FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BASAALY SAEED MOALIN, AKA Basal, AKA Muse Shekhnor Roble, *Defendant-Appellant.*	No. 13-50572 D.C. No. 3:10-cr-04246-JM-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MOHAMED MOHAMED MOHAMUD, AKA Mohamed Khadar, AKA Sheikh Mohamed, *Defendant-Appellant.*	No. 13-50578 D.C. No. 3:10-cr-04246-JM-2
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ISSA DOREH, AKA Sheikh Issa, *Defendant-Appellant.*	No. 13-50580 D.C. No. 3:10-cr-04246-JM-3

UNITED STATES OF AMERICA,
  Plaintiff-Appellee,
 	
v.
 	
AHMED NASIR TAALIL
MOHAMUD,
  Defendant-Appellant.
	No. 14-50051
	
	D.C. No.
	3:10-cr-04246-JM-4
	
	OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted November 10, 2016
Pasadena, California

Filed September 2, 2020

Before: Marsha S. Berzon and Jacqueline H. Nguyen,
Circuit Judges, and Jack Zouhary,[*] District Judge.

Opinion by Judge Berzon

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[*] The Honorable Jack Zouhary, United States District Judge for the
Northern District of Ohio, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed the convictions of four members of the Somali diaspora for sending, or conspiring to send, $10,900 to Somalia to support a foreign terrorist organization, in an appeal that raised complex questions regarding the U.S. government's authority to collect bulk data about its citizens' activities under the auspices of a foreign intelligence investigation, as well as the rights of criminal defendants when the prosecution uses information derived from foreign intelligence surveillance.

The panel held that the government may have violated the Fourth Amendment when it collected the telephony metadata of millions of Americans, including at least one of the defendants, pursuant to the Foreign Intelligence Surveillance Act (FISA), but that suppression is not warranted on the facts of this case. Having carefully reviewed the classified FISA applications and all related classified information, the panel was convinced that under established Fourth Amendment standards, the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial. The panel wrote that to the extent the public statements of government officials created a contrary impression, that impression is inconsistent with the contents of the classified record.

The panel rejected the government's argument that the defendants lacked standing to pursue their statutory challenge to the (subsequently discontinued) metadata collection program. On the merits, the panel held that the metadata collection exceeded the scope of Congress's authorization in 50 U.S.C. § 1861, which required the government to make a showing of relevance to a particular authorized investigation before collecting the records, and that the program therefore violated that section of FISA. The panel held that suppression is not clearly contemplated by section 1861, and there is no statutory basis for suppressing the metadata itself. The panel's review of the classified record confirmed that the metadata did not and was not necessary to support the requisite probable cause showing for the FISA Subchapter I warrant application in this case. The panel wrote that even if it were to apply a "fruit of the poisonous tree" analysis, it would conclude that evidence from the government's wiretap of defendant Moalin's phone was not the fruit of the unlawful metadata collection. The panel wrote that if the statements of the public officials created a contrary impression, that impression is inconsistent with the facts presented in the classified record.

The panel confirmed that the Fourth Amendment requires notice to a criminal defendant when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from the surveillance of that defendant conducted pursuant to the government's foreign intelligence authorities. The panel did not decide whether the government failed to prove any required notice in this case because the lack of such notice did not prejudice the defendants.

The panel held that evidentiary rulings challenged by the defendants did not, individually or cumulatively, impermissibly prejudice the defense.

The panel held that sufficient evidence supported defendant Doreh's convictions.

COUNSEL

Joshua L. Dratel (argued), Joshua Dratel P.C., New York, New York; Alexander A. Abdo (argued), Jameel Jaffer, Patrick Toomey, and Brett Max Kaufman, American Civil Liberties Union, New York, New York; David J. Zugman, Burcham & Zugman, San Diego, California; Elizabeth Armena Missakian, Law Office of Elizabeth A. Missakian, San Diego, California; Benjamin L. Coleman, Coleman & Balogh LLP, San Diego, California; for Defendants-Appellants.

Jeffrey M. Smith (argued), Appellate Counsel; John P. Carlin, Assistant Attorney General; National Security Division, United States Department of Justice, Washington, D.C.; Caroline P. Han, Assistant United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

Michael Price, Brennan Center for Justice, New York, New York; Faiza Patel, Brennan Center for Justice at New York University School of Law, New York, New York; Alan Butler, Electronic Privacy Information Center (EPIC), Washington, D.C.; David M. Porter, Co-Chair, NACDL Amicus Committee; Sacramento, California; Bruce D. Brown, Katie Townsend, and Hannah Bloch-Wehba, Reporters Committee for Freedom of the Press, Washington,

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