that Quezada has made a prima facie showing that the alleged suppression is constitutional error and that but for the alleged coercion ... no reasonable jury would have convicted him.
>
> For these reasons, the motion for leave to file the pending habeas petition in the District Court is granted." *Quezada*, supra, at 520-522, some emphasis supplied.

As in *Quezada*, supra, Petitioner, using due diligence, could not have previously discovered the facts underlying his claims. As pointed out in *Munchinski v. Hilson*, 694 F.3d 308 (3rd Cir. 2012), the diligence required is "reasonable diligence, not maximum feasible diligence." The *Munchinski* court stated:

> "The diligence requirement 'does not demand a showing that the petitioner left no stone unturned.' *Ramos-Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011). Rather ...courts consider the petitioner's overall level of care and caution in light of his or her particular circumstances.' *Doe v. Busby*, 661 F.3d 1001, 1013 (9th Cir. 2011)..." *Munchinski*, at 330

Petitioner was sufficiently diligent under the circumstances. He did not obtain the newly discovered evidence until the end of 2011 after he filed a FOIA application with the FBI. As the documents were heavily redacted, Petitioner first tried to convince the FBI to unredact more of the material, but to no avail. At that point Petitioner went ahead with the instant Petition.

As to the second element of the gate-keeping test, it is submitted that the Petition herein clearly made a prima facie showing that without the constitutional errors described therein, no reasonable jury would have convicted him. For example, as discussed at length therein, it is submitted that without the false evidence provided to the trial court, there would have been no "targeting instruction," and without that incredibly prejudicial instruction, no reasonable jury would have convicted Petitioner.

In addition, there are compelling reasons why the trial judge should be heard on these issues. This motion revolves around the issue of whether the prosecution misrepresented to the courts the identify of Yassin Aref, or made representation to the courts that Aref was a terrorist, or Al-Qaeda agent, or was otherwise a dangerous person based on a mistake or misrepresentation as to his identity. The trial court received extensive *ex parte* communication from the prosecution, and the trial court would be in the best position to assess the nature of these communications and the effect that these communications had on its rulings. Indeed, without the trial court's information as to the nature of its *ex parte* contacts with the prosecution, it will be impossible for the Second Circuit to fully assess the effect of secret misrepresentations on the court and on the case.

In *ex parte* communications with the District and Appellate Courts, the Prosecution falsely identified Aref as a terrorist agent based on a misidentification

With respect to the nature of the prosecution's *ex parte* communications with the courts, the prosecution first complains that Aref has submitted no proof that the prosecution identified him as a terrorist in secret communications with the District Court and Second Circuit. Of course Petitioner cannot show what was in the secret briefs or *ex parte* contacts. But it is clear that the prosecution had extensive secret communications

with both the District Court and the Second Circuit. The prosecution does not deny this. The prosecution had extensive *ex parte* meetings with and submissions to the District Court, and submitted two secret briefs to the Second Circuit as well as having a secret argument before the Second Circuit. The documents submitted with the 2255 motion establish these *ex parte* contacts beyond any question.

Because the contacts and briefs were kept secret, Petitioner was prevented from learning what the prosecutor was secretly telling the court. But that should not stop the courts from inquiring as to whether it was secretly given false and prejudicial information about Petitioner. It is a fundamental obligation of the Judiciary to ensure that information given to the court, especially by the government and especially given in secret, is accurate and does not unfairly prejudice Petitioner who cannot be protected from overreach by the prosecution under these circumstances, except by the wise oversight of the Courts.

Indeed it is an extraordinary thing that in this one trial the prosecution should have had so many *ex parte* meetings with the courts. There may of course be legitimate reasons for *ex parte* contacts– surely the courts themselves are best judge of the reasons for these secret communications. But because this case arose out of a sting in which virtually everything (except one critical meeting) was recorded by the FBI who laid the trap, there would seemingly be no reason for any secret *ex parte* meetings and submissions at all.

As discussed more below, the record shows that government officials claimed to have caught Yassin Aref by using warrantless NSA electronic surveillance (See January 17, 2006 New York Times articles, attached as Exhibit "G" to the Petition, at 4-5). None

of this NSA surveillance was shown to the defense. On information and belief much of it was shown to the courts.

Upon information and belief not all of the secret evidence shown to the courts was shown to the local prosecutor, Assistant United States Attorney Pericak, who responded to the Petition. (See Petition, Paragraph 31, and Exhibit "I," at 1)

Upon information and belief, the FBI misidentified Yassin Aref as an Al-Qaeda agent, and the government has refused to provide unredacted documents so that Petitioner can determine the extent of the misidentification and anything else about which the government provided false information. Upon information and belief, it seems very likely that the government claimed that Petitioner was a terrorist, or an Al-Qaeda agent, and that this was based on their misidentification of him.

The prosecution denied that it misrepresented Yassin Aref's identity to the courts as follows:

> "The prosecutors never mistook Petitioner Yassin Aref for Mohammed Yassin, and never represented to this court or to the Second Circuit that Yassin Aref was Mohammed Yassin."

This limited denial leaves open many ways in which the government (not necessarily Mr. Pericak) could have misled the court as to Yassin Aref's identity. The government could have told the courts that "secret intelligence indicates that Yassin Aref is actually working with terrorist groups;" "Yassin Aref is a known Al-Qaeda agent;" "Yassin Aref is believed to be a terrorist bomb maker;" or "material from the NSA indicates the likelihood that Yassin Aref is an Al-Qaeda agent," etc.

Perhaps AUSA Pericak is not aware of all of the secret evidence given to this Court, just as he was not privy to all of the secret evidence given to the Second Circuit.

There are many ways the information could have been transmitted, but in the end the question of the content and accuracy of the government's communications with the Court should be judged by the Court itself.

The Court should examine the *ex parte* material received from the government and determine if the information conveyed was accurate as measured by a broad standard of fairness and due process. If the prosecutors asserted for example that "Yassin Aref is a known Al-Qaeda agent," the Court should try to examine the basis for this assertion. If it was based on NSA reports that Yassin Aref was an alias for Mohammed Yassin a notorious Al-Qaeda bomb maker, or something of that nature, then it is clear that the assertion was false even though if AUSA Pericak never specifically told the court that Yassin Aref was Mohammed Yassin.

Petitioner cannot be expected to "prove" to the Court that the government made certain secret *ex parte* statements, as this is by definition is impossible. The Court knows what secret information it received from the government, and should re-examine this material.

In *United States v Stevens*, 715 F. Supp.2d 1 (DDC 2009) the Court conducted an inquiry into the veracity of the prosecutions claim of having fully provided exculpatory evidence to the defense, and concluded that the prosecution's claims were untrue. The defense seeks a similar review in this case, given the new evidence regarding the misidentification.

Moreover, the Court should give *security-cleared* defense counsel an opportunity to see the relevant classified evidence provided to this Court and to the Second Circuit so that he can determine the effect of the misidentification.

The New Justice Department Policy Regarding NSA Surveillance Evidence

When Petitioner learned of the warrantless NSA surveillance program, and, even more significantly, that *he had been targeted by it*, he believed he would be able to obtain this evidence and show that all evidence in his case was derived from illegal wiretapping. The New York Times reported :

> "By contrast [to cases where the NSA surveillance played only a minimal role], *different officials agree that the N.S.A.'s domestic operations played a role in the arrest in Albany of an imam and another man* who were taken into custody in August 2004 as part of an F.B.I. counterterrorism sting operation...." (Exhibit "G" to the Petition, at 4-5, emphasis supplied)

As this Court is well aware, Petitioner then filed a motion to suppress all evidence derived from the warrantless surveillance (and to dismiss the case) and stated, "The government engaged in illegal electronic surveillance of thousands of US persons, including Yassin Aref, then instigated a sting operation to attempt to entrap Mr. Aref into supporting a non-existent terrorist plot, then dared to claim that the illegal NSA operation was justified because it was the only way to catch Mr. Aref." (1/20/06 Motion for Reconsideration, at 1)

After the prosecution filed a completely classified response, this motion was denied in a classified decision, something previously unheard of. When Petitioner filed a mandamus petition to challenge this at the Second Circuit, he was told he would have to wait and raise the issue on appeal if he was convicted. When he did that, he was told, ludicrously, that he had not made a "colorable claim" showing such surveillance had been used.

Then in 2008 Congress passed the FISA Amendments Act in an attempt to belatedly "legalize" – for the future – the illegal warrantless surveillance in which the

NSA had been engaging since late 2001 or early 2002. It is submitted that this was a concession that the previous program was illegal.

Several journalists, attorneys, researchers and others filed suit, arguing that the FISA Amendments Act violated the Fourth and First Amendments, and that their activities had already been chilled as a result. The Second Circuit found that the plaintiffs had standing to challenge the Act, but the Supreme Court reversed in a 5-4 decision, saying that there was no standing, and dismissing the case. *Clapper v. Amnesty International, et. al.,* 133 S. Ct. 1138 (2013).

As has been widely reported, Solicitor General Donald B. Verrilli, Jr., had argued in *Clapper* that the issue of the constitutionality of the surveillance could be reached even if plaintiffs like these lacked standing because, he claimed, *whenever any evidence derived from the surveillance is used in a criminal case, the defendant would be able to challenge it*. "*Door May Open for Challenge to Secret Wiretaps*" New York Times, October 17, 2013. See also, "*How the Feds Won a Key Warrantless Wiretapping Ruling by Misleading the Supreme Court*," Washington Post, October 28, 2013.

However, apparently unbeknownst to Solicitor General Verrilli, this was not the case, as no defendant had *ever* been given notice of any evidence derived from NSA surveillance. And, as occurred herein, whenever the defense tried to obtain such evidence, various mechanisms were utilized by the prosecution and the courts to prevent it.

Now, however, apparently as a result of efforts by Mr. Verrilli, *the Justice Department has changed its policy and is providing notice of evidence derived from NSA surveillance*. This has already occurred in at least two cases, one which is in the pre-trial

stages (*United States v. Muhtorov*, 1-12-cr-00033 [D CO 2013] and one, *United States v. Mohamud*, 3:10-cr-00475 [D OR 2010], which is, *like the instant case, in a post-conviction status*.

Significantly, a November 15, 2013 interview with Attorney General Eric Holder has made it clear that the Department of Justice is *examining past cases* to see whether the NSA evidence was utilized. Attorney General Holder stated:

> "We will be examining cases that are in a variety of stages, and we will be, where appropriate, providing defendants with information that they should have so they can make their own determinations about how they want to react to it." http://www.washingtonpost.com/world/national-security/justice-reviewing-criminal-cases-that-used-evidence-gathered-under-fisa-act/2013/11/15/0aea6420-4e0d-11e3-9890-_a1e0997fb0c0_story_1.html

An Associated Press article from November 16, 2013 appeared to clarify that this review would occur *not just in FISA cases, but in all warrantless surveillance* cases. The article stated, "The Justice Department said Friday it will notify criminal defendants when the government has used evidence against them that was gathered through warrantless surveillance programs." http://www.timesunion.com/news/politics/article/Justice-Dept-to-notify-defendants-on-surveillance-4986209.php

Moreover, if this review is being done in cases impacted by evidence derived from NSA surveillance obtained pursuant to the FISA Amendments Act, which is arguably unconstitutional, there is *even more reason* to do this in cases such as this one where the evidence was derived from the clearly illegal pre-2008 NSA surveillance program. (See the Aref Motion for Reconsideration cited above, as well as *In re NSA Telecommunications Records Litigation*, 522 Fed. Appx 383 (9 Cir. 2013) (a challenge to the pre-2008 NSA warrantless surveillance program by plaintiffs similar to those in the *Clapper* case – this case was dismissed for lack of standing following the Supreme

Court's misinformed decision in *Clapper*.) And it appears that Attorney General Holder is directing such a review.

At this point, based on the new policy of the Justice Department, Petitioner is renewing his request that the Court direct the government to examine the NSA evidence provided to the FBI and/or the Justice Department in this case, and provide it to security-cleared defense counsel.

As noted previously, this is also something recommended by the Inspector General of the Justice Department in a 2009 Report on the NSA surveillance program. The Report recommended that prior cases be examined to see if there was exculpatory evidence with which the defendants should have been provided. However, there was no sign – until now, perhaps, thanks to Solicitor General Verrilli – that this Report was acted upon, and the Albany Common Council passed a resolution in 2010 requesting that the Department of Justice follow the recommendations of its Inspector General. It is submitted that there was classified evidence in the instant case which should have been provided years ago, and which should be provided at this time.

It is submitted that this evidence will be exculpatory (for example, it may show definitively that Petitioner was *not* told the code word on February 12, 2004) and that the failure to provide it sooner was a serious *Brady* violation.

The "Good and Valid Reasons" Instruction to the Jury

With respect to the trial judge's instruction to the jury that the FBI had "good and valid" reasons to investigate Petitioner, the government misconstrues the reason why the issue is raised here.

Upon information and belief the case started with an NSA misidentification of Aref as a dangerous Al-Qaeda figure, and then the FBI created seven other "reasons" to justify their investigation of Aref. This was akin to the "parallel construction" used by the DEA with respect to NSA derived evidence.. (See, i.e., "*US Drug Agency Surveillance Unit to be Investigated by the Department of Justice*," Guardian, August 6, 2013.)

Upon information and belief it was the mistaken identification of Yassin Aref as an Al-Qaeda agent which provided the true basis for the investigation. Therefore, the Court's instruction to the jury – that the FBI had good and valid reasons for investigating Petitioner – is not only irrelevant and highly prejudicial, but is also *false*.

Secondly, the government claims that the issue of the "good and valid reasons" instruction has already been raised on appeal and so may not be raised again. (Although this was a significant issue on appeal, the Second Circuit fail to make any specific finding on the issue and never actually reached the propriety of this prejudicial instruction to the jury.) However, the issue is not raised herein to specifically retry the validity of the instruction. Rather Petitioner is pointing to the "good and valid" instruction as an *example* of how the government's secret information kept Petitioner from receiving a fair trial.

Recording of February 12 Meeting

With respect to a NSA recording of the February 12, 2004 meeting, the prosecutor in his answer has flatly stated that "There was no recording made of that meeting". However it is not clear whether AUSA Pericak would have been privy to any information regarding such a recording, which may have been shared only with certain members of

the FBI and/or the Department of Justice's Counterterrorism Section. Another question is whether the prosecution ever asked the NSA for such a recording, and whether the NSA ever responded that no such recording existed. As noted above, in light of both the new policy of the Justice Department regarding evidence derived from NSA surveillance, and the 2009 Inspector General's Report regarding such surveillance, it is crucial that this be examined.

Given the high level of surveillance directed at suspected Al-Qaeda agents, and given the misidentification of Petitioner as such an agent, it seems extremely likely that such a recording does exits. Moreover, *during the trial the government implied that during the investigation Yassin Aref was under 24 hour electronic surveillance*. (A-372)

The prosecution knew that the February 12th meeting was the only meeting at which they could claim Petitioner was told about the meaning of the secret code. All the other meetings were recorded by the FBI's informant and Petitioner was not told the meaning of the code in these meetings, so the only other alternative would be the one meeting on February 12 which was (allegedly) not recorded by the informant.

Under these circumstances, one would expect the FBI to quickly arrange for another opportunity to explain the meaning of the code to Petitioner – which would be legally recorded - before using the code at the June 10 meeting. But that never occurred.

Interestingly, Agent Coll testified that he listened to the entire conversation on February 12 (even though it wasn't being recorded by the informant the transmitter was working so Coll could monitor the conversation) and he did *not* testify to having heard the meaning of the code word explained to Aref. He eventually resorted to a claim that Hussein (who the government basically concedes has *no credibility*) told him that he had

asked Mohammed if *he* had told Aref the meaning, and that Mohammed had supposedly said yes. However, Mohammed had in fact expressed surprise when Hussein told him at another point that *he* had told Aref about the code[1].

Yet the prosecution somehow continues to maintain to this day that Aref was told the meaning of code word on February 12. Thus it is submitted that a recording of the February 12 meeting would be exculpatory and should be provided to the defense, at least to security-cleared defense counsel. At the very least, as discussed above, there should be an inquiry *to the NSA* as to whether this recording was made, and, if so, whether it still exists.

If such a recording shows that Aref was not given the meaning of the code, it would represent a serious (though perhaps unintentional) *Brady* violation, especially considering that the charges based on the June 10 conversation (which the government conceded would have "not stood for much" if Aref didn't know the code) were the only sting counts for which Petitioner was convicted.

Newburgh Evidence

The prosecution objects that certain exculpatory material could have been discovered by the defense if it had followed up on certain rumors, or that the courts already ruled on certain objections on appeal. But by its silence the prosecution appears to essentially concede that certain exculpatory material in its possession was not turned over to the defense, including material related to Hussein's fraudulent misrepresentations in his 2003bankruptcy proceeding; his false statements made to the Probation

[1] Just nine days earlier Hossain said to Hussein in a private conversation, that Aref did not know about the plot, and Hussein lied to Hossain and said, "No, he knows. I have talked to him"(which was not true as shown by all of the tapes). Hossain replied with great surprise, "You have talked to him?....Maybe he is not telling me, I did not tell him either". (A-777).

Department; the fact that he had a criminal charge for a bad check pending at the time of Petitioner's trial, etc.

Clearly this material was highly significant to Hussein's credibility because it showed him lying repeatedly in very recent legal proceedings under circumstances that indicated he had not reformed his criminal conduct at all after his felony convictions. Indeed it could be said that he now believed that with the government as his patron he was free to tell any outrageous lie he wanted, and he would be protected from the consequences of his perjury and fraudulent misrepresentations. (In this he appears to be correct –despite the letter from the Hon. Colleen McMahon to the Bankruptcy Court (see Petitioner, Exhibit "F") it seems that no consequences have ever been imposed on him for his misconduct)

The prosecution claims the courts have already determined that no amount of impeachment would have altered the outcome of the trial because the evidence was for the most part based on recordings. However, as discussed above, the crucial claim that Petitioner was told the meaning of the code word depended on Hussein's claim. The jury was entitled to be informed fully as to the character of Hussein, and the prosecution's withholding of *Brady* material regarding him prevented that.

Actual Innocence

With respect to Petitioner's claim of actual innocence, the prosecution has essentially attached portions of its brief on appeal arguing that there was sufficient evidence presented that a jury could find Yassin Aref guilty. First, it is submitted that the quoted sections of the record fail to show guilt. No coherent plot was presented to Yassin Aref, nor at any time did he agree to join such a plot. The quotes offered by the

prosecution were taken from long conversations, weeks apart, stretching out over 6 months. They omit all of Yassin Aref's many statements indicating opposition to terrorism and respect for laws in the US. The quotes fail to indicate any statement by Yassin Aref that he supports terror or that he is aware of and supports the so-called plot of the informant Hussein. The government has claimed that Aref's act of witnessing an otherwise legitimate loan was done with the knowledge and intent that it would assist a terrorist plot being concocted by Hussein. Even when the evidence is presented all crammed together, trimmed of all the hours of irrelevant information, and read in the best light possible for the government, it is impossible to detect from these passages any coherent plot, any agreement by Yassin to be part of the plot, and any way in which his act of witnessing a loan was connected to any illegal plot.

It is submitted that the chief reason the courts (this Court as well as the Second Circuit) upheld the conviction is because the courts were secretly told that Aref was a known terrorist, and so the courts naturally tended to interpret the conversations as being consistent with what a terrorist might say. In contrast, the jurors, who were not given this secret evidence but were instead told that there were "good and valid reasons" for targeting Aref, saw Petitioner as someone who *might* support terrorism. They found insufficient proof for most of the counts, but were reluctant to acquit entirely, relying on that final conversation to justify their verdict.

The jury considered all of the recorded conversations and found acquitted Petitioner for all of the counts that occurred before the final conversation on June 10, 2004. They recognized there was insufficient evidence before that final conversation. But, as the prosecution conceded, for this final conversation to mean anything, there had

to be proof that Aref had been told the meaning of the code word. As discussed above, there was no such proof.

Yet the prosecution has continued to misrepresent the state of the record on appeal and on this motion with respect to this critical point of whether Aref was told the meaning of the code. On appeal, the prosecution stated in its brief, "On February 12, 2004…[t]he CW [Hussein] also told Aref that he would use the word "chaudry" as a code word for missile. GA 237-38; 241. On the present motion the prosecutor stated:

> Also at this meeting [February 12] the CW identified "chaudry" as the code word for missile when all three (the CW, Aref and Hossain) were together GA 237-38; 241

CONCLUSION

Based on the foregoing, this Court should not transfer this Petition to the Second Circuit, and should grant a hearing. If, *arguendo,* the Court does transfer the Petition to the Circuit, that Court should hold that it satisfies the gate-keeping requirements for a second and successive petition and return it to this Court for adjudication.

Dated: November 25, 2013

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