2007 WL 4682923 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Sabri BENKAHLA, Defendant-Appellant.

No. 07-4778.
December 17, 2007.

On Appeal from the United States District Court for the Eastern District of Virginia Alexandria Division the Honorable James C. Cacheris, District Judge

Brief for the United States

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STATEMENT OF THE CASE

This is a criminal case in which the defendant appeals his convictions and sentence on various grounds.

After Benkahla was acquitted in 2004 on charges relating to attending a jihad camp in Afghanistan because the government was unable to prove the location of the camp, he was awarded statutory immunity and ordered to testify before the grand jury. In order to hear the government's questions initially in the presence of his attorney, he agreed with the government to answer questions posed by investigators outside the grand jury under the same protections and conditions that he answered questions inside the grand jury.

Before investigators and in the grand jury in 2004, Benkahla denied attending any jihad camp and denied using any weapons in connection with such a ***3** trip. Further, he denied recollection of any specifics about suspicious individuals with whom he had traveled, visited, or corresponded about jihad training.

In 2006, Benkahla was indicted for perjury, obstruction of justice, and false statements for his statements and testimony in 2004. After a four-day trial, he was convicted on all counts. The jury found that Benkahla testified falsely, obstructed justice, and provided false answers to the FBI about his participation in a jihad training camp in 1999, who facilitated his attendance at that camp, who else attended such camps, and with whom he corresponded about jihad training and related matters.

Upon Benkahla's post-trial motions to dismiss, the district judge dismissed Count Two on the grounds that the proof of the perjury charged was made up of admissions by Benkahla that were not sufficiently corroborated, but denied the motions to dismiss Counts One, Three, and Four.

At sentencing, the district court found that, for purposes of application of Application Note 2 to *U.S.S.G.* § 3A1.4 - - the so-called "terrorism" enhancement - - Benkahla's false and misleading answers obstructed an investigation of a federal crime of terrorism. Judge Cacheris properly calculated Benkahla's guideline range at 210 - 270 months in prison. Nevertheless, the sentence he ***4** imposed included a dramatic downward variance. Ultimately, Benkahla was sentenced to 121 months in prison, and then appealed.

STATEMENT OF FACTS

A. *Background*

Benkahla is intelligent, sophisticated, and well-traveled. JA 1124-26, 1687. Between 1999 and 2003, he associated with a group of young men who followed the teachings of lecturer Ali Timimi at the Dar Al-Arqam Islamic Center in Falls Church, Virginia. JA 672-73, 703, 823-25, 909. [1] Timimi regularly espoused the importance of engaging in violent jihad against the enemies of Islam. JA 828. One of Timimi's lectures at the Dar Al-Arqam that was commercially available included a presentation made by Benkahla. JA 825-27.

During this period, Benkahla was interested in obtaining jihad training at a mujihideen camp, fighting in violent jihad, and dying a martyr. JA 786-87, 820-21, 868. This aspiration was a regular topic of his conversations and emails. JA 669, 672-73, 693-96, 708, 758, 956. Similarly, at least during this period, Benkahla openly despised the United States, lauded the Taliban for its attempts to govern by Sharia law, and yearned for the reconstitution of a Caliphate to govern ***5** the world by Sharia law. *See, e.g.,* JA 550-57; GX 9A16, GX 9A17, 9A18a, GX 9G4, GX 9G5, GX 9G20, GX 9G27.

During this same period, a terrorist group known as Lashkar-e-Taiba ("LET") provided free jihad training to Muslim men from around the world at camps in Pakistan and Afghanistan. LET advertised its policy on the internet and in its newsletter. GX 1D52; JA 336-37, 834. LET openly espoused hatred for the United States and called for jihad worldwide. JA 299-311, 911-12; GX 1F4.

Between 2000 and 2002, at least seven associates of Benkahla and Timimi at Dar Al-Arqam (other than Benkahla) trained overseas with LET. JA 709, 792, 914, 923. These included A1-Hamdi and Kwon, who were both close friends with Benkahla. JA 765-67, 922-23, 955-57. At least four - - including Kwon - - did so upon Timimi's counsel immediately after September 11, 2001, with the intent of using the training to fight for the Taliban against American troops that they expected to invade Afghanistan. JA 451, 928. *See United States v. Khan,* 461 F.3d 477, 484 (4th Cir. 2006).

In 2002 and 2003, Benkahla associated, studied, and traveled in Saudi Arabia with Abu Ali, a fellow student of Timimi's in Virginia. JA 706, 979-81. On one trip that Benkahla made with Abu Ali to Jeddah, Ali was formally initiated into Al-Qaeda. JA 506.

***6** On July 4, 1999, President Clinton banned by executive order travel to the part of Afghanistan controlled by the Taliban, JA 283. The United States designated LET as a terrorist organization in December 2001. JA 373.

In 2003, the United Nations Security Council and the United States each designated Manaf Kasmuri as a terrorist for his connections to Al-Qaeda. GX 9C21(b);GX9C23.

In 2004, the United States designated Ibrahim Buisir as a specially designated global terrorist on the grounds that he facilitated travel for Al-Qaeda operatives in Europe. JA 534; 70 Fed. Reg. 38256.

The Northwest Frontier Provinces ("NWFP") of Pakistan abut the border with Afghanistan near Peshawar, and are a lawless and dangerous area that hosts Islamic militant groups, and in which people routinely have automatic weapons and rocket-propelled grenades ("RPGs"). JA 267-68, 329.

B. *Benkahla's Trip in 1999*

On July 9, 1999, Benkahla emailed his friend Allison that he was traveling to England, Ireland, and then someplace too secret to mention over the internet. JA 625. Between July 3rd and July 13th, he telephoned Ibrahim Busir in Ireland on eight occasions. JA 628-30. He puchased a ticket for England in the United States, and flew to England on July 15th. JA 463.

***7** In England, Benkahla purchased a ticket for Pakistan and flew to Islamabad on July 26th. On August 17th, Benkahla returned to England from Peshawar. JA 641, 653. He then returned to the United States, and did not go to Ireland. JA 471. His banking and telephone transactions reflected no activity during his time in Pakistan. JA 651. [2]

In April 2000, Benkahla emailed Manaf Kasmuri for advice regarding whether he and friends should go to Chechnya to fight in the jihad there, or just continue with his studies. In explaining his qualifications to fight, Benkahla represented that he had "done some studying in Afghan." GX 9G2. In 2004, Benkahla admitted that, in making that representation to Kasmuri, he intended to convey that he previously had obtained jihad training at a mujihideen camp. JA 660-63, GX 9D1.

In the summer of 2000, Kwon asked Benkahla whether he had gone to a jihad training camp. Benkahla asked where he had heard that from. Kwon said that he had heard it from Hamdi. Benkahla responded that Hamdi was not supposed to tell anyone that because it was a secret, but confirmed to Kwon that he had gone to a camp and trained with an AK-47 rifle. JA 912-16.

***8** Also in the summer of 2000, Benkahla told Santora that Benkahla had experience in firing an automatic AK-47 rifle and an RPG. JA 995-98. Those weapons are generally illegal for private citizens to fire in the United States. JA 950, 1012.

In February 2003, government investigators searched Hamdi's home, and found within it a note with Benkahla's contact information, written in Benkahla's handwriting. The phone number on the note was that for the phone of the LET office in Lahore, Pakistan. JA 684-85.

In June 2003, Saudi government officials seized documents from Benkahla, including some that dated from as early as 1998. GX 9C8(b)(2), 9C8(b)(4). These documents included an undated "to do" list that included the item, "jihad training this summer", and contact information for Markaz al Dawa, the parent organization of LET. JA 674, 757. Saudi officials also seized Benkahla's computer, which contained numerous photos and documents about violent jihad. JA 626.

In 2006, Benkahla told Moore that Benkahla's legal troubles arose because he had gone to a place in Pakistan that wasn't designated at the time that he went, but later became designated as a terrorist organization. JA 988-89.

***9** C. *The 2003 Indictment and Subsequent Trial*

In June 2003, Abu Ali was arrested by Saudi authorities and confessed to joining Al-Qaeda. JA 316-17. Immediately upon learning of the arrest of his friend and fellow student, Benkahla deleted from his email account messages that he had been storing as long as since 1999 from Timimi or his followers, or otherwise about jihad. JA 730-35; GX 9G50. Several of these email messages about mujahideen activities were from an individual by the name of Affan. GX 9G50.

Later that month, Benkahla and ten others involved with Timimi and Dar al-Arqam were indicted for various offenses centering around a conspiracy to prepare to engage in military expeditions against India and Russia in Kashmir and Chechnya. *United States v. Khan,* 461 F.3d 477, 485 (4th Cir. 2006) (affirming convictions of three of Benkahla's co-defendants). In July 2003, Benkahla and two co-defendants (Chapman and Hasan) were arrested in Saudi Arabia, and

***10** returned to the United States from Saudi Arabia to face the charges. *See United States v. Khan,* 309 F.Supp.2d 789, 796-97 (E.D. Va. 2004). [3]

In light of the guilty pleas and cooperation of several co-defendants, a superseding indictment was returned in September 2003. *See Khan,* 461 F.3d at 485. Benkahla's case was severed from that of the remaining six defendants, and he was tried separately.

***11** Benkahla was charged with providing services to the Taliban and to the territory of Afghanistan controlled by the Taliban, in violation of 50 U.S.C. § 1705 (the International Emergency Economic Sanctions Act, or "IEEPA"), and for using a firearm in furtherance of that crime of violence, in violation of 18 U.S.C. § 924(c). JA 21-A. In essence, the government charged that, in the summer of 1999, Benkahla had participated in a jihad training camp operated by LET, in the territory of Afghanistan controlled by the Taliban - - and had used firearms in the course of doing so. JA 21-BB, 21-LL.

In March 2004, Benkahla waived a jury and was tried by Judge Leonie M. Brinkema. Judge Brinkema found beyond a reasonable doubt that Benkahla had attended a jihad camp in the summer of 1999, and by a preponderance of the evidence that the camp was in Afghanistan. She acquitted him, however, because she did not find beyond a reasonable doubt that the camp was in Afghanistan - - and neither his attendance at the camp nor his use of firearms there was then illegal if it was in Pakistan. JA 89B-90, 1592.

D. *The On-Going FBI and Grand Jury Investigations*

I In 2004, the FBI was investigating individuals suspected of connections to Al-Qaeda. This included Timimi, because Timimi had been a student of Hawaii, a Saudi cleric associated with Bin Laden. JA 347-350, 438-39. Moreover, upon ***12** Timimi's counsel, at least four of his followers at Dar al-Arqam left the United States immediately after September 11, 2001, to fight for the Taliban against the American troops Timimi told them would soon invade Afghanistan. JA 450-55. Naturally, the FBI also was intensely interested in helping to identify Abu All's associates in Saudi Arabia that may have been connected to Al-Qaeda, JA 503-07.

Similarly, the FBI was investigating individuals connected to Ibrahim Buisir and Abd al-Latif Lufti al-Rihali; the former was suspected of being a facilitator for Al Qaeda in Europe, and the latter of doing the same in Iraq. JA 567. As a result, the FBI was interested in Binkaid and Bukai, because they appeared to have referenced al-Rihali and used coded language in letters to Benkahla that were among the documents seized from Benkahla by the Saudi authorities in 2003. JA 567-71, 715-20.

Concurrently, a major indicator on which the FBI focused its investigative efforts was the travel by individuals to overseas terrorist training camps. The investigators focused on individuals in the United States who had attended such camps for fear that, like Benkahla's friends Khan and Chapman, some of those individuals might act to assist foreign terrorist groups after returning to the United States or to their homes in allied countries. JA 435-37, 446, 475. *See Khan,* 309 F.Supp.2d at 811-14, 823 (Khan and Chapman acquired software for LET to ***13** operate a remote controlled airplane more than a year after they finished their training at LET).

Investigation into the identities of individuals who attended foreign terrorist camps operated by LET was of intense importance so that the FBI could assist in the investigation of terrorist plots around the world. JA 436-37. In fact, as part of the investigation, - - through the witness testimony of cooperating witnesses - - the FBI assisted in the prosecution of individuals in England, France, and Australia who had attended LET camps or were otherwise affiliated with LET. JA 1565-67.

Further, the FBI was interested in investigating individuals in contact with Benkahla such as "myunis," "haroon," Abdullah, and Affan because of their stated intentions to engage in jihad or jihad training. JA 535-37, JA 557-62, 1517-18. Moreover, even after the conviction of Khan and Chapman in early 2004, there was still an ongoing investigation into several people associated with Dar al - Arqam with whom Benkahla was acquainted, including Chandia, Timimi, and Abu Ali, as well as individuals who were associated with them, such as Ajmal Khan. JA 571.

Ultimately, Chandia, Timimi, Abu Ali, and Ajmal Khan each were indicted for federal crimes of terrorism in the Eastern District of Virginia in 2005 and 2006. While Chandia, Timimi, and Ali were convicted at trial, Khan's indictment ***14** remains pending while he serves a prison sentence for a terrorism-related offense in England. JA 1645-52.

Benkahla's false statements and false testimony hindered and impeded the investigators' ability to find out about Timimi, Abu All, Abdullah, "myunis", "haroon," and others, as well as terrorist training camps and the people who attended them. The FBI expended considerable time and effort to attempt to confirm or verify the information provided by Benkahla. JA 1517-1518.

E. *Immunity and the 2004 Grand Jury Appearances*

On April 7, 2004, Judge Claude M. Hilton issued an order compelling Benkahla to testify completely and truthfully before the grand jury. That order further prohibited his testimony from being used against him in any criminal case except for perjury, false statements, or otherwise failing to comply with that order. JA 132-33. *See United States v. Caron,* 551 F.3d 662, 672 (E.D. Va. 1982), *aff'd mem.,* 722 F.2d 739 (1983) (a prosecution for obstruction of justice is one for "otherwise failing to comply" with the compulsion order).

The government and Benkahla agreed that the questioning of Benkahla could take place outside the grand jury under the same conditions and protections as if it were inside the grand jury. JA 133. In accordance with that agreement, Benkahla was able to have his attorney with him during the entirety of the ***15** questioning by the investigators outside the grand jury, and all of the questions posed to him inside the grand jury were first asked of him in the presence of his attorney. JA 621.

Benkahla testified before the grand jury in April and November 2004, and engaged in several interviews with the FBI outside the grand jury. In essence, he stated that during his 1999 trip to Pakistan, he did not participate in or witness any training relevant to violent jihad or combat, and that he could not identify anyone who could arrange or facilitate such training. He stated that he had never fired an AK-47, an RPG, or an automatic weapon of any kind. GX 9D a, 9D2a (tapes of Benkahla's grand jury testimony).

Benkahla stated that, in 2002, he contacted Kasmuri by email to solicit the mujahideen commander for advice about joining the jihad in Chechnya. JA 660-61. He conceded that, by writing that he had "studied in Afghan," he was trying to convey to Kasmuri that he had trained at a jihad camp. JA 663. He said, however, that he was attempting to mislead Kasmuri by conveying that information. *Id.*

Benkahla denied that he was referring to Afghanistan when, in his email to "Allison" right before he left on his trip in July 1999, he wrote that that he was going to a "place far, far away," which was "top secret info." He was referring, he said, to a trip to Pakistan. JA 644.

***16** Benkahla said that, notwithstanding his reference to his plans to go to Pakistan in his email to Allison, he did not purchase his ticket for Pakistan from the United States because he did not decide to go to Pakistan until after he arrived in England (and not because he wanted to make it more difficult to law enforcement authorities to trace his travels to a "top secret" place). He said that he only actually decided to go to Pakistan after he met an individual in London who agreed to show him around Pakistan. JA 644-45. He said that this individual escorted him around Pakistan and was his

Urdu interpreter for his entire trip, but he knew him only by the name "Abdullah." He said that he recalled no details about Abdullah, the people he met on his trip with Abdullah, or the places he visited with Abdullah. JA 639, 645-56.

Benkahla said that he spent about half of his trip to Pakistan in Islamabad, and that he spent most of his time in Islamabad at the American Center, learning about Pakistani culture. JA 646-47. In fact, the American Center in Islamabad had no information about Pakistani culture, because it was designed to show American culture to Pakistanis. JA 891-93.

Benkahla identified a list of names of people with addresses in the NWFP of Pakistan as a document given to him by Abdullah. JA 657. Benkahla explained that Abdullah gave him the list, and told him that the people on the list would help ***17** him if he told them that he was a friend of Mohammed Siddique of Ireland. Benkahla denied knowing whether he knew Siddique or any of the other people on the list, and denied knowing why Abdullah thought that Benkahla might need a list of people who would help him in the NWFP. JA 657-59, 811-13.

Benkahla said that jihad-related materials on his computer seized in Saudi Arabia were there when he purchased the computer from an individual named "Sylvan," but that Sylvan was now dead. JA 704. He said that, although he kept Affan's jihad-related emails for years, he never requested them or responded to them. JA 697. [4] He claimed not to know who Bukai and Binkaid were. JA 719-20.

Benkahla stated that he did not recall speaking to Buisir before leaving for England. JA 633, 637. He said that Timimi did not speak about jihad at Dar al-Arqam. JA 709. He said that he did not remember anyone that he met while traveling with Abu Ali in Saudi Arabia. JA 772-74.

Benkahla admitted that he sent an e-mail addressed to "myunis" in which he referenced raising money for mujahideen, an individual named "Haroon," and his desire to go to Pakistan for jihad training. He testified, however, that he could not identify Haroon or the recipient of the e-mail, "myunis." JA 668-70.

***18** F. *The 2007 Trial*

The jury found that Benkahla testified falsely and obstructed the grand jury, I by denying that:

A. During his trip to Pakistan or Afghanistan in the summer of 1999, he ever handled or fired a firearm or explosive device, or saw anyone else do so, or participated in or saw any training relevant to combat or violent jihad at any time, and that he never at any time fired an AK-47 style rifle or an RPG (as alleged in Part A of Count 1, and incorporated in Count 3);

B. He knew who "Haroon" and "myunis" were (as alleged in Part B of Count 1, and incorporated in Count 3);

C. He ever saw anybody other than Pakistani Army soldiers carrying arms (as alleged in Part A of Count 2 and incorporated in Count 3);

D. He ever fired an automatic weapon or anything like an AK-47 rifle (as alleged in Part B of Count 2 and incorporated in Count 3); and

E. He ever handled a RPG (as alleged in Part B of Count 2 and incorporated in Count 3).

JA 1283-87.

The jury further found that Benkahla was guilty of false statements or concealing a material fact to the FBI by stating that:

F. He did not recall whether he called or spoke to Ibrahim Buisir in Ireland (as alleged in Part A of Count 4);

G. He did not know whether he knew any of the individuals north of Peshawar on the list that he claimed to have been given by ***19** "Abdullah" to use if he needed held in the NWFP of Pakistan, nor why the people on the list would help him if he said that he knew "Muhammad Siddique from Ireland," nor whether he actually knew Siddique (as alleged in Part C of Count 4);

H. Timimi did not discuss jihad during his lectures at Dar Al-Arqam (as alleged in Part E of Count 4);

I. Benkahla never fired an AK-47 style rifle or rocket-propelled grenade anywhere in the world (as alleged in Part F of Count 4); and

J. Benkahla never received or participated in jihad training anywhere in the world (as alleged in Part G of Count 4).

JA 1287-91.

The jury further found that Benkahla was guilty of obstruction, as alleged in Count 3 (incorporating Part D of Count 2) - - but *not* guilty of perjury - - for testifying evasively that he bought a ticket for Pakistan from London rather than from the United States because he was not sure if he was going to Pakistan. JA 1284, 1286.

The jury also found that Benkahla testified falsely by denying that he ever saw anybody other than Pakistani Army soldiers carrying arms, and testifying that he never fired an automatic weapon or handled a RPG as charged in Count 2, JA 1283-84, but the district judge dismissed Count 2 on the grounds that it was based on the uncorroborated admissions o Benkahla.

***20** Finally, the jury found that Benkahla was not guilty of either perjury, Obstruction, or false statements for stating that he traveled with Abdullah to Pakistan as a result of Abdullah's offer to him to show him around, that he did not know Abdullah's last name, his actual first name, or where his home was, and that he did not know Bakai and Binkaid. JA 1284, 1287-89.

G. *Sentencing*

At sentencing, the district judge found that Benkahla's false and misleading information hindered the FBI's investigation into a federal crime of terrorism, and caused a diversion of resources to pursue the false trails that he provided. JA 1583-89, 1607-26. As a result, the "terrorism enhancement" found at §3A1.4 of the guidelines was applicable. Accordingly, Benkahla's guideline range was determined to be 210 to 262 months. JA 1589.

The district court did not impose a sentence within the applicable guideline range. Instead, it imposed a sentence of 121 months. JA 1639. The district court justified its sentence as a downward departure from the Sentencing Guidelines on the grounds that the Criminal History Category VI provided by application of §3A1.4 overstated the seriousness of Benkahla's criminal history. JA 1628-31. Alternately, the district court justified the sentence as a variance sentence based on ***21** the factors set forth in 18 U.S.C. § 3553(a). JA 1632-38. This appeal followed. JA 1640.

SUMMARY OF ARGUMENT

The district court correctly ruled that Double Jeopardy rules did not bar Benkahla from being prosecuted for perjury and obstruction in 2007 after being acquitted on other charges in 2004. Benkahla was unable to establish any of the factors necessary to predicate a successful Double Jeopardy claim. The issue in this case was different from the one adjudicated in the prior proceeding, not determined in the prior proceeding, and not necessary to the decision in the prior proceeding. The judgment in the prior proceeding did not settle the issue in this case, and there was no opportunity to litigate the issue in the prior proceeding.

The district court properly admitted expert testimony to explain the context of the evidence. Further, it properly admitted evidence to show the materiality of the questions asked of Benkahla and his answers. To establish that Benkahla's false answers constituted perjury, obstruction, and false statements, the government was required to show that they were material. As the district judge properly and repeatedly instructed the jury, the materiality evidence could be considered only to show why Benkahla's answers had a capability to affect the actions of the investigators and the grand jury.

***22** Ample evidence supported the convictions. This evidence included far more than Benkahla's uncorroborated admissions. Proof of the perjury, false statements, and obstruction was based on the testimony of multiple witnesses and compelling circumstantial evidence. In any event, at least one prong of each count of conviction remains valid even if Benkahla's admissions were uncorroborated.

While the district court correctly found the so-called "terrorism enhancement" at §3A1.4 of the Sentencing Guidelines to be applicable, it considered those Guidelines to be only advisory, and imposed a variance sentence far below the suggested guidelines range. In doing so, the district court properly considered the suggested guidelines range as but one of the § 3553(a) sentencing factors, and did not abuse its sentencing discretion.

ARGUMENT

I. *The Prosecution Was Not Barred by the Double Jeopardy Clause.*

Standard of Review:

Whether an indictment is barred by the Double Jeopardy clause is a question of law reviewed *de novo.* Findings of fact made in connection with such a ruling are reviewed for clear error. *United States v. Rubayan,* 325 F.3d 197, 201 (4th Cir. 2003).

***23** Benkahla argues that the indictment was barred because the facts at issue were previously litigated by the parties and determined adversely to the United States. Benkahla's Br. at 47-53. The district court properly rejected that argument. JA 112-13, 161C-161E.

Benkahla's estoppel argument is unpersuasive for several reasons, not the least of which is that he cannot challenge on estoppel grounds each of the special verdicts reached by the jury with respect to each of the counts of conviction. As a result, even if his estoppel argument were meritorious, his convictions would still stand. [5]

Benkahla correctly identifies the five factors that must be present for a collateral estoppel claim to succeed. Benkahla's Br. at 48-49. They are:
(1) whether the issue in question is identical to the issue adjudicated in a prior proceeding;

(2) whether the issue was actually determined in the prior adjudication;

***24** (3) whether the issue was necessarily decided in that proceeding;

(4) whether the resulting judgment settling the issue was final and valid; and

(5) whether the parties had a full and fair opportunity to litigate the issue in the prior proceeding.

Nash v. Fiel, 35 F.3d 997, 1006 (4th Cir. 1994).

"In order for a criminal prosecution to be barred by collateral estoppel under the *Fiel* test, each of these five elements must be resolved in the movant's favor." *Rubayan,* 325 F.3d at 202. Further, "[r]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel." *Id.* at 203. In this case, none of the five factors properly could be resolved in Benkahla's favor.

In 2003, Benkahla was prosecuted for providing services to the Taliban and I to the territory of Afghanistan controlled by the Taliban, in violation of 50 U.S.C. § 1705, and for using a firearm in furtherance of that crime of violence, in violation of 18 U.S.C. § 924(c). In essence, the government charged that, in the summer of 1999, Benkahla participated in a jihad training camp in Afghanistan, and used firearms in the course of doing so. JA 21-BB, 21-LL.

Judge Brinkema concluded that the government proved that Benkahla had, in fact, attended a jihad camp in the summer of 1999, and that he had, in fact, used ***25** firearms at that camp. She acquitted Benkahla of the IEEPA charge, however, because the government proved that the jihad camp was in Afghanistan rather than in Pakistan only by a preponderance of the evidence and not beyond a reasonable doubt. JA 89-B. Moreover, inasmuch as the firearms count depended on sufficient proof of the predicate crime of violence, she acquitted him of the firearm charge as well. JA 89B- 90, 1592.

Before the grand jury in 2004, Benkahla denied attending any jihad camp in the summer of 1999 and denied using any firearms in connection with such a trip. Ultimately, Benkahla was convicted of perjury and obstruction of justice for, in essence, falsely denying that he attended any jihad camp at all in the summer of 1999. As noted above, Judge Brinkema explicitly found that he had, in fact, attended such a camp at that time; it was the *location* of the camp with respect with which the proof was insufficient. Thug, conviction on the instant charges was completely consistent with Judge Brinkema's findings as described above. [6]

***26** In that context, it can be seen that none of the prerequisites for collateral estoppel are present:

A. The Issue in Question in This Case is Different *From the One Adjudicated in the Prior Proceeding*

The issue in the present case was different from the one adjudicated in the prior proceeding. In the prior proceeding, the main issue was whether Benkahla participated in a jihad camp in 1999 in the territory of Afghanistan controlled by the Taliban; no testimony of Benkahla was at issue because he did not testify at that trial. In the present proceeding, the main issue was whether, after he was acquitted in 2004, Benkahla testified untruthfully to the grand jury by denying that in 1999 he participated in a jihad camp *anywhere.*

Benkahla's argument relies on cases in which the defendant was prosecuted for perjury for lying in his own defense at an earlier trial. In those cases, the jury's acceptance of the defendant's testimony was essential to the verdict that the jury reached in the prior proceeding. *Ruhbayan,* 325 F.3d at 203 (noting that, in *Nash v. Fiel,* the jury necessarily had to pass upon the truthfulness of the defendant's account because there were but two conflicting explanations of Nash's possession of the firearm, Nash's version, and the Government's version).

***27** As a result, charging the defendant with perjury for the testimony that the jury believed at the earlier trial can implicate double jeopardy concerns, and the government in such cases might be collaterally estopped from challenging again the defendant's testimony given at an earlier trial. As *Ruhbayan* holds, however, even in those cases in which a

defendant is prosecuted for perjury for lying in his own defense at an earlier trial, collateral estoppel does not necessarily apply.

In any event, cases such as *Nash v. Fiel* are much different from that of Benkahla. The testimony of Benkahla that was the subject of the perjury charge was *not* testimony that convinced an earlier jury to acquit him. Instead, the testimony that was the subject of the charge was grand jury testimony that the earlier jury never heard because the grand jury testimony was not given until after that first trial concluded. In essence, the issue in this case was the truth of Benkahla's testimony, which obviously was not considered in the 2004 trial.

Regardless of whether Benkahla participated in a jihad camp *in Afghanistan* -- which was the question at issue in the first prosecution - - the question for the jury in 2007 was whether he was truthful when he later testified before the grand jury that he did not participate in a jihad camp in Pakistan or, indeed, *anywhere.* Thus, the issue in question in this case was different from the one adjudicated in the prior proceeding.

28 B. The Issue in This Case Was Not *Actually Determined in the Prior One

The central fallacy of Benkahla's argument is established by the fact that the issue litigated in this case was not actually determined in the prior proceeding. In the prior case, the main issue was whether Benkahla participated in a jihad camp in 1999 *in Afghanistan.* Indeed, the element of the offense charged in the 2003 indictment for which the government's proof failed was that Benkahla's participation in a jihad camp occurred *in Afghanistan.* Ultimately, while Judge Brinkema determined that Benkahala *had* participated in a jihad camp in the summer of 1999, she was unable to conclude beyond a reasonable doubt that the camp was in Afghanistan rather than in Pakistan. Accordingly, she acquitted Benkahla of the offense charged.

The issue in this case was different. Benkahla's participation in a camp in Afghanistan was not an element of the offense. Benkahla testified in the grand jury that he did not participate in *any* camp in *any* country, and he was found guilty as charged because the government proved that he participated in such a camp *somewhere.* Thus, the issue in this case was not actually determined in the prior one.

29 C. The Issue Was Not *Necessary* to *The Decision in the Prior Proceeding

As noted above, the issue at stake in this trial (the truth or falsity of Benkahla's grand jury testimony that post-dated his acquittal) was not decided in the prior proceeding. Moreover, even if it *had* been decided, it would not have been *necessary* to the decision.

In the prior proceeding, it was an element of the offense that Benkahla participated in a jihad camp in Afghanistan. Benkahla was acquitted because the government failed to prove that he participated in a jihad camp in Afghanistan. Later, before the grand jury, Benkahla denied participating in a jihad camp anywhere. In the prior proceeding, Judge Brinkema clearly did not acquit Benkahla of participating in a jihad camp in Pakistan; that question was not before her. As a result, the issue not only was not decided in the earlier proceeding, it would have been *unnecessary* to any such decision in the earlier proceeding even if it had been so decided.

D. *The Judgment In the Prior Proceeding Did Not Settle the Issue*

As noted above, the issue in the prior case was whether Benkahla participated in a jihad case in Afghanistan, but the location of the jihad camp in which Benkahla participated was not an element of the present case. Thus, while ***30** the judgement in the prior case was a final and valid one, it did not settle the issue that was at stake in this case.

E. There Was No Opportunity To *Litigate the Issue in the Prior Proceeding*

The issue in this case was the truth or falsity of Benkahla's grand jury testimony and false answers in 2004. That testimony and those false answers were not given until after the prior trial concluded. As a result, the parties did not have any opportunity to litigate the truth or falsity of Benkahla's grand jury testimony and answers to investigators at the trial that preceded his grand jury testimony.

In *Ruhbayan,* this Court ruled that collateral estoppel did not apply to prohibit a perjury trial for a defendant charged with lying at an earlier trial. There, this Court ruled that:

> [I]f the second trial, involving an already litigated issue, will be substantially more than a "mere rehash"-- because of evidence unavailable and undiscoverable prior to the earlier trial-- the Government has not been afforded a full and fair opportunity to litigate the issue.

Ruhbayan, 325 F.3d at 204. In that case, this Court ruled that the fifth element of the *Fiel* test was not satisfied because the government did not at the first trial have "all of the information in front of it." *Id.*

***31** In this case, the proof at trial was substantially different from that presented at the first trial. Indeed, it was Benkahla's grand jury testimony that significantly changed the proof. For example, at the first trial, the government argued that the email from Benkahla to Kasmuri constituted an admission that Benkahla had gone to a jihad camp in Afghanistan because he told Kasmuri in the email that he had "studied in Afghan."

Judge Brinkema, however, concluded that the email was insufficient to prove that Benkahla had gone to a jihad camp in Afghanistan because she was not convinced that Benkahla admitted that he had "trained" in Afghanistan when he wrote Kasmuri that he had "studied in Afghan." JA 90-A. Yet, after he was acquitted, Benkahla testified that, by using those terms, he intended to convey to Kasmuri that he had, in fact, engaged in military training in Afghanistan. JA 663. Had Judge Brinkema been aware of *that* information, the verdict in the last trial likely would have been different.

The government could not have obtained for the first trial the unequivocal evidence from Benkahla himself that the email to Kasmuri meant exactly what the government unsuccessfully argued to Judge Brinkema that it meant. Accordingly, the fifth element of the *Fiel* test is not satisfied, because the government did not at ***32** the first trial have "all of the information in front of it." *Ruhbayan,* 325 F.3d at 204.

In short, to establish his collateral estoppel claim, Benkahla was required to satisfy all of the elements of the *Fiel* test. He could not satisfy any of them. Accordingly, his motion properly was denied.

II. The District Court Did Not Abuse its Discretion in Admitting Evidence to Establish the Materiality of *Benkahla's False Answers to Investigators and the Grand Jury*.

Standard of Review:

"A district court's evidentiary rulings are reviewed under the narrow abuse of discretion standard." *United States v. Beasley,* 495 F.3d 142, 150 (4th Cir. 2007) (affirming the district court's decision to allow a witness to testify as an expert). *See United States v. Safa,* 484 F.3d 818, 822 (6th Cir. 2007) (admission of evidence to prove the materiality of false statements is reviewed for abuse of discretion).

A. *Kohlmann Properly Testified as an Expert*

Benkahla claims that the district court committed plain error by allowing Kohlmann to testify as an expert. Benkahla's Br. at 35-36. Despite his failure to challenge Kohlmann's qualifications as an expert at trial, JA 248-49, Benkahla ***33** disparages Kohlmann's qualifications now. Yet, Benkahla fails to challenge any particular aspect of Kolhmann's extensive qualifications, JA 243-52, 354-64, not the least of which was that he previously had been qualified as an expert in the same subjects six different times in the Eastern District of Virginia, the Southern District of New York, the Eastern District of New York, and in the United Kingdom. JA 360. [7]

In his testimony, Kohlmann did not even mention Benkahla or render any opinion about him. Instead, he provided the jury with useful background to enhance its ability to understand much of the facts that later would be referenced by other witnesses. Kohlmann explained the nature of the jihad camps run for foreigners as well as Pakistanis by LET in Pakistan and Afghanistan. JA 305-29. He described for the jury the history and geography of Afghanistan and the NWFP of Pakistan, the background of and interrelationships between mujahideen movements in Afghanistan, Chechnya, and Kashmir, and several of the personalities who were referenced or depicted in Benkahla's correspondence, documents, and photos, such as Azzam, Hawali, Uqla, Khatab, and Bin Laden.

***34** Finally, Kohlmann explained the concept of a global caliphate, and terms such as jihad, mujahideen, kafir, and fatwa, that were referenced in Benkahla's correspondence and documents. JA 254-305, 330-53. Every one of those individuals, concepts, or terms explained by Kohlmann was depicted or mentioned in documents, photographs, or communications *of Benkahla* that were the subject of questioning of Benkahla by the FBI, or later introduced at trial as probative of his intent to engage in jihad training at a mujahideen camp. *See, e.g.,* GX 9G2 (Benkahla's email to Kasmuri, seeking advice as to what he could do "to better prepare himself" in Kasmuri's "field," and whether he should go to fight in *Chechnya* - - alleged in the indictment); GX 9G3 (Benkahla's email exchange with "myunis" regarding supporting the *mujahideen* - - alleged in the indictment); GX 9A9 (Benkahla's contact information for LET's parent organization, *Markaz-Dawa* - - that was a subject of SA Kneisler's questioning); GX 9C10 (the list of names in the *NWFP* that Benkahla claimed he received from Abdullah - - alleged in the indictment).

These terms were included in Benkahla's email exchanges with government witnesses Kwon and Garbieh, and about which Kwon testified. JA 793-95. *See, e.g.,* GX 7A35 (to Benkahla from Kwon about *Khatab* and the murder of a Russian soldier filmed in the video *Russian Hell 2000*); GX 9G8 (to Benkahla ***35** from Kwon about the *Taliban*); GX 9G9 (to Benkahla from Kwon about *Bin Laden*); GX 9G24 (exchange between Kwon and Benkahla regarding "the *sheik* that the *Salifi* students and the *mujahideen* study with"); GX 9G21 (to Benkahla from Garbieh, about *Hawaii*).

These terms were included in Benkahla's email exchanges with Affan, about whom SA Kneisler questioned Benkahla. *See, e.g.,* GX 9G6 (about *Uqla,* the *Northern Alliance,* and the obligation of Muslims around the world to support the *Taliban* because it was an *Islamic State*); GX 9G10 (about *Basayev*); GX 9G18 (about the jihad in *Chechnya*); GX 9G27 (Benkahla's statement to Affan, "I'm back in *kafir land.* What *a fitna!*").

They were included in Benkahla's other email messages. *See, e.g.,* GX 9G4 (Benkahla's email referencing *salafis* and *kufr* and instructing Vaccarella to not "talk bad" about the *Taliban* or defend "*governments which clearly fight Islam*"); GX 9G14 (email from Benkahla that characterized the United States as "this *kafir* country with the *enemies of Islam*"). They were included in the documents seized from Benkahla. *See, e.g.,* GX 9A3 (the "to do" list seized from Benkahla including "*jihad* training this summer"). Finally, they were included in the photos and documents on his computer, about which he was questioned by SA Kneisler. *See, e.g.,* GX 9L11 (joint photo of *Azzam, Basayev, Khattab,* and *Bin Laden*); GX ***36** 9A17 (statement about the *caliphate*). These references are only a sampling of the myriad instances in which these terms, concepts, and individuals arose in the context of the questions that were asked of Benkahla and the proof of his false testimony, obstruction, and false statements; indeed, most of those terms, concepts, and individuals arose in several different exhibits (even though only one each may be particularly referenced here).

The long and short of it is that Benkahla was questioned about his communication with multiple individuals suspected of involvement in terrorism around the world, and, as a result, the proof at trial about the course of that questioning necessarily included evidence about sensitive topics. Benkahla telephoned or emailed Al-Qaeda associates Ibrahim Buisir and Manaf Kasmuri. Benkahla traveled with his friend Abu Ali to Jeddah, on a trip in which Ali was initiated into Al-Qaeda. Benkahla possessed letters from Bukai and Binkaid referencing al-Rehali, an aide to Zarqawi in Iraq. Benkahla's lecture appeared in a commercially-sold tape series by Timimi, who was himself a student of Hawaii. Seven friends of Benkahla trained at a jihad camp operated by LET, including at least four who did so with the intent to fight against American troops in Afghanistan. Affan and "myunis" corresponded with Benkahla about their intent to assist mujihideen in Chechnya and elsewhere around the world.

***37** It is unrealistic to expect that a typical juror could understand much of the evidence in this case without the assistance of expert testimony such as that provided by Kohlmann. Inasmuch as Kohlmann only identified the individuals and explained the concepts depicted or referenced in Benkahla's own communications and documents - - and the very items about which Benkahla was questioned by the FBI in 2004 - - his testimony was properly admitted to help the jury understand an area that was likely very foreign to them.

Kohlmann's testimony obviously was of assistance in helping the jury understand the context of the evidence they were to hear. Indeed, examination of the transcript of Benkahla's cross-examination of Kohlmann manifests that it was conducted not to impeach Kohlmann's credibility, but to elicit background and contextual facts that Benkahla wanted the jury to consider. JA 354-404.

In all of his testimony, Kohlmann's words were measured and restrained, and he said nothing inflammatory. His testimony helped the jury to understand the evidence in the case just as an expert witness is expected to do. In short, nothing in Kohlmann's testimony was unfairly prejudicial. Not only was there no plain error in allowing his testimony, there was no error of any kind in doing so.

38 B.** ***The Materiality Evidence Was Proper

Benkahla argues that the district court erred in allowing the government to introduce too much evidence to establish the materiality of Benkahla's false statements, Benkahla's Br. at 43-44, but fails to identify a single one that was admitted improperly. Indeed, to the extent that he argues that some materiality evidence was admitted improperly, he erroneously characterized it as admitted only as "materiality" evidence. Although Benkahla asserts that there were 89 exhibits introduced for materiality purposes, Benkahla's Brief at 14, there were in fact only 27 that were not independently admissible. [8]

The Government was obligated to prove beyond a reasonable doubt that Benkahla's false answers and testimony were material to the investigations of the ***39** grand jury and the FBI. *United States v. Sarihifard,* 155 F.3d 301, 306 (4th Cir. 1998). Accordingly, the Government was required to prove that it was material to the investigations to ascertain who helped Benkahla participate in a jihad camp in 1999, and who facilitated his ability to do so, because those people likely were themselves engaging in criminal activity. Similarly, it was material to the investigations to ascertain who else known to Benkahla was interested in participating in such jihad training camps.

In this case, the United States presented the materiality evidence through the testimony of FBI SA Linden. As the Sixth Circuit recently wrote in an analogous situation:

> Indeed, without the information provided by the witness in response to the challenged questions, the jurors would have had no information on which to base their verdict because they could not have intuitively ascertained the relevance of Safa's testimony to the larger conspiracy investigation.

United States v. Safa, 484 F.3d 818, 822 (6th Cir. 2007) (affirming admission of evidence of the materiality of the defendant's false statements). Here, without the information provided by SA Linden, the jurors could not have intuitively ascertained the relevance of Benkahla's answer to the ongoing investigations.

***40** In *United States v. Farnham,* 791 F.2d 331 (4th Cir. 1986), this Court explained that the government could prove that false testimony was material by introducing the complete transcript of the grand jury proceedings, but that "any evidence tending to show the scope of the investigation is competent to establish materiality." *Id.* Ultimately, this Court concluded that the government proved the materiality of Farnham's perjury "by the testimony of the two case agents assisting the grand jury's investigation." *Id.* A similar procedure was followed in Benkahla's case.

To prove that Benkhala's responses were material, the United States introduced portions of the testimony of other witnesses who appeared before the grand jury, and the testimony of SA Linden. SA Linden's testimony was similar to that provided by the case agents referenced by this Court in *Farnham.*

In light *of Farnham,* SA Linden's testimony was appropriate to prove that Benkahla's responses were material to the grand jury's deliberations. *See United States v. Schwieger,* 2001 WL 649826 (S.D.N.Y. June 12, 2001) (approving the use of a summary witness to describe the statements of individuals previously interviewed in connection with a murder investigation to establish the materiality of grand jury testimony later given but alleged to be false), *citing United States v. Regan,* 103 F.3d 1072 (2d Cir. 1997).

***41** Moreover, the factual background of the investigation summarized by SA Linden did not relay the specifics of what the grand jury and the investigators knew of Benkahla's own criminal activity before he testified under immunity. [9] Instead, her testimony focused on individuals associated with Benkahla, such as Timimi, Khan, and Chapman - and the organizations with which *they* were associated, including the Taliban and LET. Once her testimony established the factual background of the investigation involving Benkahla's associates, the jury was able to understand the materiality of the questions asked of Benkahla himself.

The district judge carefully considered the extent that evidence probative of materiality could be admissible without being unduly prejudicial. *See* JA 161E through JA 161J; 164-175, 183-84, 241-2, 414-15. At the most basic level, he only admitted materiality evidence that did not directly implicate Benkahla in ***42** criminal activity. JA 414-15. [10] Moreover, the district court even barred evidence that did not directly implicate Benkahla in criminal activity, on the grounds that its probative value was outweighed by its prejudicial impact. *See, e.g.,* JA 161G through 1611; JA 183-84, (denying admission of GX 3A8, a commercial video about foreign mujahideen in Chechnya that (a) was widely watched and discussed among Benkahla's associates; (b) was referenced in an email from Kwon to Benkahla; and (c) bore a cover photo that was identical to a photo that was stored in Benkahla's computer. GX 9H55, JA 299.

Further, the information that was solely admissible as probative of materiality was carefully segregated to ensure that the jury could limit its use of such evidence to consideration of the materiality of Benkahla's answers. This evidence was introduced through the testimony of only one witness, FBI SA Linden. Indeed, while SA Linden was the *only* witness who provided evidence that was admissible only as probative of materiality, her testimony included *no* evidence that was to be considered for any reason other than materiality.

***43** The district judge carefully and repeatedly instructed the jury that it should not consider SA Linden's testimony for the truth of the underlying matters asserted, or for any purpose other than to determine whether the answers Benkahla provided were material to the investigations of the grand jury and the FBI. Judge Cacheris gave this instruction immediately before SA Linden testified, JA 429, when the trial broke for the day in the midst of her direct examination,

JA 481, when the government concluded its direct exam of SA Linden, JA 573-74, and again before the jury retired to deliberate on a verdict. JA 1231 -33. [11]

Ultimately, the jury found one of the statements that was alleged to be both false and misleading to be misleading but not false, and others to be neither false *nor* misleading. Based on its carefully parsed special verdicts, the jury obviously paid close attention to the instructions.

The evidentiary rulings made by the district court in this case were carefully considered. In the end, they were more favorable to Benkahla than that to which he was entitled. The district court carefully and repeatedly properly instructed the ***44** jury regarding how to consider them. Under these circumstances, the district court's admission of evidence was not erroneous, much less an abuse of discretion.

III. Sufficient Evidence Existed to Corroborate Benkahla's *Admissions Sufficient to Support the Guilty Verdicts.*

Standard of Review: The convictions should be affirmed if, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979).

Benkahla argues that his convictions on Counts 1(A) and 4(D) should be overturned because they were based solely on his own admissions to Kwon and Santora, and that insufficient corroborative evidence exists to establish the trustworthiness of those admissions. Benkahla's argument is moot because the jury found by special verdict that he was convicted of multiple prongs of Counts 1 and 4. Indeed, he was convicted also of Part B of Count 1 (regarding his denial that he knew who "Haroon" and "myunis" were), and Parts A, C, E, F, and G of Count Four (regarding Buisir, Timimi, Siddique and the list of individuals from the NWFP, and Benkahla's own firing of AK-47 rifles and/or receiving jihad training anywhere in the world) of Count 4. Thus, regardless of whether his ***45** convictions on Counts 1(A) and 4(D) were not sufficiently corroborated, his convictions on those counts would not be affected.

In any event, Benkahla's convictions were based on ample evidence outside of his own admissions. While a criminal conviction cannot rest solely upon an uncorroborated confession, corroborating evidence need not itself establish every element of the offense. *United States v. Stephens,* 482 F.3d 669, 672 (4th Cir. 2007). Instead, corroborating evidence must merely tend to establish the trustworthiness of the confession. *Opper v. United States,* 348 U.S. 84, 93 (1954).

Corroborating evidence is sufficient if it "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* "The corroborating evidence, of course, may be circumstantial rather than direct." *United States v. Mathews,* 429 F.2d 497, 498 (9th Cir. 1970). In this case, Benkahla's admissions were extensively corroborated to establish their trustworthiness and justify the jury's inference of their truth. [12]

***46** For example, Benkahla's admissions were clearly corroborated by his passport and Pakistani visa. They evidenced that he entered Pakistan on July 26, 1999, and departed on August 17, 1999. They evidenced that, although he entered through Islamabad, he departed through Peshawar, by the NWPF. GX 7F2, 9A1, 9A2. Expert testimony established that Peshawar was the gateway to jihad camps, and the NWFP a lawless haven for militant Islamists. JA 267-68, 329.

Benkahla's banking and telephone records also corroborated his admissions. These records reflected regular activity before Benkahla arrived in Islamabad in July 1999, as well as after his departure from Peshawar three weeks later. Yet, they reflected absolutely no activity between those two events. The dramatic change from ongoing activity to no activity at all is corroborative of Benkahla's presence in a military training camp during that period. JA 651, GX 9C9.

Further, Benkahla's admissions were also corroborated by the independent evidence that established that LET provided free jihad training to young Muslim men at training camps in the area accessible from Peshawar - - and openly advertised those facts in English. JA 306, 337, 923; GX 1D52, GX 7F2. Testimony established that at least seven of Benkahla's friends or acquaintances obtained such training from camps operated by LET shortly after Benkahla's own trip. JA 709, 792, 914, 923.

***47** Moreover, Benkahla's admissions were corroborated by LET's own information. Independent evidence established that the contact information for LET in Benkahla's address books matched the contact information for LET on LET's newsletter and in the internet link to contact LET. JA 673-74; GX 7A35d, GX 9A8, 9A9. Similarly, the business card of Abu Omer of the Foreign Affairs Department of LET's parent organization, established that the contact information that Benkahla gave to Hamdi for himself included a phone number that was, in fact, the LET's phone number in Pakistan. JA 684-86, 833-34; GX 3A12.

Finally, the truth of the various admissions that Benkahla made to Santora, Kwon, Moore, Kasmuri, Allison (and others), regarding having engaged in jihad training were also corroborated by independent evidence showing that his explanations to the contrary to investigators and the grand jury were incredible. One striking piece of evidence was that, although Benkahla claimed to remember no particulars about Abdullah or the places that he traveled with Abdullah in the NWFP, his own character witnesses attested to Benkahla's intellectual curiousity. JA 1075, 1124-26, JA 1687.

Another compelling piece of independent evidence refuted his claim that he spent about half of his trip to Pakistan in Islamabad, and most of his time in Islamabad researching Pakistani culture at the American Center in Islamabad. JA ***48** 646-47. Testimony from the director of the American Center established that it contained information on America but not on Pakistan. JA 891-93. That testimony, as well as the testimony of Benkahla's own character witnesses, corroborated the evidence that Benkahla attended a military camp in the summer of 1999, because it demonstrated the implausibility of his representations to the contrary.

Benkahla also argues that the government failed to provide sufficient evidence to support a rational jury's finding of guilt beyond a reasonable doubt. Benkahla's Br. at 53. Yet, he fails to identify any specific element upon which the government's proof failed. Inasmuch as Benkahla was found guilty of multiple false and misleading statements, it is difficult to respond to such an amorphous argument.

Nevertheless, it should suffice to point out that, contrary to his argument that "the Government's evidence draws a "weak inference that Sabri may have been interested in attending jihad training," Benkahla's Br. at 54, *it was undisputed* at trial that, in 1999, Benkahla was interested in attending jihad training. As his lawyer argued in closing, Benkahla "was interested in jihad training without question. He made no bones about that. He told them that." JA 1183.

***49** Further, it was undisputed that Benkahla went to Pakistan in July 1999, that he traveled in the NWFP, and that he flew back from Peshawar. It was undisputed that LET operated jihad training camps in or near the NWFP and Peshawar, that LET welcomed young Muslim American men to train at those camps, and that several of Benkahla's friends attended LET camps shortly thereafter.

Finally, it was undisputed that, after Benkahla returned from Pakistan in August 1999, he asserted that he had engaged in jihad training overseas. Regardless of the credibility of Kwon, Santora, and Moore - - each of whom testified as to admissions by Benkahla regarding his jihad training - - it was undisputed that Benkahla made such an assertion to Kasmuri in April 2000. After all, Benkahla admitted in the grand jury and to the investigators in 2004 that, when he asked Kasmuri's advice in April 2000 about whether he and his friends should join the jihad in Chechnya, he intentionally conveyed to Kasmuri that he previously had obtained jihad training in Afghanistan. JA 662-63.

In short, ample corroborating evidence supported the essential facts admitted by Benkahla sufficiently to justify the jury's inference of their truth. *Opper,* 348 U.S. at 93. Further, after reviewing the evidence in the light most favorable to the prosecution, there is no doubt that a rational trier of fact could ***50** have found the essential elements of the crime beyond a reasonable doubt. *Jackson,* 443 U.S. at 318-19.

IV. The District Court Properly Applied U.S.S.C. § 3A1.4, *the "Terrorism Enhancement," to Benkahla's Guideline Sentence*

Standard of Review:

Criminal sentences are reviewed for abuse of discretion. Facts upon which a sentence are based are reviewed for clear error. *Gall v. United States,* ---S.Ct. ----, 2007 WL 4292116, December 10, 2007 (No. 06-7949). Questions involving the legal interpretation of the guidelines that were raised below are subject to *de novo* review. *United States v. Baucom,* 486 F.3d 822, 829 (4th Cir. 2007). A challenge to the determination of a sentence on the grounds that the district court improperly considered sentencing guidelines calculated, in part, on the basis of judicially-found facts, is reviewed for plain error. *United States v. Mackins,* 315 F.3d 399, 405-06 (4th Cir. 2003).

A. Consideration of the Sentencing Guidelines in Fashioning *A Sentence Under 18 U.S.C. § 3553 is Constitutional*

Benkahla argues that his Sixth Amendment rights were violated when Judge Cacheris considered the Sentencing Guidelines' proposed range of 210 to 270 months in fashioning his ultimate sentence of 121 months in accordance with the ***51** factors listed in 18 U.S.C. § 3553. This argument was not raised in the district court and, thereby, is subject to plain error review. No error exists, either plain or otherwise, because a judicial fact-finding to calculate a guidelines sentence cannot constitute a Sixth Amendment violation when the guidelines are only advisory. *United States v. Booker,* 543 U.S. 220 (2005).

As this Court has stated:

> When applying the Guidelines in an advisory manner, the district court can make factual findings using the preponderance of the evidence standard.

United States v. Battle, 499 F.3d 315, 322-23 (4th Cir. 2007). Nothing in *Rita v. United States,* 127 S.Ct. 2456 (2007), or *Gall* changed that.

Because the guidelines are not mandatory, the district court was free to sentence Benkahla to any amount of incarceration up to the statutory maximum - - in this case, 20 years. Judge Cacheris sentenced Benkahla to 121 months, well within the statutory maximum based on the facts found by the jury. As a result, there was no Sixth Amendment violation.

In essence, Benkahla (joined by *amici*) rests his argument on one district court opinion, *United States v. Griffin,* 494 F.Supp. 2d 1 (D. Mass. 2007), and the concurring opinion of Justice Scalia in *Rita.* Benkahla's Brief at 21-22; Brief of *Amici Curaie* Council on American-Islamic Relations ("CAIR") and Muslim ***52** American Society ("MAS") Freedom Foundation, at 18-23. [13] Justice Scalia's opinion was joined only by Justice Thomas, *Rita,* 127 S.Ct. at 2474 - - and Justice Thomas later announced that he has since changed his mind. *Kimbrough v. U.S.,* --- S.Ct. ----, 2007 WL 4292040, p. 18 (December 10, 2007). [14] Neither ***53** Justice Scalia's concurrence in *Rita,* nor the district judge's opinion in *Griffin* constitutes the law of the land as it stand now. As a result, Judge Cacheris's failure to reach similar conclusions cannot constitute plain error.

In this case, Benkahla's sentence was not mandated by the federal sentencing guidelines. Indeed, the district judge imposed on Benkahla a variance sentence that was over 40 percent lower than the minimum called for by the sentencing guidelines. Under these circumstances, no judicial fact-finding to calculate the appropriate guidelines sentence could constitute a constitutional violation.

B. There is No Inconsistency Between *§3A1.4 and Its Application Note 2*

Benkahla argues that Application Note 2 to the Terrorism Enhancement guideline at §3A1.4 should be ignored because it is inconsistent with the text of §3A1.4. As best as we can make out, he claims that they are inconsistent because ***54** an obstruction can never involve a federal crime of terrorism unless it was intended to promote such a crime. This argument is baseless for several reasons.

Section 3A1.4 of the Sentencing Guidelines provides for a significant enhancement to the base offense level if "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." Application Note 2 to that section provides that an offense that involved "obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism."

First, and most basically, there is no inconsistency between Section 3A1.4 and its application note. On its face, Application Note 2 applies where a defendant's offense "involved, or ... intended to promote" an investigation of a federal crime of terrorism." That language is identical in all material respects to the language of § 3A1.4 itself. No inconsistency between the application note and the guideline exists.

Moreover, there is no reason to read into Application Note 2 a requirement that it applies only where the obstruction was intended to promote the federal crime of terrorism. Section 3A1.4 plainly applies to every "felony that involved or was intended to promote a federal crime of terrorism." Accordingly, a felony that involved a federal crime of terrorism triggers application of Section 3A1.4, ***55** regardless of whether the defendant intended to promote such a crime. Similarly, obstruction of an investigation of a federal crime of terrorism is a felony that *involves* a federal crime of terrorism, regardless of whether it was conducted with the intent to promote such a crime. As a result, Section 3A1.4 applies, and there is no inconsistency between the section and its Application Note 2.

In any event, Judge Cacheris varied dramatically from Benkahla's guidelines sentence. This is not a case where the district court tethered its sentence to the sentencing guidelines; indeed, it imposed a sentence far removed from the sentence called for by the guidelines. Ultimately, the district court imposed the sentence that it thought best furthered the goals of sentencing pursuant to §3553.

This was not a garden-variety perjury and obstruction case. Because of the of the questions posed to Benkahla, the facts of the case cried out for a sentence substantially higher than that typically imposed in perjury and obstruction cases. Inasmuch as Judge Cacheris did not follow the applicable guideline range anyway, there is every reason to believe that he would have imposed the same sentence even if Application Note 2 had been ignored.

***56** C. The District Court's Finding that the Offense Under Investigation was a Federal Crime of *Terrorism Was Not Clearly Erroneous*

Benkahla argues that the district court clearly erred in finding that Benkahla obstructed the investigation of a federal crime of terrorism. Benkahla's Br. at 33. The reasons he provides, however, are unpersuasive.

First, Benkahla argues that any false statements concerning his use or handling of weapons could not constitute obstruction because the district court found insufficient corroboration to uphold the verdicts of guilty based on those

false answers. This argument is irrelevant, because Benkahla was convicted of multiple false statements and obstructions that were sufficiently corroborated. For example, Benkahla's false statement that Timimi did not speak about jihad at Dar al-Arqam was proved by the tapes of Timimi's lectures in which he did just that.

For another example, Benkahla's false statements about spending his time in Islamabad studying Pakistani culture at the American Center were disproved by the trial testimony of the director of that center. JA 892-93. The time investigators spent attempting to verify Benkahla's false story about spending his time researching Pakistani culture at the American Center in Islamabad alone constituted a clear obstruction of the investigation.

***57** Further, proof that that is less than beyond a reasonable doubt for a finding of guilt may well constitute a preponderance of evidence sufficient upon which to base a guidelines calculation for sentencing purposes. *Battle,* 499 F.3d at 322-23. Even if portions of Benkahla's false testimony were insufficiently corroborated to prove his perjury and obstruction beyond a reasonable doubt, they surely were sufficient to prove it by the preponderance standard applicable at sentencing.

Moreover, Benkahla's argument is foreclosed by Congress's determination to bar all restrictions on what prior acts of a defendant may be considered for sentencing purposes:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661. Thus, it simply does not matter for sentencing purposes that some of his convictions were based on what the district court found to be uncorroborated admissions.

Benkahla also argues that he did not obstruct an investigation of a federal crime of terrorism because Abu Ali was convicted of material support to a terrorist group, "thus negating any finding of actual obstruction on the part of Sabri." Benkahla's Br. at 33. There is no authority for the proposition that the ***58** government's ultimate success in concluding an investigation vitiates the fact that a defendant previously obstructed that investigation. The fact that the government was ultimately able to convict Abu Ali despite Benkahla's obstruction is irrelevant to whether Benkahla obstructed the investigation in the first place.

Finally, Benkahla argues that the district court's finding of a specific offense of a federal crime of terrorism centered on Timimi and Abu Ali. He argues:

> Without al-Timimi and Abu-Ali's crimes, the Government would be unable to point to a specific violation of an enumerated statute that was calculated to influence or affect the conduct of Government.

Benkahla's Br. at 33-34. To the contrary, the government established that the investigation obstructed by Benkahla encompassed numerous violations of 18 U.S.C. §§ 2339A and 2339B - - two enumerated statutes - - that were calculated to influence or affect the conduct of government by others besides Timimi and Abu Ali.

Application Note 1 to Section 3A1.4 provides that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5). In 18 U.S.C. § 2332b(g)(5), the term "federal crime of terrorism" is defined to include an offense that violates any of a lengthy list of criminal statutes, and that "is calculated to influence or affect the conduct of government by intimidation or ***59** coercion, or to retaliate against government conduct." In particular, the list of applicable criminal statutes includes 18 U.S.C. § 2339A and § 2339B (relating to providing material support to terrorist organizations).

Benkahla was questioned in the course of an investigation of violations of material support to LET and Al-Qaeda, in violation of 18 U.S.C. § 2339A and 2339B. As the trial testimony of SA Linden established, it was undisputed that the FBI and the grand jury sought Benkahla's information to further investigations locally and, indeed, all over the world, of individuals who had obtained training at foreign terrorist camps or were otherwise connected to terrorist groups, including, for example, Buisir, Abdullah, Affan, Chandia, and Ajmal Khan. In light of this background, it cannot seriously be disputed that Benkahla was questioned in the course of an investigation into federal crimes of terrorism in addition to those by Timimi and Abu Ali.

In any event, the obstruction of the investigation of the crimes of Timimi and Abu Ali alone sufficed to support the district court's appropriate finding that Benkahla did, indeed, obstruct an investigation of a federal crime of terrorism.

60 D. The District Court's Calculation of a Guidelines *Sentence Was Error But Irrelevant In Light of the Variance

The district court concluded that a departure from the guideline range was appropriate because Criminal History Category VI overstated Benkahla's criminal history. This conclusion was legally incorrect because enhancement of a criminal history category is inherent in the application of a §3A1.4 enhancement; if Category VI were only applicable to defendants with extensive criminal histories, then there would be no reason to include the bump to Category VI in §3A1.4 in the first place. In view of the district court's reliance on a variance pursuant to the § 3553(a) factors, however, this error was not necessary to the sentence.

In justifying its departure from the Sentencing Guidelines, the district court also clearly erred on factual matters. It stated that Benkahla's "likelihood of ever committing another crime is infinitesimal." JA 1631. To the contrary, Benkahla still has not divulged the truth regarding the matters about which he committed perjury, and there no reason to believe that, were he compelled to testify again, he would not again perjure himself and obstruct justice. The district court's clearly erroneous assertion, however, was not necessary to its judgment.

The district court further described Benkahla as an individual who has not committed any criminal acts other than those of conviction. JA 1631. That ***61** description also is clearly erroneous, but unnecessary to the judgment. It is undisputed that Benkahla conspired with his brother to provide false information to a firearms dealer in 1999 in order to acquire a firearm that has yet to be recovered. JA 710, 886. Moreover, the record also established that Benkahla committed numerous serious offenses, including, but not limited to insurance fraud, [15] bank fraud, [16] bankruptcy fraud, [17] and tax evasion. [18]

Also mystifying is the district court's description of Benkahla as dedicated to his son. JA 1631. Aside from his obligation to pay $40 a week in child support, JA 1686, while holding $1,000,000 in real estate equity, JA 1689-90, there are no facts to support the district court's description.

***62** In short, the district court's conclusions regarding the calculation of Benkahla's proper criminal history category are as baseless as they are mystifying. This Court need not address those errors, however, because they concern only findings not essential to the judgment below, and the variance sentence ultimately imposed does not constitute an abuse of discretion. *Gall,* 2007 WL 4292116.

Conclusion

For the foregoing reasons, Benkahla's appeal should be denied.

Footnotes

1 "JA _ (Witness)" refers to the pertinent page of the Joint Appendix filed in this appeal. "GX _" refers to the pertinent government trial exhibit. "Benkahla's Br. at _" refers to the pertinent page of Benkahla's brief filed in this Court.

2 Whether Benkahla attended a jihad training camp between July 26th and August 17th was one of the fundamental factual issues for the jury to resolve in determining whether he committed perjury, obstruction, and false statements.

3 Benkahla asserts that his 2004 charges resulted from his interrogation and "torture," Benkahla's Br. at 2, which he claims Judge Brinkema characterized as "Kafkaesque" *Id.* at 4. Further, he claims that the government case agent, Special Agent ("SA") Kneisler, was responsible for his mistreatment. *Id.* He does not cite to any portion of the record for these assertions, which is not surprising, for they are demonstrably untrue. First, the IEEPA and firearms charges of which he was acquitted at trial in 2004 did not result from the questioning of Benkahla; after all, Kwon, Santora, and Hamdi had already provided the information that Benkahla had gone to a jihad camp - - and the questioning at issue elicited only (false) exculpatory answers anyway. JA 609, 1009, GX 3E1.

More importantly, no "torture" was involved. As this Court noted with respect to the related accusation made by Chapman (who was arrested in Saudi Arabia and returned to the United States with Benkahla under the same conditions to face the same indictment), there was no evidence that government agents coerced statements through physical pressure or imminent threats of physical harm. *Khan,* 461 F.3d at 497. The reference to "kafkaesque" treatment was made regarding Benkahla's treatment by the Saudis before he ever reached American custody. *United States v. Benkahla,* Crim. No. 03-296-A, January 23, 2004, Transcript of Motions Hearing, at p. 70. Finally, not only was SA Kneisler not responsible for the conditions of his confinement, but Judge Brinkema specifically found that SA Kneisler had done nothing improper. *Id. at* 69.

4 This was, in fact, not correct. GX 9G27.

5 Benkahla attempts to avoid this failing by arguing that he was prejudiced by the admission of evidence that would not have been admitted had Counts I(A) and IV(D) been dismissed before trial. Benkahla's Br. at 47-48. Yet, Benkahla fails to identify any particular evidence that would have been inadmissible had his estoppel argument been accepted pre-trial. This is no accident, because there was no such evidence. After all, even if Counts I(A) and IV(D) had been dismissed on estoppel grounds pre-trial, Benkahla's involvement in jihad training with LET would have been relevant to the jury's consideration of the truth of his testimony about Abdullah, Siddique, Buisir, "myunis," and Haroon.

6 In light of these findings, the government could properly have been accused of dereliction had it *not* obtained a compulsion order to obtain Benkahla's truthful testimony, and *not* sought an indictment of Benkahla for failing to provide it. *United States v. Calandra,* 414 U.S. 338, 344 (1974) ("A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").

7 Even three years earlier, Judge Brinkema stated at Benkahla's first trial that "I'm going to accept him. I accepted him as an expert in the other trial, and clearly, he's written enough and studied enough on this, and I'm going to accept him as an expert." JA 32.

8 The list of materiality exhibits included in the Joint Appendix at JA 1031-39 is *not* the list of exhibits that was admitted only as probative of materiality. JA 1140. Benkahla's appellate counsel was not present at trial. The list of exhibits admitted only as materiality evidence actually provided to the jury was not included in the Joint Appendix, but it listed 27 exhibits. These consisted of snapshots of the front, back, and one page of a book about LET; neutral photographs of Hicks Hawaii, Bharot, and Cheiko; full or partial transcripts of five witnesses that appeared before the grand jury; five of Benkahla's email messages; three lectures by Timimi; one article by Timimi in Arabic and another for its, English translation; one article by Hawali; one chart of grand jury subpoenas; one short video of a jihad training camp; one email of Kwon's; and a video of Abu Ali reading his statement about how he joined Al-Qaeda. The remaining exhibits identified on the list referenced by Benkahla at JA 1031-1039 were admitted for other reasons, as noted in the right-hand column of the table found at those pages.

9 Indeed, likely the most significant testimony about Benkahla that the grand jury heard before Benkahla was immunized was the testimony of his friend, Hamdi. JA 304. The grand jury had heard from Hamdi that Benkahla told him that Benkahla not only went to a mujahideen camp during his trip in 1999, but that he actually engaged in combat on behalf of the Taliban. GX 3E1. Regardless of Hamdi's credibility, that testimony surely was probative of the nature of the grand jury's investigation when Benkahla testified before it. Under *Farnham,* the Hamdi grand jury transcript was clearly admissible. Nevertheless, the government withheld it in the interests of caution, and the jury never saw it for materiality or any other reason.

10 In doing so, Judge Cacheris considered the reasoning of *United States v. Reyes,* 18 F.3d 65 (2d Cir.1994), in which the Second Circuit distinguished inadmissible hearsay testimony that directly implicates a defendant from admissible hearsay testimony

that does not directly do so. JA 414. The analysis in *Reyes* was of only limited applicability to Benkahla's trial, however, because materiality was not an element of the offense charged in that case.

11 The government reiterated these instructions to the jury in its own opening statement. JA222.

12 The admissions to Santora and Kwon were just a fraction of the evidence of Benkahla's. admissions. For example, Benkahla also made damaging admissions to Moore, Garbieh, "Allison," and Kasmuri. For that matter, he made a damaging admission by including "jihad training this summer" on his "to do" list. GX 9A3. Together, the multiple admissions made orally and in writing over a period of years reinforced each other and together provided significant indicia of reliability.

13 In describing themselves, *Amici* Brief at 1, CAIR and MAS omit reference to a shared background that limits their membership to those of a particular political bent, and undercuts their credibility. The Muslim Brotherhood is a generally covert international organization whose credo is "Allah is our goal; the Qur'an is our constitution; the Prophet is our leader; Struggle is our way; and death in the path of Allah is our highest aspiration. *See, e.g.,* Efraim Karsh, *Islamic Imperialism,* 208-09 (Yale University Press 2006).

MAS was founded as the overt arm of the Muslim Brotherhood in America. *See, e.g.,* Noreen S. Ahmed-Ullah, Sam Roe and Laurie Cohen, *The new face of the Muslim Brotherhood -The Muslim American Society,* CHI.TRIB., Sep. 19, 2004, available at *http://www.chicagotribune.com//news/specials/chi-0409190261* sep 19,1,7870150print.story?coll=chi-newsspecials-hed&ctrack=1 &cset =true.

Moreover, from its founding by Muslim Brotherhood leaders, CAIR conspired with other affiliates of the Muslim Brotherhood to support terrorists. *See* Government's Memorandum in Opposition to CAIR's Motion for Leave to File a Brief, *etc.,* in *United States v. Holy Land Foundation... et al,* Cr. No. 3-04-cr-240-G (N.D. Tx. September 4, 2007), available at *http:// www.investigative project.org/documents/case_docs/479.pdf.* Proof that the conspirators agreed to use deception to conceal from the American public their connections to terrorists was introduced at both the Texas trial in 2007 and also at a Chicago trial the previous year. *United States v. Ashqar, et al.,* No. 03-978 (N.D. 111.2006).

14 In *Kimbrough,* Justice Thomas dissented on the grounds that the district erred by departing below the mandatory guideline range. Further, he wrote:

> "Although I joined Justice SCALIA's dissent in *Rita* accepting the *Booker* remedial opinion as a matter of "statutory *stare decisis,*" 551 U.S., at ---, 127 S.Ct., at 2475, I am now convinced that there is no principled way to apply the *Booker* remedy - certainly not one based on the statute. Accordingly, I think it best to apply the statute as written, including 18 U.S.C. § 3553(b), which makes the Guidelines mandatory.

Kimbrough, 2007 WL 4292040, at p. 18.

15 Benkahla represented to the district court that he did not earn wages, JA 1688, but obtained an insurance settlement for an auto accident by claiming lost wages. JA 1022-23.

16 Benkahla falsely represented to lenders that he had substantial wage income during times that - - according to what he told the district court - - he either was unemployed or earned much less. JA 1117, 1688; GX 9T3, 9T4.

17 Preliminary to and in the midst of his father's bankruptcy filings, Benkahla received from his father $1,000,000 in real properties - - including the one in which his father continues to live rent-free - - and has held them in his own name for more than six years. JA 15 (minute entry 02/02/2007), 1688, 1690.

18 Although he admitted to the district court that he earned income and gained over $1,000,000 in assets between 1998 and 2005, he filed no tax returns. GX 9T3, 9T4; JA 1688-90, JA 1022.