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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Respondent/Plaintiff,
v.
HAMID HAYAT,
Petitioner/Defendant.

No. 2:05-cr-240-GEB

ORDER

Petitioner and movant Hamid Hayat ("Hayat") moves for habeas corpus relief under 28 U.S.C. § 2255, arguing his convictions and sentence should be vacated because his attorney, Wazhma Mojaddidi, provided him with deficient representation in violation of his federal Sixth Amendment constitutional right to effective assistance of counsel. ECF No. 531 (Hayat's Motion). Specifically, Hayat contends in his motion that Mojaddidi failed to adequately investigate and present certain defenses on his behalf and to effectively represent him on certain issues during the trial.

The motion was referred to a United States Magistrate Judge for proposed findings and recommendations under a federal statute and a local rule. The federal statute under which the referral was made "makes it clear that the district judge must review the magistrate judge's findings and recommendations . . . if objection is made, but not otherwise." United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003).

1 The magistrate judge held habeas evidentiary hearings on the
2 motion. Habeas evidentiary hearings are usually required because
3 “[w]ithout [those] hearing[s], it is often difficult to ‘reliably
4 determine whether [defense] counsel’s investigation [of certain
5 defenses] was deficient [because] what was investigated, and the
6 scope of the investigation can rarely be discerned from the trial
7 record.’” Williams v. Trammell, 782 F.3d 1184, 1218 (10th Cir.
8 2015) (quoting Fairchild v. Workman, 579 F.3d 1134, 1142 (10th
9 Cir. 2009)). Further, typically it cannot be “determine[d] from
10 the bare trial record whether [defense] counsel’s choice of
11 [trial strategy] was the result of [an] [objectively reasonable]
12 strategic decision.” Fairchild, 579 F.3d at 1142.

13 The magistrate judge filed proposed Findings and
14 Recommendations (“F&Rs”), finding that Mojaddidi failed to
15 adequately investigate certain defenses on Hayat’s behalf and to
16 effectively represent him on certain issues during trial. ECF
17 No. 734 (“F&Rs”). The United States (“United States” or
18 “government”) filed objections to certain findings on April 6,
19 2019, ECF No. 744 (“Objs.”), and Hayat filed a reply to those
20 objections on May 4, 2019. ECF No. 747 (“Reply”).

21 The F&Rs include credibility determinations of fact
22 witnesses who testified before the magistrate judge during habeas
23 evidentiary hearings. “A district [judge] may not . . . reject a
24 magistrate judge’s proposed credibility determination [concerning
25 fact witnesses the magistrate judge observed testify] without
26 hearing and seeing the testimony of the relevant witnesses.”
27 Johnson v. Finn, 665 F.3d 1063, 1074 (9th Cir. 2011).

28 The F&Rs also include legal conclusions premised on legal

1 opinions of attorney expert witnesses who testified during the
2 habeas evidentiary hearings and opined on certain ineffective
3 assistance of counsel claims. Legal conclusions are reviewed
4 under the de novo review standard. "De novo review means that
5 the reviewing court 'does not defer to the lower court's ruling
6 but freely considers the matter anew, as if no decision had been
7 rendered below.'" Dawson v. Marshall, 561 F.3d 930, 933 (9th
8 Cir. 2009) (brackets omitted) (quoting United States v.
9 Silverman, 861 F.2d 571, 576 (9th Cir. 1988)). A district judge
10 has discretionary authority to rely on attorney expert testimony
11 on the ineffective assistance of counsel legal standards, and may
12 exercise that discretion by rejecting a magistrate judge's
13 findings which are premised on attorney expert legal opinions,
14 since "the district judge is himself . . . qualified to
15 understand the legal analysis required" when determining whether
16 counsel's representation of Hayat was ineffective representation.
17 Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995). cf.
18 LaGrand v. Stewart, 133 F.3d 1253, 1270 (9th Cir. 1998) (stating
19 no authority was found supporting petitioner's "contention that
20 only outside expert testimony can provide a basis on which to
21 measure counsel's performance.") Findings based on attorney
22 expert legal testimony are rejected.

23 The overview of facts and issues concerning the motion are
24 stated in the direct appeal decision issued in United States v.
25 Hayat, 710 F.3d 875, 880-84 (9th Cir. 2013), as follows:

26 Hamid Hayat is a U.S. citizen of Pakistani
27 descent. He lived in the United States until
28 he was seven and then, between the ages of
seven and eighteen, with his grandparents in
Pakistan. Hayat returned to the United

1 States in 2000 to live with his parents in
2 Lodi, California. Three years later, in
3 April 2003, he traveled to Pakistan with his
4 family. He spent just over two years in
5 Pakistan on this second stay, returning to
6 the United States in late May 2005. Days
7 after his return, Hayat was arrested by FBI
8 agents and charged with providing material
9 support to terrorists and making false
10 statements to government officials. The
11 events giving rise to Hayat's arrest are as
12 follows:

13
14 In October 2001, FBI agents in Oregon
15 interviewed Naseem Khan, a 28-year-old
16 Pakistani immigrant, in connection with a
17 money laundering investigation. Khan
18 informed the agents that he had regularly
19 observed Ayman al Zawahiri, Osama bin Laden's
20 second-in-command and one of the FBI's 22
21 most-wanted terrorists, at a mosque in Lodi,
22 California, in 1999. Khan later told the
23 agents that he had also seen two other
24 individuals on the FBI's 22 most-wanted list
25 in Lodi during the same period.

26
27 The FBI then hired Khan as a
28 confidential informant and asked him to
return to Lodi to gather additional
information on a suspected terrorist cell.
Khan agreed. He began his work as an
informant in Lodi in December 2001.
Approximately eight months later, in August
2002, Khan met Hayat, who was nineteen years
old at the time and living in his parents'
garage. As explained in greater detail
below, recorded conversations between Khan
and Hayat indicated that Hayat's father was
linked to a terrorist organization in
Pakistan and that Hayat's uncle and
grandfather were recruiters for "jihad."

29
30 Between August 2002 and October 2003
31 Khan and Hayat spoke regularly. Khan
32 recorded seven of these conversations, took
33 notes on others, and reported to the FBI soon
34 after every conversation with Hayat,
35 summarizing for the agents those
36 conversations that were not recorded. The
37 recorded conversations were introduced at
38 trial, as was testimony by Khan regarding
unrecorded conversations. Because Khan and
Hayat frequently spoke to each other in
Pashto and Urdu, the jurors were provided
with English translations of the pertinent

1 parts of the recorded conversations.

2 In the recorded conversations, Hayat
3 made several anti-American and anti-Semitic
4 remarks. At one point, for example, he
5 expressed pleasure over the murder of *Wall*
6 *Street Journal* reporter Daniel Pearl because
7 his death meant that "[n]ow they can't send
8 one Jewish person to Pakistan." In addition,
9 Hayat at times spoke approvingly of Islamic
10 fundamentalist groups such as Jaish-e-
11 Mohammed and indicated his respect for their
12 leaders. He also professed to know and to
13 admire Pakistanis who had engaged in "jihad."
14 Some of these people Hayat knew because they
15 had studied in a madrassah, or religious
16 school, in Pakistan run by his grandfather,
17 which Hayat had also attended. Hayat told
18 Khan that his grandfather was a prominent
19 cleric and that after 9/11, Pakistani
20 President Musharraf had sent him and others
21 to Afghanistan to persuade the Taliban to
22 hand over Osama bin Laden. Hayat also
23 described to Khan a terrorist training camp
24 in Pakistan—he said he had seen a video of
25 it—and, on a few occasions, expressed
26 interest in attending such a camp.

27 Five of the recorded conversations took
28 place while Hayat and Khan were both in Lodi.
29 At one point, when the two were discussing
30 travel to Pakistan and a possible meeting
31 with Hayat's uncle, Hayat said "I have one
32 objective now. If I went to Pakistan, now,
33 see, straight away, I'll stay at home for one
34 or two weeks, then I'm going for training,
35 friend." (Underlined portion spoken in
36 English).

37 Hayat traveled with his family to
38 Pakistan in April 2003. Two of the recorded
39 conversations took place when he was there.
40 Like the earlier conversations, they covered
41 a wide range of topics. On one occasion,
42 Khan scolded Hayat for being lazy and not
43 going to a training camp. In response, Hayat
44 protested that the camp was closed during hot
45 weather and that had the camp been open, he
46 "would have been there." On another
47 occasion, Khan relayed to Hayat a
48 conversation in which Hayat's father
49 explained that "[Hayat will] enter the
50 Madrassah, and, God Willing, he [will] go for
51 training!" Hayat responded to Khan: "Um-
52 hmm. . . . No problem, absolutely."

1 (Underlined portion spoken in English).

2 In another of the recorded
3 conversations, Hayat explained to Khan how to
4 send money to Sipah-e-Sahaba ("SSP"), a
5 Pakistani organization that Pakistan declared
6 a terrorist organization in 2002. During a
7 conversation with Khan, Hayat expressed
8 admiration for members of SSP who die as
9 "martyrs." Hayat boasted that he gave more
10 money to SSP than any other member of his
11 Pakistani madrassah, and stated that he gave
12 money to SSP because his money was more
likely to be used to acquire "weapons, books
and everything" than if he gave to other
groups, which wasted money. (Underlined
portion spoken in English). Hayat also
reported that when someone told him that he
could go to jail for giving SSP money, he
replied, "Fuck you. Who cares, man, who goes
to jail, man? Fuck, look what's
America doing. . . ." (Underlined portion
spoken in English).

13 Hayat made several statements to Khan
14 indicating Hayat's knowledge of his family's
15 involvement in terrorist activities. For
16 example, Hayat explained that his father in
17 Lodi had sent money to SSP. Hayat also told
18 Khan that his grandfather, who was the leader
19 of the madrassah Hayat attended in Pakistan,
20 had called a special meeting in 1999 where he
21 recommended that his students leave the
madrassah to go participate in jihad. In
addition, Hayat explained that if someone
were interested in attending a training camp,
that person could contact Hayat's maternal
uncle, who would either accompany that person
"to the Jihad people's office," or make a
phone call to that office on the interested
person's behalf.

22 Hayat's direct interactions with
23 American law enforcement began when he
24 attempted to reenter the United States in May
25 2005. On May 30, 2005, Hayat's return flight
26 to San Francisco was diverted to Japan
27 because Hayat's name appeared on the federal
28 government's "No Fly" list. Hayat was
interviewed in Japan by FBI agent Lawrence
Futa. Futa questioned Hayat about his two-
year stay in Pakistan, including whether
Hayat had joined a terrorist organization or
attended a terrorist training camp. Hayat
denied joining a terrorist group or attending

1 a training camp while in Pakistan. Futa
2 concluded that Hayat "posed [no] immediate
3 threat" and could be permitted to return to
4 the United States. Hayat left Japan and flew
5 to San Francisco that same evening.

6 Four days later, on June 3, 2005, FBI
7 agents Tenoch Aguilar and Sean Wells
8 interviewed Hayat at his parents' home in
9 Lodi. After again explaining the reason for
10 his family's trip to Pakistan—because of his
11 mother's health—and his activities while in
12 Pakistan, Hayat again denied having attended
13 a terrorist training camp and stated that "he
14 would never be involved with anything related
15 to terrorism, and didn't know why anybody
16 would say otherwise." After eliciting this
17 response, Aguilar and Wells asked Hayat to
18 come to the FBI office in Sacramento for
19 further questioning.

20 Hayat arrived at the FBI office in
21 Sacramento around 11 a.m. the following
22 morning and was interviewed in four waves.
23 Hayat at first denied having attended a
24 terrorist training camp, but during the
25 second session admitted that he had attended
26 a camp for a few days during an earlier stay
27 in Pakistan in 2000, where he "observed and
28 heard weapons training," and also in 2003,
when he himself received "pistol training" at
a camp in "Balakot."

The third and fourth sessions, which
were videotaped, took place during the
afternoon and evening of June 4, 2005, and
the early morning hours of June 5. During
the third interview, Hayat confirmed that he
had attended a camp to train for jihad and
said he was trained to use a pistol and rifle
and taught how to kill American troops.

Before the final session, Hayat was
given *Miranda* warnings (for the second time
that day) and signed an Advice of Rights form
(also for the second time). Hayat reported
that at the training camp, he was told to
expect to receive orders in the United
States. When someone wanted to transmit
orders to him, the person would first contact
Adil Khan (a prominent Islamic figure in the
Lodi, California area); Khan would contact
Shabbir Ahmed (the Imam at Hayat's Lodi
mosque); and Shabbir would contact Hayat.
Also, by the end of the interview Hayat had

1 suggested that his grandfather was involved
2 in jihadist activities, indicating that his
3 grandfather may have held a leadership
4 position in the terrorist camp Hayat
5 attended.

6 The FBI arrested Hayat at the end of
7 this set of interviews.

8 On January 26, 2006, the government
9 filed a second superseding indictment against
10 Hayat, charging him with one count of
11 violating 18 U.S.C. § 2339A (providing
12 material support to terrorists) and three
13 counts of violating 18 U.S.C. § 1001 (making
14 false statements to the FBI). Section 2339A
15 reads, in relevant part,

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Whoever provides material support
or resources or conceals or
disguises the nature, location,
source, or ownership of material
support or resources, knowing or
intending that they are to be used
in preparation for, or in carrying
out, a violation of [various
provisions prescribing penalties
for terrorist acts] . . . shall
be . . . imprisoned not more than
15 years. . . .

18 U.S.C. § 2339A(a). The statute defines
"material support or resources" as "any
property, tangible or intangible, or service,
including currency or monetary instruments or
financial securities, financial services,
lodging, training, expert advice or
assistance, safehouses, false documentation
or identification, communications equipment,
facilities, weapons, lethal substances,
explosives, personnel (1 or more individuals
who may be or include oneself), and
transportation, except medicine or religious
materials." *Id.* § 2339A(b)(1). The
prosecution's case was that Hayat had
provided his personal services to a terrorist
organization by attending the training camps
in Pakistan and returning with the intent to
carry out acts of terrorism when directed to
do so. The three counts of making false
statements to the FBI were related to Hayat's
initial statements to various FBI agents in
California, in which he denied attending a
terrorist training camp while in Pakistan.

1 Hayat's trial began on February 14,
2 2006. In addition to the seven recorded
3 conversations between Hayat and Khan, the
4 government presented Khan's testimony about
5 those conversations and Hayat's confessions
6 to the FBI. The jury viewed the videotaped
7 confessions, and several agents, including
8 Futa, Aguilar, and Sweeney, testified about
9 their interviews with Hayat. The government
10 also introduced a "scrapbook" that agents had
11 seized from Hayat's parents' garage, where
12 Hayat was living. The scrapbook bore Hayat's
13 name on the cover and contained clippings
14 from Pakistani newspapers. Several of the
15 articles in the scrapbook discussed Islamic
16 fundamentalist groups, including the Taliban,
17 and their leaders, including Osama bin Laden.
18 Khan testified that Hayat had shown him the
19 scrapbook while expressing support for the
20 fundamentalist groups described in the
21 articles.

22 The government's evidence also included
23 a note written in Arabic that government
24 agents had found in Hayat's wallet after his
25 return from Pakistan. Khaleel Mohammed, an
26 expert in Islamic studies who testified as an
27 expert witness for the government, testified
28 that the note was an Islamic supplication.
He provided the following translation of the
Arabic phrase: "Oh Allah we place you at
their throats and we seek refuge in you from
their evils." Mohammed opined that the
supplication was both uncommon and "not
peaceful," and that the type of person who
would carry such a supplication was "[a]
person who perceives him or herself as being
engaged in war for God against an enemy."

29 Finally, the government presented
30 testimony from two additional experts, Hassan
31 Abbas and Eric Benn. Abbas, an expert on
32 extremist groups, testified to the location
33 and nature of typical terrorist training
34 camps in Pakistan. Benn, a satellite imagery
35 expert who had analyzed satellite images to
36 determine the likelihood that there was a
37 militant training camp near Balakot between
38 2003 and 2005, characterized the likelihood
39 as "a good strong possible." He further
40 testified that when an analysis of the
41 satellite imagery was combined with the
42 description Hayat had provided in his
43 confession about his travel to the camp, his
44 assessment of the likelihood that a military

1 training camp existed outside Balakot
2 increased to "probable."

3 Hayat did not testify. He presented an
4 expert, Anita Weiss, who testified that it is
5 common for Pakistanis to carry a talismanic
6 prayer, known as a *ta'wiz*, for protection
7 while traveling. The district court did not
8 permit Ms. Weiss to express her opinion on
9 whether the note found in Hayat's wallet was
10 a *ta'wiz* because Weiss does not speak or read
11 Arabic.

12 Hayat also presented testimony from
13 eleven other witnesses—mostly FBI agents—and
14 from Naseem Khan, who had also testified for
15 the prosecution. One aspect of Hayat's
16 defense was that Khan was an unreliable
17 informant who had given the FBI implausible
18 information—namely a report that three Al
19 Qaeda members on the FBI's most wanted list
20 had visited a mosque in Lodi—the accuracy of
21 which the FBI was unable to confirm, and
22 which was belied by testimony from a regular
23 attendee of the Lodi mosque who never saw the
24 men. Hayat's counsel also elicited testimony
25 from Gary Schaaf, one of the agents who
26 interviewed Hayat, that Schaaf and other
27 agents used leading questions and that Hayat
28 seemed tired during the interview. In
addition, agent Terry Rankhorn testified that
he had posed undercover as a convert to Islam
and met with Hayat four times in 2002; Hayat
never mentioned training camps to Rankhorn.¹

1 The magistrate judge supplemented the facts, finding: "Rankhorn also testified that he felt Hayat's talk was often 'more boasting than actual substance.'" F&Rs at 8:28. The referenced "boasting" phrase was in Rankhorn's response to Mojaddidi's examination question concerning Hayat's uncle in Pakistan. March 30, 2006 RT ("RT" refers to the trial transcript) at 3423:17-25;3424:1-12. The trial testimony concerning this boasting phrase follows:

22 Q. Do you recall Hamid telling you that his - I'm sorry-- his uncle was
23 the King of Pakistan and that he could get cigars for you?

24 A. I don't recall him saying he was the King. I recall him saying he
25 was a politician, an influential politician. And the conversation
26 involved around he was getting some particularly hard to get cigarettes
27 for Mr. Naseem Khan, and he had mentioned something to the effect of,
28 oh, I can get lots of things.

Q. Did you believe him when he said that?

A. At the time I didn't personally believe he could. It seemed to me to
be more boasting than actual fact.

1 Jury deliberations began on April 12,
2 2005. On April 25, 2005, after nine days of
3 deliberation, the jury returned a verdict of
4 guilty on all four counts charged in the
5 indictment.

6 (alterations in original)(footnotes omitted).

7 **The government's objections to the Magistrate Judge's findings**
8 **and recommendations**

9 The government objects to the following findings: that
10 Mojaddidi failed to adequately investigate whether Hayat had a
11 viable alibi defense and to present that defense during trial;
12 that Mojaddidi failed to adequately search for a false
13 confessions expert; that Mojaddidi failed to adequately search
14 for an Arabic language expert witness to counter the government's
15 expert witness's testimony on the meaning of the supplication
16 Hayat had in his wallet, failed to object to a portion of that
17 expert's testimony as prohibited opinion testimony barred by
18 Federal Evidence Rule 704(b), and failed to adequately counter
19 the government's rebuttal closing argument on the probative value
20 of that expert's testimony; that Mojaddidi and co-defendant's
21 attorney Johnny Griffin jointly represented Hayat under a
22 conflict of interest which adversely affected Hayat's defense;
23 and "any finding" that Mojaddidi was ineffective because she

24 Q. Did Hamid seem to boast about other things in your conversations with
25 him?

26 A. His air was such that -- of course, this was only my opinion at the
27 time, that it was more -- yes, more boasting than actual substance.

28 RT 3423:17-25, 3424:1-8.

The magistrate judge also opines in a finding: "The taped conversations Hayat had with Naseem Khan showed a young man somewhat enamored of Pakistani terrorist leaders, hoping to impress the older Khan, and easily lead [sic] into a promise that he would attend such a camp when he reached Pakistan." F&Rs at 52:10-13. This conclusory finding is rejected.

1 failed to obtain a security clearance or to find counsel with a
2 security clearance. Objs. at 19 n.17, 24:20-25, 25:1, 98:11,
3 114:2-12, 119:8, 125:25-28, 127:20-22, 130:9-12, 140:9-11,
4 143:16-18, 176:24-25.

5 The government argues these findings should be rejected
6 because the magistrate judge misapplied the "legal standard
7 governing *habeas* review, including that court's erroneous refusal
8 to give deference to trial counsel's decisions because of her
9 inexperience." Id. at 1:21-23. Hayat rejoins:

10 The outcome of the proceedings below . . .
11 turned on the facts, which [the magistrate
12 judge] determined based largely on her
13 assessment of the testimony from multiple
14 witnesses at the 2018 [habeas] evidentiary
15 hearing over which [the magistrate judge]
16 presided. Chief among those witnesses was
17 Wazhma Mojaddidi, Hamid Hayat's trial
18 counsel.

19 At the [habeas] hearing . . ., the
20 magistrate heard and carefully weighed
21 attorney Mojaddidi's explanation of her trial
22 representation of Hamid Based on all
23 of the evidence before [the magistrate
24 judge], including testimony from key experts,
25 the magistrate found as fact that Mojaddidi's
26 ignorance of the law and errors in fact and
27 in logic led her to make "strategic"
28 decisions that were uninformed and
unreasonable, constituting deficient
performance.

Reply at 1:10-19 (footnote omitted).

23 The magistrate judge finds Mojaddidi's testimony at the
24 habeas evidentiary hearing "showed that she relied on Griffin,
25 [counsel for Hamid Hayat's father and co-defendant Umer Hayat,]
26 to such an extent that they were jointly representing Hamid
27 [Hayat]." F&Rs at 107:15-16. The magistrate judge also finds
28 Mojaddidi "understood that she was not competent to represent

1 Hayat without mentorship from another attorney. [Mojaddidi]
2 testified that she undertook representation of Hamid because she
3 understood that she 'would rely on [Griffin] in [her]
4 representation of Hamid' And, she relied on his advice
5 and her own research." Id. at 107:16-24 (some alterations in
6 original) (internal citation omitted).

7 The magistrate judge finds the "best evidence" of the joint
8 representation was "the decision that a rush-to-trial strategy
9 was in the best interests of both defendants. Mojaddidi simply
10 followed Griffin's decisions that were in the best interests of
11 his client, not hers." Id. at 106:6-8. The magistrate judge
12 "recognize[d] a joint defense agreement in which one defendant's
13 attorney takes a lead role can be perfectly acceptable," id. at
14 109:9-10, but finds in this case it became unacceptable "when the
15 first superseding indictment charged Hayat with material support
16 for terrorism, [because at that time] the basic defense strategy
17 [of rushing to trial caused] the representation of Hamid to come
18 into conflict with Griffin's strategy for the representation of
19 Umer [Hayat]," id. at 105:20-22. The magistrate judge finds this
20 conflict of interest "caused Hamid [Hayat]'s defense to forego
21 many viable litigation strategies," and that "this adverse effect
22 should result in a presumption [that Hamid Hayat's defense was]
23 prejudice[d]" under the United States Supreme Court's presumed
24 prejudice rule. Id. at 111:9, 13-14.

25 What the magistrate judge observed during the habeas
26 evidentiary proceeding concerning Mojaddidi's deficiencies in her
27 representation of Hayat differs from what the district judge
28 observed about Mojaddidi's representation of Hayat during the

1 trial proceedings. Cf. Bean v. Calderon, 163 F.3d 1073, 1081
2 (9th Cir. 1998) (indicating that the evidence developed at a
3 habeas evidentiary hearing concerning counsel's performance may
4 differ from evidence of how counsel represented defendant during
5 the jury trial proceedings; stating the evidence presented "at
6 the federal habeas hearing was far different from [what was
7 observed about counsel's representation of defendant during the]
8 jury [trial proceedings]"). During trial proceedings, Mojaddidi
9 appeared to independently and ably represent Hayat, and that
10 representation did not appear tainted by a conflict of interest.

11 Neither defense counsel informed the trial judge that
12 conflicts existed in this case. Defense counsel did inform the
13 trial judge that "in certain areas [they had] a common, joint
14 defense."² "[W]e generally presume that the lawyer is fully

15 _____
16 ² During a hearing on February 3, 2006, Mr. Griffin informed the district
17 judge:

18 [R]ecognizing there are going to be two juries, and basically two
19 cases being done in one, Ms. Mojaddidi will represent Mr. Hamid
20 Hayat and I'll be representing Mr. Umer Hayat, we - in certain
21 areas we have a common, joint defense. . . . [I]t's our
22 intention, with the Court's permission of course, to continue to
23 assist each other even though, for example, say, my jury is not
24 in the courtroom.

25 That assist does not mean that I'm going to examine
26 witnesses on behalf of Mr. Hamid Hayat, but that I would be able
27 to sit at counsel table, be present in the courtroom during that
28 portion where, frankly, it doesn't involve Umer Hayat, and vice
versa, when my jury, as I'm referring to it, is in the courtroom,
that Ms. Mojaddidi will be able to sit at counsel table and
provide me assistance in terms of various matters, but she will
not, for example, object, examine any witnesses, but that she
would be in the courtroom at counsel table providing me
assistance.

RT 60:17-25, 61:1-9.

Further, during the proceeding on February 14, 2006, Mr. Griffin stated:

The defense jointly has retained Mark Reichel, private
attorney from Sacramento, to provide consultation to the defense
jointly. It is not anticipated at this point that he would
examine any witnesses. He may very well assist in the preparing
briefs and motions if various issues come up during the course of
the trial.

If, however, we determine that we want him to play a role

1 conscious of the overarching duty of complete loyalty to his or
2 her client. Trial courts appropriately and 'necessarily rely in
3 large measure upon the good faith and good judgment of defense
4 counsel.'" Burger v. Kemp, 483 U.S. 776, 784 (1987) (quoting
5 Cuyler v. Sullivan, 446 U.S. 335, 347 (1980)).

6 [T]he rule applied when the trial judge [was]
7 not aware of [an asserted] conflict (and thus
8 not obligated to inquire) is that prejudice
9 [resulting from counsel's representation of a
10 defendant] will be presumed only if [a shown]
11 conflict has significantly affected counsel's
12 performance—thereby rendering the verdict
13 unreliable, even though . . . prejudice [from
14 counsel's representation under the Strickland
15 standard)] cannot be shown.

16 Mickens v. Taylor, 535 U.S. 162, 172-73 (2002).

17 However, the Ninth Circuit states in United States v.
18 Walter-Eze, 869 F.3d 891, 906 (9th Cir. 2017), cert. denied,
19 139 S.Ct. 1196 (2019), that the United States Supreme Court's
20 "reasoning regarding when prejudice should be presumed does not
21 control," when vindication of a petitioner's Sixth Amendment
22 right to counsel can be resolved under Strickland's familiar
23 performance-and-prejudice framework, explaining:

24 As the Supreme Court clarified in
25 Mickens, the presumed prejudice rule was not
26 intended "to enforce the Canons of Legal
27 Ethics, but to apply needed prophylaxis in
28 situations where Strickland itself is
evidently inadequate to assure vindication of
the defendant's Sixth Amendment right to
counsel." It follows that where a case is
sufficiently straightforward such that it can

on the record in the case, he would, with request and permission
of the Court, request to substitute in as either co-counsel or
association of counsel either for me or Ms. Mojaddidi. He will
not step in as attorney of record for both of us because each
defendant has separate counsel.
RT 18:22-25, 19:1-8. Mr. Reichel is an experienced federal criminal
law practitioner.

1 be resolved under Strickland's familiar
2 performance-and-prejudice framework, [the
3 Cuyler v. Sullivan] rule of presumed
4 prejudice does not apply.

5 Id. (internal citation omitted). Therefore, Hayat's motion is
6 analyzed under Strickland's performance-and-prejudice framework.

7 **Ineffective Assistance of Counsel Claims**

8 Under Strickland . . . an ineffective
9 assistance of counsel claim has two
10 components. First, the defendant must show
11 that counsel's performance was deficient.
12 This requires showing that counsel's
13 representation fell below an objective
14 standard of reasonableness. There is a
15 strong presumption that counsel's conduct
16 falls within the wide range of reasonable
17 professional assistance. Second, the
18 defendant must show that the deficient
19 performance prejudiced the defense. This
20 requires showing that counsel's errors were
21 so serious as to deprive the defendant of a
22 fair trial, a trial whose result is reliable.

23 Stanley v. Cullen, 633 F.3d 852, 862 (9th Cir. 2011) (internal
24 quotations and citations omitted).

25 The magistrate judge finds Mojaddidi committed several
26 errors, and that Mojaddidi's failure to adequately investigate
27 whether alibi witnesses existed who knew of Hayat's whereabouts
28 during the time he was charged with attending a terrorist
training camp and to present that defense during the trial is
singularly prejudicial.

29 **Failure to investigate potential alibi witnesses and to present** 30 **an alibi defense**

31 The government objects to the alibi defense findings,
32 arguing Mojaddidi "exercised her own independent judgment . . .
33 to pursue an alternative defense strategy over an alibi defense,
34 based on the totality of facts known to her and based on her

1 belief that it would be in the best interests of Hayat." Objs.
2 at 54:24-26. Hayat rejoins that the magistrate judge considered
3 "Mojaddidi's testimony concerning her justifications for failing
4 to conduct [an adequate investigation of the viability of an
5 alibi defense and] deemed all of them unreasonable, resting as
6 they did on errors of fact, law, and/or logic." Reply at 12:25-
7 26, 13:1.

8 The magistrate judge finds Mojaddidi's failure to adequately
9 investigate the viability of an alibi defense was objectively
10 unreasonable, explaining:

11 The evidence adduced at the evidentiary
12 hearing showed that Mojaddidi initially
13 considered an alibi defense. (IV TR 732.)
14 She testified that in her discussions with
15 Hayat, she learned that he spent his time in
16 Pakistan in either Behboodi or Rawalpindi.
17 (Id. at 726-27.) He told her he spent time
18 playing cricket, playing video games, and
19 hanging out in front of the local store in
20 Behboodi. (Id. at 727.) She knew that he
21 spent time with family members and that there
22 were others in Pakistan who could testify to
23 his whereabouts. (Id.)

24

25 . . . Despite knowing that there were
26 others in Pakistan who could provide
27 information on Hayat's whereabouts, Mojaddidi
28 testified that she did not conduct, or have
an investigator conduct, interviews of
witnesses in Pakistan. (Id. at 781.)

In her declaration in support of Hayat's
motion for a new trial, Mojaddidi stated that
she was also aware that [Hayat's cousin],
Jaber Ismail, "had spent a substantial amount
of time with Hamid in Pakistan." (ECF No.
441-2 at 2.) However, because Jaber was in
Pakistan at the time of trial, Mojaddidi
stated that she "knew [she] would be unable
to serve him with a subpoena to testify at
Hamid's trial." (Id.) At the evidentiary
hearing, Mojaddidi testified that she did not
interview Jaber. (IV TR 738.)

1 Mojaddidi summarized her investigation
2 into a possible alibi defense as follows: "I
3 spoke with his mother, his uncle, I reviewed
4 the [FBI interview reports in the] 302s, and
5 one of his cousins was a person that I did
6 consider, and ultimately decided not to use
7 him." (IV TR 737.)

8

9 Mojaddidi testified that she did not
10 consider many potential alibi witnesses as
11 viable because they did not see Hayat every
12 day. For example, she did not believe the
13 Pakistanis that Hayat played cricket with on
14 a regular basis were viable witnesses because
15 Hayat did not tell her that he played cricket
16 every day. . . .

17

18 When asked whether she considered
19 Hayat's statement that he had attended a
20 [terrorist training] camp for three to six
21 months, Mojaddidi testified that she did not
22 "know why I would pursue something that I
23 knew my client told me wasn't true." (Id. at
24 782.) However, Mojaddidi was aware that
25 Hayat's confession, which referred to
26 attending a camp for "months," provided the
27 basis for the government's case. (Id. at
28 743.)

19 Mojaddidi testified that she was unaware
20 that Rule 15 [of the Rules of Criminal
21 Procedure] permitted her to seek to take the
22 depositions of foreign witnesses in lieu of
23 in-court testimony. (IV TR 737.) . . .
24 Mojaddidi also testified that Rule 15 was not
25 relevant because she had rejected an alibi
26 defense on the basis of a lack of "viable"
27 witnesses. However, that testimony is belied
28 by other evidence.

29

30 First, Mojaddidi believed that the only
31 legitimate alibi witnesses were witnesses who
32 saw Hayat every day. Yet, the indictment
33 charged Hayat with attending a terrorist
34 training camp for a "period of months," and
35 the only evidence adduced at trial regarding
36 Hayat's attendance at a training camp was
37 that he had done so for somewhere between
38 three and six months. Thus, Mojaddidi was

1 not required to account for Hayat's
2 whereabouts every day in Pakistan over the
3 two years he was there. Rather, an alibi
4 defense needed to show that Hayat was seen
5 during every continuous three-month period
6 between October 2003 and November 2004, the
7 dates identified in the indictment. Further,
8 Mojaddidi's uncertainty about the frequency
9 with which witnesses in Pakistan saw Hayat
10 provided "no reasonable basis" to decide not
11 to investigate. See Duncan [v. Ornoski], 528
12 F.3d [1222,] 1235 [(9th Cir. 2008)] (defense
13 counsel's "mere" belief that certain
14 testimony "might not be helpful" provided no
15 basis to decide not to investigate it
16 further); Ramonez v. Berghuis, 490 F.3d 482,
17 489 (6th Cir. 2007) (a decision to forego
18 investigation into witnesses based on a
19 "guess" about what those witnesses might say
20 is not reasonable); Rios v. Rocha, 299 F.3d
21 796, 806 (9th Cir. 2002) (an unreasonable
22 assumption is not a basis for a reasonable
23 strategic decision); Lord v. Wood, 184 F.3d
24 1083, 1095 (9th Cir. 1999) (counsel's "vague
25 impression" that witnesses were not credible
26 insufficient to excuse his failure to
27 interview them).

15 Second, Mojaddidi was unaware of Rule 15
16 of the Rules of Criminal Procedure. "An
17 attorney's ignorance of a point of law that
18 is fundamental to [her client's] case
19 combined with [her client's] failure to
20 perform basic research on that point is a
21 quintessential example of unreasonable
22 performance under Strickland." Hinton v.
23 Alabama, 571 U.S. 263, 274 (2014). While
24 Mojaddidi may have had good reason to reject
25 [certain individuals that the government
26 considered to have been involved with
27 terrorism] as potential witnesses, she did
28 not have any such basis to reject others in
Pakistan. Because she felt she had no way to
obtain their testimony, Mojaddidi failed to
conduct an investigation into the possible
testimony of other Pakistani witnesses. As a
result, Mojaddidi failed to make informed
decisions about an alibi defense.

. . . .

This court also notes that the evidence
in the record is sparse about just what sort
of investigation Mojaddidi conducted. She
appeared to recall only talking with Hayat

1 and his mother for a "list" of potential
2 alibi witnesses. She did not recall talking
3 with his other family members but stated that
4 she believed she did so. She did not testify
5 about just what she asked Hayat's family
6 members regarding possible alibi witnesses.
7 Did she ask Hayat and his family members
8 appropriately probing questions to identify
9 friends and family members in Pakistan? Or,
10 as the evidence before this court indicates,
11 did she make little attempt to investigate
12 witnesses in Pakistan because she did not
13 feel she could obtain their testimony?

14 Mojaddidi's misconceptions caused her to
15 make "strategic" decisions that were wholly
16 uninformed. Mojaddidi's determination that
17 witnesses were not viable was based on an
18 error in logic. She did not understand that
19 an alibi witness did not have to have been
20 with Hayat every day. Her determination was
21 further based on an unreasonable lack of
22 knowledge of criminal law because she was
23 unaware of Rule 15. For these reasons,
24 Mojaddidi's decision that the witnesses were
25 not viable was not a reasonable basis for her
26 tactical decision to forego further
27 investigation into alibi witnesses and to
28 give up on an alibi defense. See Thomas v. Chappell, 678 F.3d 1086, 1104 (9th Cir. 2012) (counsel's decision not to call a witness can only be considered tactical if he had "sufficient information with which to make an informed decision"); Avery v. Prelesnik, 548 F.3d 434, 437 (6th Cir. 2008) (Counsel cannot make a strategic decision not to have alibi witnesses testify when "he had no idea what they would have said.") Moreover, Mojaddidi's conduct, without considering her "strategy," was objectively unreasonable. A reasonably competent attorney would have done more to investigate Hayat's alibi.

29 Finally, it is worth noting that an
30 alibi defense was not at odds with challenges
31 to the government's evidence. Mojaddidi
32 could very well have initiated investigations
33 in Pakistan early on and then determined
34 whether the witnesses would be able to appear
35 in the United States or whether she would
36 need to move for Rule 15 depositions. She
37 had months to do so. Showing that Hayat
38 could not have been at a jihadi training camp
for the "period of months" specified in the
indictment would have been completely

1 consistent with the defense that Hayat's
2 confession should not be credited and the
3 government lacked other supporting evidence.
4 F&Rs at 24:20-25, 26:7-19, 27:2-5, 14-23, 28:19-22, 29:1-21,
5 32:18-25, 33:1-20 (some alterations in original) (footnote
6 omitted).

7 These factual findings are adopted. "A lawyer has a duty to
8 investigate what information . . . potential [alibi]-witnesses
9 possess, even if [she] later decides not to put them on the
10 stand." Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994)
11 (internal quotations and original alterations omitted). "While
12 it is strongly presumed that [defense] counsel made all
13 significant decisions in the exercise of reasonable professional
14 judgment, . . . counsel cannot be said to have [exercised
15 reasonable professional judgment] without first procuring the
16 information necessary to make such a decision." Williams v.
17 Filson, 908 F.3d 546, 567 (9th Cir. 2018) (internal quotations
18 and citation omitted).

19 **Failure to procure and present a false confession expert**

20 The United States also objects to the magistrate judge's
21 following findings that Mojaddidi was ineffective because she did
22 not procure a false confession expert:

23 The evidence before the [magistrate judge]
24 makes clear that Mojaddidi did not seriously
25 consider using a false confessions expert.
26 Rather, she and Griffin, from the beginning,
27 decided that [former FBI special agent James]
28 Wedick would testify about: (1) the
interrogation techniques used and, (2) why
those techniques can render a confession
unreliable. The problem is that Wedick did
not have the expertise to testify to that
second, and most important, point. As noted
by the district [judge in a ruling on the
government's motion to exclude Wedick's

1 proposed testimony], Wedick had no background
2 in psychology or other expertise to talk
3 about the effect of the interrogation
4 techniques on a suspect.

5 F&Rs at 60:1-7.

6 The United States argues:

7 Mojaddidi reviewed all of Hayat's FBI
8 interviews and believed that the most
9 important evidence against him was his
10 confession. (W.M. Depo. 49:5-14, 68:16-18,
11 162:18-19, 207:6-11; Tr. 743:2-4). Ms.
12 Mojaddidi was familiar with methods to
13 challenge purported false confessions, had
14 "learned about" the law governing
15 voluntariness of a confession, and had
16 discussed it with Mr. Griffin and James
17 Wedick, a former FBI special agent with 35
18 years of experience, who was an investigator
19 for [Hamid] Hayat and Umer [Hayat] before and
20 through their 2006 trials. (W.M. Depo. 41:9-
21 14, 70:4-16; Tr. 574:14-610:22, 583:6-11,
22 744:2-15). Ms. Mojaddidi originally intended
23 to challenge Hayat's confession with a
24 defense expert on false confessions and
25 cross-examination of his government
26 interrogators. (W.M. Depo. 207:12-209:17). .
27 . . Ms. Mojaddidi "certainly" knew a
28 challenge to the "voluntariness" of a
confession was a legal basis for a motion to
suppress. (Tr. 744:18-20).

19 The defense intended to call Wedick as
20 an expert to explain why Hayat's confession
21 was unreliable. (W.M. Depo. 70:9-16; Tr.
22 594:6-9). As an FBI agent, Wedick had
23 conducted hundreds of interviews and
24 interrogations, and agreed to serve as an
25 expert to offer an opinion on the techniques
26 used to elicit Hayat's confession, among
27 other things. (W.M. Depo. 207:16-208:4; Tr.
28 575:12, 604:6-21, 724:9-25; Gov. Sup. Ans.
Ex. 18). Ms. Mojaddidi was aware Wedick had
never previously qualified as an expert in
the field of false confessions but she
believed he would be "good" and would be
deemed qualified to testify. (W.M. Depo.
70:21-23, 71:5-7, 208:16-17, 286:4-6). Ms.
Mojaddidi was aware there were other
potential false confession experts, and
considered information sent to her by other
experts in the field but did not contact

1 them. (Id. at 70:24-71:7, 208:7-17).
2 Ultimately, she decided to utilize Wedick as
3 an expert on behalf of Hayat. (W.M. Depo.
4 208:18-209:1; Tr. 594:6-9).

5 Objs. at 98:16-28, 99:1-8 (footnote omitted).

6 The United States further argues: "Mojaddidi reasonably
7 believed that Wedick's experience in conducting FBI
8 interrogations would be sufficient to establish his
9 qualifications to offer an expert opinion concerning the defense
10 theory of Hayat's purportedly unreliable confession." Id. at
11 113:1-3. Mojaddidi disclosed Wedick in her Rule 16 of the
12 Federal Rules of Criminal Procedure disclosure statement,
13 explaining:

14 Wedick would testify, among other things,
15 that "the FBI Sacramento office had the
16 capability to videotape Hamid Hayat's
17 interview right when it actually started";
18 that "the interviewing agents did not
19 consider but should have considered [Hayat's]
20 vulnerabilities as an interviewee"; and that
21 the agents "all used leading questions during
22 the interviews of Hamid Hayat."

23 Hayat, 710 F.3d at 903 (alteration in original).

24 The United States moved for an order excluding Wedick's
25 proposed testimony, and the motion was granted. F&Rs at 57:11-
26 25, 58:1-7.

27 The district [judge] excluded Wedick's
28 testimony in its entirety, finding that much
29 of the testimony was of "marginal probative
30 value" and that its value was outweighed by
31 the risk of confusing the jury, wasting time,
32 and presenting needless cumulative evidence.
33 The [district judge] also concluded that
34 Wedick's testimony "would not assist the
35 trier of fact."

36 Hayat, 710 F.3d at 903.

37 Hayat has not shown that Mojaddidi was objectively

1 unreasonable in her belief that Wedick could be qualified to
2 testify as a false confession expert. Further, during trial,
3 Mojaddidi "thoroughly explored the conduct of the [FBI] agents
4 who participated in Hayat's interview, including the improper use
5 of leading questions, during her cross-examination of those
6 agents." Id. Therefore, the magistrate judge's finding that
7 Mojaddidi's failure to procure a different false confession
8 expert constituted deficient representation is rejected.

9 **Failure to procure and present an Arabic language defense expert**
10 **on the meaning of the supplication**

11 The United States objects to the finding that Mojaddidi
12 failed to adequately search for an Arabic language expert to
13 counter the government's Arabic language expert's testimony on
14 the supplication Hayat carried in his wallet. Objs. at 132:18-
15 23, 133:1-21. The United States argues: "Mojaddidi could not
16 obtain an Arabic-speaking expert to opine on the correctness of
17 Dr. Mohammed's translation and focused instead on effectively
18 cross-examining him." Id. at 128:24-25.

19 Hayat replies:

20 [the magistrate judge noted] the sparseness
21 of the record regarding Mojaddidi's efforts
22 at locating an Arabic language expert -
23 Mojaddidi provided no details in her
24 testimony nor supporting documentation as to
25 those efforts - the magistrate stated that
"without knowing who those people were it is
not possible to determine whether any would
have qualified as an expert or what their
testimony could have been." (F&R at 86.)

26 Reply at 36:6-10.

27 The magistrate judge finds:

28 Mojaddidi testified at her deposition

1 that she attempted to find an Arabic language
2 expert who could testify about the meaning of
3 the supplication. (Mojaddidi Depo. at 199
4 (ECF No. 548 at 239).) Mojaddidi further
5 testified that [defense expert Anita Weiss]
6 provided some names and Mojaddidi contacted
7 people . . . who might be able to provide
8 that testimony. (Id.) However, [Mojaddidi]
9 was "unsuccessful." (Id.) Mojaddidi
10 estimated that she contacted "at least ten"
11 people to testify regarding the supplication.
12 (Id. at 200.) She was unable to identify any
13 of the people she contacted.

8 F&Rs at 86:5-11.

9 The magistrate judge also finds:

10 The record is sparse about Mojaddidi's
11 conduct in attempting to locate an Arabic
12 language expert to testify about the
13 supplication. While she testified that she
14 contacted "at least ten people," without
15 knowing who those people were it is not
16 possible to determine whether any would have
17 qualified as an expert or what their
18 testimony could have been. . . .

15 Hayat provides an article from the
16 Atlantic Monthly, published in October 2006,
17 shortly after trial. The author contacted
18 Professor Bernard Haykel, who had testified
19 for the defense in a 2003 terrorism trial in
20 Detroit; Ingrid Mattson, a professor of
21 Islamic Studies at Hartford Seminary; and
22 Salman Masood, a Pakistani journalist in
23 Islamabad. (EH Ex. ZZ at 90-91.) Each of
24 these people was familiar with the
25 supplication and told the author it is
26 "common." The fact that the article's author
27 found three people who knew the supplication,
28 two of whom who were scholars and potential
experts, shows that there were experts
available. Haykel testified in the present
case that he was available in March 2006 and,
if asked, would have testified at Hayat's
trial.

25 F&Rs at 86:14-28, 87:1-2.

26 The information Mojaddidi provided during the habeas
27 proceeding on her efforts to find an Arabic language
28 supplication expert fails to evince that when she discontinued

1 her search, that information "would [have led] a reasonable
2 attorney to [conclude there was no need to search] further."
3 Wiggins v. Smith, 539 U.S. 510, 527 (2003). "Strickland demands
4 that such decisions be reasonable and informed." Jennings v.
5 Woodford, 290 F.3d 1006, 1014 (9th Cir. 2002) (citing Strickland,
6 466 U.S. at 691). Therefore, the magistrate judge's findings on
7 this issue are adopted.

8 **Failure to object to Dr. Mohammed's testimony under Rule 704(b)**

9 The United States objects to the finding that Mojaddidi
10 should have challenged Dr. Mohammed's testimony as impermissible
11 opinion on Hayat's state of mind under Rule 704(b), because the
12 "legal precedent 'raised serious questions' about this issue."
13 F&Rs at 83:20-22. The United States argues this conclusion
14 "conflicts with the Ninth Circuit's holding in Hayat, 710 F.3d at
15 901-02 that, under established precedent, Dr. Mohammed's
16 testimony was proper under Rule 704(b)." Objs. at 124:14-15.
17 Hayat rejoins the government is wrong because "a ruling that the
18 admission of evidence did not constitute plain error does not
19 mean that evidence should have and would have been admitted over
20 a proper objection." Reply at 34:5-7.

21 Hayat has not shown that Mojaddidi's failure to object to
22 this testimony was constitutionally deficient representation:

23 Under [Ninth Circuit] precedent, Rule 704(b)
24 does not bar testimony supporting an
25 inference or conclusion that a defendant does
26 or does not have the requisite mental state,
27 so long as the expert does not draw the
28 ultimate inference or conclusion for the jury
and the ultimate inference or conclusion does
not necessarily follow from the
testimony. . . .

. . . .

1 . . . Mohammed testified about the kind
2 of person who would carry a note such as the
3 one found in Hayat's wallet, but he never
commented directly on Hayat's mental state.

4 Hayat, 710 F.3d at 901-02 (internal quotations and citations
5 omitted).

6 The magistrate judge's finding is rejected because Hayat has
7 not shown Mojaddidi's failure to object fell below the objective
8 standard of reasonableness.

9 **Other Objections**

10 The government objects to "any finding that Ms. Mojaddidi's
11 failure to seek a security clearance was deficient." Objs. at 19
12 n.17. The United States argues this finding should be reversed
13 "because it is unnecessary to dispose of Hayat's claim and, more
14 importantly, establishes a rule, contrary to law, that defense
15 counsel in a case possibly involving classified information is
16 *per se* ineffective for failing to seek and obtain an unnecessary
17 security clearance." Id. This conclusory legal finding is
18 rejected.

19 The government also objects to the admission of Tahir
20 Anwar's affidavit and testimony during the habeas proceeding,
21 arguing this evidence "was inadmissible because he was not a
22 percipient witness and therefore could not offer a lay opinion on
23 facts he did not perceive." Objs. at 131 n.92. The magistrate
24 judge finds Anwar's testimony was admissible as percipient
25 witness evidence under Evidence Rule 701, and has probative value
26 on the deficiency representation finding that Mojaddidi should
27 not have aborted her search for an Arabic language expert on the
28 meaning of the supplication Hayat possessed when she did. F&Rs

1 at 90:24-27, 91:1-5. The admissible portion of the challenged
2 lay witness evidence has minimal probative value on the
3 deficiency finding that Mojaddidi should have procured an Arabic
4 speaking expert witness on the meaning of the supplication to
5 more effectively counter the prosecution's expert witness's
6 testimony on this issue.

7 The government also objects to the magistrate judge's
8 findings that Mojaddidi was ineffective when she failed to object
9 to the government's rebuttal closing argument on the probative
10 value of Dr. Mohammed's testimony and by her failure to respond
11 to the government's characterization of Dr. Mohammed's testimony
12 in her closing argument. Objs. at 140:9-11.

13 Mojaddidi gave her closing argument before the government
14 gave a rebuttal closing argument, so she was not authorized to
15 make additional closing argument. Standard procedure in criminal
16 cases in which the government must prove each element of a crime
17 beyond a reasonable doubt prescribes that the government gives
18 its opening closing argument, followed by the defense closing
19 argument, and then the government gives a rebuttal closing
20 argument. Further, abstaining from objecting during closing
21 argument is a common choice: "Because many lawyers refrain from
22 objecting during . . . closing argument, absent egregious
23 misstatements, the failure to object during closing argument is
24 within the 'wide range' of permissible professional legal
25 conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (9th
26 Cir. 1993) (citing Strickland, 466 U.S. at 689), as amended on
27 denial of reh'g (Apr. 15, 1993).

28 In addition, Mojaddidi appears to have anticipated and

1 adequately addressed the subject portion of the government's
2 rebuttal closing argument when she gave her closing argument, and
3 her closing argument has not been shown to be an objectively
4 unreasonable argument. See RT 4322:2-25, 4323:1-25, 4324:1-2
5 (April 12, 2006).³ Further, the trial judge explained to the
6 jury in the jury instructions that closing arguments are not
7 evidence, and if the facts as jurors remember them differ from
8 the way the lawyers state them, each juror's memory of them
9 controls.

10
11 ³ The relevant portion of Mojaddidi's closing argument follows:

12 The government's expert, Dr. Mohammed, testified that it was a
13 prayer carried by a warrior. Dr. Mohammed admitted on the stand
14 that his views were controversial amongst Muslim scholars. . . .

15 Dr. Mohammed has never been to Pakistan and he doesn't
16 understand the culture. In fact, he had to send e-mail asking
17 former students of his, who are not scholars, what the
18 significance of carrying such a prayer was in Pakistan. He
19 didn't know himself. And he ultimately based his opinion about
20 that prayer on a person he's never met in Uzbekistan, and on a
21 man who no longer works for an Egyptian university because of his
22 radical views.

23 . . . He essentially called random people who he knew would
24 agree with him.

25 And he catered his testimony to draw one conclusion. Even
26 when I asked him about the two major sources that he relied upon,
27 and I pointed out that one of those sources had this prayer in
28 the Book of Traveling, he attempted to put that in the context of
29 jihad. He had one goal. That was the conclusion he wanted to
30 draw, and he was going to draw it however he had to.

31 He also gave a literal translation, and admitted that
32 literal translations can often change the meaning of the words.

33 See, the problem with Dr. Mohammed's testimony about that
34 prayer is that he has no idea of the cultural context of carrying
35 such a prayer in Pakistan. He can't possibly because he just
36 doesn't know about Pakistani culture.

37 Dr. Anita Weiss, however, is an expert on Pakistani
38 culture. You heard her tell you that carrying prayers in Arabic
39 is a very common practice in Pakistan, especially by travelers
40 for safety reasons. The government either doesn't understand the
41 cultural significance of carrying a ta'wiz or it didn't want you
42 to know about it. Because had they asked their other expert, Mr.
43 Abbas, who knows about Pakistani culture, he would have told them
44 that Dr. Mohammed's conclusions were wrong, and that prayers like
45 those are commonly carried by travelers and not warriors. So Dr.
46 Mohammed's testimony itself was problematic. And the existence
47 of that prayer in Hamid's wallet doesn't prove that he went to a
48 terrorist training camp.

1 Therefore, these findings are rejected.

2 **Prejudice**

3 Since Hayat has shown his counsel's representation was
4 deficient on two issues, the remaining question is whether
5 Hayat's defense was prejudiced by counsel's errors. Hayat "is
6 deemed to have suffered 'prejudice' as the result of [counsel's]
7 performance if he succeeds in demonstrating that 'there is a
8 reasonable probability that, but for counsel's errors, the result
9 of the proceeding would have been different.'" Bonin, 59 F.3d at
10 833 (quoting Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir.
11 1994), overruled on other grounds by Rohan ex rel. Gates v.
12 Woodford, 334 F.3d 803, 815 (9th Cir. 2003)).

13 To determine prejudice, the court "must compare the evidence
14 that actually was presented to the jury with that which could
15 have been presented had counsel acted appropriately." Cannedy v.
16 Adams, 706 F.3d 1148, 1163 (9th Cir. 2013) (quoting Thomas,
17 678 F.3d at 1102), as amended on denial of reh'g, 733 F.3d 794
18 (9th Cir. 2013). The court then decides whether "a reasonable
19 probability" exists that a juror "hearing the additional evidence
20 developed in the postconviction [habeas] proceedings," would have
21 made a different decision. Williams v. Taylor , 529 U.S. 362,
22 396-97 (2000). "Some errors will have had a pervasive effect on
23 the inferences to be drawn from the evidence, altering the entire
24 evidentiary picture, and some will have had an isolated, trivial
25 effect." Strickland, 466 U.S. at 695-96.

26 **Prejudice from failure to investigate potential alibi witnesses**

27 Hayat's habeas counsel presented six alibi witnesses at the
28 habeas evidentiary hearing. F&Rs at 11:28. These witnesses

1 could have testified at trial if Mojaddidi had adequately
2 investigated a potential alibi defense and presented that defense
3 during trial. The magistrate judge finds all six alibi witnesses
4 sufficiently credible, explaining that notwithstanding Hayat's
5 confession that he attended a training camp for three to six
6 months, the witnesses' testimony "directly contradicted" the
7 confession, their "testimony was consistent," and demonstrated
8 that "the longest period of time Hayat was absent from his
9 family's village in Behboodi was one week." F&Rs at 47:5-10.

10 The magistrate judge explains:

11 [the six witnesses] accumulated
12 testimony . . . show[s] that Hayat was not
13 absent from Behboodi or Rawalpindi for any
14 consecutive three-month period. The court
15 has no problem accepting the fact that family
16 members and good friends, who typically saw
17 Hayat on a daily or weekly basis when he was
in Pakistan at that time, would have
remembered such an extended absence. Their
memories did not need to be perfect about the
events of those two years to have that
recollection.

18 Further, the witnesses corroborated each
19 other on some important points during the
20 relevant time period of Fall 2003 to Fall
21 2004. Raheela[, Hayat's sister,] and Jaber[,
22 Hayat's cousin,] recalled that when Hayat's
23 family first arrived in Pakistan, they spent
24 a short period of time in Rawalpindi before
25 moving to Behboodi where they resided during
26 their stay. (I TR 131-32; II TR 308.)
27 Raheela and Rafaqat[, Hayat's friend,]
28 recalled that Hayat's trips to Rawalpindi
with his family for his mother's medical
treatments occurred once or twice a month.
(I TR 136-37; VI TR 962.) Several witnesses
recalled that besides the trips to
Rawalpindi, which sometimes included
Islamabad, Hayat only took two trips, both to
Multan and neither of which exceeded a week.
(I TR 138-40 (Raheela); II TR 314-15 (Jaber);
VI TR 935-36 (Anas); VI TR 960 (Rafaqat).)

The lynchpin of the government's case

1 against Hayat was Hayat's confession.
2 Without it, the government could not have
3 proven Hayat took any act in material support
4 of terrorism. The alibi witness testimony
5 would have undermined jurors' reliance on
6 Hayat's confession.

7 F&Rs at 51:18-28, 52:1-6 (footnote omitted).

8 The magistrate judge's factual determinations concerning the
9 testifying alibi witnesses are adopted.

10 **Prejudice from failure to call a defense Arabic language expert**
11 **witness on the supplication**

12 Hayat's habeas counsel also presented Dr. Bernard Haykel, a
13 professor of Near Eastern Studies at Princeton University, who
14 testified as an expert on the Arabic language, Islamic culture,
15 and Islamic political movements, and gave his expert opinion on
16 the supplication found in Hayat's wallet. F&Rs at 88:12-28,
17 89:1-10. The magistrate judge finds Haykel's testimony "clear
18 and unequivocal - the supplication Hayat carried was commonly
19 used by many Muslims, not just by jihadis." F&Rs at 90:18-19.

20 Haykel defined a "supplication" as an
21 invocation or prayer to God. [(IV TR 634.)]
22 In Arabic, such a supplication is called a
23 "du'a." (Id.) The source of this du'a is
24 the Hadith, a tradition of the Prophet
25 Muhammad. (Id.) This du'a is found in a
26 number of different collections of prophetic
27 traditions. (Id. at 636.) Haykel testified
28 that he was familiar with the supplication.
(Id. at 635) He had heard it used. (Id.)

29 Haykel testified that the literal
30 translation of the du'a is "Oh, God, we ask
31 you to be at the throats [of our enemies].
32 And we seek your help and assistance from
33 their evils or their misdeeds." (IV TR 638.)
34 The idiomatic translation provided by Haykel
35 is "Oh, God, we ask, or beseech, you to . . .
36 confront out enemies. And we ask you for
37 help from their evil deeds." (Id. at 639.)
38 Haykel explained that "tradition tells us

1 that [the Prophet] used [this du'a] at a time
2 when he was about to begin travel. . . . And
3 travel at the time in Arabia . . . was
4 fraught with danger." (Id.)

5 Haykel testified that this du'a is not
6 exclusive to any particular group. "All
7 Muslims use it." (IV TR 640.) He testified
8 that some invocations may call on God to help
9 defeat an enemy. (Id. at 642.) However, the
10 supplication Hayat carried was not an
11 "offensive invocation" like that. Rather, it
12 would be used when a Muslim is afraid that
13 someone might harm him. (Id.) Haykel has
14 heard the prayer used by religious leaders
15 leading midday Friday prayers. (Id. at 642-
16 43.)

17 Haykel testified that an opinion that
18 anyone who carried or recited this
19 supplication would necessarily be involved in
20 violent jihadi behavior was unfounded. (IV
21 TR 644-45.) "[A]ll Muslims use this
22 supplication, not just jihadis." (Id. at
23 675.)

24 F&Rs at 88:19-28, 89:1-10 (some alterations in original)
25 (footnote omitted).

26 Haykel's expert opinion that the supplication is used by
27 many Muslims, "not just jihadis," supports Hayat's argument that
28 Mojaddidi's failure to present an Arabic language expert on the
29 meaning of the supplication during trial contributed to the
30 prejudice Hayat suffered.

31 Prejudice Analysis

32 The remaining issue is whether there is a "reasonable
33 probability" that Hayat's jury, or a juror, would have reached a
34 different decision had evidence been presented to the jury that
35 was not presented because of counsel's errors. Thomas, 678 F.3d
36 at 1105. "Prejudice is established if there is a reasonable
37 probability that at least one juror would have struck a different
38 balance" Hamilton v. Ayers, 583 F.3d 1100, 1131 (9th

1 Cir. 2009) (quoting Belmontes v. Ayers, 529 F.3d 834, 863 (9th
2 Cir. 2008), rev'd on other grounds sub nom. Wong v. Belmontes,
3 558 U.S. 15 (2009)). When considering this reasonable
4 probability issue, the court examines whether "objective clues"
5 exist "as to [a juror's] assessment of the case strongly
6 suggest[ing] that the case was close." Thomas, 678 F.3d at 1103.
7 Objective clues could include the length of jury deliberations, a
8 jury request for a readback of testimony, and a jury
9 communication evincing that the jury reached an impasse in its
10 deliberations.

11 "Longer jury deliberations weigh against a finding of
12 harmless error because lengthy deliberations suggest a difficult
13 case." United States v. Velarde-Gomez, 269 F.3d 1023, 1036 (9th
14 Cir. 2001) (en banc)(internal quotations omitted)(indicating
15 complexity of trial issues are considered when deciding this
16 factor by concluding "the four-day jury deliberations were
17 relatively lengthy for this two-count drug importation and
18 possession case."). "Further, [when] the jury asked for
19 readbacks of . . . testimony while it was deliberating," that
20 could evince "it evidently did not regard the case as an easy
21 one." United States v. Blueford, 312 F.3d 962, 976 (9th Cir.
22 2002).

23 Hayat's jury took nine days to render a verdict. ECF Nos.
24 311-28. The jury deliberated on April 12, 13, 14, 17, 19, 20,
25 21, 24, and 25, 2006. The trial transcript shows that on
26 Thursday April 13, 2006, there was discussion of the jury's
27 request for readback of the videotaped interviews of Hayat. RT
28 4558:16-4559:1-15. An order issued on Monday, April 17, 2006,

1 stating in pertinent part: "Last week, . . . the Hamid jury . . .
2 requested . . . the replay of certain videotapes. The replay
3 before the Hamid jury is scheduled to begin at 9:00 a.m. on
4 [Monday] April 17, 2006." Order, ECF No. 314. The docket
5 minutes show that on Tuesday, April 18, 2006, the video replay
6 was completed and the jury resumed deliberations and eventually
7 recessed until Wednesday, April 19, 2006, at 9:00 a.m. On
8 Wednesday, April 19, 2006, the docket minutes show another note
9 was received from the jury, dated April 19, 2006. The trial
10 transcript shows that the April 19, 2006 note concerned the
11 phrase material and/or resources in a jury instruction. RT
12 4656:5-25, 4675, 4693:8-25, 4694-4697:1-4. Further discussion
13 was held on this jury instruction issue on Thursday, April 20,
14 2006, and a supplemental jury instruction was given later that
15 day. RT 4706-4708:1-8. On Friday, April 21, 2006, the judge
16 received a jury note signed by the foreperson at 4:05 p.m.,
17 stating: "There is impass [sic] with a juror who does not seem to
18 fully comprehend the deliberation process. I'm available to
19 discuss this with you and counsel at anytime [sic]." The note is
20 attached to an order filed April 26, 2006. ECF No. 326. The
21 judge responded with the following written communication: "Jury,
22 Please continue your deliberations." Id.

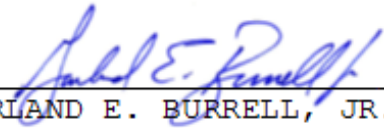
23 The trial transcript reveals that on Monday, April 24, 2006,
24 at 1:55 p.m., the jury requested in a note: "Testimony of Agent
25 Harry Sweeney of 6/4/05 interview with Hamid Hayat." RT 4782:4-
26 4787:25 (April 24, 2006). This testimony covered Hayat's
27 confession. The judge responded to the jury in writing on April
28 24, 2006, at 2:40 p.m., stating: "I am considering your request

1 and estimate it could take until 4:30 p.m. or approximately 9:00
2 o'clock a.m. on Tuesday, [April 25, 2006,] before the court
3 reporter prepares that testimony." RT 4794:25, 4795:2-4 (April
4 24, 2006). The readback of agent Harry Sweeney's testimony of
5 the interview with Hamid Hayat occurred on Tuesday, April 25,
6 2006. After the readback on April 25, 2006, the jury returned a
7 guilty verdict on all four charged counts. ECF No. 328.

8 Even though the jury returned guilty verdicts after the
9 agent Sweeney interview with Hayat was read back to the jury, the
10 April 21, 2006 jury note evinces that one juror was clearly
11 struggling to reach a verdict on which other jurors agreed.
12 Therefore, "additional exculpatory evidence, [on Hayat's] alibi
13 defense [and testimony from an Arabic language expert on the
14 meaning of the supplication Hayat carried], had a strong
15 likelihood of tipping the scales [for that juror] in the other
16 direction." Foster v. Wolfenbarger, 687 F.3d 702, 710 (6th Cir.
17 2012). "And, because the jury was required to reach a unanimous
18 verdict on each count, the outcome could have differed if only
19 'one juror would have struck a different balance.'" Weeden v.
20 Johnson, 854 F.3d 1063, 1071 (9th Cir. 2017) (quoting Wiggins,
21 539 U.S. at 537).

22 Therefore, the F&Rs filed January 11, 2019, ECF No. 734, are
23 adopted in part and the movant's convictions and sentence are
24 vacated. Further, the Clerk of Court shall close the companion
25 case No. 14-cv-1073 and enter judgment for the movant.

26 Dated: July 29, 2019

27
28


GARIAND E. BURRELL, JR.
Senior United States District Judge