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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. HAMID HAYAT, Defendant.	No. CR S-05-0240 GEB

DEFENDANT'S MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF UNDER 28 U.S.C. §2255

TABLE OF CONTENTS

Table of Contents continued

Table of Contents continued

Table of Contents continued

Table of Contents continued

TABLE OF AUTHORITIES

CASES

Table of Authorities continued

Table of Authorities continued

Table of Authorities continued

STATUTES

INTRODUCTION

As Chief Justice Roberts recently wrote, "An individual facing serious criminal charges brought by the United States has little but the Constitution and his attorney standing between him and prison." *Kaley v. United States*, 571 U.S.__ (February 25, 2014) (Roberts, C.J., dissenting). This case proves the point. The petitioner, Hamid Hayat, was utterly failed by his attorney, and as a result, has spent nine years locked in prison for a crime he did not commit, an injustice that this Court must now remedy.

A. Charges and Evidence

Hamid Hayat, a United States citizen, was accused of attending a jihadist training camp near Balakot during a visit to Pakistan, and then entering this country with the intent to commit acts of terrorism. The charges were serious, and the stakes were high. In the wake of the 9/11 attacks, the government aggressively sought to obtain terrorism convictions, and it viewed this as a marquee case—a case that, not surprisingly, drew national media attention. The potential for a verdict based on passion and prejudice, rather than evidence, was also high. Rather than quelling those flames, the FBI fanned them by announcing that Hamid's arrest resulted from the unearthing of an Al Qaeda cell in Lodi, California, a claim that the government since has admitted was without any factual basis.

Hamid was innocent of the charges: he never attended a militant training camp in Balakot or anywhere else. He had gone to Pakistan in April of 2003 to get married and to help his mother get medical care. He was arrested soon after his return to this country in May of 2005. Other than his confused and confusing statements about training camps—made during a marathon FBI interrogation and after hours of his repeated denials that he had attended any such camp—the government gave the jury little to confirm its claims. As the FBI's lead case agent testified when asked whether his investigation had unearthed evidence that Hamid attended such a camp in Pakistan: "Minus the statements, no." Hamid's often comical descriptions of militant camps, made while yawning and dozing caused by exhaustion, were no more than an effort, as he said at the time, to do "my job for my country" and to please his interrogators so that, finally, they would simply let him go home. Furthermore, though the FBI could readily access the area

around Balakot as a result of cooperation agreements with the Pakistani government, the prosecution could produce no on-the-ground evidence that the jihadist camp Hamid supposedly attended was functioning when he was in Pakistan.

Numerous alibi witnesses were available to refute the charges. The proof that Hamid was innocent lay largely with the many family members and others in the community where Hamid lived during his visit to Pakistan. Those witnesses, most still in Pakistan at the time of Hamid's 2006 trial but also others who had returned to the United States, could have established that Hamid never left his family between October 2003 and November 2004, the period when the government claimed he was in a Balakot training camp. Moreover, persuasive evidence was available to establish that the militant camps in the Balakot area, once directed at Pakistan's conflict with India over Kashmir, had been shut down by the Pakistani government following the 9/11 attacks, before Hamid had arrived in Pakistan.

B. Hamid's Attorney

Given the high stakes and the enormous complexity of the case, perhaps no defendant has ever needed an experienced and effective defense attorney more than Hamid. He was young and without means. A severe attack of meningitis during his adolescence had impaired his cognitive abilities, and his English was rusty upon his return from his two year visit to Pakistan. At trial, he faced a team of at least four government lawyers, including two specialists from the Justice Department's anti-terrorism unit, with all the resources of the FBI, the CIA, and the National Security Agency at hand. And the case involved thorny issues of the right to discovery of classified information and the defendant's right to collect and preserve evidence in a country half way around the world.

Hamid sorely needed, and was constitutionally entitled to, not only a highly skilled lead lawyer with substantial experience in cases that transcended national boundaries, but also research attorneys, investigators, and translators. Absent such a team, Hamid's defense could never be fairly presented in an American courtroom, no matter how innocent he was. Instead, Hamid was represented by a single attorney, Wazhma Mojaddidi. Ms. Mojaddidi had never defended a client in a criminal matter, not even a state misdemeanor case. Now, in 2014, Ms.

Mojaddidi is an experienced and well-respected attorney specializing in immigrations and family law matters. But when she first appeared in this matter in June of 2005, she had been a practicing lawyer for only eighteen months. To be sure, given her mastery of South Asian languages and her understanding of the Muslim religion and Pakistani culture, she would have been a valuable junior member of a defense team representing Hamid. When she began his representation, however, she knew nothing about defending a client in a complex federal criminal proceeding. The lawyer who could overcome that handicap to provide adequate representation in this most difficult of federal prosecutions has not been born. That is all the more true given that, in a case that demanded immediate and intense investigation in a country thousands of miles away, Ms. Mojaddidi did not retain an investigator to assist her in preparing Hamid's defense.

Ms. Mojaddidi *knew* she could not provide even a minimally adequate defense for Hamid if she defended him by herself. For that reason, she agreed to cede key decision-making power over strategic and tactical matters in Hamid's case to Johnny Griffin, a former assistant United States attorney and experienced defense counsel who had been retained to defend Umer Hayat, Hamid's father and co-defendant. In return, Mr. Griffin agreed to direct Ms. Mojaddidi on how she should conduct Hamid's defense. Mr. Griffin was opposed to conducting any investigation or filing any motions that might interfere with his strategy of forcing the government to trial as quickly as possible. Ms. Mojaddidi acceded to that tactic, which may have made sense for Umer, but had no potential benefit for Hamid. She also bowed to Mr. Griffin's demand that he receive and control the funds available to defend both Hayats, father and son. Ms. Mojaddidi thus could not obtain services for Hamid's defense, such as expert witnesses, without Mr. Griffin's approval and provision of needed funds.

By ceding control of the case to Mr. Griffin, Ms. Mojaddidi violated both ethical guidelines and Supreme Court case law holding that "a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person." *Wood v. Georgia*, 450 U.S. 261, 271, n.17 (1980). That decision was disastrous for Hamid's defense.

/ /

C. Trial Counsel's Failures

Both because of the conflict of interest under which she operated and because of egregious gaps in her understanding of federal criminal law and procedure—in particular, the Speedy Trial Act, Rule 15 of the Federal Rules of Criminal Procedure, the Classified Information Procedure Act (CIPA), the rules of cross-examination, the Federal Rules of Evidence governing the testimony of expert witnesses, and the jurisprudence and social science concerning false confessions—Ms. Mojaddidi failed to perform the most basic defense functions needed to defend Hamid.

First and foremost, she failed to investigate the case, both domestically and in Pakistan, and to preserve and present the exculpatory testimony of numerous witnesses who could have established Hamid's alibi defense and rebutted the government's claims concerning the functioning of the Balakot camp. Following Hamid's convictions, this Court refused to consider his claim for a new trial based on newly presented alibi evidence on the ground that the evidence could have been, but was not, proffered earlier by Ms. Mojaddidi.

Second, after failing to object to grossly misleading if not utterly false (but well-paid) expert testimony on which the government heavily relied, Ms. Mojaddidi failed to present, or to present in a timely fashion, critical and available expert testimony concerning (a) false confessions; (b) a Koranic *Taweez* carried by Hamid that a government's witness falsely claimed was jihadist in nature, and (c) the Pakistani government's defunding of militant camps in the Balakot area prior to the events charged in this case. Again, in denying a new trial, this Court refused to consider substantial legal challenges to the testimony of the government's "expert" witnesses because they had not been preserved by Ms. Mojaddidi prior to or during trial.

Third, Ms. Mojaddidi failed to obtain exculpatory evidence that the government deemed classified. This evidence could have demonstrated: (1) that there was no functioning jihadi camp in the Balakot area in 2003 and 2004; (2) that Hamid never received or sent messages discussing terrorist operations in the United States; and (3) that the record of his electronic communications was inconsistent with his having attended a training camp in Balakot. Such evidence lay within the massive data amassed by our government's aerial surveillance and warrantless electronic

surveillance of communications within and from Pakistan after 9/11. Soon after Hamid's indictment, however, the government made clear its intention to block defense access to surveillance information on the ground that it was classified. In an act of gross professional misfeasance, Ms. Mojaddidi refused, at Mr. Griffin's direction, to apply for the security clearance under CIPA that would have permitted her to contest the government's refusal to provide discovery of exculpatory classified information. Stunningly, Ms. Mojaddidi also signed on to Mr. Griffin's stipulation giving the government the power to bar from admission any and all classified information, no matter how probative that evidence was of her client's innocence.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. That right includes the right to reasonably competent counsel and also to counsel that is free from a conflict of interest. Both prongs were violated here. Given her lack of experience and knowledge, Ms. Mojaddidi would have been incapable of providing Hamid with a constitutionally adequate defense even had she not been hampered by the blatant conflict of interest under which she operated. Under the Sixth Amendment, Hamid is entitled to a new trial.

Indeed, the Ninth Circuit suggested as much in its opinion disposing of Hamid's direct appeal. Last year, a divided panel of the Ninth Circuit affirmed Hamid's convictions, in an opinion, which, extraordinarily, was issued nearly four years after oral argument. The panel majority denied several of Hamid's claims because Ms. Mojaddidi had failed to object at trial and had thus failed to preserve the issues for appeal. As the panel majority stated repeatedly, however, there was no apparent strategic rationale for counsel's failures. *See United States v. Hayat*, 710 F.3d 875, 895-97 & nn.15-17 (9th Cir. 2013). The panel stated that challenges to Ms. Mojaddidi's performance could be addressed in a § 2255 petition. This petition now raises those challenges.

D. *Brady* Material

Responsibility for the miscarriage of justice that has resulted in Hamid's many years of unconstitutional confinement cannot, however, be laid entirely at the door of his trial counsel. To state it bluntly, the government took advantage of her ineptitude to imprison a man who it knew, or certainly should have known, was entirely innocent of the crimes of which he was

accused. The government succeeded in denying Hamid's statutory right to a speedy trial by claiming additional time was needed to obtain and provide to the defendants exculpatory material that was in possession of this country's intelligence services. *See Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the Due Process Clause obligates the government to disclose material exculpatory evidence to the accused.) In fact, the government knowingly suppressed intelligence information critical to Hamid's defense. It did so because the disclosure of that constitutionally mandated discovery would have revealed the depth of the government's sweeping program of warrantless wiretapping and metadata collection. Those programs sparked a firestorm of criticism when finally exposed by the Snowden revelations in 2013.

What was true of the constitutional violations committed by the government in the first anti-terrorism prosecution in Detroit in the wake of 9/11 was true here:

> First, the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view. In doing so, the prosecution abandoned any objectivity or impartiality that any professional prosecutor must bring to his work. It is an axiom that a prosecutor must maintain sufficient distance from his case such that he may pursue and weigh all of the evidence, no matter where it may lead, and then let the facts guide him. That simply did not happen here.
>
> [T]he government's zeal to obtain a conviction overcame not only its professional judgment, but its broader obligations to the justice system and the rule of law.

United States. v. Koubriti, 336 F. Supp. 2d 676, 681 (E.D. Mich. 2004)

Hamid's trial bore little resemblance to a fair adversarial proceeding. Yet Ms. Mojaddidi, without the slightest experience in criminal law and no investigative resources, nearly brought the government's large and deeply resourced legal team to its knees. The lengthy struggle of the jury to reach its verdict against Hamid, however, does not establish that his defense was adequate. Rather, the jury's deadlock and its protracted deliberations that preceded Hamid's convictions serves as proof positive of the threadbare nature of the government's case. Had Hamid received the assistance of counsel to which he was constitutionally entitled, he would have been acquitted, and rightfully so.

STATEMENT OF THE CASE

On June 16, 2005, the government filed an indictment against defendant Hamid Hayat charging him with two counts of violating 18 U.S.C. § 1001 for allegedly making false statements to FBI officials.

On January 26, 2006, the government filed a second superseding indictment against Hamid Hayat charging him with one count of violating 18 U.S.C. § 2339A (lending material support to international terrorism) and three counts of violating 18 U.S.C. §1001. Count One alleged that Hamid, a United States citizen and resident of Lodi, California, received "jihadist training" at a camp in Pakistan sometime between October 2003 and November 2004, and intended "to return to the United States and, upon receipt of orders from other individuals, to wage violent jihad against persons and real property within the United States." Counts Two through Four alleged that Hamid willfully made false material statements to FBI agents investigating terrorism when he stated that he had never attended a jihadist camp (Count Two); that he had never received weapons or other types of jihadist training (Count Three); and that he never received training to fight against the United States (Count Four).

On April 25, 2006, following a joint trial of Hamid and Umer Hayat, after a period of some ten days, and after initially declaring a deadlock on the charges against Hamid, Hamid's jury returned guilty verdicts against him on all of the charged counts. See Dkt. Nos. 311, 312, 313, 315, 318, 319, 320, 321, 324, 328 (reflecting minute orders for proceedings beginning April 14, 2006 and concluding April 25, 2006). A separate jury could not reach a verdict against Umer on the false statement charges against him. The court thereafter denied Hamid's motion for a new trial. On September 11, 2007, the district court sentenced Hamid to a term of 288 months in prison. Hamid timely filed a notice of appeal on September 17, 2007.

After judgment but before filing a notice of appeal, Hamid had filed a motion to vacate his convictions under 28 U.S.C. section 2255 on the ground that his trial counsel had operated under a conflict of interest by subordinating all decision-making in the case to Mr. Griffin, counsel for codefendant Umer Hayat. Hamid also claimed that in multiple respects Ms. Mojaddidi had been constitutionally deficient in her representation of him. On November 7,

2007, the district court dismissed the section 2255 motion without prejudice because Hamid's criminal appeal was then pending in the Ninth Circuit.

Oral argument on appeal was held before a three judge panel of the Ninth Circuit on June 10, 2009. Nearly four years later, on March 13, 2013, a divided panel of the Circuit finally issued its opinion affirming Hamid's convictions. *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013). Judge Berzon authored the majority opinion, joined by Judge Schroeder.

In his lead argument on appeal, Hamid had claimed that Joseph Cote, the foreman of his jury, "harbored a general bias against Muslims and Pakistanis" and was willing "to engage in impermissible preventative conviction." *Id*. at 888. In a post-trial interview with the *Atlantic Monthly* magazine, Cote had stated:

> [There are] so-called new rules of engagement, and I don't want to see the government lose its case.... Can we, on the basis of what we know, put this kid on the street? On the basis of what we know of how people of his background have acted in the past? The answer is no.

****

The article also contained the following description of Cote's views of the government's approach to the case:

> This preventive approach, Cote said, means that "just as there are people in prison who never committed the crime, this may also happen. Not this particular case, I'm saying, but future cases." He argued that it was "absolutely" better to run the risk of convicting an innocent man than to let a guilty one go. "Too many lives are changed" by terrorism, he said. "So shall one man pay to save fifty? It's not a debatable question."

Id. at 887-88.

The majority deferred to the trial judge's factual finding that Cote had not been proven to harbor a bias against Muslims or to have breached his sworn promise during voir dire to hold the government to its burden of proof beyond a reasonable doubt. *Id.* at 889. While finding that Cote had committed two acts of misconduct during jury deliberations, the majority deemed them harmless. *Id.* at 889-91. Finally, the majority found that several other of Hamid's claims of trial error had not been properly preserved by his trial counsel, and indicated that trial counsel "may well have been deficient" in that regard. *Id*. at 895 n.15.

While declining to review on direct appeal the district court's refusal to hear Hamid's claim of a deprivation of his right to counsel, the majority anticipated the filing in this Court of his renewed motion to vacate his convictions. "This holding is, of course, without prejudice to our authority to review the district court's determinations on any later, properly filed initial § 2255 motion encompassing the claims Hayat sought to raise in the motion dismissed without prejudice, and expresses no view as to the merits of any of those contentions." *Id*. at 903.

Quoting *United States v. Nixon,* 418 U.S. 683, 707 (1974) for the proposition that "the primary constitutional duty of the Judicial branch [is] to do justice in criminal prosecutions," Judge Tashima wrote in dissent:

> Scrupulous fulfilment of this duty is all the more critical when the government asks a jury to deprive a man of his liberty largely based on dire, but vague, predictions that he *might* commit unspecified crimes in the future. Because this duty was not fulfilled in Hayat's trial, I would reverse the conviction and remand for a new trial. I therefore respectfully dissent.

Id. at 904 (Tashima, J., dissenting) (emphasis in original).

Rehearing and rehearing en banc was denied on June 11, 2013.

STATEMENT OF FACTS

A. The Government's Theory of the Case

Judge Tashima's dissenting opinion accurately distilled the government's theory of the prosecution:

> The government's theory is that Hamid Hayat, the American-born, erstwhile agricultural worker son of an immigrant ice-cream truck driver in rural Lodi, California, attended a terrorist training camp in Pakistan and returned to the United States with a "jihadi heart" and a "jihadi mind," intending to commit terrorist acts of some unknown sort at some unknown time in the future.
>
> The evidence against Hayat is as follows:
>
> His maternal grandfather runs a religious school in Pakistan. Hayat expressed repugnant views about the murder of American journalist Daniel Pearl. He kept a scrapbook of news articles about Pakistani politics and Islamic fundamentalism, including anti-American commentary. In conversations with a government informant, he expressed interest in going to, and then made excuses for not attending, a terrorist training camp. After hours of questioning, beginning around 11:00 a.m., and lasting into the early morning hours of the following day, he finally agreed with

> FBI interrogators, who repeatedly insisted, despite his continuing denials, that Hayat had in fact attended such a training camp. Finally, Hayat carried in his wallet a written prayer, a saying of the prophet Mohammed, that a government expert opined would be carried only by a "jihadist," a person intent on waging war in the name of God. For this, Hayat is now serving a twenty-four-year sentence in federal prison.

Hayat, 710 F.3d at 904-05 (Tashima, J., dissenting).

B. The Government's Evidence

The majority opinion's summary of the trial evidence appears at 710 F.3d at 880-883. The statements made by Hamid under interrogation by the FBI are described at length below in Argument I. The informant referred to by Judge Tashima, Naseem Khan, conducted conversations with Hamid, some recorded but most not, before, during, and after Hamid's trip to Pakistan between 2003 and 2005. Save for Hamid's statements under interrogation, Khan's testimony was the prosecution's most important evidence.

Kahn admitted on the stand that Hamid never told him in any conversation that he had attended a training camp in Pakistan, despite the fact that he had the opportunity to do so when he met Khan on May 31, 2005, upon Hamid's return to the United States. (RT 1325-26.)[1] Furthermore, despite the fact that Hamid often discussed his approval of radical and violence-prone politics in Pakistan, he never expressed to Khan an intention to do violence to any person or property within the United States.

The absence of either of these categories of incriminating evidence was particularly striking given that, as the government argued in its closing, "Hamid Hayat considered Naseem Khan to be his best friend" and spoke "openly" and "freely" with him. (RT 4231) Furthermore, had Hayat engaged in the terrorist conduct with which he is charged with in this case, he had every incentive to reveal that to Khan, who was imploring Hayat to attend a jihadi camp while Hamid was in Pakistan, and threatening him with violence if he failed to do so.

[1] RT refers to the Reporter's Transcript of Hamid's trial. Each page of the RT cited in this memorandum is included in numerical order in Exhibit EEE.1. Citations to the Reporter's Transcripts of pretrial hearings are designated by the date of that particular hearing, and included elsewhere in Exhibit EEE.

In their conversation of July 18, 2003 while Hamid was in pakistan, Khan asked Hamid about his plans to go to a camp, and when Hamid replied it couldn't be done at that time, Khan accused him of lying and talking "bullshit." In his capacity as a government agent, Khan then stated:

(1) "You don't tell the truth. You just lie and talk nonsense. Understand." (RT 1308);[2] (2) "You fucking make promises and you can't even keep it." (RT 1308-09); (3) "You fucking lie up your ass. So how about you tell me the truth." (RT 1309); (4) "You told me I'm going to a camp. I'll do that. You're sitting idle. You're wasting time. . . You're fucking wasting time." (*Id.*); (5) "You fucking sleep for half the day, all day, all night you sleep. You wake up, you talking, light up a cigarette, you eat and you sleep again. That's all you do, and you're just walking around like a loafer." (RT 1310); and (6) "God willing, when I come to Pakistan and I see you, I'm going to fucking force you to – get you from the throat and fucking throw you in the Madrasa." (*Id.*) In October of 2003, Hamid stopped speaking to Khan.

The government also introduced testimony from an expert witness, Hassan Abbas, to the effect that militant camps existed in the Balakot area, as well as aerial photos of an area near Balakot that a Defense Department expert, Eric Benn, testified roughly resembled the "camp" described by Hamid during his interrogation. Benn further testified that there was a fifty per cent chance that the photos themselves pictured a militant training camp, as opposed to a Pakistani military base. Finally, as noted by Judge Tashima, Khaleel Mohammed testified that a Koranic supplication found in Hamid's wallet at the time of his interrogation and arrest only would have been carried by a warrior bent on violent jihad.

C. The Facts Bearing on the Sixth Amendment Claims

1. Ms. Mojaddidi's Lack of Experience and Need for "Mentoring"

Following the entry of the jury's verdict, Ms. Mojaddidi, who had served as Hamid's retained counsel, applied on May 4, 2006 to the Court for a court appointment, as Hamid had no

[2]Unless otherwise indicated, "RT" refers to the Reporter's Transcript of Hamid's 2006 jury trial. Transcripts of pre- and post-trial hearings are cited by date.

funds to further retain her. The Court referred that request to the Federal Defender of this district for evaluation. In a response filed with the Court on May 15, 2006, Daniel Broderick of the Federal Defender's office, stated that: "This is Ms. Mojaddidi's first and only federal criminal case." (Dkt. 353, at 2.) Indeed, it was Ms. Mojaddidi's first criminal case of any kind.

Mr. Broderick noted that this lack of experience barred Ms. Mojaddidi from "membership on a CJA panel" (*id.*), meaning that Ms. Mojaddidi was as a general matter unqualified to serve as appointed counsel in even relatively simple federal criminal proceedings, to say nothing of an extraordinarily complex case involving a two month trial involving issues of international terrorism and national security.

2. Ms. Mojaddidi's Arrangement With Johnny Griffin, Counsel for Co-Defendant Umer Hayat

On May 19, 2006, several weeks after the jury verdicts, the law office of Riordan and Horgan filed a notice of appearance as associate counsel to Ms. Mojaddidi in post-trial proceedings. In their ensuing meetings with Ms. Mojaddidi in preparing Hamid's new trial motion, attorneys Riordan and Horgan discussed her decision to represent Mr. Hayat despite her lack of experience. In those discussions,[3] Ms. Mojaddidi stated the following:

Her family emigrated to this country from Afghanistan. She speaks Farsi, Urdu, and Pashto, and was and is well-known in the Muslim community for her legal expertise in immigration and other civil law matters. She had been active in the Counsel on American-Islamic Relations ("CAIR"), an organization established to promote understanding and improved relations between Northern California Muslims and other groups in the community. On Sunday, June 5, 2005, she had been contacted by members of CAIR who were concerned that Hamid had not returned from his interrogation at the Sacramento offices of the FBI.

Ms. Mojaddidi attempted to make contact with Hamid on June 5th, but she had limited

[3] For a description of the statements made by Ms. Mojaddidi concerning her representation of Hamid, *see* Exhibit A, the declaration of Dennis P. Riordan, and Exhibit B, an earlier declaration of Mr. Riordan tendered in support of Hamid's previous section 2255 motion. Ms. Mojaddidi received a copy of Exhibit B, Mr. Riordan's 2007 declaration, before it was filed with the Court in September of 2007 and raised no objection to the accuracy of its contents. *See* Exhibit A.

prior experience in dealing with the FBI and was unsuccessful in reaching him. She learned that same day that Johnny Griffin, a former Assistant United States Attorney in the Eastern District of California, now a prominent criminal defense attorney in Sacramento, had also been contacted by family or community members concerned about both Hamid and his father, Umer. Ms. Mojaddidi spoke to Mr. Griffin and asked for help because she was unsure how to proceed. Mr. Griffin was able to obtain from the FBI access to the Hayats, who were in federal custody.

In the belief that the government would bring more serious charges against Umer Hayat than Hamid, Ms. Mojaddidi and Mr. Griffin agreed that he would formally appear as counsel for Umer and Ms. Mojaddidi would do so for Hamid. At Hamid's first appearance in court before Magistrate Judge Peter Nowinski on Tuesday, June 7, 2005, Mr. Griffin appeared specially for Ms. Mojadiddi, who was in trial at the time, on Hamid's behalf. Ms. Mojaddidi represented Hamid at his detention hearing on June 10, 2005, and continued to do so throughout his trial and jury verdict, even though it became apparent after the indictment of both Hayats in June of 2005 that Hamid would face a much more difficult and serious case than his father. That fact was confirmed when an amended indictment was filed in September of 2005 charging Hamid alone with "material support for terrorism," a far more serious charge than the false statements charges previously lodged against both defendants.

Ms. Mojadiddi realized that, given her complete lack of experience as a criminal lawyer, she alone would not be capable of providing a competent defense to Hamid. Her decision to nonetheless represent Hamid was based on her perception that she would be a member of a team preparing a joint defense led by Mr. Griffin, counsel for Umer Hayat. Mr. Griffin insisted as a condition of working with Ms. Mojaddidi in this joint effort that, while significant strategic and tactical matters would be discussed between them, the final decision-making power over such decisions in both the cases of Umer and Hamid would rest with him. Ms. Mojaddidi agreed to that condition. While she and Mr. Griffin reached a consensus on various matters made during the trial of their clients, Mr. Griffin retained the final decision power on matters affecting Hamid throughout his trial.

The decisions as to which Mr. Griffin would be the final decision-maker included what

motions would be filed on Hamid's behalf, including whether a continuance would be sought for the purpose of investigation; whether to obtain CIPA clearances; what witnesses would be called to testify on Hamid's behalf; and whether Hamid would be called to testify on his own behalf. Under the arrangement described by Ms. Mojaddidi, Mr. Griffin functionally served as lead counsel for both Umer and Hamid. Indeed, in a press interview in the wake of the appellate affirmance of Hamid's conviction, Ms. Mojaddidi described her role as essentially that of an assistant to Mr. Griffin, rather than Hamid's lead counsel.

> "Most of the trial was jointly with Johnny Griffin," who represented Hayat's father, Umer. "I was in the case primarily because of my Muslim background, language skills and ability to analyze evidence."[4]

Mr. Griffin attended all portions of Hamid's trial, even those which did not concern Umer, his client; participated in all bench conferences with Ms. Mojaddidi; and counseled her on matters arising at trial, whether or not they concerned Umer.

When a lawyer seeks to simultaneously represent co-defendants in a case, a court has the power to refuse to permit, and generally will not permit, such multiple representation due to the probability that it will result in a conflict of interest on the attorney's part. If the court does permit multiple representation, it may only do so after explaining the pitfalls of such representation to each and every one of the defendants involved and after taking, on the record, a knowing and intelligent waiver of the potential conflict, although a court can bar the arrangement even if the defendants are willing to waive the conflict. *See Wheat v. United States*, 486 U.S. 153 (1988) (affirming order barring counsel from representing codefendants, because in multiple-representation cases, district courts have a duty to take such measures as are appropriate to protect criminal defendants against counsel's conflicts of interest, including the issuance of separate representation orders).

Ms. Mojaddidi was not familiar with the federal case law concerning the concept of a potential conflict of interest arising from the control or influence of one defendant or his or her

[4] *See* Exhibit C, an article in the Sacramento Bee, "Divided appellate panel upholds terrorist conviction of Lodi's Hamid Hayat," dated March 13, 2013.

counsel over the legal representation provided to a co-defendant in the same case. Consequently, she had not disclosed to Hamid the agreement to cede to Mr. Griffin power to make strategic and tactical decisions in Hamid's case; *a fortiori,* she never obtained from her client a written or verbal waiver of the potential conflict posed by that arrangement.

3. Mr. Griffin's Strategic Control of the Case

Ms. Mojaddidi was able to communicate with Hamid in both Pashto and Urdu, which he was more comfortable speaking than English at that time. Based on her interviews of her client, she was firmly convinced that Hamid had never attended a jihadi training camp in Pakistan, a necessary element of all four crimes with which Hamid was charged. Ms. Mojaddidi was certain that between October, 2003 and November, 2004, the period in which Hamid was charged with attending a jihadi camp, he in fact lived with his mother in Behboodi, the family's village, attended classes in study of the Koran, drove with his mother to medical visits in Rawalpindi, and played cricket with his friends. She was certain that numerous witnesses in Pakistan at the time could have testified to these facts. These included, among others, his two cousins, Jaber and Usama, his uncle Atiq-ur-Rahman, other relatives and friends of Hamid, members of the family of Hamid's wife, and the defendant himself. She also was aware that, immediately following Hamid's arrest, a number of people interviewed by the Sacramento F.B.I. who had been in Pakistan between 2003 and 2004 had stated Hamid never attended a militant training camp.

Based on her interviews of her client and her analysis of the evidence against her client, which included inculpatory statements by Hamid that Ms. Mojaddidi believed were false, it was Ms. Mojaddidi's opinion that her client needed to "go on the offense" by offering affirmative evidence at trial of his whereabouts in Pakistan during the period covered in the indictment. Mr. Griffin, however, expressed to her his belief that the defense of both Hayats would best be conducted by challenging the probative value of the government's case and arguing to the jury that the government had not proven its case beyond a reasonable doubt.

Mr. Griffin has confirmed that Ms. Mojaddidi's description of their differing perspectives

on the case was accurate.[5] He stated that Ms. Mojaddidi always expressed her beliefs that the accusation that Hamid attended a jihadi training camp was completely false; that there existed numerous witnesses who had been in Pakistan with Hamid who could testify to that fact; and that the defense should find a way to call those witnesses at trial and thereby prove Hamid's innocence. Mr. Griffin, on the other hand, based in part on his conversations with prosecutors, feared that the government would not have brought such serious charges if they did not have good reason to believe that they were true; that nonetheless the case that the government intended to put on at trial, as suggested by the discovery, was remarkably weak; and that any attempt to put on the affirmative defense that Hamid did not attend a camp might backfire and rouse the government to locate and introduce stronger incriminating evidence than that disclosed in the discovery.

For that reason, Griffin convinced Ms. Mojaddidi that the defense bore no burden of proof; that the government would not offer adequate evidence of the existence of the jihadi camp that Hamid allegedly attended; and that she should desist from attempting to put on defense witnesses to testify about Hamid's whereabouts and activities in Pakistan. As he stated, "I gave her advice and she followed my advice." He agreed that the advice he dispensed often involved Hamid's case rather than Umer's. He noted that a more experienced attorney might not have been willing to subordinate his or her inclinations on how to present a defense to Mr. Griffin's.

4. Mr. Griffin's Control of the Joint Defense Funds

On June 14, 2005, Mr. Griffin and Umer Hayat executed a retainer agreement in which Mr. Griffin agreed to represent Umer for the sum of $100,000, in addition to whatever expenses were involved in such representation. Mr. Griffin stated that he had already received $20,000 of that amount. (*See* Exhibit E, the retainer agreement.)

Between September of 2005 and the beginning of January of 2006, no investigation of the

[5] Mr. Griffin's statements concerning his role in the defense of Hamid Hayat are described in Exhibit B, the declaration of Dennis Riordan. Mr. Griffin reviewed Exhibit B before it was filed in 2007, and raised no objection to the accuracy of its contents. *See* Exhibit A, the 2014 Riordan declaration, and Exhibit D, a September 9, 2007 e-mail from Mr. Griffin.

charges against both Hayats was done by the only investigator on the case, ex-FBI agent James Wedick. (*See* Exhibit F, the declaration of James Wedick.) On January 6, 2006, Ms. Mojaddidi and Mr. Griffin jointly met together with their clients to discuss a plea offer from the government, under which Hamid would plead guilty to the material support charge for a maximum sentence of fifteen years, with the opportunity to reduce that sentence to seven and a half years by cooperating with the government by providing information about terrorism. For his cooperation, Umer would plead guilty to one false statement charge and be released from custody, with the possibility of receiving an additional sentence of six months of home confinement. Mr. Griffin urged Hamid to accept the plea agreement, which was a package deal, during the joint meeting. Hamid refused to do so, maintaining his innocence and stating that he had no information that he could truthfully provide.

As a result of Hamid's declining the plea offer, on January 18, 2006, Mr. Griffin and Umer executed a second retainer agreement covering the Hayats' trial defense. (*See* Exhibit G.) This agreement stated that in early January, Griffin and Mojaddidi had met with the two Hayats and agreed that Griffin's fee for defending Umer "would increase to $150,000 and Ms. Mojaddidi's fee for the defense of Hamid would increase to $65,000," less than half of Griffin's.

The second retainer agreement went on to state that "[a]fter negotiations, we agreed that a total amount of $200,000 is needed to cover attorney's fees and all expenses for the defense of you and your son's case." "[C]osts and expenses can include...investigators, expert witnesses, travel expenses, evidence analysis, physical exhibits, presentation materials and other expenses related to preparation for trial." (*Id.*) The agreement went on to state that Ms. Mojaddidi would receive $65,000 of that $200,000; that costs and related trial expenses "will be paid from the remaining $135,000;" and that "I will accept the balance to cover my attorney's fees." (*Id*. at 2.) Thus, given the prior payment Griffin had received of $20,000, he would need to reserve for himself $130,000, exclusive of expenses, of any future payments to obtain his objective of being paid a total fee of $150,000. Neither Ms. Mojaddidi nor Hamid signed either retainer letter.

Subsequently, Umer Khatab, a relative of Umer Hayat, paid Griffin a total of $110,000 by checks in the amounts of: $5,000 on February 8 and $10,000 on February 13, 2006 (before trial);

$15,000 on March 24 and $20,000 on April 12, 2006, (during trial); and $30,000 on June 7 and $30,000 on June 16, 2006 (after trial). (*See* Exhibit H, copies of the Khatab checks.) Ms. Mojaddidi has stated that she received $6,000 at the beginning of her representation of Hamid, and two payments of $15,000 and $10,000 in June of 2006, well after the jury verdict against Hamid had been returned on April 25th. (*See* Exhibit I, the declaration of Layli Shirani.) The Hayats' records reflect only a single check to Mojaddidi from Khatab in the amount of $10,000 on June 16, 2006. (*See* Exhibit H.)

5. The Rise and Fall of the Speedy Trial Tactic

Initially, trial in this matter had been scheduled to commence on August 23rd, 2005. Ms. Mojaddidi stated that no investigation of possible exculpatory witnesses in Pakistan was conducted during the first two months following the defendants' indictment in June of 2005 by the defense team because Mr. Griffin was focused on creating a claim for dismissal under the federal Speedy Trial Act, as Mr. Griffin was confident that the government would not be prepared to try the case within the required statutory time limits.

At hearings held on July 1 and July 15, 2005, the court considered requests by the government to vacate the August 23rd trial date because the defendants had "made discovery requests on the United States to canvass the files of over forty government agencies," including two intelligence agencies on June 20th and 23rd, and "there are potential classified information issues that need to be resolved in advance of trial." (RT of 7/01/05, at 2;[6] RT of 7/15/05, at 4, 15.[7]) The defense opposed the government's request, with Mr. Griffin stating, and Ms. Mojaddidi agreeing, that no pretrial motions would be filed by the defense that would trigger an exclusion of time under the Speedy Trial Act. The defense pledged not to file motions to suppress the search warrant or any of the statements by their clients, or to sever the cases. (RT of 7/15/05, at 2.) The Court refused to vacate the trial date of August 23rd at the hearing on July 15th, but did indicate that it might not "be practicable to keep that trial date if CIPA procedures

[6] The cited pages of the 7/01/05 hearing are contained in Exhibit EEE.2 in numerical order.

[7] The cited pages of the 7/15/05 hearing are contained in Exhibit EEE.3 in numerical order.

are involved." (*Id.* at 69.)

At the following status conference on August 5, 2005, Mr. Griffin complained that the government was delaying discovery in an effort to force him to file a motion to compel, "but in filing that motion, my client's right to a speedy trial is being delayed. That is misconduct. And it's prejudicial." (RT of 8/05/05, at 11;[8] see also *id*. at 14: 'the defense is being pushed...into a corner to file a motion to compel, so that the [speedy trial] clock will be stopped, so that our August 23rd trial date will be vacated, so that the government will have more time to prepare its case.")[9] Nonetheless, over defense objection, the court vacated the August 23rd trial date, and set a hearing on the government's CIPA motion for October 7th. (*Id*. at 32-33.)

According to Ms. Mojaddidi, Mr. Griffin then stated to her that he believed the court had erred in its ruling, and it would be important to preserve the speedy trial issue for future proceedings by opposing any further government requests for continuances and by declining to seek a continuance on the part of the defendants.[10] Ms. Mojaddidi was not aware that if the defense succeeded in gaining a dismissal of the case on speedy trial grounds, the government could seek to reinstate the case, thereby effectively gaining the time to prepare its case that the defense was seeking to deny prosecutors by forcing the case to trial quickly. She believed that a dismissal of the case on speedy trial grounds would have ended the case once and for all.

The case went to trial on February 14, 2006, a date agreeable to the government. While the defense did oppose the government's initial and subsequent motions for a continuance (the second made in November of 2005), no motion for dismissal was ever made by either defendant on the ground that the Speedy Trial Act had been violated. Ms. Mojaddidi was unaware that in order to appeal a conviction on a claim of the denial of a speedy trial, a motion to dismiss on that ground had to be brought at the district court level. Mr. Griffin had never informed her that such

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[8]The cited pages of the 8/05/05 hearing are contained in Exhibit EEE.4 in numerical order.

[9] Ms. Mojaddidi then stated to the court: "I don't have anything to add." (*Id.*)

[10] Both Mr. Griffin and defense investigator James Wedick have confirmed that a principal strategic objective of Mr. Griffin was to force the government to trial as soon as possible under the provisions of the Speedy Trial Act. (*See* Exhibits B and F.)

a motion was so required to preserve the issue for appellate review.

6. The Lack of Investigation in Pakistan

Ms. Mojaddidi did not take the opportunity during the fall of 2005 to send an investigator to Pakistan to locate and interview exculpatory witnesses because, among other reasons, she had no investigator whom she could have dispatched for that task. Former F.B.I agent James Wedick was serving as an investigator for the defense team, but was entirely under Mr. Griffin's employ or control.[11] Ms. Mojaddidi never paid Mr. Wedick; she has no idea if he was paid and, if so, how and by whom; and prior to the jury's returning of verdicts she had no authority to instruct Mr. Wedick on what tasks he should perform. Ms. Mojaddidi was unaware that a defendant who does not have the financial resources to hire an investigator is entitled to have one appointed at court expense, even if the defendant is represented by retained counsel. Mr. Griffin had not informed Ms. Mojaddidi of the right to have an investigator appointed.

Ms. Mojaddidi believed that potential witnesses in Pakistan were outside the subpoena power of the federal courts of the United States and thus could not be compelled to attend court proceedings in the United States to testify. Furthermore, Jaber Ismail, one of Hamid's cousin's, had been placed on a "no-fly" list by the United States government and thus could not attend the trial voluntarily. Ms. Mojaddidi had discussed with Mr. Griffin her belief that the defense should move the court to order the government to provide visas to prospective witnesses in Pakistan so that they could travel to Sacramento for the purposes of testifying as defense witnesses. Mr. Griffin stated to her that such a move would be futile, as the issuance of the visas was within the purview of the executive branch of government, which would be uncooperative.

The testimony of witnesses in foreign countries may be taken by means of depositions conducted under Rule 15 of the Federal Rules of Criminal Procedure. Prior to and during trial,

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[11] Mr. Wedick became involved in the Hayat case as a defense investigator because he was a long time friend of Mr. Griffin. He was paid a total of approximately $4,000 on the case, and worked largely pro bono because he became convinced that the clients were innocent. He refused to take more money from their family to assist them. His tasks were assigned solely by Mr. Griffin; Ms. Mojaddidi had no authority to direct him to perform investigative assignments; and he never understood why he was not asked to go to Pakistan or even to conduct telephone interviews with parties in Pakistan in an effort to locate exculpatory evidence. (*See* Exhibit F)

Ms. Mojaddidi had been unaware of the existence of the provision of Rule 15 authorizing such depositions and Mr. Griffin had not mentioned that provision to her.

7. The Absence of Testimony from Local Alibi Witnesses

Usama Ismail, another cousin of Hamid, had returned to the United States before the arrest of Hamid, and in fact had been interviewed by the FBI in the wake of the arrest of Hamid. An FBI 302 report of that interview had been provided to defense counsel prior to trial in which Usama described Hamid's daily routine while in Pakistan, with which Usama was familiar. The 302 was wholly exculpatory. (*See* Exhibit J.) The same was true of the 302's summarizing interviews of Hamid's brother Arslan and his cousin Sadiq. (*See* Exhibits K and L.)

Ms. Mojaddidi had interviewed Usama, and considered him a strong defense witness. Ms. Mojaddidi had wanted to call Usama, but he had been assigned court-appointed counsel when it appeared that he would be called before the grand jury convened to investigate Hamid's case. (Usama subsequently was not called before the grand jury.) Ms. Mojaddidi had been informed by Mr. Griffin that he had contacted Usama's court appointed counsel, who informed Mr. Griffin that were Usama called as a defense witness, he would invoke his client's Fifth Amendment privilege, thereby preventing him from testifying in order to protect Usama from prosecution by the government in retaliation for assisting Hamid's defense. After that conversation, Ms. Mojaddidi abandoned her attempt to call Usama, even though Usama had informed her he was willing to testify on Hamid's behalf. Ms. Mojaddidi was unaware of the case law that would have supported a motion for the court to provide judicial immunity to Usama on the ground that any governmental threat to prosecute Usama would be a bad faith attempt by the government to keep a critical defense witness off the stand.

8. The Lack of Investigation of the Alleged Camp Site

Soon after Hamid's arrest, Ms. Mojaddidi had read an article in which a governmental official stated that there were no jihadi camps in Pakistan of the sort that Hamid was alleged to

have attended.[12] Ms. Mojaddidi contacted the Pakistani embassy to inquire how she could obtain information concerning this issue from the Pakistani government. The party she spoke to at the embassy promised to look into the matter. When she informed Mr. Griffin of her communications, he was disturbed by her disclosure, and stated that the Pakistani authorities were working in coordination with the federal government and would not be of assistance. Mr. Griffin directed Ms. Mojaddidi to cease her communications with the embassy and she did so.

9. The Decision Not to Obtain Additional Counsel for Hamid

Prior to the commencement of trial proceedings in February of 2006, reflecting on the facts that she would soon be engaged in a trial that could have enormous consequences for her client and that she had no prior experience in criminal law, Ms. Mojaddidi was physically and emotionally overwhelmed. She called Mark Reichel, a lawyer with over a decade of experience in trying federal criminal cases who had recently left the Federal Defender's Office for the Eastern District to go into private practice. Mojaddidi asked Reichel whether he would agree to enter Hamid's case as her co-counsel. Mr. Reichel agreed to do so.

Ms. Mojaddidi and Mr. Griffin then discussed Mr. Reichel's entry into the case. Mr. Griffin informed Ms. Mojaddidi and Mr. Reichel that should Mr. Reichel enter the case, Mr. Griffin would no longer be able to continue to cooperate with and mentor her in the same manner in the preparing of Hamid's defense. Mr. Griffin persuaded Ms. Mojaddidi that she could adequately represent Hamid and that it would be in the best interest of both their clients that Mr. Reichel not enter the case as co-counsel for Hamid. Ms. Mojaddidi then informed Mr. Reichel that she had decided not to have him appear as counsel for Mr. Hayat.[13]

Mr. Reichel has confirmed that within weeks of the commencement of trial, Ms. Mojaddidi and/or Mr. Griffin contacted Mr. Reichel to determine if he would be willing to appear

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[12] According to a July 25, 2005 article in the Sacramento Bee, when told of the statements of the Hayats concerning militant camps, "Pakistan Prime Minister Shaukat Aziz told reporters flatly on June 11: 'There are no such camps.'" (*See* Exhibit M.) In his 302 interview report in June of 2005, Usama Ismail also stated that any militant training camps that had existed in Pakistan had been closed by President Musharraf in the wake of 9/11. (*See* Exhibit J.)

[13] *See* Exhibit B, the 2007 declaration of Dennis Riordan.

as co-counsel for Hamid. Notwithstanding the imminence of the trial date and uncertainties about what, if any, compensation he could expect to receive—he had asked for a minimal fee of $10,000—Mr. Reichel agreed to do so. In a subsequent discussion with Mr. Reichel, Mr. Griffin and Ms. Mojaddidi discussed the proposal that Mr. Reichel appear as co-counsel for defendant Hamid at trial. In the course of that conversation, Mr. Griffin stated that were Mr. Reichel to appear in that role, Mr. Griffin could not and would not actively provide Ms. Mojaddidi with guidance in connection with her conduct of the trial on Hamid's behalf. Mr. Griffin and Ms. Mojaddidi ultimately informed Mr. Reichel that Ms. Mojaddidi alone would represent Hamid and that Mr. Reichel would not be asked to appear as co-counsel.[14]

10. The Hiring of Expert Witnesses

As with the issue of investigators, Ms. Mojaddidi was unaware that Hamid had the right to apply to the court for funds to retain experts if he did not have the funds to hire them, even though he was represented by retained counsel. As a result, she did not locate and call at trial an Arabic expert who could have rebutted the testimony of the government's expert, Khaleel Mohammed, concerning the supposed jihadist supplication found in the defendant's wallet at the time of his arrest. Because of a lack of resources, the favorable testimony of Doctor Bernard Haykel of New York University, who was far more qualified in Koranic studies than Mohammed, was not presented to this court by Ms. Mojaddidi until the filing of the defendant's new trial motion.

Unlike the government, Ms. Mojaddidi did not have any funds to retain experts; rather, hiring any experts required Mr. Griffin to make funds available from the funds he had received from friends and family of the Hayats. Ms. Mojaddidi did locate Professor Anita Weiss, an expert on Pakistani culture, and procured her presence at trial. Professor Weiss's fees and expenses were paid by Mr. Griffin.

Although Mr. Wedick's proposed expert testimony concerning the methods used by FBI interrogators was primarily intended to counter the government's case against Hamid, Wedick

[14] *See* Exhibit N, the 2007 declaration of Donald Horgan.

was prepared to testify by Mr. Griffin rather than Ms. Mojaddidi. Mr. Wedick had never before testified as an expert witness, but any preparation of his testimony was left, in his words, to the "eleventh hour," rather than being commenced well prior to trial. Mr. Wedick has since been prepared to testify in other cases, and now knows "how it should be done."[15] He considered the effort to prepare and gain admission of his testimony in the Hayat case to have been hastily and inadequately done.

Ms. Mojaddidi did not retain an expert on false confessions.

11. Post-Trial Proceedings

Following Hamid's conviction and the mistrial of Umer Hayat's case at the end of April, 2006, the government announced that it would proceed to retry Umer. Although work had begun on an extensive motion for a new trial on behalf of Hamid, Ms. Mojaddidi by email informed her new co-counsel in the case, the firm of Riordan and Horgan, that beginning on June 4th, she would be involved "day to day" in Umer's retrial, as Johnny Griffin wanted her "at counsel's table next to him as a resource. I know the record and the evidence better than he does and he needs me to rely on." (*See* Exhibit O, an e-mail of 5/31/2006.) Before retrial commenced, Umer Hayat's case was settled by a time-served plea to a charge unrelated to terrorism.

ARGUMENT

I. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY WORKED UNDER AN ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HER PERFORMANCE

A. The Right to Unconflicted Counsel

Under the Sixth Amendment, a criminal defendant has a right to the effective assistance of counsel at his trial. This includes the right to representation that is free from conflicts of interest. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A criminal defense attorney has an obligation to defend his or her client and only that client. He or she owes that client a duty of loyalty, and must avoid any conflict of interest. These principles are derived not just from the ethical rules that govern attorneys—they are required by the Constitution.

[15] *See* Exhibit B.

Thus, as the Supreme Court has held, a defendant challenging a conviction is entitled to a new trial if he can demonstrate an actual conflict of interest that adversely affected his counsel's performance at trial. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) "An actual conflict of interest" is "a conflict that affected counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). Significantly, while defendants making Sixth Amendment claims based on incompetency must establish prejudice (see Argument II, below), defendants making Sixth Amendment claims based on conflict need not. *Id.* at 166.

> In other words, to show adverse effect, a defendant need not demonstrate prejudice—that the outcome of his trial would have been different but for the conflict—but only that *some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.*

United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005); *see also Taylor v. Grounds*, 721 F.3d 809, 819 (7th Cir. 2013) ("The abandoned defense need not be a winning one . . . ."); *United States v. Gambino*, 864 F.2d 1064, 1070 (3rd Cir. 1988) (abandoned defense need only have "possessed sufficient substance to be a viable alternative.") If an actual conflict adversely affected performance, then relief is constitutionally required.

B. Ms. Mojaddidi's Conflict

In June of 2005, Ms. Mojaddidi was unqualified to try any federal criminal case, much less one of daunting complexity in which her client faced a sentence of decades in prison.[16] She had no criminal law experience of any kind, and thus no experience applying (among other things) the Speedy Trial Act, the Classified Information Procedures Act, or the Federal Rules of Criminal Procedure. Ms. Mojaddidi was apparently aware that she was unqualified to try this case, and as a result, she sought assistance. But her means of obtaining assistance proved disastrous for her client. Her solution was to put her client's defense in the control of Johnny Griffin, the experienced counsel for Umer Hayat, Hamid's codefendant. Mr. Griffin functioned as lead counsel, and Ms. Mojaddidi deferred to him.

[16] *See* Exhibit P, the declaration of Quin Denvir, the Federal Public Defender for the Eastern District of California at the time of Hamid's arrest in June of 2005.

Joint defense agreements are allowed in some circumstances, but they are constitutionally impermissible where they result in conflicted representation. *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). The presentation of a common defense and a "united front" may have some benefits in some cases, but such arrangements cannot be pursued where they work to the detriment of one codefendant. *Taylor*, 721 F.3d at 819. Joint representation is no less problematic simply because the codefendants are family members. *United States v. Auerbach*, 745 F.2d 1157 (8th Cir. 1984). Moreover, such conflicts may arise not only where a single counsel represents multiple defendants, but also where independent counsel defers to lead counsel. *United States v. Martin*, 965 F.2d 839, 841-42 (10th Cir. 1992); *Robinson v. Stegall*, 342 F. Supp. 2d 626, 636 (E.D. Mich. 2004). That is precisely what happened in this case.

1. Conflicting Strategies

The strategic and tactical interests of Hamid and Umer Hayat diverged in this case. Mr. Griffin quite correctly perceived that the government would be unable to prove beyond a reasonable doubt the false statement charges lodged against Umer, offenses that were far less serious than the terrorism accusations lodged against Hamid. The government could certainly establish that one version of events or the other given by Umer in his June 5 statement had to be untrue. Umer had stated both that Hamid had not gone to a training camp in Pakistan and, to the contrary, that Hamid had done so. But the government lacked any additional admissible evidence as to which of Umer's versions of events was true, and the charged version had been obtained by the use of questionable interrogation tactics following Umer's denials. Mr. Griffin believed that he did not need evidence of what Hamid had actually done or not done in Pakistan to defeat the charges against Umer.

Accordingly, Mr. Griffin was determined to avoid any tactic that would shift the focus of the jury's attention from the weakness of the government's evidence against Umer. Mr. Griffin's strategy was to push Umer's case to trial as quickly as possible and to limit to the greatest extent possible the scope of the issues placed in dispute by the parties. In his view, the introduction of affirmative defense evidence presented unnecessary risks for Umer, as the government might succeed in impeaching that evidence. For Umer, that was a danger to be avoided at all costs.

As to Hamid, Ms. Mojaddidi initially concluded the sensational content of his "confession" required rebuttal with affirmative evidence of his innocence, especially the testimony of alibi witnesses who had been with Hamid in Pakistan between 2003 and 2004. But Ms. Mojaddidi abandoned the preparation and presentation of that affirmative defense due to Mr. Griffin's insistence in forgoing any defense measure—*e.g.*, requesting a continuance to conduct overseas investigation—that would impede Mr. Griffin's demand for a speedy trial. In the end, Ms. Mojaddidi acceded to Mr. Griffin's strategy of pursuing a speedy trial rather than developing any defense. That strategy worked adequately for Umer, but for Hamid, it was disastrous.

Ms. Mojaddidi's lack of qualification to try Hamid's case compelled her to submit to Mr. Griffin's directives whenever they were at odds with her own perception of what was in Hamid's best interests.[17] Therefore, she could not, as the Sixth Amendment requires, "use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf." *Thomas v. Municipal Court*, 878 F.2d 285, 289 (9th Cir. 2001). Ms. Mojaddidi was not functioning as lead counsel for Hamid, but as a junior associate to Mr. Griffin, who was controlling the defense and defense funds for both defendants. (That fact is made all the more clear by Ms. Mojaddidi's stated intention to serve as an assistant to Mr. Griffin during Umer's retrial, at a time when critical post-trial proceedings were pending in Hamid's case.) She was accountable to two masters rather than one, and as a result, she abandoned the attempt to develop Hamid's alibi defense—a defense that would have established his innocence.

2. Financial Arrangements

Furthermore, even if Ms. Mojaddidi had been an experienced counsel capable of exercising her independent judgment, she would have been subject to a conflict of interest in this case for another critical reason: money. In order to receive any fees for her work—and she received very little—or to obtain any funds for support services such as investigation or expert

[17] *See* Exhibit R, the declaration of Doron Weinberg, an expert witness on the subjects of attorney ethics, responsibility and competence.

testimony, she was entirely dependent on Mr. Griffin, as he controlled the limited funds that were available for the defense of both Hayats. He also directed the activities of Mr. Wedick, the only defense investigator. Ms. Mojaddidi thus was able to provide to her client only those support services which her codefendant's counsel was willing to approve. *See Edens*, 87 F.3d at 1112 (actual conflict of interest existed where codefendant's family paid for counsel's representation of both codefendants.) And to the extent that Mr. Griffin served as lead counsel for both defendants, he operated under an egregious financial conflict of interest, because any money he expended for Hamid's defense would reduce the limited funds available to pay him for his defense of Umer.[18]

In this case, if Mr. Griffin had openly sought to serve as lead counsel for both defendants, the trial court would have been compelled to deny such a request, even if the codefendants had agreed to waive any conflict. The conflict would have been too great, and joint representation would have been constitutionally impermissible. The constitutional infirmity here was even worse, with a supposedly independent counsel deferring to and dependent upon a conflicted lead counsel.

3. The Reichel Affair

The nail in the "conflict of interest" coffin was supplied by Mr. Griffin's handling of the matter of Ms. Mojaddidi's desire to bring on experienced counsel to assist her in representing Hamid Hayat. Just prior to trial, she had called Mark Reichel, a lawyer with over a decade of experience in trying federal criminal cases who had recently left the Federal Defender's Office for the Eastern District for private practice, and asked Reichel whether he would agree to enter Hamid's case as her co-counsel. Reichel agreed to do so. Mojaddidi rescinded the request for Reichel's assistance, however, when Griffin informed her that Reichel's participation would necessarily terminate Griffin's assistance of Mojaddidi's representation of Hamid.

The Reichel affair establishes four facts. *First*, Mojaddidi had entirely surrendered her control of decision-making in Hamid's case to Griffin. She had contacted Reichel when she became emotionally overwhelmed by her accurate realization that she could not competently

[18] *See* Exhibit R, the Weinberg declaration.

represent Hamid by herself. Yet, with an experienced and independent attorney prepared to come on board, she declined Reichel's assistance because Griffin insisted that she do so.

Second, the incident demonstrates that Griffin was determined to retain control over the presentation of Hamid's defense as well as that of Umer. Reichel was capable of convincing Mojaddidi that tactical options should be pursued in conflict with Griffin's tactical plan. For that reason, his presence at counsel table was unacceptable to Griffin.

Third, however, as much as it may have been in Hamid's legal interests to have Reichel assist his defense, his participation was not in Mr. Griffin's financial interest, as any monies paid to Reichel for his work on Hamid's behalf would have depleted the funds remaining for Griffin from the global flat fee for the defense of both Hayats.

Fourth, the Reichel incident establishes that her forgoing of the assistance of experienced counsel, as well as each of the subsequent deficiencies in Mojaddidi's representation of Hamid, were "adverse effects" of the conflict of interest under which she operated. Had Mojaddidi been assisted by experienced counsel, she may well have avoided the many errors of commission and omissions that plagued Hamid's defense. Mr. Griffin's decision barring Mr. Reichel from participation in the case was the cause of much of Ms. Mojaddidi's ineffective representation of Hamid at trial. The test for locating an adverse effect was satisfied. See *United States v. Wells*, 394 F.3d at 733.

C. The Specific Adverse Effects of Ms. Mojaddidi's Conflict

As a result of her decision to cede control of the case to Mr. Griffin, Ms. Mojaddidi abandoned a host of specific alternative strategies that might have advanced Hamid's defense. These failings were both the result of counsel's incompetence and also constituted specific "adverse effects" of the constitutionally impermissible conflict.

TRIAL COUNSEL'S FAILURE # 1: FAILURE TO PROCURE PAKISTANI ALIBI WITNESSES

1. Ms. Mojaddidi's Decision

Based on her initial interviews of Hamid and members of his family, Ms. Mojaddidi concluded that during his stay in Pakistan between April 2003 and May of 2005, her client had never attended a jihadi training camp near Balakot or anywhere else in Pakistan. She was aware

of key witnesses located in Pakistan who could provide exculpatory testimony to the effect that, with the exception of a few short trips with friends and family, Hamid had spent the entirety of those two years residing in his home village of Behboodi or staying at his relatives' homes during his mother's trips to Rawalpindi for medical care.

But Ms. Mojaddidi did not interview the witnesses in Pakistan, nor have them interviewed by an investigator, nor did she present their testimony at trial, for three reasons.

First, she acceded to Mr. Griffin's directive that conducting any investigation in Pakistan would take time and thus would be inconsistent with Griffin's strategy of attempting to try the case within the seventy days prescribed by the Speedy Trial Act. The proposed trade off between preserving a Speedy Trial Act claim and forgoing the investigation and presentation of Hamid's alibi defense was, to put it charitably, a fool's bargain. No counsel reasonably familiar with the provisions of the Act could possibly conclude that the speedy trial claim raised in the wake of Hamid's initial indictment in 2005 was colorable. As the government argued when it sought a pretrial continuance, the Act contains multiple exceptions to its requirement that a case be tried within seventy days, "complexity" being one of them. Moreover, as this Court ruled prior to trial in its August 5th order, the defendants' request for CIPA material resulted in exclusion of time under the Act, and effectively guaranteed the government more time.

But even if the speedy trial claim could have resulted in dismissal, that would have been of no strategic use to Hamid. Unbeknownst to Ms. Mojaddidi, absent a statute of limitations problem, which certainly was not a possibility here, the government is permitted to reindict after a dismissal under the Act.[19] In other words, a dismissal under the Act would have gotten the government just the benefit that the defense was attempting to deny it: time to fully investigate and present its case against the Hayats. Given that the government was going to be fully prepared for trial whatever the outcome of the defense's speedy trial claim, there was no tactical

[19] Ms. Mojaddidi continued to believe that a dismissal under the Speedy Trial Act would terminate the prosecution against Hamid even after Mr. Griffin acknowledged in court on August 5, 2005 that the government could reindict after such a dismissal. (RT of 8/05/ 2005, at 19.)

justification for forgoing investigation of Hamid's powerful alibi defense in Pakistan.[20]

Second, Ms. Mojaddidi mistakenly concluded that the only means of presenting the alibi testimony of witnesses residing in Pakistan was to obtain visas permitting the witnesses to travel to the United States. She abandoned that alternative after Mr. Griffin told her that such visas would be impossible to obtain from the executive branch. Rule 15 of the Federal Rules of Criminal Procedure, however, authorizes a party to move for depositions of prospective witnesses who are unavailable for trial in order to preserve and present their testimony at a criminal proceeding. Ms. Mojaddidi failed to utilize the procedures authorized by Rule 15 because she was unaware of its provisions and her "mentor," Mr. Griffin, never informed her of them.

Third, Ms. Mojaddidi declined to procure alibi witnesses due to the supposed lack of funds to hire an investigator. She received none from Mr. Griffin, who controlled the defense fund for both defendants and also controlled the only defense investigator, James Wedick. But regardless of whether Mr. Griffin would have cooperated, Ms. Mojaddidi could have requested funds under the Criminal Justice Act. The CJA provides that "a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them" from the court. 18 U.S.C. 3006A(e)(1). The Ninth Circuit has held that "[t]he statute requires the district judge to authorize defense services . . . in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973).

Ms. Mojaddidi was unaware of this provision of the CJA, however, and Mr. Griffin did not inform her of it. Once again, her ignorance of basic principles of law, combined with her deference to Mr. Griffin, resulted in a failure to secure and present evidence that would have fundamentally undermined the government's case.

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[20] Even if the Speedy Trial issue had any strategic merit, which it did not, Ms. Mojaddidi failed to preserve it. According to Ms. Mojaddidi, she continued to refrain from obtaining a continuance to pursue investigation in Pakistan because Mr. Griffin wanted to preserve the Speedy Trial Act issue for a possible appeal. That strategic choice was utterly senseless because preservation would have required a motion to dismiss on speedy trial grounds. 18 U.S.C. § 3162(a)(2). Ms. Mojaddidi did not make such a motion in the district court, because Mr. Griffin never told her such a motion was required, and she apparently never read the Act herself.

2. The Pakistani Witnesses' Testimony

Hamid's present counsel has obtained declarations from 18 witnesses to Hamid's whereabouts and activities during his stay in Pakistan between April of 2003 and May of 2005.[21] All of these witnesses were available and willing in 2005 to attest to the same facts. None of the witnesses' testimony was presented to the jury. The declarations of the Pakistani witnesses provide irrefutable proof that, consistent with Hamid's statements during his initial interrogations with the FBI, between October of 2003 and November of 2004, Hamid never left the company of his friends and family to attend a militant training camp or for any other purpose; indeed, he was almost never alone during that period of time.

Of Hamid's family and friends in Pakistan who have submitted sworn declarations, all attest to his having been predominantly in two places during his stays there—the village of Behboodi and, for shorter periods of time, the city of Rawalpindi. For example, his uncle Attique ur Rahman, who has residences in both Rawalpindi and Behboodi, attests:

> When [Hamid] came to Pakistan in 2003-05, I met him after every two or three days during this whole period. I divide my time between Rawalpindi and Behboodi. I have a place in both cities.
>
> Hamid did not have any set routine during this time. During those days we were busy preparing for his wedding, and his house in Behboodi was also being rebuilt. At the time, Hamid's age was around 20, but he was afraid of travelling alone. And he was also not allowed to spend the night away from home.[22]

Muhammad Anas, another uncle, also describes Hamid's visits to Rawalpindi:

> Hamid came to 'Pindi around two times every month, and stayed with us for three or four days each time before going back to Behboodi. His mother was being treated for Hepatitis C at the time. Hakim Azam Bhatti came from Faisalabad to Rawalpindi Sadar for a few days every month, and she was seeking treatment from him. (A Hakim is a physician who uses traditional remedies and has no

[21] With one exception, those declarations—Exhibits S to JJ—are written in Urdu. They were gathered and translated by attorney Maryam Mohiuddin Ahmed and journalist Syeda Amna Hassan. *See* Exhibits KK and LL.

[22] *See* Exhibit S, the declaration of Attique ur Rahman.

> medical degree.)[23] She would get her blood tested at Aga Khan Laboratory.
>
> Usually, a driver came with Hamid and his mother, because Hamid did not know how to drive. He did not have a very strong mental capacity/state. His behavior was childish; he played video games all day and went out to play cricket after Asr (afternoon prayer). We scolded him frequently about playing games all the time.
>
> Other than Rawalpindi and Behboodi, he went to Multan twice during his stay in Pakistan. He never traveled alone. He always insisted on taking a family member or friend with him. He never took a bus on his own either.[24]

Several of the affiants describe Hamid's daily routine in Behboodi. Mohammad Usman, the husband of Hamid's sister Najia, attests:

> I live in Behboodi. When Hamid came to Pakistan in 2003, we met almost every other day. He usually got up late every morning. He went out to play with his friends after Asr (afternoon prayer). When they played cricket at night, I was usually with them.
>
> Hamid was a simple guy. He was always in the village, except when he went to Rawalpindi with his mother. Apart from Behboodi and Rawalpindi, Hamid only traveled to Multan twice in Pakistan. As far as I know, he did not travel anywhere other than this.[25]

Hammad Ishfaq likewise attests:

> I am Hamid's (distant) cousin. My father and Hamid's mother are cousins. When Hamid came to Pakistan between 2003 and 2005, we met very often. We sat together almost every day. It was Musharraf's time, and the power used to go out very often. That's why we usually played cricket in the evenings when we met.

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[23] Information stated in parentheses represents the translator's explanation of terms or concepts.

[24] *See* Exhibit T, the declaration of Muhammad Anas. *See also* Exhibit U, the declaration of Mohammad Doud:

> When [Hamid] came back in 2003, he spent a lot of time in Behboodi. We could not meet every day, but whenever he came to Rawalpindi with his mother, we went out for a meal. We met at least once or twice a month. We also went to his village countless times. We usually ate with him at his house, and sometimes went with him to the *Baithak*. The Baithak is a custom here, where people from the street or neighborhood congregate and chat, and play cards or cricket, or watch movies.

[25] *See* Exhibit V, the declaration of Mohammad Usman.

> The village has a practice called *Baithak*. People from nearby or from the neighborhood get together and chat. Hamid came to the Baithak every day between 8 pm and 11 pm. He never spoke about jihad and there was never anything like that. He did not even know how to hold a slingshot. He never spoke about training in a jihadi camp.[26]

Mohammad Qasim attests:

> I have known Hamid since he was a child. I own a grocery store in Behboodi. I do not remember the exact month Hamid arrived in Pakistan or departed for America. But during 2003-05, we met almost every day when he came to my grocery store with Jabir and a few other friends. Sometimes we met at the mosque after Namaz (prayer) as well. Sometimes he left the village to go to Rawalpindi, and I did not see him during those days. He did not leave the village for more than a week.
>
> Hamid used to go to the Baithak every night. Some of the neighborhood boys usually played cricket there, and Hamid played with them.[27]

Sajjad Ishfaq attests:

> I am Hammad Ishfaq's brother. My father and Hamid's mother are cousins. My childhood was spent here in Behboodi. Between April 2003 and May 2005 I met Hamid almost every day. He usually got up around 11 am, and played cricket with us between Asr and Maghrib prayers. Before that, in the afternoons, he was usually at home where Hamid, Arslan Hayat, Mohammad Nauman and I played video games. Other than that, sometimes we went to Huzro city in the evening and played snooker (pool). Hamid had a lot of CDs with games, and he often went there to get more. He was crazy about games. He did not do much the rest of the day.[28]

Similarly, Rafaqat attests;

> In Behboodi Hamid played cricket in the afternoon and went to the Baithak in the evenings. This is a tradition of the village where people get together to talk and play cricket every evening between 8 and 11 pm.
> Nobody from our village has ever left for jihad. There are madrassas, but they only teach about the Quran and Islam.
>
> I also have a shop that Hamid visited once or twice a week to chat or gossip. He usually spent one or two hours at my shop.

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[26] *See* Exhibit W, the declaration of Hammad Ishfaq.

[27] *See* Exhibit X, the declaration of Mohammad Qasim.

[28] *See* Exhibit Y, the declaration of Sajjad Ishfaq.

> He did not have any special inclination towards religion. And he was very timid/ easy to scare. He never went anywhere alone. During the whole period between April 2003 and May 2005, he never left the village for more than a week.[29]

Two declarants—Hammad Ishfaq, and Rafaqat—also describe their trip to Multan with Hamid in October of 2004 to attend another friend's wedding.[30]

Perhaps the most powerful declaration is that of Fahim ud Din, a pediatrician and Hamid's maternal uncle, who addresses not only Hamid's activities in Pakistan between 2003 and 2005, but also his severe bout of meningitis in 2000 and its subsequent impact on Hamid's cognitive capabilities:

> In the year 2000, Hamid came down with acute pyogenic meningitis...I was a pediatrician working in the government sector at the time. I was posted in the Kahuta sector, which is a two-hour drive from Huzro. I have been working as a pediatrician for almost 20 years now.
>
> Within 24 hours, Hamid was shifted to Jamia Islamia in Rawalpindi, where his symptoms aggravated, and he became drowsy and displayed altered behavior. He originally had symptoms that indicated a CNS infection or a brain infection. I recommended that he be shifted to Shifa International Hospital in Islamabad. They had all kinds of facilities under one roof, and it would be easier to treat him there.
>
> He was taken to the emergency ward around midnight, where he was given a CT scan and a spinal tap/ lumbar puncture, and he was diagnosed with acute meningitis.
>
> He remained in the ICU for two or three days. I had joined the family in Islamabad, and I remember that it was under the supervision of American doctors, but I do not remember their names. He was released from the hospital after around a week.
>
> Meningitis affects the patient profoundly. It alters their psyche, thinking capabilities and even their expressiveness, and it did the

[29] *See* Exhibit Z, the declaration of Rafaqat. As to Hamid's activities in Behboodi, *see also* Exhibits AA, BB, CC, and DD, the declarations of Salahuddin, Mohammad Saeed, Nisar Ahmad, and Shakeel Ahmad.

[30] *See* Exhibits W and Z. Also, in Exhibit V, Mohammed Usman attests: "A friend of mine was getting married in a place called Abdul Hakeem near Multan, and Hamid went there with my brother and Mohammad Nauman. This was in October 2004. My maternal grandfather owns land there, and I went to school in Abdul Hakeem up till Matric (Grade 10) at Government High School Chak 9B8R. My family had a house there. Apart from the trip for the wedding, Hamid also went to Multan with me to meet mutual friends for a few days."

> same to Hamid. When he was in school, he was a very shy boy. Arslan (Hayat) was younger than him, but he could wrestle him to the ground. He was easy to intimidate, and quick to accept whatever others told him. He would not even play with a toy gun. He did not have very strong nerves to begin with, and meningitis made him worse.
>
> When he came back to Pakistan in 2003, I met him and his family on a weekly basis until he went back to America in 2005. The family would get together in Behboodi and occasionally in Rawalpindi, and have lunch and chat. He was usually at home. Sometimes he would go out to play cricket with his friends, but I do not know how often.
>
> I am certain that he never left the village on his own. I did not see him travel alone or hear of him doing so from anyone else. From what I remember, he had his mother or friends or uncles or siblings with him when he traveled. I don't think he could have gone from Rawalpindi to Attock on his own, let alone Balakot. I never heard him mention Balakot, and I do not think he has ever been to the city, not even as a tourist.
>
> I met him almost weekly for the entire duration of his stay, so it is not possible that he left the village (Balakot) for more than two weeks.[31]

Many talk about how Hamid was simple, timid, childish and afraid to travel alone. The declaration of Mohammad Nauman specifically addresses not only his activities in Behboodi, but the impact of his meningitis on his relationship with Naseem Khan:

> When Hamid came to Pakistan between 2003 and 2005, he spent most of his time in Behboodi, which I frequently visited myself. There was a shop there that was open during the day, where his friend Jabir used to sit. Hamid spent a lot of time there. Other than that, we sometimes went to Huzro city or to a hotel, etc. for a meal. He had a very large collection of movies and videogames. Whenever we went to Huzro, he bought new CDs. He couldn't live without TV or games. If the TV's aerial or the game console broke down, he spent the whole day in a terrible mood. Other than that we also went to Imperial Market.
>
> In Behboodi there is a congregation during the evening. We call it a *Baithak*. It is like a tradition of our village where the villagers get

[31] *See* Exhibit EE, the declaration of Fahim ud Din. *See also* Exhibit S, the declaration of Attique ur Rahman: "In 2000, when Hamid got Meningitis, he was in a very critical situation. He had a very high fever and we were losing hope. When he was taken to Shifa Hospital's emergency ward, I was with him. The illness left a very strong mark on him. He did not remain as intelligent as he was when he was a child. He became physically weak as well;" and Exhibit FF, the declaration of Pashmina, Hamid's maternal grandmother: "When [Hamid] got sick, his mind declined and he became more timid than before."

> together. Hamid waited for the Baithak eagerly. He used to have the keys to the Baithak, and he would open the door for the villagers. There were approximately 20 or 25 people there at a time. If the weather was good, we played cricket. Otherwise, we sat inside and played cards or watched movies.
>
> Hamid's mind was sort of weak after the illness, after meningitis. I was surprised that the guy who spent so much time in Pakistan and never talked about jihad, returned from America in 2003 and talked with such enthusiasm about what his friend Naseem Khan said. Hamid used to say that Naseem Khan is an emotional person, and he is interested in jihad. He would come to Pakistan soon, and he wanted to go to a training camp. Hamid never said anything about going to a camp himself. In the beginning (of his trip), he used to talk to Naseem Khan every other day with warmth. Khan used to say that he was interested in touring Pakistan, and that when he came to Pakistan, it would be Hamid's responsibility to show him around. Hamid asked me to go with them too. But his friend never came to Pakistan, and Hamid never went anywhere. [32]

Hamid was happy about his marriage and fond of his wife, according to the declarations of many of his friends.[33] Finally, the declaration of Attique ur Rahman explains the origin of the Taweez carried by Hamid that was the subject of testimony at trial: "Before his wedding, my father or his uncle gave him the taweez (amulet) that was presented in court later. In our culture, taweez are for healing or protection. If a child gets sick, giving him a taweez is pretty much routine. The average person does not even know what is written inside it."

The investigation and presentation of the Pakistani witnesses' testimony was not merely a *plausible* alternative defense strategy; it was a strategy that any competent counsel would necessarily have pursued. The testimony of these witnesses would have exposed the government's case as baseless; indeed, if defense counsel had conducted Rule 15 depositions in this case, the government would have been ethically bound to dismiss the charges against Hamid prior to trial due to its inability to prove them beyond a reasonable doubt. But due to Ms. Mojaddidi's ignorance of the law and her deference to Mr. Griffin, the testimony was never presented.

TRIAL COUNSEL'S FAILURE # 2: FAILURE TO PROCURE DOMESTIC ALIBI WITNESSES

For similar reasons, Ms. Mojaddidi also failed to investigate and procure domestic

[32] *See* Exhibit GG, the declaration of Mohammad Nauman.

[33] *See* Exhibits GG, HH, U, II, and JJ, the declarations of Mohammad Nauman, Malik Ihtesham Mumtaz, Mohammad Daud, Tayyaba Fahim, and Bibi Asma.

witnesses who would have undermined the government's case. Usama Ismail, a cousin of Hamid, had returned to the United States before the arrest of Hamid Hayat, and on June 9, 2005, days after the arrest of Hamid, was interviewed by the FBI. An FBI 302 of that interview had been provided to the defense prior to trial in which Usama described his personal observations of Hamid's daily routine while the two were together in Beboodi, Pakistan, between 2003 and 2005:

> ISMAIL claimed that HAMID is innocent and that the allegations against HAMID are untrue. While in Pakistan, ISMAIL saw HAMID in person almost everyday. The maximum period of time that ISMAIL may not have seen HAMID was two weeks, unless HAMID was visiting his grandfather in Rawalpindi. HAMID's mother OMA was sick with Typhoid 2 and underwent homeopathic treatment, as well as, visited the SHIFAH or SHAFI hospital in Islamabad (which is a two-hour drive). HAMID did not go to any training camp. HAMID went to Pakistan in early 2003, to attend his older sister NAJIA's wedding. HAMID's parents were looking for a bride for him. HAMID got married after Ramadan in 2004.

(*See* Exhibit J.)

Arslan Hayat, Hamid's brother, and Sadiq Shoaib, Hamid's second cousin, had also been interviewed by the FBI soon after Hamid's arrest. Like Usama's, their 302s were wholly exculpatory. (*See* Exhibits K and L.)

Ms. Mojaddidi had interviewed Usama, and considered him a strong defense witness. Ms. Mojaddidi initially planned to call Usama, and Usama himself had informed her that he was willing to testify on Hamid's behalf. But she was then informed by Mr. Griffin that Usama's court appointed counsel told him that, if Usama were called as a witness, he would invoke the Fifth Amendment privilege. After that conversation, Ms. Mojaddidi abandoned her attempt to call Usama, without any further investigation.

That decision was indefensible. Notwithstanding his lawyer's supposed claim to the contrary, Usama wanted to assist Hamid. It is doubtful that Usama had a plausible claim of Fifth Amendment privilege, as nothing in his testimony would have exposed him to criminal penalties. But even if he had a valid self-incrimination concern, Ms. Mojaddidi then could have sought a grant of judicial immunity. The Ninth Circuit has repeatedly held that when a witness's self-incrimination right conflicts with a defendant's right to present a defense, the trial court can

compel an immunity grant. *See United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008). But Ms. Mojaddidi, once again unaware of the relevant law and deferring blindly to Mr. Griffin, did not even attempt to obtain a judicial grant of immunity. As a result, she senselessly abandoned any effort to procure the testimony of these valuable defense witnesses.

TRIAL COUNSEL'S FAILURE # 3: FAILURE TO PROCURE BALAKOT CAMP EXPERT

1. Ms. Mojaddidi's Handling of Balakot Camp Evidence

As detailed above, fact witnesses would have testified that Hamid never went to the supposed terrorist training camp near Balakot. In addition, expert witnesses could also have undermined the government's claims—because they could have testified that the Balakot camp did not even exist at the relevant times.

At trial, the government relied heavily on its own paid expert witness, Hassan Abbas, to support the existence of the Balakot camp. Abbas's testimony focused on the JEM organization and its leader Mohammed Masood Azhar. Abbas traced how Azhar had been associated with HUM (Harakat ul Mujaheden), his work in India and his subsequent imprisonment, and his return to Pakistan. Abbas generally described jihadi camps in existence throughout Pakistan between 2000 and 2005, but made his most detailed statement about a JEM encampment near Balakot started in 2000-2001 and run under the auspices of Azhar. Abbas testified that the camp was in a hilly, forested area outside Balakot, and that it was not a true religious madrassa but rather a camp for training armed militants. (RT 2692.) Abbas, however, had never seen the camp, nor even seen a photo of the camp, nor had he ever interviewed or spoken to anyone who actually visited the camp. (RT 2830-44.)

Abbas's testimony was critical to the government's case. It was, however, weaker than it appeared. It could have been easily exposed with effective cross or a contrary expert, and yet, once again, Ms. Mojaddidi failed to pursue available defense strategies.

Ms. Mojaddidi had exculpatory information about the camp that she could have pursued and presented. At the beginning of July 2005, Ms. Mojaddidi, Mr. Griffin, and investigator Wedick met with the FBI, and were shown aerial images of the Balakot area. Ms. Mojaddidi sent Griffin and Wedick an email the following day stating that her research had unearthed a news

article from the New Delhi Times dated June 9, 2002, reporting that India had asked the United States as part of this country's anti-terrorism campaign to pressure Pakistan to close a camp run by JEM near Balakot. (*See* Exhibit MM.) She was on notice that the camp had been closed long before Hamid's trip to Pakistan.

She also had evidence available. In the interview of Usama Ismail by the FBI on June 9, 2005, Usama, who had been in Pakistan with Hamid during most of Hamid's stay in 2003 to 2005, told the FBI not only that Hamid never attended a camp, but that the camps had been destroyed by President Musharraf. (Exhibit J.) Furthermore, as noted above, Mojaddidi had read a press article in which a governmental official stated that there were no jihadi camps in Pakistan of the sort that Hamid was alleged to have attended. (Exhibit M.) Ms. Mojaddidi contacted the Pakistani embassy to inquire how she could obtain information concerning this issue from the Pakistani government. Mr. Griffin, however, directed Ms. Mojaddidi to cease her communications with the embassy and she did so. Lacking any available resources, Ms. Mojaddidi did not attempt to initiate any investigation in Pakistan concerning the Balakot camp issue.

2. Available Expert Testimony

Substantial exculpatory evidence was available, however, in the form of expert testimony. Hamid's present counsel has obtained a declaration of Ghulam Hasnain—an example of one potential expert witness that could have been called but was not.[34] Hasnain is a highly respected journalist who, unlike any of the experts who actually testified at trial, actually visited and reported on the camps in which militants received armed training to prepare them to participate in attacks on Indian facilities and institutions as part of the struggle over Kashmir.

In his declaration, Hasnain has affirmed that the camps in the Balakot area in the early 2000s were funded by the Pakastani ISI, and were effectively shuttered by the end of 2002 due to pressure from the United States government. That pressure resulted in the ISI terminating the monthly stipend that the militants were paid, thereby cutting off the funds needed to continue training at the camps. Thereafter the camp locations functioned at most as mere residences. Those interested in continuing militancy tended to migrate to Waziristan, thereby escaping control by the

[34] *See* Exhibit NN, the declaration of Ghulam Hasnain Asser.

ISI and becoming more amenable to Al Qaeda influence. Hasnain specifically affirms that the JEM camp in the Balakot area at the coordinates testified to by Benn was closed before October of 2003.

Hasnain's expert testimony could have established that the training camp Hamid supposedly attended did not even exist at the relevant times. And yet the jury never heard his testimony, nor did it hear testimony from any other expert witness who could have attested specifically to the Balakot camp's closure. This failure was due in part to Mr. Griffin's instructions to Ms. Mojaddidi and in part due to Mr. Griffin's control of defense funds, as well as to Ms. Mojaddidi's failure to seek CJA funding. The combined effect of conflict and incompetence resulted in a hamstrung defense for Hamid.

TRIAL COUNSEL'S FAILURE # 4: FAILURE TO OBTAIN CIPA CLEARANCE

From the outset of this case, it was obvious to everyone that some relevant evidence would be classified for national security reasons. And indeed, it was obvious that somewhere in the federal government's massive national security and intelligence apparatus, it might possess classified evidence that would have exculpatory value for Hamid. The only way for the defense to obtain any such evidence was for counsel to obtain a security clearance under CIPA. As Judge Burrell stated at a pretrial hearing, "[O]ne has to wonder why [defense counsel] would accept this case, since to litigate in CIPA proceedings everybody knows, just by reading the law, that you have to have such a clearance." (1/27/06 Hearing RT at 5.)

For no good reason, however, Ms. Mojaddidi declined to seek a CIPA clearance, and also obtained a waiver of her client's rights to CIPA evidence. These decisions were made at Mr. Griffin's behest, and they were dreadful for Hamid. Ms. Mojaddidi's mishandling of the CIPA issue was a travesty.

1. CIPA and Sixth Amendment Law

CIPA was designed to protect classified information and to prevent criminal defendants from engaging in "gray mail" with requests for irrelevant classified information. But CIPA was not intended to infringe on criminal defendants' rights to a fair trial and to present a defense. It strikes a balance between national security interests and a defendant's rights. Moreover, as the

Ninth Circuit recently held, the Sixth Amendment trumps CIPA, and the latter must be interpreted in light of the former. "While the government must safeguard classified information in the interest of national security, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence." *United States v. Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013).

CIPA sets forth a robust set of procedures that allow defendants to obtain and use classified evidence in their trials while still protecting that evidence from public disclosure. Those procedures, however, were not employed in this case, because trial counsel unaccountably abandoned any effort to obtain classified exculpatory information.

2. Background and the Pretrial CIPA Hearing

At the outset of the case, Ms. Mojaddidi joined with Mr. Griffin in a letter to the government demanding discovery from a multitude of those agencies. In response, the government successfully argued for continuances of the trial date based on its obligation to provide the defense with exculpatory information from its intelligence files, thereby confounding Mr. Griffin's (and thus Ms. Mojaddidi's) chief strategic objective: to force the prosecution out to trial within the seventy day limit of the Speedy Trial Act.

Having obtained more than adequate time to prepare its case, however, the government proceeded to withhold all exculpatory information held by intelligence agencies. Any and all efforts by the defense to compel such disclosure were fruitless because such discovery proceedings were subject to CIPA. Under that law, defense counsel were barred from participation in any hearing concerning classified information unless and until they obtained security clearances, which Ms. Mojaddidi and Mr. Griffin adamantly refused to do, much to the frustration and bewilderment of the trial judge.

On December 16, 2005, the government informed the defense by letter that it possessed inculpatory material which it would offer at trial, and the foundation for which it would establish at a closed CIPA hearing. Because much of that foundation was itself classified, defense counsel would not be able to participate in the upcoming hearing because they had not obtained security clearances. The government further stated that "there is a realistic possibility that there will be

other litigation related to other information subject to the protections of CIPA. For this reason as well, prudence dictates that you obtain security clearances." The letter stated that the defense counsel had not submitted their clearance questionnaires, and because the vetting process could take several months, they should take "immediate steps" to get their clearances. It requested a response.[35]

On January 6, 2006, the government requested a hearing on the clearance issue, stating "On January 3, 2005 [sic], defense counsel for Umer Hayat suggested *(on behalf of both defendants*) that defense counsel did not believe a security clearance was necessary..." (Dkt. 139, at 4; italics added.) At a status conference on the same date, the district court set a briefing schedule on all motions, including motions in limine, and set a CIPA hearing for January 27th. (Dkt. 136). Prior to the hearing, on January 13th, defense counsel filed a motion seeking discovery of classified information—but nothing in the motion indicated an intent to seek a clearance.'

The hearing was held on January 27th. The transcript of the hearing on the CIPA issue makes clear that the decision to refuse to obtain clearances was Mr. Griffin's. Ms. Mojaddidi plainly had no grasp of the devastating consequences to her client that flowed from her joining in that decision: i.e., the deprivation of Hamid's constitutional rights to confront the witnesses against him and to present a defense. The transcript demonstrates the following:

1. The government made a record that "if defense counsel is not cleared, and should an issue occur at trial which winds up into this path of potentially classified information, that pursuant to Section 8 of CIPA the government can then invoke Section 8 to limit cross-examination," and Ms. Mojaddidi and Mr. Griffin would be excluded from any discussion of the government's objection. (RT of 1/27/06, at 2-3.)[36]

2. The Court was "troubled" by the attempt in the defense's brief on the issue to link the government's insistence on defense counsel obtaining security clearances to their previous speedy trial claims, because the Court had ruled on the speedy trial issues, finding there was good cause for the government's requested continuances. The Court admonished defense counsel that "you

[35] *See* Exhibit OO, the government's letter of December 16, 2005.

[36] The cited pages of the 1/27/05 hearing are contained in Exhibit EEE.5 in numerical order.

need to recognize the rulings." (*Id*. at 4.) As quoted above, the Court then expressed its incredulity that defense counsel had not yet obtained security clearances, as at a hearing in October of 2005, the Court had informed counsel they should begin the process immediately. (*Id*. at 5.) The Court then discussed available courses of action, including ordering defense counsel to obtain the clearances, finding outside counsel who already had the necessary clearance to assist the defense, or accepting a stipulated waiver of the defense's right to participate in any CIPA proceeding. (*Id*. at 6-7.)

3. Ms. Mojaddidi then stated that the defense could have applied for security clearances, but did not because the government "never offered and never told us about any specific classified information, [so] we felt there was no need." (*Id*. at 7.)

4. The Court responded that he found that response "incredible," asking "Why do you think the government has been conducting CIPA hearings? What do you think we've been doing at CIPA hearings?" (*Id*. at 8.) The government added that: "[I[t's been abundantly clear from the beginning of the case that there was going to be classified information in the case...." (*Id*. at 9.)

5. Ms. Mojaddidi replied that the government had only informed them of a single CIPA issue as to the foundation for one specific piece of evidence, and "we're ready to stipulate to [the admission] of that."[37] Without the government informing the defense as to what other potential classified evidence might be in play, she maintained, "[i]t's hard for us to make a decision" as to whether to obtain a security clearance. (*Id*. at 10.) The Court again expressed its disbelief as to that assertion, asking how the defense could make a discovery request to "40 intelligence agencies [yet] not foresee...the possibility, the probability, that there was going to be classified information." (*Id*. at 11.)

6. As to the defense assertion that the government had not provided them with specifics regarding classified information, the government commented that: "Because defense counsel is not cleared, the government can't discuss these issues with them." (*Id*.)

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[37] The government later made clear the specific classified information discussed with the defense concerned "the foundational issues on the image," a reference to the aerial images later testified to by government witness Eric Benn. (*Id.* at 14; *see also* 16, and 22; *see also* Argument II.)

7. Ms. Mojaddidi responded that unless and until the government informed them "for sure" that a CIPA issue would arise, "at this point we just don't feel comfortable with the need for a security clearance...." (*Id*. at 12.) But the government reiterated that CIPA issues could arise not only in regard to the prosecution's evidence, but during defense cross-examination, and that no one in the government could predict "what the defense is going to ask on cross-examination." (*Id*.)

8. Mr. Griffin then spoke for both defendants, stating that "we've been fine tuning our defense," and that "Ms. Mojaddidi is sensitive as to how she's going to phrase her questions, so as to avoid what could potentially involve classified information." (*Id*. at 17.) Mr. Griffin unequivocally stated that "*our defense* is based on the evidence that the government can put before this jury, not based on some classified evidence that may be out there." (*Id.*)

9. Mr. Griffin then indicated that if "by some chance" a CIPA issue arose, the defense would "more than likely consider the option" of then obtaining cleared counsel to deal with it. (*Id*. at 17-18.) The Court immediately challenged that position as "quite troubling" and "inconsistent with the defense's position that they want a speedy trial, because you basically are going to be delaying the trial if that happens, and who knows for how long." (*Id*. at 18.) Mr. Griffin then retreated from any request for cleared counsel, flatly stating on behalf of both defendants that "with reference to questions on cross-examination that the government believes will elicit a response that involves classified information, *the defense* will either withdraw the question, or reword the question and will not seek classified information." (*Id*. at 20.)

10. Having heard that position stated without exception, the Court asked defense counsel if it should attempt to "see whether or not there is cleared counsel available to come into the case." Mr. Griffin stated "my response is no," and Ms. Mojaddidi responded: "I concur on that." (*Id*. at 21.) The government added that it was "not going to disagree with the defense request that there be no cleared defense counsel." (*Id*. at 24.)

On February 3, 2006, both defendants signed a stipulation agreeing that their counsel could be excluded from all hearings on classified information. (Dkt 179.)

3. The Adverse Effects of Ms. Mojaddidi's CIPA Decision

Trial counsel declined to obtain CIPA clearance, and then advised her client to waive all rights to be present at any hearing on classified issues. Resting on the advice of incompetent and conflicted counsel, Hamid's waiver of his CIPA rights was and is patently invalid.[38] At this point, there is no way to precisely quantify prejudice from Ms. Mojaddidi's decisions, since the classified evidence remains hidden. But because this failure was the result of conflict, no prejudice is required. Moreover, even the existing record makes clear that the CIPA failure hampered the defense.

As the Court made crystal clear during the hearing on January 27th, the defense claim that obtaining a security clearance would further deny Hamid's speedy rights was meaningless. The Court had decided the speedy trial issues in favor of the government months before; trial was to commence in eighteen days; and the speedy trial concerns had no continuing relevance to whether Mojaddidi should obtain a clearance. Furthermore, the Court had offered an option that would not affect the upcoming trial date: *i.e.*, obtaining independent counsel who had been already cleared to participate in defending Hamid's interests in any CIPA proceeding.

There was absolutely no benefit for her client to be gained from Ms. Mojaddidi's refusal to obtain a clearance herself or make use of counsel who already possesses such a clearance. The inanity of her refusal is illustrated by the fact that on January 13, Ms. Mojaddidi filed a motion to compel discovery of information from the government's intelligence agencies, and yet two weeks later refused to obtain the clearance needed to receive any of the information she had requested.

Ms. Mojaddidi's refusal to obtain a security clearance is explained by her ignorance and the fact that she herself made no such decision; Mr. Griffin made it for her. As to her ignorance,

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[38] A defendant can establish the invalidity of a guilty plea, and the waiver of constitutional rights on which it is based, by establishing that "'an actual conflict of interest adversely affected his lawyer's performance.' " *See, e.g., United States v. MacEwan*, 2008 WL 862396 (E.D. Pa. Mar. 31, 2008) (quoting *Cuyler*, 446 U.S. at 348); *United States v. Taylor,* 139 F.3d 924 (D.C. Cir. 1998) (same); *United States v. Berberena*, 642 F. Supp. 2d 445, 456 (E.D. Pa. 2007) (vacating defendant's guilty plea on basis of counsel's actual conflict arising from joint representation of defendant and codefendant). Likewise, a defendant who is represented by ineffective counsel in pleading guilty is entitled to set aside that plea and the waiver of rights that accompanied it. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

in her pleading regarding the January 27th hearing, Mojaddidi asserted that "the government is attempting to force defense counsel to undergo lengthy security clearances just to litigate an evidentiary issue [regarding the aerial photographs] that the defense has stated in open court it has no objections to...[T]he admissibility of the proposed item of evidence is the *only* issue that involves CIPA and there is *no* other known potentially classified information in this case..." (DKT. 148, at 3; italics in original.) She thus entered the hearing with no idea that CIPA's provisions would apply not only to information related to the government's case in chief, but also to exculpatory evidence sought by the defense on cross-examination or proffered by defense witnesses.

As the accompanying declaration of attorney and CIPA expert John Cline makes clear,[39] CIPA requires defense counsel to affirmatively pursue the admission of all classified information that may be relevant to his or her client's defense. The statute's scope is clear on its face, but Ms. Mojaddidi apparently had never read it, as the Court indicated in its withering comments on the performance of defense counsel. (RT of 1/27/06, at 5.)

As to Mr. Griffin's position taken on behalf of both defendants, he may well have reasoned that Umer's conviction could be avoided without reliance on classified evidence, a judgment that proved correct as to his client but, as stated in Mr. Cline's declaration, was obviously inapplicable to Hamid. Griffin's insistence that *both* defense counsel would waive all their rights under CIPA can be explained by the terms of his retainer agreement with Umer, under which funds *not* spent on Hamid's defense would wind up in Griffin's coffers. Griffin thus had an incentive to ensure that the Hayats' joint trial was as short and uncomplicated as possible, and did not involve the hiring of independent cleared counsel.

As the Cline declaration establishes, Ms. Mojaddidi's refusal to obtain a security clearance was of absolutely no benefit to her client's defense. Yet she acceded to Mr. Griffin's concession that the Hayats would not present any defense "based on some classified evidence that may be out there." (RT of 1/27/14, at 17.) No minimally competent lawyer would agree to forgo reliance on

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[39] *See* Exhibit PP, the declaration of attorney expert John Cline.

classified information when CIPA guarantees, rather than precludes, the right to rely on such evidence when relevant to a defendant's defense. And no attorney with a modicum of familiarity with the Sixth Amendment right to counsel would agree to withdraw any question asked on defense cross-examination, regardless of its relevance, to which the government might raise a CIPA objection. But Ms. Mojaddidi did just that.

In essence, Ms. Mojaddidi bestowed upon the government unfettered veto power over her client's Sixth Amendment right to confrontation. The government could prevent any inquiry that could prove her client innocent simply by raising a CIPA objection, however frivolous, because Mojaddidi had agreed prior to trial to forfeit her client's right to challenge that objection in a closed CIPA hearing.

The government utilized Ms. Mojaddidi's surrender of her client's procedural rights to great advantage, blocking inquiry into several subjects that would have gravely undermined the government's accusations. For example, on April 4, 2006, while conducting her direct examination of FBI agent Gary Schaaf, Ms. Mojaddidi asked whether Schaaf knew of "any other secretly recorded conversations besides those that Naseem Khan recorded of Hamid Hayat." (RT 3628.) The prosecutor objected "on 401, 403 grounds, *and also CIPA*." (*Id*. [emphasis added]) This Court observed that, as phrased, the question potentially implicated "all of the investigations that the FBI may be engaged in," and "sustained [the objection] on 403 grounds because of the way it's worded." (RT 3628-29.)

Ms. Mojaddidi then asked whether Hamid had been the "target of any other FBI investigation besides the investigation that led to the interviews on June 4th," to which the prosecutor interposed the "same objection" — i.e. implicitly including the previous CIPA challenge. (RT 3629.) Ms. Mojaddidi withdrew the question. (*Id*.) As developed below in Argument III, Hamid maintains that other of his conversations were indeed "secretly recorded' under a warrantless surveillance program of the government that did not come to public light until after Hamid was convicted. He further asserts that those recordings were exculpatory in that they contained evidence that he did not attend a militant training camp in Pakistan, as the government alleged.

Likewise, as discussed more fully below, Ms. Mojaddidi was forced to terminate her questioning of Eric Benn, a Defense Department official who testified regarding the photographic images of an area near Balakot which the government claimed might house an active jihadi training camp. Having failed to secure a security clearance, Mojaddidi was forced to abort her cross-examination at key points upon the prosecution's objection that her questions might call for disclosure of classified material. (*See* RT 3083 [upon such objection, Ms. Mojaddidi withdraws question whether other satellite images of Balakot reviewed by Benn during his career had disclosed presence of militant training camps]; RT 3105 [court sustains objection on these grounds to question whether anyone from the United States government had visited the location depicted on the satellite images (trial exhibits 1-4) discussed by Benn during direct examination].) Again, had those lines of inquiry been pursued as they could and should have been by cleared counsel, they could have produced exculpatory information establishing that there was no active training camp in the Balakot area between October of 2003 and November of 2004. Ms. Mojaddidi's refusal to obtain a security clearance plainly prejudiced her client.

The full extent of prejudice Ms. Mojaddidi caused Hamid on this issue will never be known. But, due to the clear conflict under which she operated, prejudice is presumed in these circumstances, and in any event, prejudice is abundantly clear.

TRIAL COUNSEL'S FAILURE # 5: FAILURE TO MOVE FOR SEVERANCE

Hamid and Umer Hayat were tried together. The charges were related, though the charges against Hamid were vastly more serious. The false statement charges against Umer accused him of falsely denying knowledge of Hamid's attendance of a camp when he was initially questioned. When subsequently questioned by the FBI in his June 4 interview, Umer made statements that inculpated Hamid. Those statements were inadmissible against Hamid under both the prohibition on hearsay in the Federal Rules of Evidence and under *Bruton v. United States*, 391 U.S. 123 (1968).

There are few if any circumstances under which a reasonably competent attorney who possesses a colorable claim for a severance from the case of a codefendant should not and would not make a motion for a separate trial. There are always good reasons to avoid a joint trial, such

as the likelihood of conflicting defenses and of differing strategic choices on the part of each defendant's counsel. That was the case here, as it was clearly in Hamid's interest to conduct pretrial investigation despite the fact that Mr. Griffin had decided any delay in going to trial could benefit the government and prejudice Umer. But the most compelling reason to seek a continuance arises when evidence admissible against one defendant but not his codefendant will prejudice the latter. No competent counsel whose client was entitled to the exclusion of a codefendant's confession would ever fail to move for a severance on *Bruton* grounds.[40]

Ms. Mojaddidi's joinder in Mr. Griffin's announcement at the outset of the case (RT of 7/15/13, at 2), that "no pretrial motions" would be filed can only be explained by the reality that she would have been utterly adrift if Mr. Griffin was not at her side to "mentor" her on the fundamentals of trying a criminal case. Because seeking a severance on *Bruton* grounds was a "plausible alternative defense strategy or tactic [which] might have been pursued but was not and...the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests," a new trial is in order on this ground alone. *Hovey,* 458 F3d at 908.

TRIAL COUNSEL'S FAILURE # 6: FAILURE TO MOVE TO SUPPRESS HAMID'S STATEMENTS

The government alleged that Hamid attended the Balakot terrorist training camp sometime between 2003 and 2005. The government could produce no eyewitnesses who saw him there, and indeed, the evidence that such a camp even existed at that time was dubious. The case against Hamid entirely rested on his statements made to the FBI interrogators in a marathon interrogation session between June 4 and June 5, 2005. As noted above, the lead FBI agent on this case testified when asked on cross-examination whether he could confirm that Hamid attended a training camp in Pakistan, "minus the statements, no." (RT 762.)

The circumstances of the interrogation rendered it involuntary. Moreover, in addition to

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[40] Six months later, when their trial date was rapidly approaching, Mr. Griffin and Ms. Mojaddidi did file a one sentence motion in limine to exclude on *Bruton* grounds the admission of those portions of the statements of Hamid and Umer that were inadmissible against their respective clients respectively. (Dkt. 144, at p. 13.) Remarkably, they filed this motion only *after* the government informed the defense that it "would request that two juries be empaneled in this case to avoid the *Bruton* issues." (*Id.*) No request for severance rather than separate juries was made by Ms. Mojaddidi.

the circumstances and heavy-handed tactics, the content of the statements rendered the supposed confession highly unreliable. Hamid made a variety of dubious and contradictory statements, finally giving into the interrogators' suggestions after they had thoroughly exhausted him.

Any competent trial counsel would have moved to suppress the statements as involuntary. And yet Ms. Mojaddidi did nothing.

When on July 15, 2005, Mr. Griffin announced that "based on the discovery we have received to date," he intended to file no pretrial motions on behalf of Umer Hayat, Ms. Mojaddidi chimed in that her position was "exactly" the same. (RT of 7/15/13, at 2.) The government reacted with something approaching incredulity: "So that means no motion to suppress either the search warrant [sic], no motion to suppress any of the statements of either of their clients, and no motion to sever the case." (*Id.*) That reaction was due to the fact that, as the government pointed out, the defense lawyers already had received copies of their respective clients' statements under interrogation from the FBI, which statements plainly merited challenge on voluntariness grounds. Obviously, Ms. Mojaddidi should have moved to suppress, but she declined due to the conflict of interest under which she was operating. Her failure to file motions to sever and to suppress was dictated by Mr. Griffin's strategy of forgoing all pretrial motions in a futile effort to invoke the protections of the Speedy Trial Act.

1. Hamid's Purported Confession

a. The May 30, 2005 Interview in Japan

On April 19, 2003, Hamid flew from San Francisco to Pakistan. Approximately two years later, on May 30, 2005, Hamid was returning from Pakistan to San Francisco when authorities diverted his plane to Narita, Japan because his name appeared on the federal government's "no-fly list." (RT 446-447.) Lawrence Futa, an FBI legal attaché, interviewed Hamid upon his arrival in Narita. (RT 453.) Futa told Hamid that the FBI had received information that Hamid might have ties to terrorism. (RT 449.) Hamid acknowledged Mr. Futa's need to investigate and stated his desire to cooperate. (RT 455.)

Hamid stated he had been in Pakistan for two years. He traveled there because his mother had hepatitis C and was not improving in the United States. (RT 455.) The family went to

Pakistan to consult with doctors about her condition. (RT 474.) Hamid also stated he had recently married in Pakistan. Hamid described his day-to-day activities: taking care of his mother, playing cricket, making trips to Islamabad, and attending mosque on Fridays. (RT 455-56.)

Hamid denied membership in any group the United States would consider a terrorist organization and denied attending a terrorist training camp while in Pakistan. (RT 456-57.) He stated that upon return to the States he hoped to become a truck driver and to attend school to improve his English. (RT 474.)

Futa found Hamid friendly, cooperative, calm and polite. (RT 474, 485.) Futa noticed that Hamid was thin and did not appear "as someone who would have recently attended anything involving rigorous training." (RT 457, 474-475.) Hamid also gave Futa permission to search his carry-on luggage. (RT 479.)

Futa concluded that Hamid did not pose an immediate threat to the airplane. (RT 479.) Based on Futa's recommendation, Hamid was allowed to fly into San Francisco International Airport. (RT 459.)

b. The June 3, 2005 Interview at the Hayat Home

On June 3, 2005, FBI agents Tenoch Aguilar and Sean Wells went to interrogate Hamid at his family home in Lodi, California. (RT 538-539) The interview occurred in the presence of family members. (RT 547.)

Hamid—now working at Delta Packing in Lodi and planning on getting a degree—said he had been in Pakistan for two years. (RT 559, 692.) He traveled to Pakistan because his mother had Hepatitis C and the family wanted her seen by a doctor in Rawalpindi. He went to Behboodi, Pakistan, about two hours south of Islamabad. (RT 560.)

Hamid did not work in Pakistan because the 12-hour work days earned only the equivalent of one U.S. dollar. (RT 561.) He played cricket, hung out with his cousins, and played Sony Playstation. Every other weekend he went cruising in Islamabad and watched movies, hung out, and ate American food. On the other weekends, he took his mother to the Rawalpindi doctor for medical treatment. He would leave for Rawalpindi on Friday, visit the doctor on Saturday, and return to Behboodi by Sunday. His grandparents lived very near the doctor's office in

Rawalpindi. (RT 562.)

When he left for Pakistan, Hamid did not plan to marry, but soon after his arrival, his parents showed him pictures of potential brides and he later did so. (RT 564.) He showed the agents his marriage certificate and provided his wife's name and birth date and her father's name. (RT 694.)

Hamid denied attending a terrorist or jihadi training camp or jihadi madrasa in Pakistan or anywhere else. (RT 565-566.) Hamid stated he was not a jihadi or terrorist and would never be involved with anything related to terrorism. (RT 567.)

Hamid showed the agents his driver's license, Delta Packing identification badge, U.S. passport, and Pakistani identification card. (RT 691-692.) He had been pleasant and fully cooperative throughout the interview. He gave the agents his telephone number and agreed to go to the Sacramento FBI office the next day for further questioning. (RT 696-97.)

c. The First Unrecorded Interview at the FBI Office

On the morning of June 4th, Umer Hayat drove his son Hamid to the FBI office in Sacramento, arriving some time between 10 and 11 a.m. (RT 569-70.) Aguilar took Hamid into an interviewing room and questioned him alone for either 15-20 minutes or 20-25 minutes. (RT 570, 711.)

Once alone with Hamid, Aguilar showed him some photographs that had been taken from Hamid's luggage at the airport and scanned by authorities. (RT 699.) The photos depicted men carrying and shooting rifles and an explosion in an open field. (Defendant's Trial Exhibits A1, A2, A3, A4.) One showed Hamid wearing a garland of flowers around his neck. (Defendant's Exhibit A4.)

Asked about the weapons, Hamid explained the photos were taken during a celebration of his wedding and that it was cultural practice to shoot blank rounds on such occasions. He identified the people depicted in the photos. (RT 708-09.) He stated the weapons belonged and were licensed to his Pakistani uncle who used them for protection, a common practice in Pakistan.(RT 709)

This interview was neither audiotaped or videotaped. (RT 699.)

d. The Second Unrecorded Interview at the FBI Office

After the interview by Aguilar, agent Harry Sweeney took Hamid into a different room for a further interview which began at about noon and ended at about 4:15 pm. (RT 518-519.)

Hamid told Sweeney that he was born in the United States and educated, in part, in the United States up until the 5th or 6th grade. (RT 498.) Asked about the purpose of his recent trip, Hamid said he had gone to care for his mother and to get married. He said that most of the time he hung out with friends, played cricket, and traveled to another city with American-type restaurants. (RT 498-99.)

When asked whether he had ever received weapons training at a jihadist training camp, or whether he had received such training to fight against the United States, Hamid denied it. (RT 499.) Indeed, for the next 3 ½ hours, Hamid repeatedly denied any connection to jihadi training. (RT 519-20.) He endured more than four hours of continuous questioning and supplied no grounds for detention when Sweeney suggested, "Is it possible, Hamid, that you didn't know that you were going to a jihadi training camp? Is it possible that you may have thought it was something else, like a religious education camp?" (RT 521.) Only after Sweeney repeatedly asked this question did Hamid finally say "yes" or provide any detail. (RT 521-22.)

Hamid said he attended a camp sometime in the year 2000. He said he had taken a 7-8 hour bus ride to a place where he expected religious training but instead found a jihadist camp where he overheard weapons and explosions. (RT 500-01.) He escaped the camp by bus several days later. (RT 501.) The camp was in Pakistan. Sweeney deemed this statement the first "admission." (RT 500.)

Sweeney testified that about 30-45 minutes later, he asked Hamid "why would we have a picture of you on satellite image in 2003 in your most recent trip to Pakistan." (RT 523.) This assertion was false; the government did not, in fact, have any such image. "Shortly" afterwards, Hamid responded with a second "admission" (RT 526), telling Sweeney he attended a training camp that involved weapons and explosives training for about three months (RT 502-03, 526). Hamid said he thought he was going to a religious training camp, but it ended up to be a jihadist camp that included long gun weapons training, explosives training, calisthenics, and jogging. (RT

502-03.) He said he took another 7-8 hour bus trip and received pistol training at the camp. (RT 503.) Hamid described the city where the camp was located, writing down the name in Urdu as "Balakot." (RT 504.)

This second interview, again, was neither audiotaped nor videotaped. (RT 519, 529.)

e. The Videotaped Interviews on June 4th and June 5th

Over the next 10 hours, agents conducted two more interviews of Hamid and videotaped both of them. (Gov. Exh. 19, 20, 21, 22.) The third, and first recorded, interview, was attended by agents Gary Schaaf, Sweeney, and Lucero, began at 4:47 p.m., and ended at 7:09 p.m. (Gov. Exh. 19, 20.)

Agent Schaaf did most of the questioning. He initially asked Hamid about what kind of camps he attended. (Gov. Exh. 23 [transcript] at 2.) Hamid replied, "Uh they were like you know like uh training camps. . . Like you know…uh, you know if you're not that good they won't like give you any good stuff like that move forward and like that…the camps are like that." (*Id*. at 2.)

Early on, Hamid said, "Most of the uh, you know for my country I'll do anything you know sir, cause you know these guys are hurting our country a lot… cause you know everything that was received sir, you know our troops are working there very hard you know making peace in the whole world." (*Id*. at 16.) Hamid also told of how he had chastised one of his younger cousins for renting a jihadi movie. (*Ibid*.)

During their subsequent questioning, the agents used the following terms and concepts, among others, before Hamid ever mentioned them:

the North West Frontier Province in discussing the location of a training camp (Gov. Exh. 23, at 6);[41]

arriving at the camp in the dark (*id*. at 7);

weapons training at the camp (*id.*);

explosives training at the camp (*id*.)

taking a path to the camp and carrying supplies up a trail (*id*. at 8);

[41] Government Trial Exhibit 23 is a transcript of the videotaped interviews conducted on June 4th and June 5th.

rifle training at the camp (*id*. at 45);

Kalashnikovs and Kalashnikov training at the camp (*id*. at 45-46);

knives at the camp (*id*. at 48);

martyrs and suicide-bombers at the camp (*id*.);

buildings at the camp (*id*. at 9);

Harakut ul Mujahideen running the camp (*id*. at 12);

Harakut ul Ansar running the camp (*id*.);

Sipah I Sihaba running the camp (*id*.);

"JUI" in discussing who runs the camp (*id*.);

Fazlur Rahman (*id*. at 32);

the Pashto language being spoken at the camp (*id*. at 14);

the presence of mostly Pakistanis at the camp (*id*. at 13);

the presence of Afghanis at the camp (*id*. at 13);

the presence of Kashmiris at the camp (*id*. at 62);

jogging at the camp (*id*. at 18);

being taught to kill Americans at the camp (*id*. at 16);

being taught to kill Crusaders at the camp (*id*. at 53)

being taught to kill Jews at the camp (*id*. at 53);

camp attendees going to Kashmir for jihad (*id*. at 63);

camp attendees going to Afghanistan for jihad (*id*. at 63)

the presence of security at the camp (*id*. at 94); and

the term "jihadi" (*id*. at 12.)

Hamid yawned at least 13 times during the interview (Gov. Exh. 23, *passim*) and when he complained of being tired and jet-lagged, Schaaf told him that was okay (*id*. at 21) and continued the interview (*id*.). Shortly thereafter, Schaaf asked Hamid to wake up to answer a question. (*Id*. at 30.) In response to Shaaf's questioning, Hamid responded "I don't know" at least 10 times, "I don't remember" at least 6 times, and with a simple "uh huh" at least 20 times. (Gov. Exh. 23, *passim*.)

Schaaf told Hamid at least 9 times during the interview that parts of his story about the camp did not make sense. (Gov. Exh. 23, *passim.*) When Hamid said that he was tricked into going to the camp both in 2000 and in 2003, Schaaf again said that he did not believe him. (*Id.* at 99, 102.) When Hamid said that on both occasions he thought he was going for Tabligh Jamaat (i.e., essentially religious revival meetings) and not to a camp, Schaaf said the story made no sense. (*Id.* at 99.)

During the interview, Hamid offered to go to the camp and gather information about the camp for the FBI agents. (*Id.* at 79-80.) He asked Schaaf for a business card to contact him and when Schaaf said he didn't have one, Hamid asked for a beeper number or anything to contact him by, and Schaaf agreed to do so. (*Id.* at 58.)

This interview concluded with the following colloquy:

Hamid: Any chance of go home?

Schaaf: Ah, let me see what's going on here.

Hamid: You guys have any more questions?

Schaaf: I'm thinking, I'm thinkin' I got this ah,

Hamid: See ah, (unintelligible) can I see my Dad or anything like that?

Schaaf: Yeah. Let me check on that.

(*Id.* at 107.)

Hamid was not questioned for the ensuing five and half hours but remained at the FBI office where he ate pizza and drank soda. Agent Aguilar did not recall seeing Hamid sleeping during this time. (RT 774.) Hamid invited Aguilar to come to his reception when his wife came into the country and Aguilar told him that he might not be able to make it. (RT 775.)

The fourth, and second recorded, interview of Hamid was attended by FBI agents Harrison and Aguilar, began at 12:37 a.m. on June 5, 2005 and ended at 2:58 a.m. (Gov. Exh. 23 at 108.)

Agent Harrison conducted most of the questioning. (*Id.*) Early on, he told Hamid, "…I'm trying to build an argument for you. I'm trying to help you out here…You know, by saying that you're cooperating (Hamid Hayat nodding) with us." (*Id.* at 118.)

During this interview Hamid complained of being tired, of being sleepy, of having a

headache and at one point said, "my mind is not working right now, that's the problem." Harrison successively replied: "Blame it on whatever you want to blame it on." (*Id*. at 204); "Free your mind from that headache, and that, you know other voice in your head that's going right now." (*Id*. at 209); and "If you tell the truth, you're mind is not working because you're struggling to come up with answers. And you're struggling and struggling. You're fighting this. You know. I, I see you fighting it. I , I see your mind trying to work to come up with answers that are gonna satisfy me somehow. (Hamid Hayat nodding)." (*Id*.)

Throughout the interview, Harrison asked questions that he claimed "opened the door" for Hamid to respond, e.g.:

Harrison:	[Y]ou got to give me something in order for me to go help you.
Hamid:	OK.
Harrison:	You know, to tell my bosses that you're cooperating, that you're working with us. You know you're in a bad situation, you know but it could be a lot worse, and there's a lot we can do to help you. But you got to help us, you gotta work with us.
Hamid.	(nodding)

(*Id*. at 203.)

Towards the end of the interview, Hamid asked if he would be returning the next day. The following exchange ensued:

Harrison:	No, no. You're not leaving here tonight, no.
Hamid:	No, I mean ah, tomorrow. I'm going to be here tonight. Staying here? In the building?
Harrison:	No, no you're going to go, you're going to go to jail.
Aguilar:	Hamid you're going to jail.
Hamid:	Yeah, so am I going to get a place to sleep over there like that?
Aguilar:	It's jail Hamid you know that?
Hamid:	Yeah, I know, I know it's a jail, but can I lay down because my head (Hamid points to head) is hurting, I want to sleep. I'm just saying when I come back here again tomorrow or anything like that?

(*Id*. at 205-06.) Hamid was formally placed under arrest at around 3 a.m. and about 15 minutes after the video concluded. (RT 772.)

2. Content and Contradictions

The content of Hamid's statements themselves call into question their own reliability. The statements contain numerous contradictions and numerous assertions that were only made at the suggestion of interrogators.

a. Method of Travel to the Camp and Camp Location

Hamid told Schaaf during the first recorded interview that he left from Rawalpindi on a 7-hour bus ride to the camp. (Gov. Exh. 23 at 3-5.) The bus drove in the direction of Northwest Frontier Province. (*Id*. at 6.) It was dark when they arrived and they had to walk three or four miles on a path because the "bus can't go up there." (*Id*. at 7-8.) Asked who led them up the trail, Hamid replied, "Taking us up there? You know, no one's leading you up there, you know just going up there…Get - - get direction and then people know that location." (*Id*. at 8.) Asked later whether someone led him to the camp, Hamid responded, "Yeah (yawning) I didn't ask, I didn't talk with no one or nothing like that." (*Id*. at 11.)

Schaaf asked Hamid about the location of the camp and referred Hamid to the paper where he wrote the name "Balakot" during an earlier interview. (*Id*. at 14.) Hamid said the camp was in the city of Balakot but he didn't know the name of the camp. (*Id*.)

During the second videotaped interview with Agent Harrison, Hamid said the following about the location of the camp:

The camp was located in Balakot (Gov. Exh. 23, at 110);

"This camp is in NWFP…" (*id*. at 111);

The camp was in Kashmir (*id*. at 196);

The camp was in Afghanistan (*id*. at 197);

"I'll say Balakot, that the first thing I'll say uh in NWFP that's what I'll say." (*Id*. at 197);

"[I]t's in Mansehra." (*Id*. at 198);

"I'll say it's in what's it called uh uh the final question…what's it called uh Kashmir that's what I'll say, Kashmir or like you trying to say that uh sure you got the wrong, wrong place so you guys try to say so." (*Id*. at 198);

> "[T]he camp will be in (unintelligible) Tora Bora something or Dohum (phonetic)…" (*Id.* at 199);
>
> "The final thing I'll say was in uh Afghanistan." (*Id.* at 201);
>
> "I'll say you know what's it called this camp will be final question for mine is you know N-W-F-P, you know Peshawar, that's the area I'll say, that's where the camp was. I'll say sir. Cause I remember that pretty good, that's what I'll say. If you guys can give me more time to think about it, you know, I clear my mind." (*Id.* at 202);
>
> "Like I tell you guys, you know, my final answer would be like two places. I don't remember that good. One would be like, you know. That, ah, camp I told, Kashmir, one, would be like ah, you know near the Afghani border. The only two places I can tell you…Or maybe, maybe in our, you know, ahh the village, in our village, ahh (unintelligible), you know, like ahh near the village or something." (*Id.* at 204-205.)

Agent Aguilar testified that the FBI's follow-up investigation did not confirm Hamid's having attended a camp in any of the locations Hamid had mentioned during his interview. (RT 764.)

b. Dates of Travel to and Duration of Stay at the Camp

Hamid told Schaaf he went to the camp "six, seven months" after arriving in Pakistan in 2003, but he didn't remember the date or month. (Gov. Exh. 23 at 15.) Schaaf asked: "All right. So - - so, in 2003, you go to Paki-, in 2003 you're in back in Pakistan. And about 7-8 months after you get there you go to camp and you're in camp for - - for 3 to 4 months? (*Id.* at 15.) Hamid replied: "Something like that." (*Id.* at 15.) Minutes later, Hamid told Schaaf he returned from the camp four to five months before his wedding. (*Id.* at 20.) Aguilar acknowledged, however, that six to seven months after Hamid's April, 2003 arrival in Pakistan would fall in October or November of 2003. (RT 760.) Yet Hamid was married in March 2005, and four to five months prior to that would fall in October or November 2004. (RT 762.)

During the first videotaped interview, Hamid said he ran away from the camp after three months. (Gov. Exh. 23 at 11.) During the second videotaped interview, he adopted Harrison's suggestion that he had been there for six months. (*Id.* at 116.) During the remainder of the interview Harrison repeatedly stated that Hamid attended the camp for 6 months. (Gov. Exh. 23, *passim*.)

c. The Camp's Group Affiliations

When asked by Schaaf who owned the camp, Hamid replied, "Uh. There was no names

about no groups or no nothing over there like he owns this camp, this group owns a camp, they don't care which group you came from or like you know which group you're gonna go with. Their job is to train. They just train. That's it." Schaaf: "Training just jihadi training basically? Hamid: "That's it." (Gov. Exh. 23, at 12.)

When asked again about the camp's group affiliation during the second videotaped interview, Hamid first responded, "The group, I'll say, is Harakat- Ul-Ansar." (*Id*. at 126.) The following exchange followed Harrison's later inquiry about who ran the camp:

Harrison: The name of who is in charge of the camp.

Hamid: I'll say Harakat-ul-Ansar is a bosses Maulana Asood Azar. Something like that.

Harrison: Yeah there's Maulana Asood Azar which is not what I am talking about. Alright, we're talking about someone who you know very well. He's very close to you.

Hamid: That runs the camp.

Harrison: In your family, yeah.

Hamid: In my family?

Harrison: Yeah.

Hamid: Maybe my uncle.

Harrison: Now, I'm, I'm again I'm cracking that door for you a little bit here, you know.

Hamid: Yeah I know, my uncle (unintelligible), maybe it's my uncle.

Harrison: Maybe, maybe it's your uncle?

Hamid: Yeah.

Harrison: What is your uncle's name?

Hamid: Attique, uh, I mean the little one what's it called Anas, maybe him.

Harrison: Runs, runs the camp?

Hamid: Yeah, I'll say that maybe, I'm not sure, maybe my Grandfather.

Harrison: Maybe?

Hamid: Yeah.

Harrison: Maybe your grandfather?

Hamid: Uh, my grandfather I say 75 or 80 per cent.

(*Id*. at 170.)

d. Types of Training at the Camp

When asked during the first videotaped interview what kind of training he received at the camp, Hamid stated, "I got to do pistol that's it." (Gov. Exh. 23, at 18.) Later, however, he stated he did not receive much training. "They were using me for like you know for the kitchen and the cooking, but I don't know how to cook or anything like that." (*Id*. at 79.) He went on to say he didn't learn how to cook so all he did was wash vegetables at the camp. (*Id*.)

e. Number of Camp Attendees

When, during the first videotaped interview, Hamid was asked how many people were at the camp, Hamid responded, "What can I say, sir, uh maybe uh 35, 40, 50 maybe." (*Id*. at 9.) Minutes later, when asked if there were hundreds of people that came and went at the camp, Hamid responded, "I didn't see that much like uh over 50 people I'll say. I didn't see over 50 people over there, Sir." (*Id*. at 10.) During the second videotaped interview, when asked how many students were training with him at the camp, Hamid responded, "Uh, I think so, over like uh 200 something." (*Id*. at 195-96.)

f. Intent

A chief focus of agent Harrison's questioning in the second recorded interview was Hamid's intent upon returning to the United States. Harrison told Hamid that he knew "you left [Pakistan] with marching orders," and that Hamid had been told "what your mission is. Here's what you do." (*Id*. at 116.) Hamid replied: "They, they didn't tell me nothing. They say you can go right now and if we need anything you like that you know..." (*Id.*) Asked later why he was here rather than Afghanistan or Kashmir, Hamid replied, "You know I got married so I just came back and you know." (*Id*. at 153.) After Harrison stated he knew there were plans for the United States and demanded details, Hamid responded, "...they didn't give us no plans no nothing right now like we're coming from there. They didn't give us no plans. Like I was saying they gonna

give us orders that, you get orders...." (*Id*. at 154.)

Harrison asked Hamid about the targets in the United States that they were trained to attack, suggesting various kinds of buildings. (*Id*. at 176.) Hamid responded, "The big ones, I'll say, yeah, you know finance, I'll say finance and things like that…hospitals maybe…they didn't tell us yet." (*Id*. at 175.) Later he added, "…maybe stores." (*Id*. at 176.) When Harrison asked Hamid who would help him to take on the buildings, Hamid said he didn't know but thought maybe one or two guys from the Lodi gang would join him. (*Id*. at 177.) Hamid also said he knew nothing about guns or weapons to be used. (*Id*. at 178.)

g. Statements About Ahmed and Adil

As reflected by the interviews, Shabbir Ahmed and Imam Adil were a key focus of the FBI's Lodi investigation. During the first videotaped interview, Hamid stated that someone, name unknown, told him Shabbir went to a camp. (*Id*. at 23-25.) Hamid also stated that Shabbir was brought to the United States by Imam Maulana Adil ("Adil"), but Hamid didn't know much about Adil. (*Id*. at 37.) When agent Harrison asked during the second videotaped interview if Shabbir went to the camp, Hamid stated, "Aah, actually I think so he went to the same camp, that's what I'll say." (*Id*. at 124.) Hamid said "I have no idea if he went to Jihad or something… He didn't share stories or nothing like that." (*Id.* at 124-125.) Inquiring how Hamid would get his orders, Harrison stated, "They're not gonna, are they gonna call you from Pakistan? I don't think so." Hamid responded, "Maybe, uh, send a letter or anything like that maybe." (*Id*. at 128.)

Harrison then said that someone local like Shabbir could receive orders and pass them on to people like Hamid. (*Id*. at 130-31.) Hamid responded that Shabbir didn't tell him that he would contact Hamid, but Hamid was 100% sure Shabbir would do so. (*Id*. at 131.) Harrison then asked what directions Shabbir had given and Hamid said he had heard nothing yet but that they would meet later. (*Id*. at 139.)

Harrison then said, "…what I am trying to get to is, you know, the importance of Shabbir, and the importance of Shabbir's boss." (*Id*. at 145.) Hamid responded, "The boss over here in Lodi is Maulana Adil." (*Id*. at 145.) The following exchange ensued:

Harrison: All right, what do you know about Adil?

Hamid: Adil?

Harrison: Uh-hmm.

Hamid: Ah, he's making an Islamic center in Lodi. And that's what I know about him…(unintelligible)

Harrison: Ok, about orders coming from.

Hamid: I'll say this guy Adil.

Harrison: Uh-huh.

Hamid: Ah, he gives him the orders.

Harrison: He gives Shabbir the orders?

Hamid: I'll say.

Harrison: All right.

Hamid: Cause you know there you know they are close to each other.

Harrison: Um-hmm.

Hamid: I'll say that.

Harrison: Ok, so, if someone in the camp wants to give orders to you, they would call.

Hamid: They would contact him Adil.

Harrison: Call Adil.

Hamid: Adil will contact Shabbir like that.

Harrison: And Adil will contact Shabbir?

Hamid: Uh-huh.

Harrison: And on to you.

Hamid: They will contact me.

(*Id*. at 146.) Harrison later asked which camp Adil went to and Hamid said he didn't know. (*Id*. at 192.) "I don't even know stories about Jihad he done. Like I'm saying, he did, he probably did and I'm sure about that. I'll say he did it." (*Id*. at 192.)

During the second videotaped interview, Hamid was also asked about other people he knew, including relatives, who might have attended a training camp in Pakistan. (Gov. Exh. 23,

at 132, 142, 179-81.) Hamid said he thought all of the people discussed had done so, but did not base that conclusion on having seen them at camps or having heard them say that they had been there. (*Id*.)

3. The Failure to Move to Suppress

Lay jurors will consider a confession "the most compelling possible evidence of guilt." *Miranda v. Arizona*, 384 U.S. 436, 466 (1963). As any competent criminal attorney knows, a defendant's own statements are often the government's most powerful evidence. The Due Process Clause bars the use of involuntary confessions against a criminal defendant. *Jackson v. Denno*, 378 U.S.368, 385-86 (1964). The Supreme Court "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton,* 474 U.S. 104, 109 (1985).

Moreover, it is not merely physical coercion that renders a confession involuntary. A confession can be involuntary where a defendant's "will was overborne by official pressure, fatigue and sympathy falsely aroused." *Spano v. New York*, 360 U.S. 315, 323 (1959). A judge must examine the totality of the circumstances—including the defendant's age, intellect, and education—to determine whether his statements were the product of a rational intellect and a free will. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

In this case, an argument for suppression was not merely plausible—it was powerful. The circumstances of the lengthy and exhausting interrogation were coercive. Many of the most inculpatory statements were not made until the very end, in response to leading and suggestive questions. Hamid was known as being physically and intellectually weak, in part due to a prior attack of meningitis, and he was exhausted on that night. Many of his statements made no sense.

Moreover, there was absolutely no plausible tactical reason for failing to file a motion to suppress. Even if the motion was not guaranteed to succeed, any competent defense attorney would have filed and vigorously litigated the argument, since there was much to gain and nothing to lose. For example, even a losing motion would have provided a wealth of information to support the testimony of a false confession expert. Yet Ms. Mojaddidi did nothing. It is likely

that Ms. Mojaddidi, having never been involved in a criminal case, was completely ignorant of the Supreme Court's jurisprudence concerning involuntary confessions. Even were she familiar with the relevant case law, she had been directed to forgo any and all pretrial motions to suppress by her "mentor," Mr. Griffin, and she acceded to that directive. (*See* RT of 7/15/13, at 2.) Ms. Mojaddidi's failure to move to suppress her client's statements as involuntary alone establishes the adverse impact on her representation of the conflict of interest under which she operated.

TRIAL COUNSEL'S FAILURE # 7: FAILURE TO PROCURE A FALSE CONFESSION EXPERT

Even assuming the admissibility of Hamid's statements to his interrogators, Ms. Mojaddidi should have vigorously attacked their weight. Lay jurors assume that no one would ever confess to a crime he did not commit. In reality, false confessions are one of the most routine sources of wrongful convictions. *See Lunbery v. Hornbeak*, 605 F.3d 754, 763 (9th Cir. 2010) (Hawkins, J., concurring) ("Among the hundreds of persons exonerated of serious crimes through DNA testing are numerous individuals who earlier confessed." (citing studies)). Jurors do not recognize that their own beliefs about the rock-solid validity of confessions are myths.

The best way to combat the myths that jurors hold is to call an expert on the science of false confessions. As Judge Hawkins explained in *Lunbery*, a defense attorney's failure to procure such an expert can be constitutionally deficient. Indeed, in this case, any competent (and unconflicted) defense attorney would have done so. Ms. Mojaddidi did not.

In his accompanying declaration, Professor Richard Leo, the country's leading expert on police interrogation methods, summarizes the state of the law and social science concerning false confessions. He then offers the following opinion concerning this case:

> I have reviewed relevant citations to the trial record in United States v. Hamid Hayat concerning the interrogation of Mr. Hayat by FBI agents at their Sacramento office on June 4th and 5th, 2005. I am aware that the interrogation extended over fourteen hours, involved the extensive use of leading questions and at least one false assertion by the interrogators, was conducted at times when Mr. Hayat dozed off, and was continued after requests by Mr. Hayat to speak to his father or to go home were denied. In my opinion, an expert in the psychology of police interrogation practices and false confessions would have been helpful to Mr. Hayat before and during trial. Prior to trial, such an expert could have provided testimony which would have assisted the district court judge in fully and fairly considering a defense motion to

> suppress Mr. Hayat's statements during his interrogation on the ground of involuntariness. At trial, such an expert could have provided both general and case-specific testimony that would have aided and assisted the jury with its difficult task of deciding what weight to put on Mr. Hayat's statement. Generally, such an expert could have testified about police interrogation training and techniques; how interrogation is designed to work as a psychological process; which interrogation techniques are psychologically coercive and why; how and why certain interrogation techniques can, and sometimes do, lead to false confessions from the innocent; situational and personal risk factors for false confession; and how both experts and law enforcement use the post-admission narrative analysis and standard of fit to evaluate whether confession statements are likely reliable.
>
> In 2006, at the time of Mr. Hayat's trial, there were numerous police interrogation and false confession experts who could have testified had the defense chosen to offer evidence of a false confession or improper police interrogation. By the end of 2005, I had been qualified and testified 119 times in disputed confession cases; by the end of 2006, 134 times. Other qualified experts include Dr. Richard Ofshe, Dr. Elliott Aronson, Dr. Lawrence Wrightsman, Dr. Christian Meissner, Dr. Gisli Gudjonsson, Dr. Saul Kassin, Dr. Mark Costanzo, Dr. Deborah Davis, Dr. Daniel Lassiter, Dr. Allison Redlich, and Dr. Lawrence White. The testimony of such an expert could have assisted Mr. Hayat's defense by explaining to the jury what the social science research shows about how and why psychological police interrogation methods can cause innocent suspects to falsely confess to crimes they did not commit, the situational and personal risk factors for eliciting false confessions, the different types of false confession (i.e., coerced-compliant and coerced-internalized), and the patterns and characteristics that tend to be present in false confession cases. Such an expert could also have educated the jury about the empirical standards and principles that researchers rely on when analyzing the likely reliability (or likely unreliability) of interrogation-induced statements, admissions and/or confessions.[42]

Ms. Mojaddidi recognized that an expert would have been helpful, yet she failed to call a competent expert. She made a proffer of testimony by James Wedick, a former FBI agent. But the district court held that the proposed testimony of Wedick would not assist the jury because it simply recited facts that were obvious to the jury from its own viewing of the videotapes of the interrogation. That finding was affirmed by the Ninth Circuit panel. *Hayat*, 710 F.3rd at 903. Both the district court and the circuit panel emphasized, however, that a principal reason that Wedick's testimony could be excluded was the fact that he had no qualifications to opine of the

[42] *See* Exhibit QQ, the declaration of Richard Leo.

nature or causes of false confessions. The district court ruled that: "Hayat has not shown Wedick is qualified as an expert in the field of psychology or psychiatry, or otherwise had the qualification to give expert testimony regarding Hayat's alleged susceptibility to suggestion and coercion." *See* Dkt. 482, order denying motion for new trial, at 50. Likewise, the appellate panel ruled: "Nor was it clear that Wedick had particular expertise in the field of false confessions. The district court did not abuse its discretion in excluding Wedick's testimony." 710 F.3d at 903.

A witness who did have expertise in the field would have been admissible, but Ms. Mojaddidi failed to procure such an expert. Once again, this failure can be traced both to Mr. Griffin's control over the case and its finances, and to Ms. Mojaddidi's tragic lack of experience in criminal litigation.

TRIAL COUNSEL'S FAILURE # 8: INSTRUCTING HAMID NOT TO TESTIFY

There is no more important decision for defense counsel in a criminal case than that of deciding whether to have his or her client testify. That was the case here. Ms. Mojaddidi believed her client was innocent. He had no prior convictions with which he could be impeached if he testified. If he did not explain the how and why of his "confession" being false, the jury was likely to convict on the basis of his statements alone. On the other hand, Hamid had proven highly suggestible during his interrogation, and his counsel could have serious doubts as to whether he could withstand the rigors of cross-examination.

It is precisely because the decision whether to have a client testify is so important and so difficult that it must be made by an attorney who takes into account only the best interests of his or her client. A frequent ground upon which courts find an attorney suffered from a conflict of interests requiring a new trial arises where that attorney convinces a defendant not to testify because doing so could endanger the interests of a codefendant. *See, e.g.*, *Gallegos*, 108 F.3d at 1283 (counsel's duty to one defendant was to encourage codefendant to testify to elicit exculpatory information, but duty to codefendant was to discourage him from testifying).

In this case, Mr. Griffin told Ms. Mojaddidi that she should not call Hamid to the stand. Ms. Mojaddidi felt compelled to defer to that directive because, in this and all other matters related to Hamid's defense, she had no experiential basis on which to question Mr. Griffin's

judgment, and she could not afford to alienate him, for she was in pressing need of his "mentoring." Furthermore, Mr. Griffin held all the resources available to fund Hamid's defense.

It was absolutely in the legal interests of Umer, Mr. Griffin's principal client, that Hamid not testify in his own defense. To the extent that Hamid's statements under interrogation supported the conclusion that he had attended a jihadi camp, they were inculpatory as to Umer, charged with lying about knowing of Hamid's attendance in Umer's own interrogation session with the FBI. Hamid's inculpatory statements had been excluded from the joint trial of Hamid and Umer under the *Bruton* rule because they could not be subjected to confrontation by Umer. But the *Bruton* ban would evaporate if Hamid testified and thus could be cross-examined by counsel for Umer.

Mr. Griffin quite correctly concluded that, with the *Bruton* prohibition in place, the government had insufficient evidence to convict Umer, whose interests he was committed to protecting. Griffin had no more compelling tactical objective than limiting the universe of evidence available to the government, and therefore needed to ensure that Hamid would not testify in his own behalf. He accomplished that objective because it was Mr. Griffin, not Ms. Mojaddidi, who was ultimately in control of Hamid's defense. Once again, the conflict of interest adversely affected Hamid's trial counsel.

TRIAL COUNSEL'S FAILURE # 9: FAILURE TO REQUEST BILL OF PARTICULARS OR TO OBJECT TO THE GOVERNMENT'S CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

The government's theory of guilt in this case was slippery. The indictment mentioned no particular camp or location. At trial, however, all of the evidence focused on the supposed Balakot camp. But given the weak evidence that such a camp even existed, the government shifted course at the last minute, and stated that it did not have to prove any particular camp. Ms. Mojaddidi objected to none of this.

The second superceding indictment (SSI) alleged that Hamid "had attended a camp in Pakistan where he received jihadist training" (SSI at ¶ 11), but provided no detail as to where that camp might be located. Ms. Mojaddidi, however, made no motion to dismiss for lack of adequate notice of the alleged camp's location or for a bill of particulars seeking to pin the government

down on its theory as to where the "jihadi camp" was located. Ms. Mojaddidi's failure to obtain a "definite written statement of the essential facts constituting the offense charged." (Fed. R. Crim. P. 7(c)) was due to the fact that she was operating under Mr. Griffin's directive to file no motions. In addition, Ms. Mojaddidi likely had no knowledge of the functions of a facial challenge to the sufficiency of an indictment or a bill of particulars.

At trial, however, the government's case against Hayat rested on the allegation that he had attended a militant"jihadi" camp near Balakot. As described above, the testimony of Eric Benn of the Defense Department focused only on a purported camp site near Balakot. The only evidence that the government presented was related to Balakot. The defense presented some evidence disputing the evidence of any camp at Balakot—but Ms. Mojaddidi requested no jury instruction limiting the government to that theory, and none was given.

In closing argument, the defense argued that the government had failed to prove beyond a reasonable doubt that Hamid had attended the camp near Balakot. In response, the government shifted course and radically broadened the theory of the case. AUSA Deitch stated: "The government doesn't have the burden to prove that [Hamid] attended a particular camp, only the burden of proving that he provided the material support and resources as defined in the judge's instructions." (RT 4361.) Ms. Mojaddidi made no objection to this last-minute attempt to broaden the permissible basis of conviction.

In sum, throughout the proceedings, Ms. Mojaddidi failed to pin the government down to any theory of guilt. She failed to move for a bill of particulars, she failed to request any pinpoint jury instructions, and she failed to object to the government's last-minute broadening of the theory of the case, which worked a constructive amendment of the charges. Once again, these failures were due to her lack of knowledge of the criminal law, and her total deference to Mr. Griffin over all tactical decisions in the case.

* * * *

In myriad ways, Hamid Hayat's representation was adversely affected by conflict. Due to her own inexperience, Ms. Mojaddidi deferred—absolutely and blindly—to Mr. Griffin's directive. She abandoned and failed to pursue numerous plausible avenues of defense. It is clear

enough that these failures prejudiced Hamid. Indeed, Ms. Mojaddidi's failures made it impossible for Hamid to prove the truth: that he is innocent of these charges. But regardless, because the above failures resulted from conflict, no showing of prejudice is required. What is required is simply a new trial with unconflicted counsel.

II. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE

The Sixth Amendment entitles a defendant to the assistance of counsel. This includes two "correlative rights": the right to counsel of reasonable competence, and the right to unconflicted counsel. *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988). As described in Argument I above, Ms. Mojaddidi made numerous errors due to her conflicted status. Those errors, resulting from conflict, entitle the petitioner to relief. But even if there had been no conflict, those errors would still entitle petitioner to relief under the other prong of the Sixth Amendment: the right to counsel of reasonable competence.

The standards governing claims of ineffective assistance based on incompetent performance are firmly established. To succeed, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) had counsel performed adequately, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 696.

A counsel's performance is deficient if, considering all the circumstances, it fell below an objective standard of reasonableness measured under prevailing professional norms. *Id.* at 688. Although judicial scrutiny of counsel's performance is highly deferential, "even if counsel's decision could be considered one of strategy, that does not render it immune from attack—it must be a reasonable strategy." *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997).

Consistent with this precedent, and highly pertinent to the claims raised here, "decisions" that are the product of counsel's ignorance simply cannot qualify as reasonable under the *Strickland* standard. As the Supreme Court emphasized in a per curiam decision issued just weeks ago,

> An attorney's ignorance of a point of law that is fundamental to his

> case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.

Hinton v. Alabama, 134 S.Ct. 1081, 1089 (Feb. 24, 2014); *see also* 3 LaFave et al., *Criminal Procedure* § 11.10(c), p. 971-72 (3d ed. 2007) (Observing that perhaps the "easiest case" for finding ineffective assistance under *Strickland* appears where counsel "failed to make a crucial objection or to present a strong legal defense solely because counsel was unfamiliar with clearly settled legal principles.")

As to failures to present evidence, "decisions that are made before a complete investigation is conducted are reasonable only if the level of investigation is also reasonable." *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008) (citing *Strickland*, 466 U.S. at 691). "The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Rios v. Roca*, 299 F.3d 796, 805 (9th Cir. 2002).

Of course, counsel's failure to move for the suppression of evidence obtained in violation of *Miranda v. Arizona, supra*, can constitute deficient performance. *Lowry v. Lewis*, 21 F.3d 344, 346-47 (9th Cir. 1994) ("Few things can more greatly benefit a criminal defendant than keeping the most probative evidence against him from being seen by the jury.") So, too, can counsel's failure to consult with expert witnesses or present expert testimony. Indeed, as the Court noted in *Hinton, supra*, "'Criminal cases will arise where the *only* reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'" 134 S.Ct. at 1088 (quoting *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011) (emphasis added)).

Finally, as to prejudice, a "reasonable probability" of a different result had counsel acted competently is less than a preponderance of the evidence but instead simply a probability sufficient to undermine confidence in the outcome. *Kyles v. Whitley,* 514 U.S. 419, 434-35 (1995); *Strickland,* 466 U.S. at 693, 695. Furthermore, the cumulative impact of multiple deficiencies may generate prejudice within the meaning of this standard. *See Harris v. Wood,* 64 F.3d 1432, 1438 (9th Cir. 1995), and citations contained therein.

Again, virtually all of the failings of counsel discussed in Argument I, *supra*, not only constituted adverse effects of counsel's conflict, but, primarily owing to counsel's ignorance of

governing legal principles, also constitute deficient performance within the meaning of *Strickland.* Furthermore, considered alone and together, these deficiencies—the failure to investigate and present exculpatory foreign and domestic alibi witnesses; to procure exculpatory evidence concerning the Balakot camp; to secure a CIPA clearance; to move for severance; to move for suppression of Hamid's statements; to procure a false confession expert; to secure a bill of particulars and object to the prosecution's closing argument—undermine confidence in the verdict.

Putting aside these failings that implicate issues of both conflict and competence, Ms. Mojaddidi made several other errors arguably the product of her incompetence alone (although Hamid contends that even these omissions can be traced to Mr. Griffin's insistence that Ms. Mojaddidi forego the assistance of Mark Reichel). These errors, especially when considered collectively with all those discussed above, likewise denied Hamid his Sixth Amendment right to competent counsel

TRIAL COUNSEL'S FAILURE # 10: FAILURE TO CHALLENGE INADMISSIBLE EXPERT TESTIMONY REGARDING BALAKOT CAMP

The prosecution recognized that in order to bolster its claim that defendant's purported confession was valid, the jury would require objective corroboration of a central element underlying all of the charges alleged in the indictment—namely, that defendant had actually attended a militant training camp in or near Balakot. To support that claim, the government called a single "expert" witness, who testified that it was highly probable that satellite images of Balakot depicted a militant, i.e., non-military training camp of the kind described by Hayat at the conclusion of his lengthy interrogation.[43]

This probability estimate rested in critical part upon (1) the "expert's" assumption, urged upon him by prosecutors, that Hayat's statement about attending a camp had been truthful and (b) his related (unacknowleged) assumption that Hayat's initial denials about attendance had been

[43] The government's expert witness on Pakistan militants, Hasan Abbas, provided no testimony whatsoever concerning Hamid, and, as more fully described below in Argument V, the testimony of its other expert, Khaleel Mohammed, did not in any way address the subject of militant camps in Pakistan.

false. These assumptions, however, were fundamentally unreliable because they arose from the expert's assessment of witness credibility, an issue that is reserved exclusively to resolution by the jury and that was, in any event, categorically beyond the witness's professed expertise. *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995). The disputed estimate should have been excluded under the federal rules governing the admission of expert evidence. Unaware of the rules' requirements, however, trial counsel failed to challenge the estimate before or during trial, and the result was admission of emotionally powerful but deeply flawed evidence that tipped the balance of the case against defendant.

1. Background

Government expert witness Eric Benn was a senior imagery analyst from the Department of Defense. (RT 3004.) Benn identified satellite photos of the area near Balakot, Pakistan, two taken in August, 2004 (Exh. 1 and 2), and two in October, 2001 (Exh. 3 and 4), and described details of the photos, including structures they contained. (RT 2998, 3008-3060.)

Based on his analysis of the photos, Benn initially opined that the probability that the 2004 structures represented a militant training camp was fifty percent or a "good strong possible." (RT 3062, 3073; *see also* RT 3102.)

Responding to the prosecutor's leading questions, Benn thereafter confirmed that he had previously reviewed the videotaped "interview" of defendant conducted on June 4 and June 5 of 2005, and that the "information conveyed" during that session had been "relevant" to his analysis as to the presence of the militant training camp. (RT 3066.)[44] The prosecutor thereafter proposed playing certain excerpts of the videotape containing select statements made by Hamid during the taped portion of his interrogation "to provide . . . the basis for the testimony Mr. Benn will give . . . ." (*Id.*) Asked to state her position on the proposal, Ms. Mojaddidi stated, "no objection." (RT 3067.) The prosecutor thereafter played a number of Hamid's interrogation excerpts containing

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[44] Benn testified that, prior to trial, and in addition to providing him with the interrogation videotape and related transcripts (RT 3084-85), the prosecution had "described" the indictment to him and had told him "what the charges were" and "[about] some of ... the records that had been filed." (RT 3085-86; see also RT 3085 [Benn testified he was told about the case "at the macro level, kind of the overall context."].)

his descriptions of the camp area he purportedly visited, with Benn opining that certain such descriptions were "consistent" with features depicted in the 2004 satellite imagery. (RT 3067-72.)

Factoring in certain statements made by Hamid during his interrogations, Benn raised his estimation of the probability that the photos taken in 2004 portrayed a militant training camp to sixty or seventy percent. (RT 3074; *see also* RT 3073 [tape of interrogation "very much influence[d] the confidence of [Benn's] judgment that this would be a [militant] training camp.]; RT 3074 [consideration of Hamid's interrogation statements made it "much more likely than not" that images depict militant training camp]; RT 3102-03; RT 3114 [on the basis of the "accumulated body of materials" he reviewed, Benn is "very confident" in his assessment of the location depicted].)

Benn's higher probability estimation that the relevant images depicted a militant camp was founded on no evidence apart from the specific satellite images of the Balakot site admitted into evidence as Government Exhibits 1-4 *and defendant's statements*. (RT 3082.) Benn had never visited Balakot or talked to anyone who had visited the location depicted in the satellite images. (RT 3084, 3105.) He was aware that during his interrogation, Hayat had mentioned at least five other sites as the possible location for a training site he said he had attended, but, again, "the government did not ask [Benn] to review" satellite photos of any locations other than the area near Balakot. (RT 3087.)

Moreover, Benn formed his "probability estimate" only by ignoring all of Hamid's other conflicting statements that he had never attended the camp. In short, Benn thus formed his opinion as to the greater probability that the photos disclosed a camp by deeming untrue not only Hamid's repeated denials of attending a camp in Japan, at his home in Lodi, and in the unrecorded portions of his interview at FBI headquarters in Sacramento, but also his statements about any locations other than Balakot. Specifically, Benn testified that he did not "understand" that these other locations were "the camp that he spent the several months at" (RT 3086-87), making clear that his expert testimony assumed the truth of the pivotal allegation on which the government's entire case rested. He further testified that in reviewing Hayat's recorded statements, he had "discounted" those made late in the interview concerning camp locations other than Balakot

because they "stopped having consistency." (RT 3118.) He also had discounted Hayat's statement that the camp was "in" Balakot, rather than six miles from Balakot, which was the location depicted in the relevant satellite imagery analyzed by Benn. (*Id.*; RT 3043-44.)[45]

2. General Principles

Federal Rule of Evidence 702 permits testimony by experts qualified by "knowledge, skill, expertise, training, or education" to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue." The expert's testimony must be "based upon sufficient facts or data," "the product of reliable principles and methods," and the expert must "appl[y] the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court described the district court's "gatekeeping role," and required that "all forms of expert testimony, not just scientific testimony" survive scrutiny under Rule 702. *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002).

3. Ms. Mojaddidi's Failure to Object

Any competent trial counsel would have objected to Benn's testimony, and in particular his numerical "probability estimates"—which can only be described as preposterous. That testimony violated Federal Rule of Evidence 702 in numerous ways.

Benn's testimony failed to satisfy the basic reliability requirements of Rule 702 and *Daubert*. Benn offered numerical estimates of the probability that a satellite photo depicted a

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[45] In its decision on appeal, the Ninth Circuit summarized Benn's testimony as follows:

> Benn, a satellite imagery expert who had analyzed satellite images to determine the likelihood that there was a militant training camp near Balakot between 2003 and 2005, characterized the likelihood as "a good strong possible." He further testified that when an analysis of the satellite imagery was combined with the description Hayat had provided in his confession about his travel to the camp, his assessment of the likelihood that a military training camp existed outside Balakot increased to "probable."

Hayat, 710 F.3d at 884.

terrorist training camp. But there is no demonstrable principle or method that allows an expert to estimate such a numerical probability based on a photograph. *See* Fed. R. Evid. 702(c). And there was no showing in this case that Benn's opinion was truly based on sufficient facts and data. *See* Fed. R. Evid. 702(b). Initially, Benn apparently looked at the photos and picked a number: 50%. That numerical estimate, however, was not anything that can be called science. It is rather junk science, the science of guessing, which is exactly what *Daubert* and Rule 702 forbid.

Moreover, the defense was denied the ability to question the basis of Benn's estimate. Benn's estimate appears to have been based in part on classified information made known to him by the prosecution. Under the Rules 703, an expert may rely on otherwise inadmissible evidence—but only on the assumption that the opponent has an opportunity to view that evidence, and also admit the evidence if it chooses. Yet the government blocked any defense inquiry into that information on its assertion that it was classified and thus subject to CIPA protections.[46] Given that the defense had no fair opportunity to contest the basis of Benn's (bogus) statistical estimates, the testimony should have been excluded.

But if the initial 50% estimate was merely junk, the revised higher estimate—based on reviewing Hamid's statements—was highly prejudicial junk. Benn effectively testified that he, as an expert, believed Hamid's statements about attending the camp. This testimony was not reliable, it was not science, and it was not helpful to the jury. *See* Fed. R. Evid. 702(a). And inasmuch as it flatly disregarded Hamid's repeated *denials* that he had attended a camp, made

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[46] On March 28, 2006, while cross examining Department of Defense senior analyst Eric Benn as to the "perhaps dozens of images that [Benn had] reviewed over the course of [his] career" depicting potential militant camps in Pakistan, Ms. Mojaddidi asked Benn for his opinion as to the breakdown among "possible," "probable," and "confirmed" existence of such camps "in that vicinity." (RT 3082-83.) The prosecutor objected under Rules 401 and 403 "and ... also [on the grounds that *the question*] *may call for the disclosure of classified information*." (RT 3083 [emphasis added].) Ms. Mojaddidi responded, "That's fine. I'll move on." And she did so. (*Id.*)

Shortly thereafter, Ms. Mojaddidi asked Benn on cross whether "anyone from the United States [had] visited [the] location [depicted in the satellite images discussed by Benn]"— i.e., those depicting the camp Hamid had supposedly attended. (RT 3105) The prosecutor responded, "Objection. Relevance. 403. *And may call for the disclosure of classified information*." (*Id.* [emphasis added]) This Court sustained the objection. Ms. Mojaddidi did not pursue the inquiry. (*Id.*)

during the initial, unrecorded portion of the interrogation, the testimony was not based on sufficient facts or data. Fed. R. Evid. 702(b). More to the point, it ran afoul of the foundational principle that experts may not offer opinions on the credibility of witness statements or offer any opinion that has the effect of buttressing a witness's statements. Yet that was precisely what Benn did here.

It is firmly established in this Circuit (and others) that expert testimony that bolsters or attacks witness credibility does not assist the trier of fact; to the contrary, such testimony invades the province of the jury and is therefore flatly prohibited. *See, e.g.*, *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (because credibility is issue for jury, psychiatric experts may not testify specifically as to credibility or buttress credibility improperly), overruled on other grounds, *United States v. Morales*, 108 F.3d 1031, 1035 n. 1 (9th Cir. 1997); *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979) (error to permit an expert to testify to the ability of a witness to recall a stabbing, and noting that under the Federal Rules of Evidence, opinion testimony on credibility is generally limited to character, and all other opinions on credibility are for the jury to form); *United States v. Barnard*, 490 F.2d 907, 912–913 (9th Cir. 1973) (upholding, in the absence of unusual circumstances, the trial court's exclusion of the opinion of a psychiatrist and psychologist that a government witness was a sociopath who would lie when it was to his advantage to do so); *United States v. Charley*, 189 F.3d 1251, 1268 (10th Cir. 1999) (Doctor's testimony that alleged victims were sexually abused inadmissible to the extent that it rested on crediting victims' statements concerning charged events). *See also* Charles B. Gibbon, *Federal Rules of Evidence with Trial Objections*, § E50 (4th ed.) ("A fundamental premise of our system of trial in both civil and criminal cases is that determining the weight and credibility of witness testimony is the responsibility of the jury. It is this premise that underlies the principle that a witness's credibility is "not an appropriate subject matter for expert testimony.")

This Circuit adheres to a particular and forceful formulation of the rule: "'An expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility.'" *Rivera*, 43 F.3d at 1295 (quoting *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989); *see also United States v. Scop*, 846 F.2d 135,

138 (2d Cir. 1988) ("Our holding ... is that witness A may not offer an opinion as to relevant facts based on A's assessment of the trustworthiness or accuracy of witness B where B 's credibility is an issue to be determined by the trier of fact.")

Significantly, this Court itself effectively recognized and applied the foregoing principle in rejecting petitioner's proposed expert testimony from former FBI agent James Wedick concerning the particular factors and circumstances surrounding petitioner's confession and how they rendered the confession unreliable. In so ruling, the Court stated:

> . . . [T]he record [does not] indicate that Wedick was in a better position than a juror to opine about Hayat's age, language barrier, marriage and/or family status, or any fatigue factor; and Wedick's testimony was unnecessary to inform the jury about Hayat's level of education, health, occupation and employment status, religion and/or belief in God, illiteracy, or experience with the criminal justice system. *See U.S. v. Adams,* 271 F.3d 1236, 1244 (10th Cir. 2001) (upholding the district court's exclusion of a psychologist's report with which the defendant wished to challenge the credibility of his prior statements to police; finding that nothing in *Crane* warranted the categorical admission of evidence; and noting that expert evidence relating to the credibility of a confession was problematic for a variety of reasons: it may invade the province of the jury, and, thus, not "assist" the jury as required by Rule 702; it may exceed the scope of the witness's expertise; or be overly prejudicial under Rule 403, as witnesses may tend to overvalue scientific evidence as it bears on truthfulness); *U.S. v. Charley,* 189 F.3d 1251, 1267 (10th Cir.1999) ("[E]xpert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by Rule 702."); *U.S. v. Barnard,* 490 F.2d 907, 912 (9th Cir.1973) ("Credibility ... is for the jury-the jury is the lie detector in the courtroom.").

United States v. Hayat, 2:05-CR-240-GEB, 2007 WL 1454280 at *23.[47] Those principles, if fairly applied, would also have required the exclusion or limitation of Benn's testimony.

But those principles were never applied to the government's witnesses, because Ms. Mojaddidi failed to insist on them. The jury was thus presented with "expert" opinion testimony concerning a crucial issue that, because it plainly rested on an assessment of Hamid's credibility,

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[47] The prosecution, too, relied heavily on the same principles and precedent in urging this Court to exclude the Wedick testimony. *See, e.g.,* 2:05-CR-240-GEB, Dkt. No. 261 ("Government's Motion to Preclude Expert Testimony by Defense Witness James Wedick on Opinions Set Forth in his March 21, 2006 Disclosure"), at 10-11.

was flatly prohibited and subject to exclusion as a matter of law. There was never any finding that Benn's methods or data were reliable, because trial counsel never insisted on one. There was never any limitation placed on Benn's implicit credibility determinations, because trial counsel never objected. This Court never performed its "gatekeeping" role under *Daubert*, because trial counsel never filed any *Daubert* motion.

There can be no plausible strategic explanation for Ms. Mojaddidi's failure to raise *Daubert* and 702 objections to Benn's testimony. Nothing would have been lost by filing such motions, and much would have been gained—because those motions would, at a minimum, have required Benn to refrain from opining on credibility, and to refrain from offering utterly baseless numerical estimates of probability. Counsel's failure to object was constitutionally deficient.

4. Prejudice

As a practical matter, as to all four counts charged against Hamid, the prosecution was required to prove beyond a reasonable doubt that he had actually attended a militant training camp between October, 2003 and November, 2004. But apart from his extraordinarily dubious "confession," the only evidence the prosecution was able to present on the question was that of (non-percipient) witness Benn. Before he factored in Hamid's statements, Benn essentially testified that whether the prosecution's satellite images depicted a militant camp at all came down to a coin flip. But, bolstered by the unreliable probability estimate, Benn gave jurors reason to be, like Benn, "very confident" that the images depicted such a camp, and simultaneously provided them an "objective" basis for believing Hamid's confession was true.

A timely and proper challenge would have ensured its exclusion. Admission of the testimony, even that confined to the "70 per cent" estimate, undermines confidence in the verdict, thereby warranting reversal under *Strickland*.

TRIAL COUNSEL'S FAILURE # 11: FAILURE TO CHALLENGE EXPERT TESTIMONY REGARDING TAWEEZ

As noted in Judge Tashima's dissenting opinion on direct appeal, "Hayat carried in his wallet a written prayer, a saying of the prophet Mohammed, that a government expert opined would be carried only by a "jihadist," a person intent on waging war in the name of God." *Hayat*,

710 F.3d at 904-05. That government witness was Khaleel Mohammed, who provided the jury with a literal translation of the prayer or supplication, the correctness of which was certainly subject to challenge as to its weight, if not its admissibility. The remainder of Mohammed's opinion—that the prayer would be carried only by a "jihadist,"—was blatantly false, both in general and as to Hamid, who was given the prayer, or taweez, as a wedding present. As his uncle, Attique ur Rahman, explains in his declaration: "In our culture, taweez are for healing or protection. If a child gets sick, giving him a taweez is pretty much routine. The average person does not even know what is written inside it."

Hamid's present counsel attempted to challenge the admission of Mohammed's testimony on direct appeal. That challenge, however, was rejected by the panel majority largely because Ms. Mojaddidi failed to object. As a result, the challenge was only reviewable under the nearly insurmountable plain error standard. Although Judge Tashima argued that error was so egregious and so obvious that it met that standard, the majority disagreed, and ruled that the admission of Mohammed's testimony "was not *plain.*" *Hayat*, 710 F.3d at 902 (emphasis in original). As even the majority suggested, however, trial counsel's failure to object cannot be justified.

1. Mohammed's "Expert" Testimony

Prior to trial, the government notified the defense of its intent to call Dr. Khaleel Mohammed—an Assistant Professor of Religion at San Diego State University—to testify as an expert in "Arabic, Islam, and the interpretation of supplications." A copy of Dr. Mohammed's CV was attached. It established that he had earned his Ph.D in Islamic Law from McGill University. His publications, presentations, keynote addresses, etc., revealed an interest in the intersections of Islam and Judaism. The prosecution stated that Mohammed would testify about the piece of paper found in Hamid's pocket—that it was a prayer for a warrior, a prayer asking for Allah's assistance in fighting enemies, and so on.

The defense did not specifically object to this testimony, under either Rule 702 or Rule 704(b). The defense had previously filed a boilerplate *Daubert* objection to all prosecution experts, but this Court denied that motion stating that it lacked specificity with regard to the evidence the defense sought to limit, prohibit, or exclude. (*See* Dkt. 152, Order of January 19,

2006, at 1-2.)

On March 12, 2006, two days before Dr. Khaleel Mohammed was scheduled to testify, the defense received a packet of *Jencks* materials. The packet included source materials for the prayer, as well as Dr. Mohammed's interpretation of the sources. It also included a number of emails, sent to seven individuals, described in his testimony as "colleagues who are in the field, from both the academic side of the field as well as those who are ... based within the faith as well." (RT 2002.) The questions Dr. Mohammed posed to one or all of them—asking them to treat them as "urgent"—included whether Pakistanis/Bangladeshis/Indians normally carry amulets with prayers written on them; if one had such a prayer, what would that tell us about him; if not a common prayer among Pakistanis, can we identify a group that uses it; and would we find it written on ta'wiz?

Mohammed received responses from eight people. Zafar Ishaq Ansari, a Pakistani scholar of Islamic studies stated: "My feeling is that this is not very common in amulets at least in this part of the world. But occasionally I have heard it in the post-Friday Prayer dua, especially when people are feel that they facing the hostility of non-muslims."[48] Bariza Umar, a Ph.D candidate in Islamic studies, and apparently a native of Pakistan, wrote that "They are called Taweez here ... the taweez usually has dua's and surah's offering protection, nothing more. ... Usually these amulets are worn by people who believe in the protective power of the words of the quran ... Some also wear them to be cured of illnesses ... *I would guess that most people probably don't know what is written in the Taweez*."[49] Mehmood Chatta, a postgraduate student at the University of Western Australia's School of Social Work, wrote that he did not succeed in finding a Pakistani Imam in Perth, and furthermore "no group can be identified in Pakistan using this dua for any purpose including ta'wiz."[50] Ahmed Subhy, an Islamic scholar and activist, wrote that the "Sunni Wahabbists and Muslim Brotherhood and their different organizations" use the prayer. He

[48] *See* Exhibit RR, the email response of Zafar Ishaq Ansari.

[49] *See* Exhibit SS, the email response of Bariza Umar.

[50] *See* Exhibit TT, the email response of Mehmood Chatta.

identified it as one of "their traditional sayings in their prayers."[51] Omar Huda, a professor of Islamic History, wrote: "I do not know this dua— I'm not big on this things anyway." [52] Dr. Omar Farooq, the founder and moderator of North American Bangladeshi Islamic Community, responded that while he was not aware of this prayer, and did not recall hearing it, it is not at all uncommon for people from Bangladesh/Pakistan to carry amulets...a lot of people probably do." He concluded that "[o]f course, any observation on this, without any serious study, would be anecdotal at best."[53] Abudrrahmaan Saaleh, of the International Islamic University Islamabad, wrote that he had not noticed any special importance given to the prayer in any of the regions of Pakistan. "[S]tudents from various regions of Pakistan, as well as the imams from different regions belonging to different schools of thought, they also confirm the same."[54]

Finally, Mohammed wrote to a student in Uzbekistan, named Gulfiya. He asked her to direct his questions to her "Mufti." Unable to speak directly with the Mufti, Gulfiya instead spoke with an Imam who was his second in command, and relayed her recollection of his responses to Mohammed. Gulfiya herself did not know the meaning of the prayer, but was told that it is commonly used by "our people." The Imam told her that the prayer "can be pronounced by warriors too with purpose of asking Allah to help in their war...."[55]

The thrust of Dr. Mohammed's direct testimony at trial was succinctly summarized by Judge Tashima, in his opinion:

> The government's expert witness, Khaleel Mohammed, teaches Islamic studies and is an erstwhile imam. He has experience in translating and interpreting prayers from a "faith based perspective, as well as from an academic perspective." Mohammed testified on direct examination that he translated from Arabic a written supplication found in Hayat's wallet. He translated it as: "Oh Allah we place you at their throats and we seek refuge in you from their

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[51] *See* Exhibit UU, the email response of Ahmed Subhy.

[52] *See* Exhibit VV, the email response of Omar Huda.

[53] *See* Exhibit WW, the email response of Dr. Omar Farooq.

[54] *See* Exhibit XX, the email response of Abudrrahmaan Saaleh.

[55] *See* Exhibit YY, the email response of Gulfiya.

> evils." He then testified that the supplication was "not peaceful" because he looked up the supplication in several commentaries, and "just about every commentary [the expert] checked puts it [the supplication] in a case where someone who is in jihad makes this supplication, someone who is at war with a perceived enemy ...." The following exchange then occurred between the prosecutor and the government's expert:
>
> > Q. Based on your research and experience, what is the context, then, of this supplication?
> >
> > A. The context of the supplication is for when one is engaged in war, a holy war, fighting for God, against an enemy that is perceived to be evil.
> >
> > Q. In your opinion, would a particular kind of person carry this supplication?
> >
> > A. Yes. A particular kind of person would carry this supplication.
> >
> > Q. What kind of person?
> >
> > A. A person who perceives him or herself as being engaged in war for God against an enemy.
>
> Mohammed further testified that a person carrying this supplication would be "[a] person engaged in jihad." He insisted that *"there is no other way it could be used."* He elaborated that it would be fair to say that this person would be a "jihadist" or "part of the mujahedeen." Among other sweeping conclusions, Mohammed explained that carrying this particular supplication means a person: "*has* to be involved in jihad"; *must* "perceive [ ] himself to be carrying out one of the obligations of jihad, that he was involved in what he deemed to be jihad"; and "was completely ready. The person was in the act of being a warrior."

Hayat, 710 F.3d at 911. This testimony drew no objection from Ms. Mojaddidi.

The prosecutor also proceeded to ask Dr. Mohammed if he was "personally aware of warriors carrying similar supplications?" After replying that he was, Dr. Mohammed explained that he gained this awareness during his six-year period of study in Saudi Arabia, where he "came into contact with students from various parts of the world, and [he] met people who came from the regions [he] already mentioned, and [they] spoke about these things because some of them had these amulets still on them. And [he] would question them as to what they were, and they explained to [him] their role in jihad." (RT 2014.) In addition, according to Dr. Mohammed, the fact that the students he encountered were still wearing the amulets indicated that "they still

perceive themselves to be in jihad, and that they would be returning to their countries to continue to fight against the enemy." (RT 2015.) The amulet-bearing "warriors" testified about by Dr. Mohammed hailed from Afghanistan, Pakistan, Southern Philippines, parts of Africa, Waziristan and Kashmir. (RT 2015.)

Next, Dr. Mohammed was asked if he knew of a "particular group" that was using a "similar supplication." He began to testify regarding a group of fighters in the Southern Sahara, when Ms. Mojaddidi lodged an objection as to the relevancy, potential for prejudice/waste of time, and foundation of this testimony. The prosecutor defended this line of questioning by saying that "it's just another example of how a warrior would use *this* supplication, and therefore it's relevant because it may strengthen his opinion." (RT 2015-2016 [emphasis added].) Finally, the prosecutor asked Dr. Mohammed if he knew of a group called the "Egyptian Muslim Brotherhood," and whether those members would "carry this or similar supplications." Dr. Mohammed clarified that they "would make these supplications. As to whether they would carry them, I'm not sure, because their mother tongue is Arabic for the most part, so they memorized this, and I noted they used these supplications." "I consulted one of their experts who was part of the Muslim Brotherhood at one time, who graduated from Azhar, and who served as an imam in Egypt, and he gave me this information." (RT 2016-2017.)

On cross-examination, Ms. Mojaddidi asked Dr. Mohammed about the people he had contacted. Ms. Mojaddidi proceeded to read portions of the emails to Dr. Mohammed (quoted in the previous section), and to ask about the people contacted. He did not deny the accuracy of the many quotations which offered no support for his sweeping conclusions linking the supplication solely to jihadi warriors. When questioned as to Omar Huda's credentials, he seemed to know very little about him, including his area of discipline: "To the best of my knowledge, Omar Huda is a professor at UCLA in some discipline other than Islamic Studies, but not in religious studies. (RT 2071.) The only individual consulted who was able to provide information about the specific supplication was Gulfiya, an English Lit student from Uzbekistan whom Mohammed did not know (RT 2075), who had contacted an unnamed Imam she had consulted (RT 2082). Mohammed was also asked if he had consulted "an expert of Hadith who is currently living." He

responded that Dr. Zafar Ansari was such a person, and he had written that he had occasionally heard of the prayer. (RT 2082.) Ms. Mojaddidi did not cross-examine Mohammed about the email he had received from Bariza Umar—the Pakistani student and Ph.D candidate in Islamic Studies—who had identified it as a ta'wiz and said that most Pakistanis do not know what is written in the ta'wiz.

In his direct testimony, Dr. Mohammed had been asked if the particular supplication was "common or not." In reply he said that he "checked with scholars of the different regions, I checked with scholars from Pakistan, from Uzbekistan, from Bangladesh, which was once part of Pakistan, I checked with scholars from Egypt, and they all said that it is not a common supplication." (RT 2008.) During the defense case, Ms. Mojaddidi called Dr. Anita Weiss to testify that ta'wizs are commonly carried by Pakistani travelers. Weiss stated that it is "extremely common. Whenever you go to an airport, you're always seeing many people either put—tying ta'wiz around somebody's arm, or handing them verses that they put in their pockets or their wallets ... . It's very common." (RT 4192.) This Court granted, however, the government's motion to exclude, as untimely disclosed, testimony by Dr. Weiss that the supplication carried by Hamid was in fact a ta'wiz. (RT 3572, *)

During the government's rebuttal closing argument, AUSA Deitch stated that Dr. Mohammed was the "only expert witness who testified in this trial who can read and write Arabic," suggesting that his testimony *must* be believed over the testimony of Dr. Anita Weiss regarding the extremely common cultural practice among Pakistanis, of carrying a "ta'wiz" during times of travel. (RT 4356.) Moreover, Mr. Deitch characterized the individuals consulted by Dr. Mohammed as "highly qualified colleagues ... highly qualified Islamic scholars," whose "uniform opinion was that this was a piece of paper with a prayer on it that would be carried by a holy warrior, a violent jihadi, who felt himself to be traveling in an enemy land, and who was ready to commit violent jihad." (RT 4357.) Ms. Mojaddidi did not object to this characterization.

2. The Atlantic Monthly Article

On October 1, 2006, after the jury had convicted Hamid but before his new trial motion had been filed, an article written by Amy Waldman appeared in the *Atlantic Monthly* magazine,

entitled "Prophetic Justice."[56] Much of the article was directed at the Hayat case and the testimony concerning the supplication.

According to Waldman, the prayer was critical to the government's case, as the prosecution called "an expert, Khaleel Mohammed, a Guyanese-born, Saudi-trained scholar, to interpret it, at $250 an hour. Mohammed is an assistant professor of religious studies at San Diego State University and is best known for asserting that, according to the Koran, Israel belongs to the Jews. Most other Islamic scholars find that position politically unpalatable and scholastically indefensible." (*See* Exhibit E, at 89.) In her conversations with members of the jury, Waldman learned that some had speculated—despite no evidence to that effect—that "the paper might be Hayat's graduation certificate from the terrorist training camp." As the jury foreman put it: "It became quite apparent that this is no accidental piece of paper that you would fold up and put in your wallet like a Saint Christopher medal or anything like that, ... This is something very very – very specific." (*Id.* at 90.) In the article, McGregor Scott, then the United States Attorney for the Eastern District of California, stated that "it's pretty hard to put a benign meaning to [the prayer as translated]. To try to represent that this is a common thing that people carry about just defies common sense." (*Id*.)

Waldman also reached out to other scholars about the prayer. First, she spoke with the prosecution's other Muslim expert—Hassan Abbas—a Pakistani academic who had testified about "Pakistani extremist groups and the literature found in the Hayat household; he was not asked about the supplication." (*Id.*) Abbas told Waldman that "he was surprised the prosecution had made such a big deal out of the prayer, because almost everyone in Pakistan carried a tawiz. He pulled out his wallet and removed a square of folded white paper that was laminated with plastic —a tawiz from a mystic he trusted in Pakistan. Unable to extract the paper from its plastic covering, Abbas wasn't sure what it said—he thought it was a set of numbers surrounded by different names for Allah—but it offered him comfort nonetheless." (*Id*.)

Recalling Mohammed's testimony that the prayer was not at all common—"something

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[56] *See* Exhibit ZZ, a copy of Waldman's *Atlantic Monthly* article.

almost secretive"—Waldman sent the prayer to three others: two Islamic scholars—Bernard Haykel, then a professor at NYU and presently at Princeton, and Ingrid Mattson at the Hartford Seminary—and to Salman Masood, a Pakistani reporter, working for the New York Times in Islamabad. (*Id*. at 90-91.) Dr. Haykel wrote that the prayer is a "very canonical and widely used Sunni (originally Prophetic) Islamic invocation or supplication," that is used when a Muslim is in fear of something or someone, and is not at all used exclusively by terrorists or jihadists, though jihadists may certainly use it also. (*Id*. at 90.) Dr. Mattson "recognized the words right away. It is a traditional supplication that you will find in many, many collections of prayers ... ." Echoing Haykel's comment that the prayer had originally been said by the Prophet when he feared harm, Mattson added that all of her prayer books offered the same reason for saying the prayer: "to ask God's protection from people who might do you harm." (*Id*.) While it was of course possible that one might utter it for a wrong purpose, "the prayer itself is a 'defensive' prayer; it does not, in itself, connote a desire to do harm." (*Id*.)

Likewise, Salman Masood, the Pakistani journalist, recognized the prayer right away, characterizing it as "a very common prayer." Masood affirmed what the others had said about the prayer seeking protection, in God, from others' mischief, and located the prayer in a number of sources, including in a small booklet that taught how to say the five daily prayers of Islam. (*Id*.) Masood wrote that the booklet said that this prayer should be said 'when you have the fear of enemies,' ... It's a very common prayer, and yes, I would say that many Pakistanis know about it." (*Id*. at 90-91.)

3. Ms. Mojaddidi's Failure to Challenge or Counter Mohammed's Testimony

Mohammed's testimony no doubt packed a great emotional punch and had a substantial impact on the jury. But it was also highly dubious. It should have been excluded or substantially limited, and any competent trial counsel would have objected. At a minimum, a competent trial counsel would have developed an effective cross or called a contrary expert. Once again, however, Ms. Mojaddidi's inexperience resulted in her taking none of these actions.

a. Qualifications

At the very outset, Mohammed's testimony could have been excluded based on lack of

qualifications alone. See e.g., *Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1005-06, *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (reversing summary judgment in favor of defendant where, *inter alia*, purported expert on Korean business culture and practices was patently unqualified, rendering testimony unreliable as a matter of law under *Daubert* and Rule 702). He can speak some Urdu, but is not fluent. He has no knowledge of Pashto, and has never visited, much less studied or conducted research in, Pakistan or India, nor Afghanistan. (RT 2021) Mohammed testified that—as part of his course of study in Islamic Law—he was required to take two years of Classical Arabic. But, as his emails seeking information from third parties made evident, when he first was retained by the government, he knew nothing about this supplication in particular, or the practice of carrying a ta'wiz in Pakistan in general.

Those materials revealed that, in order to determine the meaning of the supplication, Mohammed had consulted eight friends and colleagues via email. When contacted by Mohammed to offer an opinion on the supplication, Dr. Farooq, the founder and moderator of North American Bangladeshi Islamic Community, responded that he was not aware of this prayer, and concluded that "[o]f course, any observation on this, without any serious study, would be anecdotal at best." Because Mohammed had done no systematic study of the supplication, his opinions could at best have been anecdotal in nature. But Mohammed in fact had no anecdotes to rely on, because he had no experience with either this specific prayer or Pakistani religious culture. He did not testify that he had ever identified, met, or interviewed anyone who carried the supplication, jihadi or not. He could not testify that the supplication ever had been carried by a known terrorist. His testimony regarding the jihadis he had met during his studies nearly 30 years prior in Saudi Arabia, and reference to the "similar" (yet undescribed) supplications they carried, provided no experiential basis for an opinion that anyone carrying this particular supplication was bent on violent jihad.

Mohammed was not qualified to offer any opinion, much less an expert opinion, on the meaning of a supplication carried by a member of a culture that he had never studied. Trial counsel, however, made no challenge to his qualifications.

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b. Reliability

Qualifications aside, an expert's opinion must be based on reliable methods, and they must be supported by sufficient facts and data under Rule 702 and *Daubert*. Mohammed's testimony was wholly unreliable and unsupported. Various factors bear on the 702/*Daubert* analysis, and in this case, the factors militate strongly in favor of exclusion.

i. Independence

Mohammed did not research the meaning of this prayer independently. Rather, he did so only in anticipation of this criminal prosecution. *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995) ("[I]n determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office."). Nowhere in his testimony did Mohammed assert that he had ever encountered the particular prayer herein at issue in academic work done prior to being retained by the government. He knew which sources to consult in locating the prayer and establishing its provenance as an invocation attributed to the Prophet himself, and could likely render a literal translation of the prayer. But nowhere in his CV, or in his voir dire by any party, does it emerge that he was qualified to offer any expert opinions about the religious and cultural practices of Pakistani Muslims, be they jihadists or not.

Indeed, a review of his publications, presentations and keynote addresses in his curriculum vitae reveals an overwhelming emphasis on areas of intersection between Islam and Judaism: e.g., "Muslim Exegesis, the Hadith and the Jews"; "Demonizing the Jew: Examining the Antichrist Traditions in the Sahihayn"; "Abraham Geiger and Heinrich Graetz: A Comparison of their Different Perspectives on Jewish History"; "The Hajj and the Retelling of Jewish History"; "Islam and Zionism: the Trajectory from the Qur'an to the Hadith"; "The Qur'an Militant Islam and Israel"; "For Whom the Land? A Qur'anic Answer"; "Medieval Islam and the Demonization of Jews." This is hardly the type of research that would qualify a person to assist the trier of fact in understanding the meaning and possible usages of a prayer found folded inside the wallet of a non-Arabic speaking Pakistani Muslim.

In a pretrial email to the prosecutor, Mohammed stated that he "found a hit for the source

on the internet. It is indeed a classical text "riyadh al saliheen" by Imam Nawawi. That is ALL that any sunni Muslim needs as an authority to show the relation as per my postulations. I shall attempt to obtain a copy of this book shortly.[57] This email makes clear that Mohammed, like a lay person, was looking on the internet to see what he might learn about this specific supplication. There can be no question that Mohammed's research and opinions regarding the supplication, rather than being part of his academic research, were developed expressly for purposes of litigation, a factor cutting against the admissibility of his testimony.

ii. Logical connection

Expert opinions should be excluded where "there is simply too great an analytical gap between the data and the opinion proffered." *General Electric v. Joiner*, 522 U.S. 136, 146 (1997); *see also Daubert*, 509 U.S. at 591-92 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."). In this case, the data consisted of Mohammed's translation of the supplication and the opinions he received in response to his emails. In terms of logic, none of this data remotely justified the opinion proffered.

Mohammed translated the supplication as follows: "Oh Allah we place you at their throats and we seek refuge in you from their evils." The translation in the English language version of *Riyadh al Salihin* provided in the Jencks packet for Mohammed (and readily available on Google) is as follows: "O Allah! We put You in front of them, and we seek refuge in You from their evils. Obviously, both translations seek divine protection but express no intention to do anything on the part of the supplicant. Regardless of the translation used, there is simply no rational methodology that could support a necessary inference from the language of this prayer to a conclusion about a given person's mental state.

In *Riyadh al Salihin* the prayer was found in two sections: The Book of Jihad (subsection Obligations of Jihad) and the Book of the Etiquette of Travel. Based *solely* upon the chapter heading, Mohammed concluded that "It means that you can identify that a person who is making— since this is an obligation of jihad, it means the person making the— this supplication

[57] See Exhibit AAA, an email from Mohammed to Laura Ferris, dated December 28, 2005.

has to be involved in jihad. It is an obligation. You have to do it." (RT 1988.) But aside from the irrationality of basing a reader's mental state from a chapter heading, there is no logical basis for assuming that one who possesses a writing in a language the possessor does not speak would possibly know the title of the chapter from whence it came.

As detailed in the government's Jencks materials, Mohammed "researched" the meaning of the supplication by asking eight friends and colleagues their opinions. One Pakistani student surmised that the supplication might be a ta'wiz, and stated that most Pakistanis do not know the meaning of the ta'wiz they carry; Zafar Ishaq Ansari, a Pakistani scholar of Islamic Studies, wrote that his "feeling" was that the prayer was not common in amulets, but that he had heard it occasionally in the Friday prayers "especially when people are feel that they facing the hostility of non-Muslims"; another Pakistani wrote that he could not locate a Pakistani imam in Perth, Australia, and he could not identify a group in Pakistan who used the prayer; Abdurrahmaan Saaleh, another Pakistani scholar, wrote that he had "not noticed any special importance given to the du'a" and that he had queried students on the matter, and they confirmed his view. Gulfiya, the English Lit student in Uzbekistan, found an unidentified Imam who knew the prayer and opined that it is uttered when a person fears harm, while Ahmed Subhy, the Egyptian former professor who claimed that the prayer had "nothing to do with Islam," wrote that the "Sunni Wahabbists and Muslim Brotherhood and their different organizations" use the prayer.

These observations and comments provide no logical basis for an opinion that the supplication is used *only* "by people who perceive themselves in a state of war or at enmity with some force," who "perceive [themselves] to be in a jihad against someone or some people." Judge Tashima's opinion made this point powerfully:

> Suppose a Christian is arrested on suspicion of providing material support for terrorism. In the suspect's wallet is found the following excerpt: "Onward, Christian soldiers, marching as to war/ With the cross of Jesus going on before/ At the sign of triumph Satan's host doth flee/ On then, Christian soldiers, on to victory!" An academic, an expert on the Bible and its translation, is called to testify at the suspect's trial. Asked what kind of person would carry this hymn, the academic testifies, "A person who believes him or herself as being engaged in a war for [Jesus] against an enemy."

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> Such testimony would be laughable. We easily comprehend, without the aid of expert testimony, that " 'Onward, Christian Soldiers' does not mean that the zealous churchman is literally militant." *Berg v. State,* 29 Okla.Crim. 112, 233 P. 497, 503 (App.1925). Someone carrying it might be a non-violent volunteer for the Salvation Army, or a Methodist, or a supporter of the phrase "under God" in the Pledge of Allegiance. *See Newdow v. Rio Linda Union Sch. Dist.,* 597 F.3d 1007, 1056–57 (9th Cir. 2010) (Reinhardt, J., dissenting) (describing the celebratory playing of "Onward, Christian Soldiers" after Congress amended the Pledge of Allegiance to add the phrase "under God"). Alternatively, the person could be a member of the Ku Klux Klan. *See Virginia v. Black,* 538 U.S. 343, 356, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (describing the singing of "Onward, Christian Soldiers" at cross burnings). It is inconceivable that a court would allow an "expert" to opine definitively and categorically on the "kind of person" who would carry "Onward, Christian Soldiers" in his wallet because the conceivable variations in understanding and motivation are too great. Yet this is exactly what the government expert in this case was permitted to do with respect to the prayer found in Hayat's wallet.

741 F.3d at 914.

Mohammed's opinion on mental state should have been excluded on this basis alone.

iii. Alternate explanations

Expert opinions are not reliable where they fail to account for and exclude alternate explanations of data. *See* 29 Wright et al., *Fed. Prac. & Proc. Evid*. § 6266 (2010 ed. & 2013 Supp.) (proffered opinions may be subject to challenge under Rule 702(1) where the expert "failed to consider facts or data that might lead to alternative theories of causation.") *See also* Fed.R.Evid. 702 advisory committee's notes to 2000 Amendments (same); *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994). Mohammed testified that "the context [of the supplication] is jihad." Any person carrying it can do so only for the purpose of jihad. Referring to the commentaries, he stated: "With this uniformity of context, there is no other way that it could be used." (RT 2007-08.) Asked if the supplication could be a ta'wiz, he stated that it might, but then testified unequivocally that the particular person carrying this particular ta'wiz would be "a person who is engaged in jihad." (RT 2007.)

Yet, as noted above, a consulted source more familiar with Pakistan than Mohammed, a Pakistani student, opined that the supplication might be a ta'wiz, and stated that most Pakistanis do not know the meaning of the ta'wiz they carry. Mohammed utterly failed to explain why this

alternate, innocent explanation of Hamid's possession of the ta'wiz was not entirely reasonable. Plainly, Dr. Mohammed was not genuinely considering other plausible and culturally relevant explanations as *Daubert* requires, another basis for the exclusion of his testimony.

c. Rule 704(b)

Even if Mohammed's testimony could have survived a challenge under Rule 702 and Daubert, it could not have survived a challenge under Rule 704(b). That rule forbids experts from offering any opinion on a criminal defendant's mental state. Yet that is precisely the sort of testimony that Mohammed offered. As Judge Tashima explained:

> Rather than testifying about the modus operandi of would-be terrorists, Mohammed repeatedly stated that "a person" who would carry the supplication at issue was ready to engage in war, perceived himself as "a warrior," and was certainly a "jihadist" or part of the mujahadeen. In short, Mohammed's testimony is the "functional equivalent" of an opinion that Hayat had the requisite intent to provide material support for terrorism—because he could not be anything other than a "jihadist." Once an expert labels someone a "jihadist," what is left for the jury to determine? The jury could not but reach the conclusion that a "jihadist" is guilty of "providing material support for terrorism." There was no wiggle room for the jury to determine that Hayat was "atypical" and thus reach another conclusion. *Younger,* 398 F.3d at 1189.

Id. at 913 (footnote omitted). The testimony was objectionable under Rule 704(b), but once again, Ms. Mojaddidi unaccountably failed to object on that basis.

d. Inadequate Cross-Examination

Even if she had not been able to exclude Mohammed's dubious opinions, Ms. Mojaddidi should have been able to eviscerate them on cross. As the Court in *Daubert* stated of expert testimony introduced at trial: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. The Mohammed testimony having been admitted, Ms. Mojaddidi failed to adequately make use of the "traditional and appropriate means" of challenging it.

First, while Ms. Mojaddidi made use of a number of the emails solicited by Mohammed to demonstrate the lack of support for his mental state opinion, she inexplicably failed to cross-examine him about the email he had received from Bariza Umar, the Pakistani student and Ph.D

candidate in Islamic Studies who had identified it as a ta'wiz and stated that most Pakistanis do not know what is written in the ta'wiz. That information from someone with great knowledge of the practices of Pakistani Muslims, which Mohammed lacked, alone would have devastated the credibility of the government's claim that only one bent on violent jihad would be in possession of the supplication.

Secondly, during closing arguments, Ms. Mojaddidi asserted that "[t]he government either doesn't understand the cultural significance of carrying a ta'wiz or it didn't want you to know about it. Because their other expert, Mr. Abbas, who knows about Pakistani culture, he would have told them that Dr. Mohammed's conclusions were wrong, and that prayers like those are commonly carried by travelers and not warriors." (RT 4323.)

Mojaddidi was quite correct in her contention. Following Hamid's conviction, Abbas told Amy Waldman of the Atlantic Monthly that almost everyone in Pakistan carried a tawiz. He himself carried one in his wallet that he had obtained from a mystic he trusted in Pakistan, although he did not know what it said. Had Abbas so testified at trial, as a government witness who was also a Pakistani Muslim, he would have forcefully demonstrated the inanity of the mental state opinion of Mohammed, the government's other expert. But Ms. Mojaddidi never elicited that testimony, a grave deficiency on her part.

e. Contrary Expert

Ms. Mojaddidi also should have procured a competent contrary expert—in particular, an expert who spoke Arabic. She failed to do so. Instead, she proffered the testimony of expert Anita Weiss. Weiss sought to testify that the supplication was a "taweez [that] would [not] be carried by a warrior anymore than anyone else" would have flatly contradicted the claim of prosecution witness Mohammed that the "particular kind of person" who carries the writing "perceives [himself] as being engaged in war for God against an enemy" (RT 1974-75) and that a person who carries the writing "would be a part of the mujaheden," and "a jihadist" (RT 2009), testimony on which the government rested its argument in closing that "[d]efendant's possession of this supplication is powerful evidence that he returned to the United States with a jihadi intent" (RT 4270). This portion of Weiss's testimony was excluded as untimely disclosed and

inadmissible because Weiss was not an Arabic speaking expert who could translate the supplication herself.

Given that Mohammed's testimony was effectively left unrebutted once Weiss's testimony concerning the supplication was excluded, it is fair to assume that the jury took the prosecution at its word when it argued in closing that the "[d]efendant's possession of this supplication is powerful evidence that he returned to the United States with a jihadi intent." (RT 4270.) During rebuttal argument, AUSA Deitch asserted Mohammed was the "only expert witness who testified in this trial who can read and write Arabic" (RT 4356), thus arguing that his testimony *must* be believed over the more general testimony of Weiss, which was admitted, regarding the extremely common cultural practice among Pakistanis, of carrying a "ta'wiz" during times of travel.

Other experts, however, surely would have been available given any reasonable amount of diligence by counsel. Indeed, after trial, based on the Atlantic Monthly article covering the case, Ms. Mojaddidi contacted Bernard Haykel, a professor at Princeton University. His declaration was submitted as an attachment to Hamid's Motion for New Trial.[58]

Professor Haykel is one of this country's leading Middle Eastern and Islamic scholars, having obtained his doctorate at Oxford University. In addition to many publications, he has consulted the United States and British governments on the issue of Islamic terrorism, is fluent in Arabic, having taught it both at Oxford and NYU. He has been asked by the U.S. government to assist in the prosecution of Al Qaeda members, and has agreed to do so. Having reviewed the testimony of Dr. Mohammed in this case, Dr. Haykel concluded as follows:

> The supplication found in Hamid Hayat's trial is a very canonical and widely used Sunni (originally Prophetic) Islamic invocation or supplication in the event a Muslim is in fear of something or someone. In it, the Muslim beseeches God to confront his enemies and to protect him from their evil deeds.
>
> It can literally be translated as "Oh God! We ask You to be at their throats/chests and we seek Your protection from their evil deeds." The Arabic expression "to be at their throats or chests" is an idiom that means to "confront them." Therefore a literal translation would not be an accurate way to translate this text. A preferable, and more accurate, translation into English would be "Oh God! We ask You

[58] *See* Exhibit BBB, the declaration of Bernard Haykel.

> to confront [those who seek to do us harm] and we seek Your protection from their evil deeds."
>
> Dr. Mohammed's claim during his trial testimony that in Islamic studies there is a rule giving preference to literal translation is incorrect. The expression "be at their throats" is idiomatic in Arabic and does not make sense if translated literally into English, unless the effort is aimed at prejudicing the mind of the jury in light of the beheading videos and activities of the jihadis in al-Qaeda.
>
> The supplication is in no way exclusive to terrorists or Jihadists and cannot be considered a "warrior prayer" as, the government expert Dr. Mohammad labels it.
>
> I based my opinion in part on the most widely used and popular medieval compilation of Prophetic traditions (hadiths) amongst the Sunni Muslim entitled Riyad al-Salihin. In its widespread use, this book is akin to the Book of Common Prayer that one might find in any Anglican church. In its chapter on the etiquette of traveling, and under the heading of "Supplication if one fears harm," the tradition that is mentioned is that when the Messenger of God (i.e. Muhammad) feared mischief from a people he would recite this prayer.
>
> In my opinion, this supplication is used widely by Muslim travelers around the world. This supplication or invocation is in Riyad al-Salihin, which is one of the most commonly read and owned books by Muslims after the Koran. As such, this supplication would be very widely known and widely used by Muslims.
>
> During his trial, Dr. Mohammad claims that the supplication found in Hayat's wallet is one that is used by Jihadis in all arenas of conflict across the globe. This claim is unsubstantiated and not true. I have rarely seen this invocation used by Jihadis and it is rarely to be found in any of their publications or internet sites.

Likewise, Imam Tahir Anwar, who is of South Asian descent and lived in India for eight years, states in his declaration that "The practice of carrying—or uttering—this supplication, and others, is extremely common among Muslims. It is intended to protect the person from harm, much like the practice of carrying an amulet. I myself have said this prayer on many mundane occasions— for example when visiting a gas station late at night. The proposition that any person carrying this supplication is bent on violent jihad is entirely contrary to my knowledge and experience. Indeed, I can state with confidence that I have never heard it said in that context."[59] Imam Anwar was living and working in the Bay Area in 2005 and would have been available to

[59] *See* Exhibit CCC, the declaration of Imam Tahir Anwar.

testify as an expert witness at Hamid's trial.

Professor Haykel and Imam Anwar are far more qualified and more knowledgeable than Mohammed on the meaning of the supplication and its use in Southeast Asia. Their testimony would have been devastating to Mohammed's credibility. Yet neither their testimony, nor the testimony of any other qualified expert was offered to rebut Mohammed's baseless "expert" opinions. That failure by trial counsel was yet another example of deficient performance.

f. Misstatement of Evidence

Adding injury to injury, trial counsel failed to object when the prosecutor misstated evidence regarding the supplication in closing argument. In closing, AUSA Deitch characterized the individuals consulted by Mohammed as "highly qualified colleagues ... highly qualified Islamic scholars," whose "uniform opinion was that this was a piece of paper with a prayer on it that would be carried by a holy warrior, a violent jihadi, who felt himself to be traveling in an enemy land, and who was ready to commit violent jihad." (RT 4357.) That, quite simply, was a lie. As Deitch well knew and as demonstrated above, not one of the parties consulted by Mohammed offered an opinion that one carrying the supplication was necessarily "a violent jihadi, who felt himself to be traveling in an enemy land, and who was ready to commit violent jihad." Most of those consulted could offer no information regarding the supplication, and Bariza Umar, the Pakistani student and Ph.D candidate in Islamic Studies, wholly undermined Mohammed's opinion by identifying the supplication as a ta'wiz and stating that most Pakistanis do not know what is written in the ta'wiz. Deitch's misconduct and Mojaddidi's failure to object to it are another reason a new trial must be granted.

4. Prejudice

The prejudice from the failure to challenge Mohammed's testimony is both abundantly clear from the trial record, and also fully detailed in Judge Tashima's opinion. In this case, moreover, the prejudice was displayed with unusual clarity by Waldman's *Atlantic Monthly* article. The Atlantic Monthly article demonstrates two incontrovertible facts. First, Mohammed's testimony had a powerful effect on the jury. Second, Mohammed's testimony could have been easily eviscerated by even a minimal effort to consult true Islamic scholars.

Counsel's deficient performance was prejudicial.

TRIAL COUNSEL'S FAILURE # 12: INADEQUATE CROSS OF KHAN

Ms. Mojaddidi's derelictions in questioning government witnesses Schaaf, Benn, Mohammed, and Abbas, demonstrated in the preceding arguments, were not the only errors she committed in regard to her constitutional right to cross-examination. On appeal, Hamid's appellate counsel raised a key issue which arose during Ms. Mojaddidi's cross-examination of informant Khan concerning a phone call Khan had with Hamid on October 5, 2003, the last phone contact Khan had with Hayat while Hamid was in Pakistan. The issue was whether

> the district court ought to have admitted Hayat's statement that "he never intended on going to a camp"....On appeal, Hayat argues that the statement should have been admitted to prove his then-existing intent, see Fed.R.Evid. 803(3), and also under the so-called rule of completeness, see Fed.R.Evid. 106.

710 F.3d at 893.

The panel majority first held, over Judge Tashima's dissent, that Ms. Mojaddidi had failed to preserve the claims that sections 803(3) and 106 provided a basis for admission of Hamid's refusal to go to a camp at the urging, sometimes violent and profane, of Khan. *Id.* at 894-95. The majority then applied the "plain error" standard for determining whether reversible error occurred *(id*. at 895), and concluded that Hamid could not meet the requirements of that demanding standard. *Id.* at 895-99. The majority specifically and repeatedly indicated, however, that Ms. Mojaddidi may have deprived Hamid of his constitutional right to effective representation by failing to properly preserve the basis for her client's claims of evidentiary error.

> Nor, of course, do we preclude a demonstration on collateral review that counsel rendered ineffective assistance in enunciating the basis for admission as she did. Hayat's attorney may well have been deficient by failing to offer a plausible justification for admission of the "never intended" statement.

Id. at 895 n.15.

> Under these circumstances, the failure of Hayat's attorney to explain the connection between the proffered statement and Khan's prior testimony may be relevant to a later claim for ineffective assistance of counsel. But the district court's failure to recognize such a basis on its own was not plain error**.**

Id. at 897.

> We cannot determine from the current record why defense counsel did not attempt to justify the admission of Hayat's statements on the bases now asserted. In order to determine whether such failure constituted ineffective assistance of counsel, further factual development not possible on direct appeal is necessary.

Id. at 897 n.16.

Finally, the circuit made clear that its rulings under the plain error standard did not equate to a finding that the exclusion of the "intent' statement was harmless.

> We note that this conclusion is *not* tantamount to a determination that the exclusion of the evidence could not have affected the outcome of the trial.

Id. at 897 n.17 (emphasis in original)

In short, even while affirming the conviction, the panel majority made clear that there was no plausible basis for failing to admit the evidence. No reasonably competent attorney seeking to gain admission of a critical piece of exculpatory evidence would fail to preserve the legal grounds for its admission. Trial counsel's incompetence is manifest in the decision itself. Prejudice is once again obvious as well. The admission of the exculpatory statements could not have been denied under the Rules of Evidence, and the admission of those statements would have seriously undercut all of Khan's supposedly inculpatory testimony.

* * * *

Ms. Mojaddidi failed her client in numerous respects, from the beginning of trial to the end. Many of those failures—those set forth in Argument I—do not require any showing of prejudice since they are attributable to her conflicted status. Even ignoring the conflict, however, all of the errors demonstrate constitutionally ineffective representation. But for those failures, there is at least a reasonable probability that Hamid Hayat would have obtained a more favorable result at trial.

The case against Hamid was far from overwhelming. No eyewitness could confirm the government's core allegations about Hamid, and indeed, no eyewitness could even confirm that the supposed jihadist camp at Balakot even existed during the relevant time period. The case was built on Hamid's own dubious and coerced confession and on the testimony of highly unreliable (and highly paid) government experts.

Even on the evidence presented to the jury, it was a close case. The case against Hamid remained in equipoise for a period of *more than nine days*—i.e., at least *fifty hours*—that jury deliberations continued. See Dkt. Nos. 311, 312, 313, 315, 318, 319, 320, 321, 324, 328 (reflecting minute orders for proceedings beginning April 14, 2006 and concluding April 25, 2006). Federal courts have consistently recognized that lengthy deliberations weigh in favor of finding that trial errors were prejudicial to the defendant. *See, e.g., Parker v. Gladden*, 385 U.S. 363, 365 (1966) (twenty-six hours of deliberations "indicat[ed] a difference among [jurors] as to the guilt of petitioner" and supported a finding of prejudice arising from jury's improper exposure to extraneous evidence); *Gibson v. Clanon*, 633 F.2d 851, 855 n. 8 (9th Cir. 1980) (nine hour period of deliberations supported finding of prejudice arising from constitutional error despite fact that state's case against habeas petitioner had been "a strong one"); *Rhoden v. Rowland*, 172 F.3d 633, 637 (9th Cir. 1999) (finding prejudice arising from error in shackling defendant during court proceedings as to petitioner's sexual assault conviction; noting that evidence on key issue was disputed and "the jurors deliberated for over nine hours over three days, which suggests that they did not find the case to be clear-cut").

The case against Hamid should have quickly resolved against him had the government's case been a strong one. In fact, it was extraordinarily weak, and any of the failures noted above, if avoided, could have tipped the balance in Hamid's favor. Indeed, had counsel performed effectively and in an unconflicted manner, she could have not only prevented the government from proving its case beyond a reasonable doubt, she could have affirmatively proven Hamid's actual innocence of these charges. But she failed, repeatedly, in numerous ways, due to her inexperience and ignorance of the law. As a result, an innocent man was convicted of extremely serious terrorism charges. The Sixth Amendment requires reversal and a new trial.

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III. THE GOVERNMENT VIOLATED ITS *BRADY* OBLIGATIONS BY FAILING TO DISCLOSE EXCULPATORY INFORMATION CONCERNING THE CLOSING OF THE CAMP NEAR BALAKOT THAT HAMID ALLEGEDLY ATTENDED

A. Introduction

The core allegation against Hamid Hayat at trial was that he attended a militant camp in the Balakot/Mansehra area of Pakistan where he received training to be employed in attacking institutions in the United States upon his return to this country. The profoundly disturbing anomaly inhering in that claim was well summarized on the editorial page of the San Francisco Chronicle in the wake of Hamid's trial:

> A Department of Defense imagery expert said he was "confident" that satellite images taken in 2001 and 2004 of buildings in the vicinity of Balakot were of a militant training camp. The long-lens view of the camp was curious, considering that Balakot is not in one of those remote tribal regions along the Afghanistan border. It's a 60-mile drive from the capital city of Islamabad.

The editorial continued:

> The government has never explained what became of that terrorist camp in Pakistan where Hayat supposedly was trained to kill. If investigators were certain enough of its existence and lethality to send one of its trainees to prison for 24 years, then where was the follow-up announcement of it being obliterated with smart bombs or raided by U.S. special forces with - dare I suggest? - the cooperation of a Pakistani government that is getting $10 billion a year in our tax dollars to help us fight terrorism.[60]

The flimsy, indeed, bizarre nature of the government's proof regarding the Balakot camp is explained by the fact that the camp had been closed by the Musharraf government before October of 2003. That closure surely became known to the government during its investigation of this case, through its aerial surveillance of the Balakot area as well as the ready access it had to the camp location after Hamid's arrest in June, 2005. But at trial the government blocked inquiry into its knowledge of the camp closing by invoking CIPA when the subject was raised by Ms. Mojaddidi on the cross-examination of Benn. Notwithstanding Ms. Mojaddidi's incompetence in failing to obtain a security clearance, CIPA cannot trump the government's obligation under *Brady* to disclose exculpatory information. *See Sedaghaty*, 728 at 903 ("CIPA does not expand

[60] Diaz, *The Phantom Terrorist Camp*, San Francisco Chronicle, September 16, 2007.

or restrict established principles of discovery and does not have a substantive impact on the admissibility of probative evidence.") The violation of that critical duty of disclosure concerning the Balakot camp closing requires that Hamid's convictions be set aside.

B. The United States Presence in Pakistan Post-9/11

Evidence introduced at trial indicated the scope of the reach of our government's powers in Pakistan in the wake of 9/11. Hasan Abbas testified that Pakistan received a 3.5 billion dollar grant from the United States for the years 2003 to 2008, plus yearly military support. Pakistan had collaborated with the United States in its anti-terrorism campaign, captured and turned over to the United States over 700 al-Qaeda operatives since 9/11, and lost over 300 soldiers in the anti-terrorism battle. (RT 2859-61.) The FBI maintains an office in Islamabad, the capital of Pakistan. (RT 3754.) FBI special agent Gary Schaaf, who between 1998 and 2005 specialized in international terrorism investigations in the Sacramento office of the FBI, admitted traveling to Pakistan in his work and being familiar with the location of terrorist training camps there. (RT 3616-3618.)

The trial evidence only scratched the surface of the United States presence and power in Pakistan in the first decade of this century. In a speech to the nation on June 7, 2002, announcing the formation of the Department of Homeland Security, President Bush trumpeted the capture in Pakistan of "Abu Zebedah, al Qaeda chief of operations," whom FBI and CIA agents arrested after a gun battle in Faisalabad in March of that year.[61] American forces took control of Ramsi bin al Shibh, a principal in the 9/11 attacks, after his arrest on September 11, 2002, in Karachi. And the FBI's Report on Terrorism, 2002-2005, noted the seizure of Khalid Sheik Mohammed, the chief architect of the 9/11 attacks, whom Pakistani and American forces arrested in Rawalpindi on March 1, 2003.

Furthermore, the *Report for Congress; Pakistan-U.S. Anti-Terrorism Cooperation*, Congressional Research Service, The Library of Congress, updated on March 28, 2003,[62]

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[61] Tim McGirk, *Anatomy of a Raid*, Time Magazine, April 8, 2002.

[62] Available at: www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA461690.

reported, *inter alia*:

1. "During 2002, the United States took an increasingly direct, if low-profile, role in both law enforcement and military operations being conducted in Pakistani territory." *Id*., Summary page.

2. "The F.B.I. is reported to have trained and equipped a number of former Pakistani army officers and others in what is known as the 'Spider Group,' and informal intelligence-gathering unit that is especially focused on monitoring the activities of Pakistani Islamist groups." *Id*. at 10.

3. "In January 2003, Pakistani police and F.B.I. agents arrested three suspected Al Qaeda operatives after a gunfight on the outskirts of Karachi." *Id*. at 11.

4. "Pakistani-U.S. anti-terrorism cooperation has been broad in both scale and scope, and has realized tangible successes since October 2001." *Id*. at 23.

In an article in the New York Times on July 4, 2002 entitled, "F.B.I. and Military Unite in Pakistan to Hunt Al Qaeda,"[63] Dexter Filkins wrote:

1. "In Pakistani cities, agents of the Federal Bureau of Investigation are helping the local police and providing information-in rare instances even personnel-to break up what senior American intelligence and law enforcement officials regard as a depleted but still dangerous network."

2. "The F.B.I.'s role in Pakistan reflects the bureau's determination to redefine its mission from investigating crimes to thwarting terrorist attacks planned outside the United States."

3. "That accounts for the two-pronged strategy: the F.B.I. to the cities, where they gather intelligence and coordinate communications for local raids, and American military forces to the border areas, where they are helping the Pakistani find the last pockets of Al Qaeda there. For the F.B.I., the focus has been on assembling intelligence to identify Qaeda operatives who fled

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[63] Available at: http://www.nytimes.com/2002/07/14/world/fbi-and-military-unite-in-pakistan-to-hunt-al-qaeda.html?pagewanted=all.

from Afghanistan as well as other Islamic militants."

Furthermore, an article by Paul Watson and Josh Meyer entitled, "Pakistanis See FBI in Shadows,"[64] published in the Los Angeles Times on August 25, 2002, reported that: "Some Pakistani officials say privately that the number of FBI counter-terrorism specialists in Pakistan is in the low hundreds. An FBI official confirmed that 'between several dozens and a hundred' FBI agents are in Pakistan at any one time, working closely with local and federal police intelligence officials."

And the New America Foundation has detailed the life and death power the United States government wields in Pakistan, listing the 370 drone strikes conducted between 2004 and the end of 2013, resulting in the death of between 1,623 and 2,787 Islamic militants.[65]

C. The *Brady* Violation

At trial, it was established that one could drive by car from Islamabad, the city where the FBI maintained an office, to the site in the aerial images described by Eric Benn, in about four and one half hours. (RT 3585.) Obviously, the FBI had the capacity to easily visit that site and search it with a fine-tooth comb. It could have joined Pakistani law enforcement in arresting any militants on site, or had the arrests made by the Pakistanis alone. The United States also had the power to put an end to the life of any militant located at the Balakot/Mansehra location who might have been involved in threatening this country's national security, as it had done in a number of drone strikes prior to mid-2005 and hundreds since then.

Yet the government introduced no evidence at trial of the results of the on-the-ground search of the Balakot location. Its choice of the aerial images it placed in evidence through Benn were purposefully extremely narrow: two images from 2001 and two from 2004. (RT 3081.) And it blocked any questions by the defense on the subjects of whether United States operatives has visited the site represented in Benn's aerial images and whether Benn himself had examined other images of the same site. (RT 3083; RT 3105.)

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[64] Available at: http://articles.latimes.com/2002/aug/25/world/fg-fbipak25.

[65] Available at: http://natsec.newamerica.net/.

Obviously, any answer to the question of whether U.S. agents had visited the camp site would have been exculpatory. One the one hand, if agents did so, they learned that the camp had been closed, because otherwise on-the-ground proof of its continued functioning would have been introduced at trial. On the other hand, if no investigation of the site was conducted, then-given the government's easy access to the camp location-no reasonable jury could find that the government had met its burden of proving the functioning of the camp beyond a reasonable doubt.

Equally obviously, the Department of Defense was in possession of hundreds, if not thousands, of additional images of the Balakot area taken in the many weeks and months between 2001 and 2004. If military training with weapons was going on at the Balakot site during the time Hamid was allegedly there, that activity was surely detected by the ongoing aerial surveillance.[66] Not only did Benn fail to produce those images, he was careful to state that his opinion that there might be a militant camp at the location was based solely an examination of those four photographs (RT 3081), strongly supporting the exculpatory inference that he had access to, and had examined, other photographs that undermined rather than supported the opinion he proffered to the jury.[67]

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[66] In describing his analysis of a particular satellite image, Benn testified that at one time, cameras were used to produce 'frames on a roll of imagery,' which would be placed on glass tables illuminated from below and examined with optic devices. Even as to this older and now outdated process, Benn noted that the "the film can be extraordinarily sophisticated and detailed." (RT 3001-02.) Benn then explained that, at present, images are recorded with digital sensors, permitting examination with "electronic light tables" that permit various adjustments to the image and with "extremely high resolution" computer monitors. (RT 3002.) And Benn confirmed that Exhibits 1 through 4 were the product of digital recording that he had reviewed by means of the more advanced electronic process. (RT 3079.)

[67] During cross-examination, Ms. Mojaddidi sought to determine (1) whether Benn had "review[ed] any other images besides the images that are displayed in these Exhibits 1 through 4" (RT 3079-80) and (2) whether Benn had review[ed] other images of the location depicted by the coordinates corresponding to Exhibits 1 through 4 (RT 3080-81). In response to each such question, the prosecutor interposed an objection on the grounds of "relevance" and "Rule 403." (RT 3079-81.)

When the trial court thereafter asked Ms. Mojaddidi to explain why the questions should not be barred on the stated grounds. she failed to press forward and instead pursued different lines of inquiry. (*Id.*) For the reasons set forth above, the questions clearly were relevant and highly

In a letter to the defense before Hamid's trial began, the government informed Hamid's counsel that it was "in possession of an analysis of information related to Hamid and Umer Hayat's statements to the FBI." The analysis "indicate[d] that the description of the training provided does not match that associated with al Qaeda training camps, but is much more consistent in both physical description and the description of the training with Deobandi associated militant groups in Pakistan."[68] The letter went on to state that

> the government is not aware that al Qaeda operates training camps within the borders of Pakistan that match the description of the size and locations provided by Hamid and Umer Hayat. The leaders of the militant Deobandi groups which include JEM, HUM and HUJI have historical ties to al Qaeda and, like al Qaeda have publically espoused their anti-western philosophy and have called for attacks on the United States. Members of these groups have committed violent acts in Pakistan, Afghanistan, India and Kashmir. Moreover, JEM has committed anti-U.S. and anti-western attacks in Pakistan. The analysis indicates that there are militant camps associated with these groups near Mansehra and Balakot, and the training offered by these camps is consistent with Hamid and Umer Hayat's description of the training received by Hamid Hayat when he attended the camp.

The letter omitted the fact that there was no functioning camp in the JEM Balakot/Manhersa region between October of 2003 and November of 2004. The government was well aware of that fact, yet suppressed its evidence demonstrating that the camp had closed. That violation of its Brady obligations plainly undermines confidence in the verdicts against Hamid, and requires that they be vacated.

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important to the defense, such that Ms. Mojaddidi's decision to retreat itself constitutes yet another instance of her deficient performance. But as Judge Kozinski recently observed in *Milke v. Ryan*, 711 F.3d 998, 1003-04 (9th Cir. 2013), "The law requires the prosecution to produce *Brady* and *Giglio* material whether or not the defendant requests any such evidence."

[68] See Exhibit DDD, a page of the pretrial letter located in Ms. Mojaddidi's file containing correspondence with the government. The cover page containing the date of the pretrial letter could not be located in her files.

IV. THE GOVERNMENT SUPPRESSED EXCULPATORY EVIDENCE OBTAINED THROUGH WARRANTLESS ELECTRONIC SURVEILLANCE AND VIOLATED HAMID'S CONSTITUTIONAL RIGHTS BY NOT NOTIFYING HIM OF EVIDENCE DERIVED FROM SUCH SURVEILLANCE

A. Introduction

During her direct examination of FBI agent Gary Schaaf, Ms. Mojaddidi asked the critical question of whether Shaaf knew of "any other secretly recorded conversations besides those that Naseem Khan recorded of Hamid Hayat." (RT 3628.) The prosecutor objected on CIPA grounds, among others, and consistent with her agreement to forgo any defense based on classified information, no matter how relevant, Ms. Mojaddidi eventually withdrew the question. (RT 3629.)

Hamid maintains that other of his conversations were indeed "secretly recorded." Any such recordings made while Hamid was in Pakistan would have been pursuant to what has now been disclosed as the United States' extensive warrantless wiretapping programs. They thus violated the Foreign Intelligence Surveillance Act, which only later was amended to justify such programs. Moreover, before evidence derived from these recordings could be used at his trial, Hamid was entitled to notice of the evidence's source and the right to challenge its admissibility. He was deprived of these rights. He was also deprived of his rights under Brady because the recordings and location metadata would have supported his defense that he did not attend a militant training camp in Pakistan, as the government alleged.

Either (a) evidence derived from unlawful electronic surveillance was used against Hamid in violation of his statutory and constitutional rights; or (b) the government gathered other evidence by electronic surveillance that it did not disclose to the defense or rely on at trial because it was exculpatory; or (c) both of the above. Under any of these scenarios, Hamid's convictions must be vacated.

B. Legal Framework

At the time Hamid was in Pakistan, United States intelligence agencies were required, under the Foreign Intelligence Surveillance Act ("FISA") to obtain a court order before conducting electronic surveillance of communications if at least one person involved was in the

United States. *See* 50 U.S.C. 1803(a). The government may use information obtained pursuant to FISA in criminal prosecutions if it provides advance notice to both the court and the defendant. *Id*. at 1801(k), 1806(c), 1881e(a); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 (2013) ("[I]f the Government intends to use or disclose information obtained or derived from a §1881(a) acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition.") Like CIPA, FISA cannot and does not diminish the government's Brady obligations.

C. Hamid Was Undoubtedly Subject to Warrantless Surveillance in Violation of FISA

1. The Government Was Engaged in Warrantless Surveillance in Violation During the Period When Hamid Was in Pakistan

The government repeatedly violated FISA between 2001 and 2004 by conducting foreign surveillance without a warrant. As the Supreme Court recently noted:

> In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in "the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization."

Clapper, 133 S. Ct. at 1143-44 (citations omitted). The National Security Agency began a "special collection program" to monitor international telephone calls and international emails of warrant required by FISA. *See* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, Dec. 16, 2005. As was later revealed, this program also included warrantless surveillance of internet metadata. *See* Charlie Savage and James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, New York Times, June 27, 2013.

Justice Department officials recognized the illegality of this "special collection" program as early as 2003. *See* Charlie Savage and James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, New York Times, June 27, 2013. Bowing to pressure

from the Justice Department, President Bush "rescinded [the] authorization to the N.S.A. to collect bulk Internet metadata . . ." in 2004, but later obtained reauthorization for the program from the Chief Judge of the Foreign Intelligence Surveillance Court. *Id*.

The warrantless surveillance was first disclosed to the public on December 16, 2005. *See* Risen and Lichtblau, *supra*, *Bush Lets U.S. Spy on Callers Without Courts*. Following the disclosure, at least one federal court ruled that the program was unconstitutional. *See ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

President Bush sought and ultimately obtained Congressional approval to broaden FISA in an effort to legalize post-hoc the warrantless surveillance that had already been occurring for years. *See Clapper*, 133 S.Ct. at 1144 ("[T]he Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism"). The FISA Amendment Act ("FAA") gave "the executive branch broader latitude in eavesdropping on people abroad and at home who it believes are tied to terrorism, and . . . reduce[d] the role of [FISC] in overseeing some operations." Eric Licthblau, *Senate Approves Bill to Broaden Wiretap Powers*, New York Times, July 10, 2008. Under the FAA, then, the NSA was allowed to continue the exact manner of surveillance in which it had already been engaged-wiretapping without a court order.

2. The Scope of The Warrantless Surveillance Was Broad, and Focused on Pakistan

The disclosure of various NSA documents by Edward Snowden ("the Snowden documents") beginning in June 2013 has revealed numerous programs through which the NSA engaged in warrantless foreign surveillance. Many of these programs covered Pakistan during the time period at issue in this case. Among the revelations contained in the Snowden documents are the following:

1. "60 percent of the president's daily intelligence briefing came from the NSA in 2000, even before the surge in the agency's capability began." Dana Priest, *NSA Growth Fueled by Need To Target Terrorists*, Washington Post, July 21, 2013.

2. As early as 2001, the NSA assembled a team called the Geolocation Cell "to track

people, geographically, in real time." *Id*. By 2004, the NSA devised a technique called "The Find" that "enabled the agency to find cellphones even when they were turned off." *Id*.

3. The NSA tracks "information about the locations of at least hundreds of millions of devices" and generates "nearly 5 billion records a day." Barton Gellman and Ashkan Soltani, *NSA Tracking Cellphone Locations Worldwide, Snowden Documents Show*, Washington Post, December 4, 2013. This program includes data "collected from the tens of millions of Americans who travel abroad with their cellphones every year." *Id*.

4. The CO-TRAVELER program allows the NSA "to look for unknown associates of known intelligence targets by tracking people whose movements intersect." *Id*. And "[s]ophisticated mathematical techniques enable NSA analysts to map cellphone owners' relationships by correlating their patterns of movement over time with thousands or millions of other phone users who cross their paths." *Id*.

5. The Boundless Informant program allows the NSA to map the data collected by country. A user can "select[] a country on a map and view the metadata volume and select details about the collections against that country." Glenn Greenwald and Ewen MacAskill, *Boundless Informant: the NSA's Secret Tool To Track Global Surveillance Data*, The Guardian, June 8, 2013, quoting an NSA factsheet.

6. The NSA "systemically scan[s] Americans' cross-border emails without warrants and sav[es] copies of any that contain[] discussion of a surveillance target." Charlie Savage, *Warrantless Surveillance Continues to Cause Fallout*, New York Times, November 20, 2013.

7. The early "special collection program," for example, accelerated in early 2002, with a focus on Pakistan. Risen and Lichtblau, *supra, Bush Lets U.S. Spy on Callers Without Courts*.

8. The Snowden documents "reveal a more expansive effort to gather intelligence on Pakistan than U.S. officials have disclosed." Greg Miller, Craig Whitlock, and Barton Gellman, *Top-Secret U.S. Intelligence Files Show New Levels of Distrust of Pakistan*, Washington Post, September 2, 2013. "Multiple U.S. agencies exploited the massive American security presence in Afghanistan-including a string of CIA bases and National Security Agency listening posts along the border mainly focused on militants-for broader intelligence on Pakistan." *Id*. The

Snowden documents also describe how the CIA was directly engaged in finding al-Qaeda leaders in Pakistan's tribal regions. *Id*.

9. Up to 13.5 billion reports a month were generated for Pakistan, the second highest number for any country. *Id*. Glenn Greenwald and Ewen MacAskill, *Boundless Informant: the NSA's Secret Tool To Track Global Surveillance Data*, The Guardian, June 8, 2013.

There can be little doubt that Hamid's communications were surveilled while he was in Pakistan. And there is no doubt that any such surveillance was unlawful at the time that it occurred. The apparent need to legalize such surveillance after the fact makes clear that it had been unlawful while occurring during the period when Hamid was in Pakistan. For the entirety of the period when Hamid was in Pakistan and allegedly visiting a terrorist camp, the government was engaged in warrantless surveillance aimed directly at the exact type of activity in which they suspected he was engaged. It is inconceivable that the government did not obtain information through this surveillance as to Hamid's activities, whereabouts, and contacts while in Pakistan and allegedly at a terrorist training camp. Indisputably, the Sacramento office of the FBI was maintaining a counter-terrorism operation aimed at Hamid while he was in Pakistan between 2003 and 2005. The government concededly was recording his phone calls with informant Khan during that period. The government took the utterly extraordinary step of diverting his return flight from Pakistan to the United States, forcing the commercial flight he was on with hundreds of other passengers to land in Narita, Japan because his name appeared on the federal government's "no fly list." (RT 446 447.) It would strain credulity to propose that Hamid was not the subject of the government's warrantless surveillance programs while he was in Pakistan.

D. Any Evidence Derived From Surveillance Was Used Unlawfully Because Hamid Was Not Given the Required Notice and Was Deprived of His Right To Challenge Such Evidence

Following the Snowden disclosures, it was revealed for the first time that the Department of Justice's official policy had been to not notify defendants when evidence derived from warrantless surveillance was used against them in criminal prosecutions. The flagrant unconstitutionality of such a policy is made clear by the government's 180-degree policy change following disclosure of its previous stonewalling.

During oral argument before the Supreme Court in *Clapper*, the lawsuit challenging the FAA, United States Solicitor General Donald Verrilli assured the Court that if the Department of Justice had used evidence derived from warrantless wiretapping in any criminal prosecution, prosecutors would have notified the defendant of such evidence's origins. Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, New York Times, January 29, 2014. Following the Snowden disclosures, however, Verrilli "raised questions inside the Justice Department about whether prosecutors were telling defendants when they faced evidence derived from warrantless wiretapping." *Id*.

Contrary to Verrilli's statement to the Supreme Court, "it turned out that it was instead the practice of the [Department of Justice] National Security Division *not* to say when warrantless surveillance was an earlier link in an investigative chain." *Id*. (emphasis added). Only after changing its policy in late July 2013 did the Department of Justice begin reviewing cases to determine which defendants needed to be belatedly notified that evidence derived from warrantless wiretapping had been used against them. *Id*. "It is not clear what standards prosecutors have used in deciding who merits a belated disclosure." *Id*. As of late January 2014, the Justice Department's review was continuing. *Id*. "[I]t remains unclear how many other cases-including closed matters in which convicts are already serving prison sentences-involved evidence derived from warrantless wiretapping in which the National Security Division did not provide full notice to defendants, nor whether the department will belatedly notify them." Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, New York Times, October 26, 2013.

1. The Government Has Already Notified At Least Four Defendants of Evidence Derived From Warrantless Wiretapping

Following these disclosures, there has been a crescendo of belated developments in terrorism prosecutions around the country. At least four defendants have now been notified by the Department of Justice that warrantless wiretap evidence had been or will be used against them:

The first defendant to be notified that warrantless wiretap evidence would be used against

him was Jamshid Muhtorov, who is being prosecuted in the District of Colorado for providing material support to a terrorist group in Uzbekistan. *United States v. Jamshid Muhtorov*, Case No. 12-cr-00033-LJK-1 (D. Colo.) The criminal complaint against Muhtorov "showed that much of the government's case was based on intercepted e-mails and phone calls." Savage, *supra, Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*. Following the notification, Muhtorov filed a motion in January, 2014 to suppress evidence obtained or derived from surveillance under the FISA Amendments act. *United States v. Jamshid Muhtorov*, Case No. 12-cr-00033-LJK-1 (D. Colo.), Dkt. No. 520. "Muhtorov is also seeking discovery related to the FAA disclosure, arguing that the notice does not provide any details about the type of evidence found, the scope of the surveillance or what role the evidence had in his arrest." Michael Lipkin, *Terrorism Suspect Challenges Warrantless NSA Wiretapping*, Law 360, January 30, 2014.

The Department of Justice also notified Mohamed Mohamud that evidence from warrantless surveillance had been used in his prosecution for trying to use a weapon of mass destruction in Portland, Oregon. Mohamud had already been convicted, but the district judge postponed his sentencing following the government's belated notification. Helen Jung, *Portland Bomb Plot: Mohamed Mohamud Sentencing Canceled Pending Fisa Motions*, The Oregonian, November 26, 2013. Mohamud recently filed a motion seeking full discovery regarding the surveillance, arguing that a new trial may be necessary because of the incomplete information the government provided Mohamud and the court. *United States v. Mohamed Osman Mohamud*, Case No. 10-cr-00475-KI (D. Or.) Dkt No. 489.

Adel Daoud, currently facing prosecution for attempting to use a weapon of mass destruction in Illinois, won a key ruling in January 2014. Daoud filed a motion for disclosure of FISA-related material and to suppress any evidence obtained via FISA or other foreign surveillance. *United States v. Adel Daoud*, Case No. 12-cr-723-SJC (N.D. Ill.) Dkt. No. 51. In response, Attorney General Eric Holder "filed an affidavit under oath that disclosure of such materials would harm national security." *Id*. at Dkt. No. 92, p.3. The court recently ruled for Daoud. Because Daoud's counsel had a top secret security clearance, the Court indicated that it

"will allow disclosure of the FISA application materials . . ." to Daoud's counsel. As the Court noted, no court had ever before allowed disclosure of FISA materials to the defense.

The government also recently notified Agron Hasbajrami that he had been subject to warrantless surveillance before his arrest on terrorism-related charges, to which he eventually pleaded guilty. Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, New York Time, February 25, 2014. According to the government's notification, Mr. Hasbajrami may not withdraw his plea and waiver of appeal, but may add any claims regarding surveillance to his efforts to vacate his conviction on other grounds. *See id*.; *see also United States v. Agron Hasbajrami*, No. 11-CR-623-JG (E.D.N.Y).

2. The Unlawfulness of the Government's Policy Is Even Clearer in Hamid's Case

A critical distinction between the cases discussed above and Hamid's prosecution is that any electronic surveillance of Hamid occurred before the passage of the FAA and therefore was unauthorized by statute. Muhtorov, Mohamud, Daoud, and Hasbajrami still face the hurdle imposed by the FAA—unless they prevail in challenging the constitutionality of the FAA itself, they may be unable to challenge the legality of any evidence derived from surveillance that was used against them. But Hamid faces no such hurdle. The FAA had not yet been passed when he was surveilled in Pakistan. Any evidence used against him derived from surveillance was evidence derived in violation of the law and used in violation of his constitutional rights. The government must now notify Hamid of any such evidence so that he may challenge its legality. Hamid formally requested notice of any such evidence in a March 14, 2014 letter to the United States Attorney General. This is an opportunity he should have had before being prosecuted. That he was not afforded such an opportunity renders his conviction plainly unconstitutional.

Alternatively, if the government claims its surveillance of Hamid, which was surely extensive, produced no inculpatory information that it relied on at trial to prove he attended a militant training camp, then that evidence obtained through that surveillance was exculpatory and subject to disclosure under *Brady*. If the government's constant tracking of Hamid's communications and activities during two years captured no sign that he attended a camp, that

would have served as proof positive at trial that he did not. A new trial is required under that scenario as well.

V. THE COURT MUST CONVENE AN EVIDENTIARY HEARING SO THAT IT MAY FAIRLY EXPLORE AND DECIDE DEFENDANT'S PRESENT CLAIMS

Defendant submits that his entitlement to relief in this matter will be established beyond any reasonable dispute on the basis of the pleadings submitted by the parties in connection with this motion.

Alternatively, pursuant to Rule 8 of the Rules Governing Section 2255 Cases, defendant moves for an evidentiary hearing on the grounds that (1) the files and records of the case do not conclusively show that he is entitled to no relief; (2) he has set out specific factual allegations that, accepted as true (as they must be at this juncture of the proceedings), state claims on which relief could be granted; (3) his allegations are neither palpably incredible nor patently frivolous when viewed against the record; (4) he is not relying solely on unsupported, conclusory, unsworn statements; and (5) he is relying on matters outside of the record. *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004) ("A claim [under section 2255] must be 'so palpably incredible or patently frivolous as to warrant summary dismissal' in order to justify the refusal of an evidentiary hearing.")

CONCLUSION

For all the foregoing reasons, the Court should issue an order vacating defendant's convictions and related sentence or, alternatively, convene an evidentiary hearing to resolve any disputed issues of material fact and rule on defendant's claims accordingly.

Dated: April 30, 2014

Respectfully submitted,

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