

1 DENNIS P. RIORDAN (SBN 69320)
dennis@riordan-horgan.com
2 DONALD M. HORGAN (SBN 121547)
don@riordan-horgan.com
3 LAYLI SHIRANI (SBN 257022)
lshirani@gmail.com
4 RIORDAN & HORGAN
523 Octavia Street
5 San Francisco, CA 94102
Telephone: (415) 431-3472
6 Facsimile: (415) 552-2703

7 MARTHA BOERSCH (SBN 126569)
BOERSCH SHAPIRO LLP
8 235 Montgomery Street, Suite 835
San Francisco, CA 94104
9 Telephone: (415) 217-3700
Mboersch@boerschshapiro.com

10 TED SAMPEL-JONES (MN SBN 034302X)
11 William Mitchell College of Law
875 Summit Avenue
12 St. Paul, MN 55105
Telephone: (651) 290-6348
13 ted.sampseljones@wmitchell.edu

14 Attorneys for Defendant
HAMID HAYAT

16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

18
19 UNITED STATES OF AMERICA,) No. CR S-05-0240 GEB
20 Plaintiff,)
21 vs.)
22 HAMID HAYAT,)
23 Defendant.)
24 _____)

25
26 **DEFENDANT'S MEMORANDUM OF POINTS AUTHORITIES**
27 **IN SUPPORT OF MOTION FOR RELIEF UNDER 28 U.S.C. §2255**
28

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1 **INTRODUCTION**

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

8 **A. Charges and Evidence**

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

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

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

4 Numerous alibi witnesses were available to refute the charges. The proof that Hamid was
5 innocent lay largely with the many family members and others in the community where Hamid
6 lived during his visit to Pakistan. Those witnesses, most still in Pakistan at the time of Hamid's
7 2006 trial but also others who had returned to the United States, could have established that
8 Hamid never left his family between October 2003 and November 2004, the period when the
9 government claimed he was in a Balakot training camp. Moreover, persuasive evidence was
10 available to establish that the militant camps in the Balakot area, once directed at Pakistan's
11 conflict with India over Kashmir, had been shut down by the Pakistani government following the
12 9/11 attacks, before Hamid had arrived in Pakistan.

13 **B. Hamid's Attorney**

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

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

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

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

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

28 //

1 **C. Trial Counsel’s Failures**

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

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

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

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

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

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

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

24 **D. *Brady* Material**

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

1 accused. The government succeeded in denying Hamid's statutory right to a speedy trial by
2 claiming additional time was needed to obtain and provide to the defendants exculpatory material
3 that was in possession of this country's intelligence services. *See Brady v. Maryland*, 373 U.S.
4 83 (1963) (holding that the Due Process Clause obligates the government to disclose material
5 exculpatory evidence to the accused.) In fact, the government knowingly suppressed intelligence
6 information critical to Hamid's defense. It did so because the disclosure of that constitutionally
7 mandated discovery would have revealed the depth of the government's sweeping program of
8 warrantless wiretapping and metadata collection. Those programs sparked a firestorm of
9 criticism when finally exposed by the Snowden revelations in 2013.

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

12 First, the prosecution early on in the case developed and became
13 invested in a view of the case and the Defendants' culpability and
14 role as to the terrorism charges, and then simply ignored or
15 avoided any evidence or information which contradicted or
16 undermined that view. In doing so, the prosecution abandoned any
17 objectivity or impartiality that any professional prosecutor must
18 bring to his work. It is an axiom that a prosecutor must maintain
19 sufficient distance from his case such that he may pursue and
20 weigh all of the evidence, no matter where it may lead, and then let
21 the facts guide him. That simply did not happen here.

18 [T]he government's zeal to obtain a conviction overcame not only
19 its professional judgment, but its broader obligations to the justice
20 system and the rule of law.

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

20 Hamid's trial bore little resemblance to a fair adversarial proceeding. Yet Ms. Mojaddidi,
21 without the slightest experience in criminal law and no investigative resources, nearly brought
22 the government's large and deeply resourced legal team to its knees. The lengthy struggle of the
23 jury to reach its verdict against Hamid, however, does not establish that his defense was
24 adequate. Rather, the jury's deadlock and its protracted deliberations that preceded Hamid's
25 convictions serves as proof positive of the threadbare nature of the government's case. Had
26 Hamid received the assistance of counsel to which he was constitutionally entitled, he would
27 have been acquitted, and rightfully so.
28

1 **STATEMENT OF THE CASE**

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

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

16 On April 25, 2006, following a joint trial of Hamid and Umer Hayat, after a period of
17 some ten days, and after initially declaring a deadlock on the charges against Hamid, Hamid’s
18 jury returned guilty verdicts against him on all of the charged counts. See Dkt. Nos. 311, 312,
19 313, 315, 318, 319, 320, 321, 324, 328 (reflecting minute orders for proceedings beginning April
20 14, 2006 and concluding April 25, 2006). A separate jury could not reach a verdict against Umer
21 on the false statement charges against him. The court thereafter denied Hamid’s motion for a
22 new trial. On September 11, 2007, the district court sentenced Hamid to a term of 288 months
23 in prison. Hamid timely filed a notice of appeal on September 17, 2007.

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

1 2007, the district court dismissed the section 2255 motion without prejudice because Hamid’s
2 criminal appeal was then pending in the Ninth Circuit.

3 Oral argument on appeal was held before a three judge panel of the Ninth Circuit on June
4 10, 2009. Nearly four years later, on March 13, 2013, a divided panel of the Circuit finally
5 issued its opinion affirming Hamid’s convictions. *United States v. Hayat*, 710 F.3d 875 (9th Cir.
6 2013). Judge Berzon authored the majority opinion, joined by Judge Schroeder.

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

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

14 *****

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

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

21 *Id.* at 887-88.

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

1 While declining to review on direct appeal the district court's refusal to hear Hamid's
2 claim of a deprivation of his right to counsel, the majority anticipated the filing in this Court of
3 his renewed motion to vacate his convictions. "This holding is, of course, without prejudice to
4 our authority to review the district court's determinations on any later, properly filed initial §
5 2255 motion encompassing the claims Hayat sought to raise in the motion dismissed without
6 prejudice, and expresses no view as to the merits of any of those contentions." *Id.* at 903.

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

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

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

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

18 STATEMENT OF FACTS

19 A. The Government's Theory of the Case

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

22 The government's theory is that Hamid Hayat, the American-born,
23 erstwhile agricultural worker son of an immigrant ice-cream truck
24 driver in rural Lodi, California, attended a terrorist training camp
25 in Pakistan and returned to the United States with a "jihadi heart"
26 and a "jihadi mind," intending to commit terrorist acts of some
27 unknown sort at some unknown time in the future.

28 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

1 FBI interrogators, who repeatedly insisted, despite his continuing
2 denials, that Hayat had in fact attended such a training camp.
3 Finally, Hayat carried in his wallet a written prayer, a saying of the
4 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.

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

6 **B. The Government’s Evidence**

7 The majority opinion’s summary of the trial evidence appears at 710 F.3d at 880-883.

8 The statements made by Hamid under interrogation by the FBI are described at length below in
9 Argument I. The informant referred to by Judge Tashima, Naseem Khan, conducted
10 conversations with Hamid, some recorded but most not, before, during, and after Hamid’s trip to
11 Pakistan between 2003 and 2005. Save for Hamid’s statements under interrogation, Khan’s
12 testimony was the prosecution’s most important evidence.

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

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

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27 ¹ RT refers to the Reporter’s Transcript of Hamid’s trial. Each page of the RT cited in this
28 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.

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

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

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

22 C. The Facts Bearing on the Sixth Amendment Claims

23 1. *Ms. Mojaddidi's Lack of Experience and Need for* 24 *"Mentoring"*

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

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

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

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

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

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

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

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

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26 ³ For a description of the statements made by Ms. Mojaddidi concerning her representation of
27 Hamid, *see* Exhibit A, the declaration of Dennis P. Riordan, and Exhibit B, an earlier declaration
28 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.

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

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

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

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

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

8 “Most of the trial was jointly with Johnny Griffin,” who
9 represented Hayat’s father, Umer. “I was in the case primarily
10 because of my Muslim background, language skills and ability to
11 analyze evidence.”⁴

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

15 When a lawyer seeks to simultaneously represent co-defendants in a case, a court has the
16 power to refuse to permit, and generally will not permit, such multiple representation due to the
17 probability that it will result in a conflict of interest on the attorney’s part. If the court does
18 permit multiple representation, it may only do so after explaining the pitfalls of such
19 representation to each and every one of the defendants involved and after taking, on the record, a
20 knowing and intelligent waiver of the potential conflict, although a court can bar the arrangement
21 even if the defendants are willing to waive the conflict. *See Wheat v. United States*, 486 U.S.
22 153 (1988) (affirming order barring counsel from representing codefendants, because in
23 multiple-representation cases, district courts have a duty to take such measures as are appropriate
24 to protect criminal defendants against counsel’s conflicts of interest, including the issuance of
25 separate representation orders).

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

28 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.

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

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

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

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

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

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

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

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

24 Between September of 2005 and the beginning of January of 2006, no investigation of the
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27 ⁵ Mr. Griffin's statements concerning his role in the defense of Hamid Hayat are described in
28 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.*

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

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

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

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

1 \$15,000 on March 24 and \$20,000 on April 12, 2006, (during trial); and \$30,000 on June 7 and
2 \$30,000 on June 16, 2006 (after trial). (See Exhibit H, copies of the Khatab checks.) Ms.
3 Mojaddidi has stated that she received \$6,000 at the beginning of her representation of Hamid,
4 and two payments of \$15,000 and \$10,000 in June of 2006, well after the jury verdict against
5 Hamid had been returned on April 25th. (See Exhibit I, the declaration of Layli Shirani.) The
6 Hayats' records reflect only a single check to Mojaddidi from Khatab in the amount of \$10,000
7 on June 16, 2006. (See Exhibit H.)

8 **5. The Rise and Fall of the Speedy Trial Tactic**

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

15 At hearings held on July 1 and July 15, 2005, the court considered requests by the
16 government to vacate the August 23rd trial date because the defendants had "made discovery
17 requests on the United States to canvass the files of over forty government agencies," including
18 two intelligence agencies on June 20th and 23rd, and "there are potential classified information
19 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,
20 15.⁷) The defense opposed the government's request, with Mr. Griffin stating, and Ms.
21 Mojaddidi agreeing, that no pretrial motions would be filed by the defense that would trigger an
22 exclusion of time under the Speedy Trial Act. The defense pledged not to file motions to
23 suppress the search warrant or any of the statements by their clients, or to sever the cases. (RT of
24 7/15/05, at 2.) The Court refused to vacate the trial date of August 23rd at the hearing on July
25 15th, but did indicate that it might not "be practicable to keep that trial date if CIPA procedures
26

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

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

1 are involved.” (*Id.* at 69.)

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

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

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

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

26 ⁹ Ms. Mojaddidi then stated to the court: “I don’t have anything to add.” (*Id.*)

27 ¹⁰ Both Mr. Griffin and defense investigator James Wedick have confirmed that a principal
28 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.)

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

2 **6. The Lack of Investigation in Pakistan**

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

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

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

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25 ¹¹ Mr. Wedick became involved in the Hayat case as a defense investigator because he was a
26 long time friend of Mr. Griffin. He was paid a total of approximately \$4,000 on the case, and
27 worked largely pro bono because he became convinced that the clients were innocent. He
28 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)

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

3 **7. *The Absence of Testimony from Local Alibi Witnesses***

4 Usama Ismail, another cousin of Hamid, had returned to the United States before the
5 arrest of Hamid, and in fact had been interviewed by the FBI in the wake of the arrest of Hamid.
6 An FBI 302 report of that interview had been provided to defense counsel prior to trial in which
7 Usama described Hamid's daily routine while in Pakistan, with which Usama was familiar. The
8 302 was wholly exculpatory. (*See Exhibit J.*) The same was true of the 302's summarizing
9 interviews of Hamid's brother Arslan and his cousin Sadiq. (*See Exhibits K and L.*)

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

23 **8. *The Lack of Investigation of the Alleged Camp Site***

24 Soon after Hamid's arrest, Ms. Mojaddidi had read an article in which a governmental
25 official stated that there were no jihadi camps in Pakistan of the sort that Hamid was alleged to
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28

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

7 **9. The Decision Not to Obtain Additional Counsel for Hamid**

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

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

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

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25 ¹² According to a July 25, 2005 article in the Sacramento Bee, when told of the statements of
26 the Hayats concerning militant camps, "Pakistan Prime Minister Shaukat Aziz told reporters
27 flatly on June 11: 'There are no such camps.'" (See Exhibit M.) In his 302 interview report in
28 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.

1 as co-counsel for Hamid. Notwithstanding the imminence of the trial date and uncertainties about
2 what, if any, compensation he could expect to receive—he had asked for a minimal fee of
3 \$10,000—Mr. Reichel agreed to do so. In a subsequent discussion with Mr. Reichel, Mr. Griffin
4 and Ms. Mojaddidi discussed the proposal that Mr. Reichel appear as co-counsel for defendant
5 Hamid at trial. In the course of that conversation, Mr. Griffin stated that were Mr. Reichel to
6 appear in that role, Mr. Griffin could not and would not actively provide Ms. Mojaddidi with
7 guidance in connection with her conduct of the trial on Hamid’s behalf. Mr. Griffin and Ms.
8 Mojaddidi ultimately informed Mr. Reichel that Ms. Mojaddidi alone would represent Hamid and
9 that Mr. Reichel would not be asked to appear as co-counsel.¹⁴

10 ***10. The Hiring of Expert Witnesses***

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

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

25 Although Mr. Wedick’s proposed expert testimony concerning the methods used by FBI
26 interrogators was primarily intended to counter the government’s case against Hamid, Wedick
27

28 ¹⁴ See Exhibit N, the 2007 declaration of Donald Horgan.

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

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

8 **11. Post-Trial Proceedings**

9 Following Hamid’s conviction and the mistrial of Umer Hayat’s case at the end of April,
10 2006, the government announced that it would proceed to retry Umer. Although work had begun
11 on an extensive motion for a new trial on behalf of Hamid, Ms. Mojaddidi by email informed her
12 new co-counsel in the case, the firm of Riordan and Horgan, that beginning on June 4th, she would
13 be involved “day to day” in Umer’s retrial, as Johnny Griffin wanted her “at counsel’s table next
14 to him as a resource. I know the record and the evidence better than he does and he needs me to
15 rely on.” (See Exhibit O, an e-mail of 5/31/2006.) Before retrial commenced, Umer Hayat’s case
16 was settled by a time-served plea to a charge unrelated to terrorism.

17 **ARGUMENT**

18 **I. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF** 19 **COUNSEL BECAUSE HIS TRIAL ATTORNEY WORKED UNDER AN ACTUAL** 20 **CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HER** 21 **PERFORMANCE**

22 **A. The Right to Unconflicted Counsel**

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

¹⁵ See Exhibit B.

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

8 In other words, to show adverse effect, a defendant need not demonstrate
9 prejudice—that the outcome of his trial would have been different but for
10 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.

11 *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005); *see also Taylor v. Grounds*, 721 F.3d
12 809, 819 (7th Cir. 2013) (“The abandoned defense need not be a winning one”); *United*
13 *States v. Gambino*, 864 F.2d 1064, 1070 (3rd Cir. 1988) (abandoned defense need only have
14 “possessed sufficient substance to be a viable alternative.”) If an actual conflict adversely affected
15 performance, then relief is constitutionally required.

16 **B. Ms. Mojaddidi’s Conflict**

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

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

1 Joint defense agreements are allowed in some circumstances, but they are constitutionally
2 impermissible where they result in conflicted representation. *Holloway v. Arkansas*, 435 U.S.
3 475, 481 (1978). The presentation of a common defense and a “united front” may have some
4 benefits in some cases, but such arrangements cannot be pursued where they work to the
5 detriment of one codefendant. *Taylor*, 721 F.3d at 819. Joint representation is no less
6 problematic simply because the codefendants are family members. *United States v. Auerbach*,
7 745 F.2d 1157 (8th Cir. 1984). Moreover, such conflicts may arise not only where a single
8 counsel represents multiple defendants, but also where independent counsel defers to lead
9 counsel. *United States v. Martin*, 965 F.2d 839, 841-42 (10th Cir. 1992); *Robinson v. Stegall*, 342
10 F. Supp. 2d 626, 636 (E.D. Mich. 2004). That is precisely what happened in this case.

11 ***1. Conflicting Strategies***

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

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

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

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

21 2. *Financial Arrangements*

22 Furthermore, even if Ms. Mojaddidi had been an experienced counsel capable of
23 exercising her independent judgment, she would have been subject to a conflict of interest in this
24 case for another critical reason: money. In order to receive any fees for her work—and she
25 received very little—or to obtain any funds for support services such as investigation or expert
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27 ¹⁷ See Exhibit R, the declaration of Doron Weinberg, an expert witness on the subjects of
28 attorney ethics, responsibility and competence.

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

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

15 3. *The Reichel Affair*

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

24 The Reichel affair establishes four facts. *First*, Mojaddidi had entirely surrendered her
25 control of decision-making in Hamid's case to Griffin. She had contacted Reichel when she
26 became emotionally overwhelmed by her accurate realization that she could not competently
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28 ¹⁸ See Exhibit R, the Weinberg declaration.

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

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

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

11 *Fourth*, the Reichel incident establishes that her forgoing of the assistance of experienced
12 counsel, as well as each of the subsequent deficiencies in Mojaddidi’s representation of Hamid,
13 were “adverse effects” of the conflict of interest under which she operated. Had Mojaddidi been
14 assisted by experienced counsel, she may well have avoided the many errors of commission and
15 omissions that plagued Hamid’s defense. Mr. Griffin’s decision barring Mr. Reichel from
16 participation in the case was the cause of much of Ms. Mojaddidi’s ineffective representation of
17 Hamid at trial. The test for locating an adverse effect was satisfied. See *United States v. Wells*,
18 394 F.3d at 733.

19 **C. The Specific Adverse Effects of Ms. Mojaddidi’s Conflict**

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

24 **TRIAL COUNSEL’S FAILURE # 1: FAILURE TO PROCURE PAKISTANI ALIBI WITNESSES**

25 **1. Ms. Mojaddidi’s Decision**

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

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

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

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

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

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27 ¹⁹ Ms. Mojaddidi continued to believe that a dismissal under the Speedy Trial Act would
28 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.)

1 justification for forgoing investigation of Hamid’s powerful alibi defense in Pakistan.²⁰

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

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

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

24
25 ²⁰ Even if the Speedy Trial issue had any strategic merit, which it did not, Ms. Mojaddidi
26 failed to preserve it. According to Ms. Mojaddidi, she continued to refrain from obtaining a
27 continuance to pursue investigation in Pakistan because Mr. Griffin wanted to preserve the
28 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.

1 2. *The Pakistani Witnesses' Testimony*

2 Hamid's present counsel has obtained declarations from 18 witnesses to Hamid's
3 whereabouts and activities during his stay in Pakistan between April of 2003 and May of 2005.²¹
4 All of these witnesses were available and willing in 2005 to attest to the same facts. None of the
5 witnesses' testimony was presented to the jury. The declarations of the Pakistani witnesses
6 provide irrefutable proof that, consistent with Hamid's statements during his initial interrogations
7 with the FBI, between October of 2003 and November of 2004, Hamid never left the company of
8 his friends and family to attend a militant training camp or for any other purpose; indeed, he was
9 almost never alone during that period of time.

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

14 When [Hamid] came to Pakistan in 2003-05, I met him after every
15 two or three days during this whole period. I divide my time
between Rawalpindi and Behboodi. I have a place in both cities.

16 Hamid did not have any set routine during this time. During those
17 days we were busy preparing for his wedding, and his house in
Behboodi was also being rebuilt. At the time, Hamid's age was
18 around 20, but he was afraid of travelling alone. And he was also
not allowed to spend the night away from home.²²

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

20 Hamid came to 'Pindi around two times every month, and stayed
21 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.
22 Hakim Azam Bhatti came from Faisalabad to Rawalpindi Sadar for
a few days every month, and she was seeking treatment from him.
23 (A Hakim is a physician who uses traditional remedies and has no
24

25
26 ²¹ With one exception, those declarations—Exhibits S to JJ—are written in Urdu. They were
27 gathered and translated by attorney Maryam Mohiuddin Ahmed and journalist Syeda Amna
Hassan. *See* Exhibits KK and LL.

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

1 medical degree.)²³ She would get her blood tested at Aga Khan
2 Laboratory.

3 Usually, a driver came with Hamid and his mother, because Hamid
4 did not know how to drive. He did not have a very strong mental
5 capacity/state. His behavior was childish; he played video games all
6 day and went out to play cricket after Asr (afternoon prayer). We
7 scolded him frequently about playing games all the time.

8 Other than Rawalpindi and Behboodi, he went to Multan twice
9 during his stay in Pakistan. He never traveled alone. He always
10 insisted on taking a family member or friend with him. He never
11 took a bus on his own either.²⁴

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

14 I live in Behboodi. When Hamid came to Pakistan in 2003, we met
15 almost every other day. He usually got up late every morning. He
16 went out to play with his friends after Asr (afternoon prayer). When
17 they played cricket at night, I was usually with them.

18 Hamid was a simple guy. He was always in the village, except when
19 he went to Rawalpindi with his mother. Apart from Behboodi and
20 Rawalpindi, Hamid only traveled to Multan twice in Pakistan. As
21 far as I know, he did not travel anywhere other than this.²⁵

22 Hammad Ishfaq likewise attests:

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

28 //

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

31 ²⁴ See Exhibit T, the declaration of Muhammad Anas. See also Exhibit U, the declaration of
32 Mohammad Doud:

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

40 ²⁵ See Exhibit V, the declaration of Mohammad Usman.

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

7 Mohammad Qasim attests:

8 I have known Hamid since he was a child. I own a grocery store in
9 Behboodi. I do not remember the exact month Hamid arrived in
10 Pakistan or departed for America. But during 2003-05, we met
11 almost every day when he came to my grocery store with Jabir and a
12 few other friends. Sometimes we met at the mosque after Namaz
13 (prayer) as well. Sometimes he left the village to go to Rawalpindi,
14 and I did not see him during those days. He did not leave the village
15 for more than a week.

16 Hamid used to go to the Baithak every night. Some of the
17 neighborhood boys usually played cricket there, and Hamid played
18 with them.²⁷

19 Sajjad Ishfaq attests:

20 I am Hammad Ishfaq's brother. My father and Hamid's mother are
21 cousins. My childhood was spent here in Behboodi. Between April
22 2003 and May 2005 I met Hamid almost every day. He usually got
23 up around 11 am, and played cricket with us between Asr and
24 Maghrib prayers. Before that, in the afternoons, he was usually at
25 home where Hamid, Arslan Hayat, Mohammad Nauman and I
26 played video games. Other than that, sometimes we went to Huzro
27 city in the evening and played snooker (pool). Hamid had a lot of
28 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, Razaqat 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.

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.

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

5 Two declarants—Hammad Ishfaq, and Razaqat—also describe their trip to Multan with
6 Hamid in October of 2004 to attend another friend’s wedding.³⁰

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

11 In the year 2000, Hamid came down with acute pyogenic
12 meningitis...I was a pediatrician working in the government sector
13 at the time. I was posted in the Kahuta sector, which is a two-hour
14 drive from Huzro. I have been working as a pediatrician for almost
15 20 years now.

16 Within 24 hours, Hamid was shifted to Jamia Islamia in
17 Rawalpindi, where his symptoms aggravated, and he became
18 drowsy and displayed altered behavior. He originally had symptoms
19 that indicated a CNS infection or a brain infection. I recommended
20 that he be shifted to Shifa International Hospital in Islamabad. They
21 had all kinds of facilities under one roof, and it would be easier to
22 treat him there.

23 He was taken to the emergency ward around midnight, where he
24 was given a CT scan and a spinal tap/ lumbar puncture, and he was
25 diagnosed with acute meningitis.

26 He remained in the ICU for two or three days. I had joined the
27 family in Islamabad, and I remember that it was under the
28 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 Razaqat. 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.”

1 same to Hamid. When he was in school, he was a very shy boy.
2 Arslan (Hayat) was younger than him, but he could wrestle him to
3 the ground. He was easy to intimidate, and quick to accept whatever
4 others told him. He would not even play with a toy gun. He did not
5 have very strong nerves to begin with, and meningitis made him
6 worse.

7
8 When he came back to Pakistan in 2003, I met him and his family
9 on a weekly basis until he went back to America in 2005. The
10 family would get together in Behboodi and occasionally in
11 Rawalpindi, and have lunch and chat. He was usually at home.
12 Sometimes he would go out to play cricket with his friends, but I do
13 not know how often.

14
15 I am certain that he never left the village on his own. I did not see
16 him travel alone or hear of him doing so from anyone else. From
17 what I remember, he had his mother or friends or uncles or siblings
18 with him when he traveled. I don't think he could have gone from
19 Rawalpindi to Attock on his own, let alone Balakot. I never heard
20 him mention Balakot, and I do not think he has ever been to the city,
21 not even as a tourist.

22
23 I met him almost weekly for the entire duration of his stay, so it is
24 not possible that he left the village (Balakot) for more than two
25 weeks.³¹

26
27 Many talk about how Hamid was simple, timid, childish and afraid to travel alone. The
28 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."

1 together. Hamid waited for the Baithak eagerly. He used to have the
2 keys to the Baithak, and he would open the door for the villagers.
3 There were approximately 20 or 25 people there at a time. If the
4 weather was good, we played cricket. Otherwise, we sat inside and
5 played cards or watched movies.

6 Hamid's mind was sort of weak after the illness, after meningitis. I
7 was surprised that the guy who spent so much time in Pakistan and
8 never talked about jihad, returned from America in 2003 and talked
9 with such enthusiasm about what his friend Naseem Khan said.
10 Hamid used to say that Naseem Khan is an emotional person, and
11 he is interested in jihad. He would come to Pakistan soon, and he
12 wanted to go to a training camp. Hamid never said anything about
13 going to a camp himself. In the beginning (of his trip), he used to
14 talk to Naseem Khan every other day with warmth. Khan used to
15 say that he was interested in touring Pakistan, and that when he
16 came to Pakistan, it would be Hamid's responsibility to show him
17 around. Hamid asked me to go with them too. But his friend never
18 came to Pakistan, and Hamid never went anywhere.³²

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

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

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

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

34 _____
35 ³² See Exhibit GG, the declaration of Mohammad Nauman.

36 ³³ See Exhibits GG, HH, U, II, and JJ, the declarations of Mohammad Nauman, Malik
37 Intesham Mumtaz, Mohammad Daud, Tayyaba Fahim, and Bibi Asma.

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

6 ISMAIL claimed that HAMID is innocent and that the
7 allegations against HAMID are untrue. While in Pakistan, ISMAIL
8 saw HAMID in person almost everyday. The maximum period of
9 time that ISMAIL may not have seen HAMID was two weeks,
10 unless HAMID was visiting his grandfather in Rawalpindi.
11 HAMID's mother OMA was sick with Typhoid 2 and underwent
12 homeopathic treatment, as well as, visited the SHIFAH or SHAFI
13 hospital in Islamabad (which is a two-hour drive). HAMID did not
14 go to any training camp. HAMID went to Pakistan in early 2003, to
15 attend his older sister NAJIA's wedding. HAMID's parents were
16 looking for a bride for him. HAMID got married after Ramadan in
17 2004.

18 (See Exhibit J.)

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

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

28 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

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

5 **TRIAL COUNSEL’S FAILURE # 3: FAILURE TO PROCURE BALAKOT CAMP EXPERT**

6 ***1. Ms. Mojaddidi’s Handling of Balakot Camp Evidence***

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

11 At trial, the government relied heavily on its own paid expert witness, Hassan Abbas, to
12 support the existence of the Balakot camp. Abbas’s testimony focused on the JEM organization
13 and its leader Mohammed Masood Azhar. Abbas traced how Azhar had been associated with
14 HUM (Harakat ul Mujaheden), his work in India and his subsequent imprisonment, and his return
15 to Pakistan. Abbas generally described jihadi camps in existence throughout Pakistan between
16 2000 and 2005, but made his most detailed statement about a JEM encampment near Balakot
17 started in 2000-2001 and run under the auspices of Azhar. Abbas testified that the camp was in a
18 hilly, forested area outside Balakot, and that it was not a true religious madrassa but rather a camp
19 for training armed militants. (RT 2692.) Abbas, however, had never seen the camp, nor even
20 seen a photo of the camp, nor had he ever interviewed or spoken to anyone who actually visited
21 the camp. (RT 2830-44.)

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

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

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

5 She also had evidence available. In the interview of Usama Ismail by the FBI on June 9,
6 2005, Usama, who had been in Pakistan with Hamid during most of Hamid's stay in 2003 to
7 2005, told the FBI not only that Hamid never attended a camp, but that the camps had been
8 destroyed by President Musharraf. (Exhibit J.) Furthermore, as noted above, Mojaddidi had read
9 a press article in which a governmental official stated that there were no jihadi camps in Pakistan
10 of the sort that Hamid was alleged to have attended. (Exhibit M.) Ms. Mojaddidi contacted the
11 Pakistani embassy to inquire how she could obtain information concerning this issue from the
12 Pakistani government. Mr. Griffin, however, directed Ms. Mojaddidi to cease her communications
13 with the embassy and she did so. Lacking any available resources, Ms. Mojaddidi did not attempt
14 to initiate any investigation in Pakistan concerning the Balakot camp issue.

15 2. *Available Expert Testimony*

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

22 In his declaration, Hasnain has affirmed that the camps in the Balakot area in the early
23 2000s were funded by the Pakistani ISI, and were effectively shuttered by the end of 2002 due to
24 pressure from the United States government. That pressure resulted in the ISI terminating the
25 monthly stipend that the militants were paid, thereby cutting off the funds needed to continue
26 training at the camps. Thereafter the camp locations functioned at most as mere residences. Those
27 interested in continuing militancy tended to migrate to Waziristan, thereby escaping control by the

28 ³⁴ See Exhibit NN, the declaration of Ghulam Hasnain Asser.

1 ISI and becoming more amenable to Al Qaeda influence. Hasnain specifically affirms that the
2 JEM camp in the Balakot area at the coordinates testified to by Benn was closed before October of
3 2003.

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

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

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

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

24 ***1. CIPA and Sixth Amendment Law***

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

1 Ninth Circuit recently held, the Sixth Amendment trumps CIPA, and the latter must be interpreted
2 in light of the former. “While the government must safeguard classified information in the
3 interest of national security, courts must not be remiss in protecting a defendant’s right to a full
4 and meaningful presentation of his claim to innocence.” *United States v. Sedaghaty*, 728 F.3d
5 885, 903 (9th Cir. 2013).

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

10 **2. Background and the Pretrial CIPA Hearing**

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

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

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

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

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

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

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

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

27
28 ³⁵ See Exhibit OO, the government’s letter of December 16, 2005.

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

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

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

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

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

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

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

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

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

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

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

26 On February 3, 2006, both defendants signed a stipulation agreeing that their counsel
27 could be excluded from all hearings on classified information. (Dkt 179.)
28

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

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

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

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

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

23 _____
24 ³⁸ A defendant can establish the invalidity of a guilty plea, and the waiver of constitutional
25 rights on which it is based, by establishing that “an actual conflict of interest adversely affected
26 his lawyer's performance.” See, e.g., *United States v. MacEwan*, 2008 WL 862396 (E.D. Pa.
27 Mar. 31, 2008) (quoting *Cuyler*, 446 U.S. at 348); *United States v. Taylor*, 139 F.3d 924 (D.C.
28 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).

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

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

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

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

28 ³⁹ See Exhibit PP, the declaration of attorney expert John Cline.

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

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

11 The government utilized Ms. Mojaddidi’s surrender of her client’s procedural rights to
12 great advantage, blocking inquiry into several subjects that would have gravely undermined the
13 government’s accusations. For example, on April 4, 2006, while conducting her direct
14 examination of FBI agent Gary Schaaf, Ms. Mojaddidi asked whether Schaaf knew of “any other
15 secretly recorded conversations besides those that Naseem Khan recorded of Hamid Hayat.” (RT
16 3628.) The prosecutor objected “on 401, 403 grounds, *and also CIPA.*” (*Id.* [emphasis added])
17 This Court observed that, as phrased, the question potentially implicated “all of the investigations
18 that the FBI may be engaged in,” and “sustained [the objection] on 403 grounds because of the
19 way it’s worded.” (RT 3628-29.)

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

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

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

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

19 Hamid and Umer Hayat were tried together. The charges were related, though the charges
20 against Hamid were vastly more serious. The false statement charges against Umer accused him
21 of falsely denying knowledge of Hamid's attendance of a camp when he was initially questioned.
22 When subsequently questioned by the FBI in his June 4 interview, Umer made statements that
23 inculpated Hamid. Those statements were inadmissible against Hamid under both the prohibition
24 on hearsay in the Federal Rules of Evidence and under *Bruton v. United States*, 391 U.S. 123
25 (1968).

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

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

8 Ms. Mojaddidi's joinder in Mr. Griffin's announcement at the outset of the case (RT of
9 7/15/13, at 2), that "no pretrial motions" would be filed can only be explained by the reality that
10 she would have been utterly adrift if Mr. Griffin was not at her side to "mentor" her on the
11 fundamentals of trying a criminal case. Because seeking a severance on *Bruton* grounds was a
12 "plausible alternative defense strategy or tactic [which] might have been pursued but was not
13 and...the alternative defense was inherently in conflict with or not undertaken due to the attorney's
14 other loyalties or interests," a new trial is in order on this ground alone. *Hovey*, 458 F3d at 908.

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

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

23 The circumstances of the interrogation rendered it involuntary. Moreover, in addition to
24

25 ⁴⁰ Six months later, when their trial date was rapidly approaching, Mr. Griffin and Ms.
26 Mojaddidi did file a one sentence motion in limine to exclude on *Bruton* grounds the admission
27 of those portions of the statements of Hamid and Umer that were inadmissible against their
28 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.

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

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

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

18 ***1. Hamid's Purported Confession***

19 *a. The May 30, 2005 Interview in Japan*

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

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

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

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

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

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

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

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

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

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

1 Rawalpindi. (RT 562.)

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

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

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

13 *c. The First Unrecorded Interview at the FBI Office*

14 On the morning of June 4th, Umer Hayat drove his son Hamid to the FBI office in
15 Sacramento, arriving some time between 10 and 11 a.m. (RT 569-70.) Aguilar took Hamid into
16 an interviewing room and questioned him alone for either 15-20 minutes or 20-25 minutes. (RT
17 570, 711.)

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

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

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

1 d. *The Second Unrecorded Interview at the FBI Office*

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

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

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

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

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

1 502-03.) He said he took another 7-8 hour bus trip and received pistol training at the camp. (RT
2 503.) Hamid described the city where the camp was located, writing down the name in Urdu as
3 “Balakot.” (RT 504.)

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

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

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

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

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

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

21 the North West Frontier Province in discussing the location of a training camp (Gov. Exh.
22 23, at 6);⁴¹

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

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

25 explosives training at the camp (*id.*)

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

27
28 ⁴¹ Government Trial Exhibit 23 is a transcript of the videotaped interviews conducted on June
4th and June 5th.

1 rifle training at the camp (*id.* at 45);
2 Kalashnikovs and Kalashnikov training at the camp (*id.* at 45-46);
3 knives at the camp (*id.* at 48);
4 martyrs and suicide-bombers at the camp (*id.*);
5 buildings at the camp (*id.* at 9);
6 Harakut ul Mujahideen running the camp (*id.* at 12);
7 Harakut ul Ansar running the camp (*id.*);
8 Sipah I Sihaba running the camp (*id.*);
9 “JUI” in discussing who runs the camp (*id.*);
10 Fazlur Rahman (*id.* at 32);
11 the Pashto language being spoken at the camp (*id.* at 14);
12 the presence of mostly Pakistanis at the camp (*id.* at 13);
13 the presence of Afghans at the camp (*id.* at 13);
14 the presence of Kashmiris at the camp (*id.* at 62);
15 jogging at the camp (*id.* at 18);
16 being taught to kill Americans at the camp (*id.* at 16);
17 being taught to kill Crusaders at the camp (*id.* at 53)
18 being taught to kill Jews at the camp (*id.* at 53);
19 camp attendees going to Kashmir for jihad (*id.* at 63);
20 camp attendees going to Afghanistan for jihad (*id.* at 63)
21 the presence of security at the camp (*id.* at 94); and
22 the term “jihadi” (*id.* at 12.)

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

1 Schaaf told Hamid at least 9 times during the interview that parts of his story about the
2 camp did not make sense. (Gov. Exh. 23, *passim*.) When Hamid said that he was tricked into
3 going to the camp both in 2000 and in 2003, Schaaf again said that he did not believe him. (*Id.* at
4 99, 102.) When Hamid said that on both occasions he thought he was going for Tabligh Jamaat
5 (i.e., essentially religious revival meetings) and not to a camp, Schaaf said the story made no
6 sense. (*Id.* at 99.)

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

11 This interview concluded with the following colloquy:

12 Hamid: Any chance of go home?

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

14 Hamid: You guys have any more questions?

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

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

17 Schaaf: Yeah. Let me check on that.

18 (*Id.* at 107.)

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

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

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

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

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

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

10 Harrison: [Y]ou got to give me something in order for me to go
11 help you.

12 Hamid: OK.

13 Harrison: You know, to tell my bosses that you’re cooperating,
14 that you’re working with us. You know you’re in a
15 bad situation, you know but it could be a lot worse,
16 and there’s a lot we can do to help you. But you got
17 to help us, you gotta work with us.

18 Hamid. (nodding)

19 (*Id.* at 203.)

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

22 Harrison: No, no. You’re not leaving here tonight, no.

23 Hamid: No, I mean ah, tomorrow. I’m going to be here
24 tonight. Staying here? In the building?

25 Harrison: No, no you’re going to go, you’re going to go to jail.

26 Aguilar: Hamid you’re going to jail.

27 Hamid: Yeah, so am I going to get a place to sleep over there
28 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?

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

3 2. ***Content and Contradictions***

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

7 a. ***Method of Travel to the Camp and Camp Location***

8 Hamid told Schaaf during the first recorded interview that he left from Rawalpindi on a
9 7-hour bus ride to the camp. (Gov. Exh. 23 at 3-5.) The bus drove in the direction of Northwest
10 Frontier Province. (*Id.* at 6.) It was dark when they arrived and they had to walk three or four
11 miles on a path because the “bus can’t go up there.” (*Id.* at 7-8.) Asked who led them up the trail,
12 Hamid replied, “Taking us up there? You know, no one’s leading you up there, you know just
13 going up there...Get - - get direction and then people know that location.” (*Id.* at 8.) Asked later
14 whether someone led him to the camp, Hamid responded, “Yeah (yawning) I didn’t ask, I didn’t
15 talk with no one or nothing like that.” (*Id.* at 11.)

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

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

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

22 “This camp is in NWFP...” (*id.* at 111);

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

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

25 “I’ll say Balakot, that the first thing I’ll say uh in NWFP that’s what I’ll say.” (*Id.* at 197);

26 “[I]t’s in Mansehra.” (*Id.* at 198);

27 “I’ll say it’s in what’s it called uh uh the final question...what’s it called uh Kashmir that’s
28 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);

1 “[T]he camp will be in (unintelligible) Tora Bora something or Dohum (phonetic)...” (*Id.*
2 at 199);

3 “The final thing I’ll say was in uh Afghanistan.” (*Id.* at 201);

4 “I’ll say you know what’s it called this camp will be final question for mine is you know
5 N-W-F-P, you know Peshawar, that’s the area I’ll say, that’s where the camp was. I’ll say
6 sir. Cause I remember that pretty good, that’s what I’ll say. If you guys can give me more
7 time to think about it, you know, I clear my mind.” (*Id.* at 202);

8 “Like I tell you guys, you know, my final answer would be like two places. I don’t
9 remember that good. One would be like, you know. That, ah, camp I told, Kashmir, one,
10 would be like ah, you know near the Afghani border. The only two places I can tell
11 you...Or maybe, maybe in our, you know, ahh the village, in our village, ahh
12 (unintelligible), you know, like ahh near the village or something.” (*Id.* at 204-205.)

13 Agent Aguilar testified that the FBI’s follow-up investigation did not confirm Hamid’s
14 having attended a camp in any of the locations Hamid had mentioned during his interview. (RT
15 764.)

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

17 Hamid told Schaaf he went to the camp “six, seven months” after arriving in Pakistan in
18 2003, but he didn’t remember the date or month. (Gov. Exh. 23 at 15.) Schaaf asked: “All right.
19 So - - so, in 2003, you go to Paki-, in 2003 you’re in back in Pakistan. And about 7-8 months after
20 you get there you go to camp and you’re in camp for - - for 3 to 4 months? (*Id.* at 15.) Hamid
21 replied: “Something like that.” (*Id.* at 15.) Minutes later, Hamid told Schaaf he returned from the
22 camp four to five months before his wedding. (*Id.* at 20.) Aguilar acknowledged, however, that
23 six to seven months after Hamid’s April, 2003 arrival in Pakistan would fall in October or
24 November of 2003. (RT 760.) Yet Hamid was married in March 2005, and four to five months
25 prior to that would fall in October or November 2004. (RT 762.)

26 During the first videotaped interview, Hamid said he ran away from the camp after three
27 months. (Gov. Exh. 23 at 11.) During the second videotaped interview, he adopted Harrison’s
28 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

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

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

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

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

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

14 Hamid: That runs the camp.

15 Harrison: In your family, yeah.

16 Hamid: In my family?

17 Harrison: Yeah.

18 Hamid: Maybe my uncle.

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

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

23 Harrison: Maybe, maybe it's your uncle?

24 Hamid: Yeah.

25 Harrison: What is your uncle's name?

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

28 Harrison: Runs, runs the camp?

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

Harrison: Maybe?

1 Hamid: Yeah.

2 Harrison: Maybe your grandfather?

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

4 (*Id.* at 170.)

5 *d. Types of Training at the Camp*

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

11 *e. Number of Camp Attendees*

12 When, during the first videotaped interview, Hamid was asked how many people were at
13 the camp, Hamid responded, “What can I say, sir, uh maybe uh 35, 40, 50 maybe.” (*Id.* at 9.)
14 Minutes later, when asked if there were hundreds of people that came and went at the camp,
15 Hamid responded, “I didn’t see that much like uh over 50 people I’ll say. I didn’t see over 50
16 people over there, Sir.” (*Id.* at 10.) During the second videotaped interview, when asked how
17 many students were training with him at the camp, Hamid responded, “Uh, I think so, over like uh
18 200 something.” (*Id.* at 195-96.)

19 *f. Intent*

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

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

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

9 g. *Statements About Ahmed and Adil*

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

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

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

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

1 Hamid: Adil?
2 Harrison: Uh-hmm.
3 Hamid: Ah, he's making an Islamic center in Lodi. And
4 that's what I know about him...(unintelligible)
5 Harrison: Ok, about orders coming from.
6 Hamid: I'll say this guy Adil.
7 Harrison: Uh-huh.
8 Hamid: Ah, he gives him the orders.
9 Harrison: He gives Shabbir the orders?
10 Hamid: I'll say.
11 Harrison: All right.
12 Hamid: Cause you know there you know they are close to
13 each other.
14 Harrison: Um-hmm.
15 Hamid: I'll say that.
16 Harrison: Ok, so, if someone in the camp wants to give orders
17 to you, they would call.
18 Hamid: They would contact him Adil.
19 Harrison: Call Adil.
20 Hamid: Adil will contact Shabbir like that.
21 Harrison: And Adil will contact Shabbir?
22 Hamid: Uh-huh.
23 Harrison: And on to you.
24 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,

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

4 3. *The Failure to Move to Suppress*

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

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

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

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

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

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

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

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

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

22 I have reviewed relevant citations to the trial record in
23 *United States v. Hamid Hayat* concerning the interrogation of Mr.
24 Hayat by FBI agents at their Sacramento office on June 4th and 5th,
25 2005. I am aware that the interrogation extended over fourteen
26 hours, involved the extensive use of leading questions and at least
27 one false assertion by the interrogators, was conducted at times
28 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

1 suppress Mr. Hayat's statements during his interrogation on the
2 ground of involuntariness. At trial, such an expert could have
3 provided both general and case-specific testimony that would have
4 aided and assisted the jury with its difficult task of deciding what
5 weight to put on Mr. Hayat's statement. Generally, such an expert
6 could have testified about police interrogation training and
7 techniques; how interrogation is designed to work as a
8 psychological process; which interrogation techniques are
9 psychologically coercive and why; how and why certain
10 interrogation techniques can, and sometimes do, lead to false
11 confessions from the innocent; situational and personal risk factors
12 for false confession; and how both experts and law enforcement use
13 the post-admission narrative analysis and standard of fit to evaluate
14 whether confession statements are likely reliable.

15 In 2006, at the time of Mr. Hayat's trial, there were numerous police
16 interrogation and false confession experts who could have testified
17 had the defense chosen to offer evidence of a false confession or
18 improper police interrogation. By the end of 2005, I had been
19 qualified and testified 119 times in disputed confession cases; by
20 the end of 2006, 134 times. Other qualified experts include Dr.
21 Richard Ofshe, Dr. Elliott Aronson, Dr. Lawrence Wrightsman, Dr.
22 Christian Meissner, Dr. Gisli Gudjonsson, Dr. Saul Kassin, Dr.
23 Mark Costanzo, Dr. Deborah Davis, Dr. Daniel Lassiter, Dr.
24 Allison Redlich, and Dr. Lawrence White. The testimony of such an
25 expert could have assisted Mr. Hayat's defense by explaining to the
26 jury what the social science research shows about how and why
27 psychological police interrogation methods can cause innocent
28 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

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

36
37
38 ⁴² See Exhibit QQ, the declaration of Richard Leo.

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

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

11 **TRIAL COUNSEL’S FAILURE # 8: INSTRUCTING HAMID NOT TO TESTIFY**

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

19 It is precisely because the decision whether to have a client testify is so important and so
20 difficult that it must be made by an attorney who takes into account only the best interests of his
21 or her client. A frequent ground upon which courts find an attorney suffered from a conflict of
22 interests requiring a new trial arises where that attorney convinces a defendant not to testify
23 because doing so could endanger the interests of a codefendant. *See, e.g., Gallegos*, 108 F.3d at
24 1283 (counsel’s duty to one defendant was to encourage codefendant to testify to elicit
25 exculpatory information, but duty to codefendant was to discourage him from testifying).

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

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

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

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

18 **TRIAL COUNSEL’S FAILURE # 9: FAILURE TO REQUEST BILL OF PARTICULARS OR TO OBJECT**
19 **TO THE GOVERNMENT’S CONSTRUCTIVE AMENDMENT OF THE INDICTMENT**

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

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

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

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

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

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

25 * * * *

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

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

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

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

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

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

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

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

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

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

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

13 Of course, counsel’s failure to move for the suppression of evidence obtained in violation
14 of *Miranda v. Arizona*, *supra*, can constitute deficient performance. *Lowry v. Lewis*, 21 F.3d 344,
15 346-47 (9th Cir. 1994) (“Few things can more greatly benefit a criminal defendant than keeping
16 the most probative evidence against him from being seen by the jury.”) So, too, can counsel’s
17 failure to consult with expert witnesses or present expert testimony. Indeed, as the Court noted in
18 *Hinton*, *supra*, “Criminal cases will arise where the *only* reasonable and available defense
19 strategy requires consultation with experts or introduction of expert evidence.” 134 S.Ct. at 1088
20 (quoting *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011) (emphasis added)).

21 Finally, as to prejudice, a “reasonable probability” of a different result had counsel acted
22 competently is less than a preponderance of the evidence but instead simply a probability
23 sufficient to undermine confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419, 434-35
24 (1995); *Strickland*, 466 U.S. at 693, 695. Furthermore, the cumulative impact of multiple
25 deficiencies may generate prejudice within the meaning of this standard. *See Harris v. Wood*, 64
26 F.3d 1432, 1438 (9th Cir. 1995), and citations contained therein.

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

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

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

14 **TRIAL COUNSEL’S FAILURE # 10: FAILURE TO CHALLENGE INADMISSIBLE EXPERT**

15 **TESTIMONY REGARDING BALAKOT CAMP**

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

23 This probability estimate rested in critical part upon (1) the “expert’s” assumption, urged
24 upon him by prosecutors, that Hayat’s statement about attending a camp had been truthful and (b)
25 his related (unacknowledged) assumption that Hayat’s initial denials about attendance had been

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

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

9 **1. Background**

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

14 Based on his analysis of the photos, Benn initially opined that the probability that the 2004
15 structures represented a militant training camp was fifty percent or a “good strong possible.” (RT
16 3062, 3073; *see also* RT 3102.)

17 Responding to the prosecutor’s leading questions, Benn thereafter confirmed that he had
18 previously reviewed the videotaped “interview” of defendant conducted on June 4 and June 5 of
19 2005, and that the “information conveyed” during that session had been “relevant” to his analysis
20 as to the presence of the militant training camp. (RT 3066.)⁴⁴ The prosecutor thereafter proposed
21 playing certain excerpts of the videotape containing select statements made by Hamid during the
22 taped portion of his interrogation “to provide . . . the basis for the testimony Mr. Benn will give . .
23 . . .” (*Id.*) Asked to state her position on the proposal, Ms. Mojaddidi stated, “no objection.” (RT
24 3067.) The prosecutor thereafter played a number of Hamid’s interrogation excerpts containing

25
26 ⁴⁴ Benn testified that, prior to trial, and in addition to providing him with the interrogation
27 videotape and related transcripts (RT 3084-85), the prosecution had “described” the indictment
28 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.”].)

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

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

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

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

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

4 **2. General Principles**

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

15 **3. Ms. Mojaddidi’s Failure to Object**

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

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

21 ⁴⁵ In its decision on appeal, the Ninth Circuit summarized Benn’s testimony as follows:

22
23 Benn, a satellite imagery expert who had analyzed satellite images
24 to determine the likelihood that there was a militant training camp
25 near Balakot between 2003 and 2005, characterized the likelihood
26 as “a good strong possible.” He further testified that when an
27 analysis of the satellite imagery was combined with the description
28 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.

1 terrorist training camp. But there is no demonstrable principle or method that allows an expert to
2 estimate such a numerical probability based on a photograph. *See* Fed. R. Evid. 702(c). And
3 there was no showing in this case that Benn’s opinion was truly based on sufficient facts and data.
4 *See* Fed. R. Evid. 702(b). Initially, Benn apparently looked at the photos and picked a number:
5 50%. That numerical estimate, however, was not anything that can be called science. It is rather
6 junk science, the science of guessing, which is exactly what *Daubert* and Rule 702 forbid.

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

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

20
21 ⁴⁶ On March 28, 2006, while cross examining Department of Defense senior analyst Eric
22 Benn as to the “perhaps dozens of images that [Benn had] reviewed over the course of [his]
23 career” depicting potential militant camps in Pakistan, Ms. Mojaddidi asked Benn for his opinion
24 as to the breakdown among “possible,” “probable,” and “confirmed” existence of such camps “in
25 that vicinity.” (RT 3082-83.) The prosecutor objected under Rules 401 and 403 “and ... also [on
26 the grounds that *the question*] may call for the disclosure of classified information.” (RT 3083
27 [emphasis added].) Ms. Mojaddidi responded, “That’s fine. I’ll move on.” And she did so. (*Id.*)

28
29 Shortly thereafter, Ms. Mojaddidi asked Benn on cross whether “anyone from the United
30 States [had] visited [the] location [depicted in the satellite images discussed by Benn]”— i.e.,
31 those depicting the camp Hamid had supposedly attended. (RT 3105) The prosecutor responded,
32 “Objection. Relevance. 403. *And may call for the disclosure of classified information.*” (*Id.*
33 [emphasis added]) This Court sustained the objection. Ms. Mojaddidi did not pursue the
34 inquiry. (*Id.*)

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

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

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

1 138 (2d Cir. 1988) (“Our holding ... is that witness A may not offer an opinion as to relevant facts
2 based on A’s assessment of the trustworthiness or accuracy of witness B where B's credibility is
3 an issue to be determined by the trier of fact.”)

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

8 . . . [T]he record [does not] indicate that Wedick was in a better
9 position than a juror to opine about Hayat's age, language barrier,
10 marriage and/or family status, or any fatigue factor; and Wedick's
11 testimony was unnecessary to inform the jury about Hayat's level of
12 education, health, occupation and employment status, religion
13 and/or belief in God, illiteracy, or experience with the criminal
14 justice system. *See U.S. v. Adams*, 271 F.3d 1236, 1244 (10th Cir.
15 2001) (upholding the district court's exclusion of a psychologist's
16 report with which the defendant wished to challenge the credibility
17 of his prior statements to police; finding that nothing in *Crane*
18 warranted the categorical admission of evidence; and noting that
19 expert evidence relating to the credibility of a confession was
20 problematic for a variety of reasons: it may invade the province of
21 the jury, and, thus, not “assist” the jury as required by Rule 702; it
22 may exceed the scope of the witness's expertise; or be overly
23 prejudicial under Rule 403, as witnesses may tend to overvalue
24 scientific evidence as it bears on truthfulness); *U.S. v. Charley*, 189
25 F.3d 1251, 1267 (10th Cir.1999) (“[E]xpert testimony which does
26 nothing but vouch for the credibility of another witness encroaches
27 upon the jury's vital and exclusive function to make credibility
28 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.”).

21 *United States v. Hayat*, 2:05-CR-240-GEB, 2007 WL 1454280 at *23.⁴⁷ Those principles, if fairly
22 applied, would also have required the exclusion or limitation of Benn’s testimony.

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

26 ⁴⁷ The prosecution, too, relied heavily on the same principles and precedent in urging this
27 Court to exclude the Wedick testimony. *See, e.g.*, 2:05-CR-240-GEB, Dkt. No. 261
28 (“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.

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

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

11 **4. Prejudice**

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

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

24 **TRIAL COUNSEL’S FAILURE # 11: FAILURE TO CHALLENGE EXPERT TESTIMONY REGARDING**

25 **TAWEEZ**

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

1 710 F.3d at 904-05. That government witness was Khaleel Mohammed, who provided the jury
2 with a literal translation of the prayer or supplication, the correctness of which was certainly
3 subject to challenge as to its weight, if not its admissibility. The remainder of Mohammed’s
4 opinion—that the prayer would be carried only by a “jihadist,”—was blatantly false, both in
5 general and as to Hamid, who was given the prayer, or taweez, as a wedding present. As his
6 uncle, Attique ur Rahman, explains in his declaration: “In our culture, taweez are for healing or
7 protection. If a child gets sick, giving him a taweez is pretty much routine. The average person
8 does not even know what is written inside it.”

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

16 ***1. Mohammed’s “Expert” Testimony***

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

25 The defense did not specifically object to this testimony, under either Rule 702 or Rule
26 704(b). The defense had previously filed a boilerplate *Daubert* objection to all prosecution
27 experts, but this Court denied that motion stating that it lacked specificity with regard to the
28 evidence the defense sought to limit, prohibit, or exclude. (See Dkt. 152, Order of January 19,

1 2006, at 1-2.)

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

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

25 ⁴⁸ See Exhibit RR, the email response of Zafar Ishaq Ansari.

26 ⁴⁹ See Exhibit SS, the email response of Bariza Umar.

27 ⁵⁰ See Exhibit TT, the email response of Mehmood Chatta.

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

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

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

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

24 ⁵¹ See Exhibit UU, the email response of Ahmed Subhy.

25 ⁵² See Exhibit VV, the email response of Omar Huda.

26 ⁵³ See Exhibit WW, the email response of Dr. Omar Farooq.

27 ⁵⁴ See Exhibit XX, the email response of Abudrrahmaan Saaleh.

28 ⁵⁵ See Exhibit YY, the email response of Gulfiya.

1 evils.” He then testified that the supplication was “not peaceful”
2 because he looked up the supplication in several commentaries, and
3 “just about every commentary [the expert] checked puts it [the
4 supplication] in a case where someone who is in jihad makes this
5 supplication, someone who is at war with a perceived enemy”
6 The following exchange then occurred between the prosecutor and
7 the government’s expert:

8 Q. Based on your research and experience, what is
9 the context, then, of this supplication?

10 A. The context of the supplication is for when one is
11 engaged in war, a holy war, fighting for God, against
12 an enemy that is perceived to be evil.

13 Q. In your opinion, would a particular kind of
14 person carry this supplication?

15 A. Yes. A particular kind of person would carry this
16 supplication.

17 Q. What kind of person?

18 A. A person who perceives him or herself as being
19 engaged in war for God against an enemy.

20 Mohammed further testified that a person carrying this supplication
21 would be “[a] person engaged in jihad.” He insisted that “*there is*
22 *no other way it could be used.*” He elaborated that it would be fair
23 to say that this person would be a “jihadist” or “part of the
24 mujahedeen.” Among other sweeping conclusions, Mohammed
25 explained that carrying this particular supplication means a person:
26 “*has to be involved in jihad*”; *must* “perceive [] himself to be
27 carrying out one of the obligations of jihad, that he was involved in
28 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

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

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

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

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

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

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

26 2. *The Atlantic Monthly Article*

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

1 entitled “Prophetic Justice.”⁵⁶ Much of the article was directed at the Hayat case and the
2 testimony concerning the supplication.

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

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

26 Recalling Mohammed’s testimony that the prayer was not at all common—“something
27

28 ⁵⁶ *See* Exhibit ZZ, a copy of Waldman’s *Atlantic Monthly* article.

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

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

21 3. *Ms. Mojaddidi’s Failure to Challenge or Counter Mohammed’s Testimony*

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

27 a. *Qualifications*

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

1 qualifications alone. See e.g., *Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1005-06,
2 *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (reversing summary judgment
3 in favor of defendant where, *inter alia*, purported expert on Korean business culture and practices
4 was patently unqualified, rendering testimony unreliable as a matter of law under *Daubert* and
5 Rule 702). He can speak some Urdu, but is not fluent. He has no knowledge of Pashto, and has
6 never visited, much less studied or conducted research in, Pakistan or India, nor Afghanistan. (RT
7 2021) Mohammed testified that—as part of his course of study in Islamic Law—he was required
8 to take two years of Classical Arabic. But, as his emails seeking information from third parties
9 made evident, when he first was retained by the government, he knew nothing about this
10 supplication in particular, or the practice of carrying a ta'wiz in Pakistan in general.

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

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

28 //

1 **b. Reliability**

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

6 **i. Independence**

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

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

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

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

8 **ii. Logical connection**

9 Expert opinions should be excluded where “there is simply too great an analytical gap
10 between the data and the opinion proffered.” *General Electric v. Joiner*, 522 U.S. 136, 146
11 (1997); *see also Daubert*, 509 U.S. at 591-92 (“Rule 702’s ‘helpfulness’ standard requires a valid
12 scientific connection to the pertinent inquiry as a precondition to admissibility.”). In this case, the
13 data consisted of Mohammed’s translation of the supplication and the opinions he received in
14 response to his emails. In terms of logic, none of this data remotely justified the opinion proffered.

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

23 In *Riyadh al Salihin* the prayer was found in two sections: The Book of Jihad (subsection
24 Obligations of Jihad) and the Book of the Etiquette of Travel. Based *solely* upon the chapter
25 heading, Mohammed concluded that “It means that you can identify that a person who is
26 making— since this is an obligation of jihad, it means the person making the— this supplication
27

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

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

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

19 These observations and comments provide no logical basis for an opinion that the
20 supplication is used *only* “by people who perceive themselves in a state of war or at enmity with
21 some force,” who “perceive [themselves] to be in a jihad against someone or some people.”

22 Judge Tashima’s opinion made this point powerfully:

23 Suppose a Christian is arrested on suspicion of providing material
24 support for terrorism. In the suspect’s wallet is found the following
25 excerpt: “Onward, Christian soldiers, marching as to war/ With the
26 cross of Jesus going on before/ At the sign of triumph Satan’s host
27 doth flee/ On then, Christian soldiers, on to victory!” An academic,
28 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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1 Such testimony would be laughable. We easily comprehend,
2 without the aid of expert testimony, that “ ‘Onward, Christian
3 Soldiers’ does not mean that the zealous churchman is literally
4 militant.” *Berg v. State*, 29 Okla.Crim. 112, 233 P. 497, 503
5 (App.1925). Someone carrying it might be a non-violent volunteer
6 for the Salvation Army, or a Methodist, or a supporter of the phrase
7 “under God” in the Pledge of Allegiance. *See Newdow v. Rio Linda*
8 *Union Sch. Dist.*, 597 F.3d 1007, 1056–57 (9th Cir. 2010)
9 (Reinhardt, J., dissenting) (describing the celebratory playing of
10 “Onward, Christian Soldiers” after Congress amended the Pledge of
11 Allegiance to add the phrase “under God”). Alternatively, the
12 person could be a member of the Ku Klux Klan. *See Virginia v.*
13 *Black*, 538 U.S. 343, 356, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)
14 (describing the singing of “Onward, Christian Soldiers” at cross
15 burnings). It is inconceivable that a court would allow an “expert”
16 to opine definitively and categorically on the “kind of person” who
17 would carry “Onward, Christian Soldiers” in his wallet because the
18 conceivable variations in understanding and motivation are too
19 great. Yet this is exactly what the government expert in this case
20 was permitted to do with respect to the prayer found in Hayat's
21 wallet.

22 741 F.3d at 914.

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

24 **iii. Alternate explanations**

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

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

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

4 **c. Rule 704(b)**

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

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

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

24 **d. Inadequate Cross-Examination**

25 Even if she had not been able to exclude Mohammed’s dubious opinions, Ms. Mojaddidi
26 should have been able to eviscerate them on cross. As the Court in *Daubert* stated of expert
27 testimony introduced at trial: “Vigorous cross-examination, presentation of contrary evidence, and
28 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

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

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

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

18 *e. Contrary Expert*

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

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

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

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

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

21 The supplication found in Hamid Hayat’s trial is a very canonical
22 and widely used Sunni (originally Prophetic) Islamic invocation or
23 supplication in the event a Muslim is in fear of something or
24 someone. In it, the Muslim beseeches God to confront his enemies
25 and to protect him from their evil deeds.

26 It can literally be translated as “Oh God! We ask You to be at their
27 throats/chests and we seek Your protection from their evil deeds.”
28 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.

1 to confront [those who seek to do us harm] and we seek Your
2 protection from their evil deeds.”

3 Dr. Mohammed’s claim during his trial testimony that in Islamic
4 studies there is a rule giving preference to literal translation is
5 incorrect. The expression “be at their throats” is idiomatic in
6 Arabic and does not make sense if translated literally into English,
7 unless the effort is aimed at prejudicing the mind of the jury in light
8 of the beheading videos and activities of the jihadis in al-Qaeda.

9 The supplication is in no way exclusive to terrorists or Jihadists and
10 cannot be considered a “warrior prayer” as, the government expert
11 Dr. Mohammad labels it.

12 I based my opinion in part on the most widely used and popular
13 medieval compilation of Prophetic traditions (hadiths) amongst the
14 Sunni Muslim entitled *Riyad al-Salihin*. In its widespread use, this
15 book is akin to the Book of Common Prayer that one might find in
16 any Anglican church. In its chapter on the etiquette of traveling,
17 and under the heading of “Supplication if one fears harm,” the
18 tradition that is mentioned is that when the Messenger of God (i.e.
19 Muhammad) feared mischief from a people he would recite this
20 prayer.

21 In my opinion, this supplication is used widely by Muslim travelers
22 around the world. This supplication or invocation is in *Riyad*
23 *al-Salihin*, which is one of the most commonly read and owned
24 books by Muslims after the Koran. As such, this supplication
25 would be very widely known and widely used by Muslims.

26 During his trial, Dr. Mohammad claims that the supplication found
27 in Hayat’s wallet is one that is used by Jihadis in all arenas of
28 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.

1 testify as an expert witness at Hamid’s trial.

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

7 **f. Misstatement of Evidence**

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

22 **4. Prejudice**

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

1 Counsel's deficient performance was prejudicial.

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

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

9 the district court ought to have admitted Hayat's statement that "he
10 never intended on going to a camp"...On appeal, Hayat argues that
11 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.

12 710 F.3d at 893.

13 The panel majority first held, over Judge Tashima's dissent, that Ms. Mojaddidi had
14 failed to preserve the claims that sections 803(3) and 106 provided a basis for admission of
15 Hamid's refusal to go to a camp at the urging, sometimes violent and profane, of Khan. *Id.* at
16 894-95. The majority then applied the "plain error" standard for determining whether reversible
17 error occurred (*id.* at 895), and concluded that Hamid could not meet the requirements of that
18 demanding standard. *Id.* at 895-99. The majority specifically and repeatedly indicated, however,
19 that Ms. Mojaddidi may have deprived Hamid of his constitutional right to effective
20 representation by failing to properly preserve the basis for her client's claims of evidentiary error.

21 Nor, of course, do we preclude a demonstration on collateral
22 review that counsel rendered ineffective assistance in enunciating
23 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.

24 *Id.* at 895 n.15.

25 Under these circumstances, the failure of Hayat's attorney to
26 explain the connection between the proffered statement and Khan's
27 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.

28 *Id.* at 897.

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

6 *Id.* at 897 n.16.

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

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

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

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

20 * * * *

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

27 The case against Hamid was far from overwhelming. No eyewitness could confirm the
28 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.

1 Even on the evidence presented to the jury, it was a close case. The case against Hamid
2 remained in equipoise for a period of *more than nine days*—i.e., at least *fifty hours*—that jury
3 deliberations continued. See Dkt. Nos. 311, 312, 313, 315, 318, 319, 320, 321, 324, 328
4 (reflecting minute orders for proceedings beginning April 14, 2006 and concluding April 25,
5 2006). Federal courts have consistently recognized that lengthy deliberations weigh in favor of
6 finding that trial errors were prejudicial to the defendant. See, e.g., *Parker v. Gladden*, 385 U.S.
7 363, 365 (1966) (twenty-six hours of deliberations “indicat[ed] a difference among [jurors] as to
8 the guilt of petitioner” and supported a finding of prejudice arising from jury’s improper
9 exposure to extraneous evidence); *Gibson v. Clanon*, 633 F.2d 851, 855 n. 8 (9th Cir. 1980) (nine
10 hour period of deliberations supported finding of prejudice arising from constitutional error
11 despite fact that state’s case against habeas petitioner had been “a strong one”); *Rhoden v.*
12 *Rowland*, 172 F.3d 633, 637 (9th Cir. 1999) (finding prejudice arising from error in shackling
13 defendant during court proceedings as to petitioner’s sexual assault conviction; noting that
14 evidence on key issue was disputed and “the jurors deliberated for over nine hours over three
15 days, which suggests that they did not find the case to be clear-cut”).

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

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

5 **A. Introduction**

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

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

17 The editorial continued:

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

26 The flimsy, indeed, bizarre nature of the government's proof regarding the Balakot camp
27 is explained by the fact that the camp had been closed by the Musharraf government before
28 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.

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

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

5 Evidence introduced at trial indicated the scope of the reach of our government's powers
6 in Pakistan in the wake of 9/11. Hasan Abbas testified that Pakistan received a 3.5 billion dollar
7 grant from the United States for the years 2003 to 2008, plus yearly military support. Pakistan
8 had collaborated with the United States in its anti-terrorism campaign, captured and turned over
9 to the United States over 700 al-Qaeda operatives since 9/11, and lost over 300 soldiers in the
10 anti-terrorism battle. (RT 2859-61.) The FBI maintains an office in Islamabad, the capital of
11 Pakistan. (RT 3754.) FBI special agent Gary Schaaf, who between 1998 and 2005 specialized in
12 international terrorism investigations in the Sacramento office of the FBI, admitted traveling to
13 Pakistan in his work and being familiar with the location of terrorist training camps there. (RT
14 3616-3618.)

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

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

26 _____
27 ⁶¹ Tim McGirk, *Anatomy of a Raid*, Time Magazine, April 8, 2002.

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

1 reported, *inter alia*:

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

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

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

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

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

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

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

22 3. “That accounts for the two-pronged strategy: the F.B.I. to the cities, where they gather
23 intelligence and coordinate communications for local raids, and American military forces to the
24 border areas, where they are helping the Pakistani find the last pockets of Al Qaeda there. For
25 the F.B.I., the focus has been on assembling intelligence to identify Qaeda operatives who fled
26

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

1 from Afghanistan as well as other Islamic militants.”

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

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

11 **C. The *Brady* Violation**

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

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

26
27 ⁶⁴ Available at: <http://articles.latimes.com/2002/aug/25/world/fg-fbipak25>.

28 ⁶⁵ Available at: <http://natsec.newamerica.net/>.

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

8 Equally obviously, the Department of Defense was in possession of hundreds, if not
9 thousands, of additional images of the Balakot area taken in the many weeks and months between
10 2001 and 2004. If military training with weapons was going on at the Balakot site during the
11 time Hamid was allegedly there, that activity was surely detected by the ongoing aerial
12 surveillance.⁶⁶ Not only did Benn fail to produce those images, he was careful to state that his
13 opinion that there might be a militant camp at the location was based solely an examination of
14 those four photographs (RT 3081), strongly supporting the exculpatory inference that he had
15 access to, and had examined, other photographs that undermined rather than supported the
16 opinion he proffered to the jury.⁶⁷

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

27 ⁶⁷ During cross-examination, Ms. Mojaddidi sought to determine (1) whether Benn had
28 "review[ed] any other images besides the images that are displayed in these Exhibits 1 through
29 4" (RT 3079-80) and (2) whether Benn had review[ed] other images of the location depicted by
30 the coordinates corresponding to Exhibits 1 through 4 (RT 3080-81). In response to each such
31 question, the prosecutor interposed an objection on the grounds of "relevance" and "Rule 403."
32 (RT 3079-81.)

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

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

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

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

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

28 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.

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

5 **A. Introduction**

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

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

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

26 **B. Legal Framework**

27 At the time Hamid was in Pakistan, United States intelligence agencies were required,
28 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

1 United States. *See* 50 U.S.C. 1803(a). The government may use information obtained pursuant
2 to FISA in criminal prosecutions if it provides advance notice to both the court and the
3 defendant. *Id.* at 1801(k), 1806(c), 1881e(a); *see also Clapper v. Amnesty Int’l USA*, 133 S. Ct.
4 1138, 1154 (2013) (“[I]f the Government intends to use or disclose information obtained or
5 derived from a §1881(a) acquisition in judicial or administrative proceedings, it must provide
6 advance notice of its intent, and the affected person may challenge the lawfulness of the
7 acquisition.”) Like CIPA, FISA cannot and does not diminish the government’s Brady
8 obligations.

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

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

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

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

23 *Clapper*, 133 S. Ct. at 1143-44 (citations omitted). The National Security Agency began a
24 “special collection program” to monitor international telephone calls and international emails of
25 warrant required by FISA. *See* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers*
26 *Without Courts*, New York Times, Dec. 16, 2005. As was later revealed, this program also
27 included warrantless surveillance of internet metadata. *See* Charlie Savage and James Risen,
28 *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, New York Times, June
29 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

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

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

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

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

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

25 1. “60 percent of the president's daily intelligence briefing came from the NSA in 2000,
26 even before the surge in the agency's capability began.” Dana Priest, *NSA Growth Fueled by*
27 *Need To Target Terrorists*, Washington Post, July 21, 2013.

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

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

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

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

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

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

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

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

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

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

6 There can be little doubt that Hamid's communications were surveilled while he was in
7 Pakistan. And there is no doubt that any such surveillance was unlawful at the time that it
8 occurred. The apparent need to legalize such surveillance after the fact makes clear that it had
9 been unlawful while occurring during the period when Hamid was in Pakistan. For the entirety
10 of the period when Hamid was in Pakistan and allegedly visiting a terrorist camp, the government
11 was engaged in warrantless surveillance aimed directly at the exact type of activity in which they
12 suspected he was engaged. It is inconceivable that the government did not obtain information
13 through this surveillance as to Hamid's activities, whereabouts, and contacts while in Pakistan
14 and allegedly at a terrorist training camp. Indisputably, the Sacramento office of the FBI was
15 maintaining a counter-terrorism operation aimed at Hamid while he was in Pakistan between
16 2003 and 2005. The government concededly was recording his phone calls with informant Khan
17 during that period. The government took the utterly extraordinary step of diverting his return
18 flight from Pakistan to the United States, forcing the commercial flight he was on with hundreds
19 of other passengers to land in Narita, Japan because his name appeared on the federal
20 government's "no fly list." (RT 446 447.) It would strain credulity to propose that Hamid was
21 not the subject of the government's warrantless surveillance programs while he was in Pakistan.

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

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

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

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

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

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

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

1 him was Jamshid Muhtorov, who is being prosecuted in the District of Colorado for providing
2 material support to a terrorist group in Uzbekistan. *United States v. Jamshid Muhtorov*, Case No.
3 12-cr-00033-LJK-1 (D. Colo.) The criminal complaint against Muhtorov “showed that much of
4 the government's case was based on intercepted e-mails and phone calls.” Savage, *supra*,
5 *Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*. Following the
6 notification, Muhtorov filed a motion in January, 2014 to suppress evidence obtained or derived
7 from surveillance under the FISA Amendments act. *United States v. Jamshid Muhtorov*, Case
8 No. 12-cr-00033-LJK-1 (D. Colo.), Dkt. No. 520. “Muhtorov is also seeking discovery related to
9 the FAA disclosure, arguing that the notice does not provide any details about the type of
10 evidence found, the scope of the surveillance or what role the evidence had in his arrest.”
11 Michael Lipkin, *Terrorism Suspect Challenges Warrantless NSA Wiretapping*, Law 360, January
12 30, 2014.

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

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

1 “will allow disclosure of the FISA application materials . . .” to Daoud’s counsel. As the Court
2 noted, no court had ever before allowed disclosure of FISA materials to the defense.

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

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

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

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

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

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

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

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

18 **CONCLUSION**

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

22 Dated: April 30, 2014

Respectfully submitted,

23 DENNIS P. RIORDAN
24 DONALD M. HORGAN
25 LAYLI SHIRANI
26 MARTHA BOERSCH
27 TED SAMPSELL-JONES

By /s/ Dennis P. Riordan
Dennis P. Riordan

28 Attorneys for Defendant
HAMID HAYAT