No. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

ZIYAD YAGHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX

Mr. Ziyad Yaghi
Pro se Petitioner
Reg. No. 51771-056
F.C.I. Ray Brook
Ray Brook, New York 12977

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6500

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ZIYAD YAGHI,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:09-cr-00216-FL-8; 5:15-cv-00523-FL)

Submitted: January 3, 2020 Decided: February 25, 2020

Before WILKINSON, KEENAN, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Robert Joseph Boyle, ROBERT J. BOYLE, ATTORNEY AT LAW, New York, New York, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ziyad Yaghi seeks to appeal the district court's order adopting in part the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2255 (2018) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Yaghi has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:09-CR-216-FL-8
NO. 5:15-CV-523-FL

ZIYAD YAGHI)
)
Petitioner,)
) ORDER
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (DE 2207), the government's motion to dismiss, or in the alternative, motion for summary judgment, (DE 2235), and petitioner's motion to access sealed documents (DE 2271). Pursuant to 28 U.S.C. § 636(b)(1)(B), United States Magistrate Judge James E. Gates, entered a memorandum and recommendation ("M&R") (DE 2268), wherein it is recommended that the court deny petitioner's § 2255 motion and grant respondent's motion to dismiss. Petitioner timely filed objections to the M&R, and in this posture, the issues raised are ripe for ruling. For the reasons stated herein, the court denies petitioner's motion to vacate, and grants respondent's motion to dismiss or alternative motion for summary judgment. The court denies as moot counsel's request to access sealed documents.

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BACKGROUND

Upon de novo review of the record, the court adopts and incorporates herein pertinent portions of the background section in the M&R, where it accurately reflects the case history and court rulings. (See M&R (DE 2268) at 1-5). Petitioner was charged in this case along with his seven co-defendants in an initial indictment returned on July 22, 2009 (DE 3), a superseding indictment returned on September 24, 2009 (DE 145), and a second superseding indictment, the final indictment, returned on November 24, 2010 (DE 670). The operative indictment charges petitioner with conspiracy to provide material support to terrorists from no later than November 9, 2006, through at least July 2009, in violation of 18 U.S.C. § 2339A (Count One); and conspiracy to murder, kidnap, maim, and injure persons in a foreign country during the same period, in violation of 18 U.S.C. § 956(a) (Count Two).

Petitioner was represented initially by J. Douglas McCullough ("McCullough"). (See Am. Notice of App. of McCullough (DE 59)). On December 21, 2010, James M. Ayers, II ("Ayers"), entered his appearance as counsel for petitioner (DE 689) and on January 14, 2011, following a transitional period of dual representation with McCullough, proceeded as sole counsel for petitioner. (See (DE 688)).

Petitioner was tried before a jury with two co-defendants — Hysen Sherifi ("Sherifi") and Mohammad Omar Aly Hassan ("Hassan") — from September 19, 2011, to October 13, 2011, encompassing 17 trial days. (See, e.g., Minute Entries (DE 1463, 1503)). Petitioner was convicted on both counts. (See Verdict (DE 1508)). On January 13, 2012, he was sentenced to

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180 months of imprisonment on Count One and 380 months on Count Two to run concurrently. (See Judgment (DE 1666)).

Petitioner appealed on January 26, 2012. See Notice of Appeal (D.E. 1678). The United States Court of Appeals for the Fourth Circuit affirmed judgment against petitioner on February 4, 2014. United States v. Hassan, 742 F.3d 104 (4th Cir. 2014). On October 6, 2014, the United States Supreme Court denied petition for writ of certiorari. Yaghi v. United States, 135 S. Ct. 192 (2014) (Mem).

Petitioner filed his § 2255 motion pro se on October 2, 2015. Three days later, on October 5, 2015, counsel noticed appearance on petitioner's behalf. On January 19, 2016, with leave of court (see DE 2216), and through counsel, petitioner filed memorandum (DE 2217) with 34 exhibits (DE 2217-1 to 2217-34) in support of the petition. Petitioner relies upon hearing transcripts and trial transcripts (DE 2217-2 to 2217-11); declarations by individuals who petitioner argues should have been called to testify at trial (DE 2217-12 to 2217-23); transcripts of FBI recordings of phone conversations (DE 2217-24 to 2217-26); declarations by proffered experts on the reliability of the trial testimony of Evan Kohlmann ("Kohlmann") (DE 2217-27 to 2217-31); and the declaration of Joshua Dratel that the government withheld material constitutionally required to be turned over to defense counsel (DE 2217-32).

On May 12, 2016, the government filed its motion to dismiss or, in the alternative, for summary judgment (DE 2235) with a statement of material facts pursuant to Local Civil Rule 56.1 (E.D.N.C.) and other supporting documents, including a notice of filing with the classified information security officer of a classified appendix to the motion (DE 2239), and a redacted

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version of a portion of the classified appendix (DE 2240). The government also entered into the record an appendix to the statement of material facts (DE 2241), consisting of a table of contents (pp. 1-2), a declaration by Ayers (pp. 3-12). Ayers makes reference in his declaration to various memoranda and notes made by him during the course of his representation, together with certain correspondence sent by him to petitioner.

On January 5, 2018, petitioner's counsel filed his motion to access sealed documents in this case. Less than two weeks later, petitioner indicated he wished to discharge counsel, and asked that counsel request a continuance on his behalf to file objections to the M&R. (McDonald Decl. (DE 2273-1) ¶¶ 4-7). Subsequently, counsel moved for an extension of time to file objections and moved to withdraw as petitioner's attorney on January 23, 2018.

On February 7, 2018, petitioner filed his objections to the M&R. The next day, the court denied as moot petitioner's motion for extension of time to file objections, and granted petitioner's counsel's motion to withdraw.

On February 13, 2018, the government responded in opposition to petitioner's objections, relying heavily on the magistrate judge's reasoning. Nine days later, the government also responded in opposition to petitioner's former counsel's motion to access sealed documents.

On July 13, 2018, the court allowed petitioner to file a supplemental memorandum in support of his objections to the M&R. The government responded in opposition to petitioner's supplemental memorandum on August 7, 2018.

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COURT'S DISCUSSION

A. Standard of Review

The district court reviews de novo those portions of the M&R to which specific objections are filed. 28 U.S.C. § 636(b). The court does not perform a de novo review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not

inconsistent with any statutory provisions, or the [§ 2255 Rules], may be applied to" § 2255 proceedings. Rules Governing Section 2255 Proceedings, Rule 12.

B. Analysis

Petitioner asserts several grounds for relief under § 2255. These include ineffective assistance of counsel by his trial counsel; the government's violation of Giglio v. United States, 405 U.S. 150 (1972); and improper admission of government expert Evan Kohlmann's testimony. Petitioner also urges his actual innocence, and he complains about the government's alleged misconduct regarding witnesses.

Petitioner raises numerous objections to the M&R. Petitioner contends his § 2255 motion and supporting evidence raises genuine issues of material fact; the magistrate judge improperly relied upon information filed in support of a summary judgment motion in recommending dismissal of the § 2255 petition; the M&R should not raise a procedural bar sua sponte when the claim related back to the original pro se habeas petition; and the test for ineffective assistance of counsel articulated in Strickland v. Washington, 466 U.S. 688 (1984) is inapplicable to his Giglio claim. Petitioner also complains about the magistrate judge's failure to grant petitioner an evidentiary hearing. The court analyzes these assignments of error in the context of each claim on which petitioner bases his request for relief under § 2255.

1. Petitioner's Objection to the M&R's Finding That No Hearing is Necessary

Upon de novo review, the record is manifestly conclusive that the prisoner is entitled to no relief for the reasons set forth below, and thus petitioner is not entitled to a hearing in this matter. 28 U.S.C. § 2255(b).

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2. Ineffective Assistance of Counsel

Petitioner's specifically objects to four portions of the M&R pertaining to alleged ineffective assistance of counsel: defense counsel's failure to challenge the testimony of Kohlmann, to interview Amber Mohammad, to interview witnesses regarding petitioner's travel to Jordan, and to review the recording of the meeting between Jude Mohammad and Daniel Boyd (M&R (DE 2268) at 14–33). The court reviews these challenges to sufficiency of counsel de novo.[2]

In order to establish ineffective assistance of counsel, a petitioner must satisfy a two-pronged test. See Strickland v. Washington, 466 U.S. 688, 687 (1984). Under the first prong, a petitioner must show that his counsel's representation "fell below an objective standard of reasonableness." Id. at 688. The court must be "highly deferential" to counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." Id. at 689. Therefore, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. The second prong requires a petitioner to show that he was prejudiced by the ineffective assistance by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

[2] Petitioner does not specifically object to any other sections of the M&R's findings regarding ineffective assistance of counsel. The court has reviewed the remaining sections of the M&R pertaining to ineffective assistance of counsel and finds no clear error with respect to those sections.

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a. Failure to Challenge the Testimony of Evan Kohlmann

Petitioner asserts that counsel's questioning of the government's expert witness Kohlmann fell below an objective standard of reasonableness, and that counsel's failure to adequately question Kohlmann prejudiced the outcome of his trial. For the reasons stated below, counsel's performance with respect to questioning Kohlmann at trial was not deficient.

On August 16, 2011, the court held evidentiary hearing on defendants' motion to exclude expert testimony by Kohlmann pursuant to Daubert v. Merrell Dow Pharamceuticals, Inc., 509 U.S. 579 (1993). Following hearing, Kohlmann was qualified by the court as an expert in trends of decentralized terrorism and home-grown terrorism, including certain criteria that comprise the profile of a home-grown terrorist network and such topics as the manner and location of overseas travel as it relates to home-grown terrorist networks. (See 16 Sept. 2011 Ord. (D.E. 1443) ("Daubert Ord.") at 6; Trial Day 6 Tr. (DE 2217– 7) 180:7–272:12 (Kohlmann's trial testimony); Trial Day 7 Tr. (DE 2217-3) 15:20–32:11 (same); Kohlmann's Supp. Rep. (DE 1315–1); see also Trial Day 2 Tr. (DE 2217–6) 71:12–72:2; 81:7-13; 84:25–85:11 (references to Kohlmann in government's opening statement); Trial Day 15 Tr. (DE 2217–11) 14:3–17:2; 26:9-12; 37:12-14; 63:23–64:2; 83:21–24 (references to Kohlmann in government's closing argument)).

Petitioner first contends that Kohlmann's theory had never been scientifically tested, and that counsel should have more vigorously questioned Kohlmann about his methods at the Daubert hearing evaluating his qualifications to testify as an expert. (Pet. Supp. Mem. (DE 2290) at 9–10). Specifically, he contends that counsel should have questioned whether Kohlmann's theories had ever been scientifically tested. As the magistrate judge correctly noted,

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counsel's choice of questions for Kohlmann at the Daubert hearing is a strategic matter due deference. Counsel focused on the extent to which Kohlmann had studied statistics relating to association of marriage and jihad. (Daubert Hrg. Tr. (DE 2217–2) 96:8–102:12). These questions, which supplemented other questions raised by other defense counsel and defendant Subasic on use of open source materials and translations in his research, the subject matter of prior reports and testimony by Kohlmann, the sources upon which he relied in this case, and the conclusions he reached in this case, (id. at 41:5–96:6), are questions that fall within an objective standard of reasonableness.

Next, petitioner contends that counsel's decision not to question Kohlmann about his methodology during cross-examination at trial was not a strategic choice because "[c]ross examining Kohlmann about that methodology could only have benefitted petitioner." (Pet. Supp. Mem. (DE 2290) at 11). Petitioner further argues that counsel should have attacked Kohlmann's ability "to opine that the evidence in this case showed a conspiracy of home grown terrorists." (Id. (emphasis in original)).

Counsel's decision not to cross-examine Kohlmann at trial was a strategic choice entitled to deference. Petitioner's counsel had joined in a motion to restrict Kohlmann from testifying as to any defendant's mental state. In securing that limitation, counsel acted to restrict Kohlmann's testimony, and acted within a professional standard of reasonableness in his approach to cross-examination. Contrary to petitioner's assertion, questioning an expert about his or her methods before the jury can help or harm the party conducting the cross-examination, depending on the expert's response. Therefore, the court rejects the assertion that "[c]ross[-]examining Kohlmann

about that methodology could only have benefitted petitioner." (Pet. Supp. Mem. (DE 2290) at 11).

The court grants the government's motion for summary judgment on the issue of counsel's strategic choices in the cross-examination of Kohlmann.

b. Defense Counsel's Failure to Interview Amber Mohammad

Petitioner asserts that a genuine issue of material fact exists as to whether or not Ayers interviewed Amber Mohammad ("Amber"), and that Ayers's failure to interview Amber was deficient performance by counsel and prejudiced petitioner. Amber is the daughter of Elena Mohammad and the sister of the co-defendant Jude Mohammad. Petitioner asserts Amber's testimony would have impeached Elena Mohammad's testimony that petitioner convinced Jude Mohammed to engage in violent jihad. Petitioner proffers Amber's testimony for the purpose of showing that Jude Mohammad, her brother, traveled to Pakistan to live with his father. (See Amber Mohammad Decl. (DE 2217-16) ¶¶ 11-15). Petitioner reasons that counsel's performance was deficient because he did not sufficiently cross-examine Elena Mohammad, and petitioner was prejudiced by not calling Amber Mohammad as a witness.

Amber testified in declaration relied upon by petitioner that she was never contacted by Ayers or anyone in connection with petitioner's defense. (Amber Mohammad Decl. (DE 2217-16) ¶ 16). Ayers testifies that he did interview Amber. (Ayers Decl. (DE 2241) ¶ 27, p. 30). No genuine issue of material fact exists because, even taking Amber's assertion as true, petitioner has still not established ineffective assistance of counsel.

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Amber asserts that "[t]he main motivation for Jude's moving back to Pakistan was that he learned that one of our younger sisters was being molested by a close relative and he felt that he needed to protect her." (Amber Mohammad Decl. (DE 2217-16) ¶ 15). Petitioner argues that Ayers's performance was deficient because he could have used this assertion to impeach the testimony of Elena Mohammad, who testified that petitioner had convinced her son Jude to move to Pakistan to engage in violent jihad.

The court rejects petitioner's claim that Ayers's performance was deficient. Counsel did cross-examine Elena Mohammad, pointing out inconsistencies in her testimony in an effort to impeach her. (Trial Day 8 Tr. (DE 2217-10) 137:7-23). Moreover, Ayers makes clear that "strategically it was not, in my opinion, necessary to berate Jude Mohamm[a]d's crying mother [Elena Mohammad]. She had nothing good to say about [p]etitioner. A crying mother that blames [p]etitioner for her missing son and who is determined to compromise petitioner is best removed from the stand as soon as possible." (Ayers Decl. ¶ 20). The court must give deference to trial counsel's strategic decision to limit cross-examination of Elena Mohammad, who was an adverse witness to petitioner.

Moreover, petitioner does not show that counsel's failure to use Amber's testimony at trial prejudiced the outcome of trial. Amber testifies that "[t]he main motivation" for Jude Mohammad's moving back to Pakistan was to be with his family. (Amber Mohammad Decl. (DE 2217-16) ¶ 15). Petitioner concludes that this statement shows that he did not convince Jude Mohammad to go to Pakistan to engage in violent jihad. However, even taken as true, Amber's

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declaration does not show a reasonable probability that her testimony would have changed the outcome of petitioner's trial.

At trial, the jury was presented with evidence that Jude Mohammed wanted to travel back to Pakistan to be with his father. (See, e.g., Trial Transcript Day 12 (DE 1838) 14:2-16). The weight of the testimony also overwhelmingly defeats assertion that Jude Mohammad did not intend to engage in violent jihad when traveling to Pakistan. For example, at trial Dana Tamer ("Tamer"), a computer center coordinator at Wake Technical Community College, testified to an encounter she had with Jude Mohammad. (See Trial Tr. Day 8 (DE 2217-10) 138:22-141:16). Tamer described how Jude Mohammad made several statements which caused her to file an incident report, including that "he was going to die young" and that he was "going to the mountains of Pakistan" to die. (Trial Tr. Day 8 (DE 2217-10) 140:21-141:8). Similarly, Holden Eliason ("Eliason"), an individual close to Jude Mohammad from mosque, testified that Jude Mohammad believed that "he was really called to going overseas and fighting, and he called to revolting against the government and to fighting American troops overseas." (Trial Tr. Day 8 (DE 2217-10) 145:23-146:19). Eliason also testified that petitioner shared the same views as Jude Mohammad and that petitioner watched propaganda videos advocating "raising up and fighting against American forces who were overseas." (Trial Tr. Day 8 (DE 2217-10) 152:1-22).

Contrary to petitioner's assertion, Amber's proffered testimony neither adds new evidence the jury had not considered nor rebuts the testimony of Dylan Boyd and others that Jude Mohammad also intended to travel to Pakistan to engage in violent jihad. Therefore, petitioner has failed to show a reasonable probability that, but for counsel's failure to interview

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Amber, the outcome of the trial would have been different. The court grants the government's motion for summary judgment on petitioner's ineffective assistance of counsel claim for purported failure to interview Amber Mohammad.

c. Defense Counsel's Failure to Investigate Petitioner's Trips to Jordan

Petitioner asserts in his objection to the M&R that counsel failed to adequately investigate and present evidence as to his 2006 and 2007 trips to Jordan. He argues that several witnesses, including Mohammad Shibley Yaghi, Ahmed Yaghi, Aamir Tariq, Walid Musafer Al-Shishani, Adnan Shishani, and Saleh Hamdan and Naji Sarsour would have presented evidence that he was searching for a wife in his 2006 trip to Jordan, that counsel's performance was deficient because he did not investigate or present the testimony of these individuals in defense, and that but for the exclusion of these witnesses, the outcome of his trial would have been different. Additionally, petitioner argues that, had counsel interviewed and introduced testimony of Adnan Shishani and Walid Musafer Al-Shishani, their testimony would have shown that petitioner's 2006 trip to Jordan was benign.

None of petitioner's proffered testimony shows a reasonable probability of changing the outcome of petitioner's case. Mohammad Shibley Yaghi, petitioner's cousin once removed, mentions no interest in marriage at all. (See Mohammad Shibley Yaghi Decl. (DE 2217–14); Adnan Shishani Decl. (DE 2217–17)). The declarations of Saleh Hamdan and Naji Sarsour only show that they met their own wives in the Middle East. (See Saleh Hamdan Decl. (DE 2217–20) ¶ 5; Naji Sarsour Decl. (DE 2217–21) ¶ 5). None of these declarations address the issue of

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petitioner's intent in traveling to Jordan in 2006. These individuals' testimony not being introduced at trial did not prejudice petitioner.

The only declarations that petitioner submits to the court which even address petitioner's intent are those of Aamir Tariq and Walid Musafer Al-Shishani. Aamir Tariq testifies "[d]uring my meetings with [petitioner] in Jordan we discussed that he was in Jordan to visit his relatives and find a bride." (Aamir Tariq Decl. (DE 2217–15) ¶ 8). Walid Musafer Al-Shishani testifies "I was aware that [petitioner] was traveling to Jordan and my understanding was that he was going there to find a wife." (Walid Musafer Al-Shishani Decl. (DE 2217–19) ¶ 13). Ahmed Yaghi, petitioner's uncle, testifies that a relative of petitioner in Jordan suggested that he find a wife in Jordan, and that petitioner sought to arrange a marriage. (Ahmed Yaghi Decl. (DE 2217-13) ¶¶ 4, 12, 13). However, counsel's alleged failure to investigate or present this evidence at trial does not prejudice petitioner because the notion that petitioner was seeking a wife was considered by the jury.

Petitioner's counsel mentioned in his opening statement that petitioner was attempting to find a wife (Trial Day 2 Tr. (DE 2217–6) 130:25–131:8). During trial counsel's cross-examination of FBI Special Agent Michael Greer, the government's witness acknowledged that petitioner made internet searches about finding a wife, conducted email conversations with regard to becoming married, and met with people in Jordan about becoming married. (Trial Day 6 Tr. (DE 2217–7) 130:8–131:2). Moreover, Majed Musa testified at trial that petitioner told him he was going to Jordan "to get married." (Trial Day 5 Tr. (DE 1742) 134:17–18). This evidence was considered by the jury and petitioner was still convicted. Therefore, the

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declarations of Aamir Tariq and Walid Musafer Al-Shishani asserting petitioner's intent to find a wife during his 2006 trip to Jordan do not show a reasonable probability that the outcome of petitioner's trial would be different.

Similarly, petitioner asserts that counsel failed to investigate or present testimony from Adnan Shishani, Walid Al-Shishani, Bryant Rivera, Saleh Hamdan, and Naji Sarsour and failing to introduce that evidence prejudiced his case because such evidence would have shown that he was not traveling to engage in violent jihad. First, petitioner argues that Adnan Shishani and Walid Al-Shishani would have testified that going to Mosque Al-Shishani was benign because "it is used by the locals [of Zarqa] as a meeting point." (Walid Al-Shishani Decl. (DE 2217–19) ¶ 12; see Adnan Shishani Decl. (DE 2217–17) ¶¶ 6–7). These statements, taken as true, merely establish that the mosque was a well-known meeting point in the city. The statements do not speak at all to petitioner's intent in going to the mosque, nor do they contradict the testimony of Daniel Boyd, where he testified that he recommended to petitioner that he go to the mosque to meet others seeking to engage in violent jihad. (Trial Day 7 Tr. (DE 2217–3) 62:15–63:7; Trial Day 8 Tr. (DE 2217–10) 31:17–33:22). Therefore, failure to introduce the testimony did not prejudice the outcome of petitioner's trial.

Petitioner also asserts that Bryant Rivera, Saleh Hamdan, and Naji Sarsour's testimony showed that the term "good brother" or "best brother" was not a code word for a violent jihadist. Petitioner argues that, had counsel presented these individuals as witnesses, they would have testified that those terms mean "a good Muslim and a person of good character." (Bryant Rivera Decl. (DE 2217–18) ¶ 8; see Saleh Hamdan Decl. (DE 2217–20) ¶ 7; Naji Sarsour Decl. (DE

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2217–21) ¶ 11). However, these statements do not meaningfully contradict Daniel Boyd's testimony. The essence of a code word is that it has some additional meaning known only to the speaker and listener in addition to those discernible to other individuals. Here, Daniel Boyd testified that, when petitioner asked him where he could find the "best brothers" in Jordan, he understood petitioner to mean people that "were going to pray, and you know, keep [petitioner] within the bonds of fellowship and Islam and these kind of things. But, yes, up to and including the understood obligation of jihad at that point." (Trial Day 7 Tr. (DE 2217–3) 63:3–7; see Trial Day 8 Tr. (DE 2217–10) 32:14–21). The statements offered by petitioner do not show a reasonable probability that, but for counsel's alleged failure to investigate and present the statements into evidence, the outcome of trial would be different.

Petitioner fails to address the evidence against him at trial concerning his 2007 trip to Jordan. While discussing his travel plans, petitioner prompted Daniel Boyd and Hassan to show him a rifle hidden in the modified center console of the vehicle in which they were traveling and told petitioner they used it for "target practice and training." (Trial Day 7 Tr. (DE 2217–3) 88:11–89:21). Daniel Boyd understood such training to include preparing "to go and fight somewhere." (Id. at 89:4–9).

For all of these reasons, petitioner's ineffective assistance of counsel claim fails as to counsel's alleged failure to investigate his trips to Jordan. Therefore, the court dismisses petitioner's claim under Rule 12(b)(6).

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d. Defense Counsel's Failure to Review Recording of Meeting Between Jude Mohammad and Daniel Boyd

Petitioner also raises in support of his ineffective assistance of counsel claim that trial counsel did not adequately cross-examine Daniel Boyd, the architect of the conspiracy to engage in violent conflict against the United States and the government's primary witness. Petitioner asserts counsel should have used a recorded conversation wherein Boyd made statements showing prior knowledge of Jude Mohammad. Petitioner contends that these statements prove petitioner did not introduce Jude Mohammad to Daniel Boyd, and therefore there is no evidence that he intended to violate the laws for which he is convicted. Petitioner also contends that he is not procedurally barred from raising his claim, and that the court should address the merits of his claim.

Even assuming without deciding that petitioner has not procedurally defaulted on his claim that trial counsel was ineffective by not reviewing the recording and not cross-examining Daniel Boyd on it, petitioner's claim fails on the merits, because petitioner has failed to show that a reasonable probability that, but for counsel's allegedly deficient performance, the outcome of the trial would have been different.

First, petitioner contends that had counsel used the recording at trial, it would have impeached Daniel Boyd's testimony that petitioner introduced him to Jude Mohammad. In the recording, Daniel Boyd does refer to having previously met Jude Mohammad at the community center. However, the recording in this case does not impeach Daniel Boyd's trial testimony, where he testified that he "saw [Jude Mohammad a couple times at the Islamic center" before meeting him through petitioner. (Trial Day 7 Tr. (DE 2217-3) 112:4-7).

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Additionally, counsel developed the argument that petitioner did not introduce Jude Mohammad to Daniel Boyd on cross-examination of Hysen Sherifi ("Sherifi"), who testified that petitioner had come to Daniel Boyd's store in May 2008 to wrestle Jasmin Smajic. (See Trial Day 14 Tr. (DE 2217-8) 100:19-101:7). Sherifi testified that he was aware that petitioner "was there to wrestle with Smajic." (Trial Day 14 Tr. (DE 2217-8) 101:5-7). Sherifi also testified that petitioner "just purchased a few things, and asked for water," did not discuss "killing or maiming anybody" or "providing material support to anybody," and that "he did not have any discussions with anybody at that time." (See Trial Day 14 Tr. (DE 2217-8) 101:8-21).

In the face of overwhelming evidence, the transcript of the recording would add little to the evidence presented to the jury, failing to show a reasonable probability that the outcome in the case would have been different. Consequently, the court dismisses petitioner's ineffective assistance claim under Rule 12(b)(6).

3. Alleged Giglio Violation

Petitioner's second ground for relief in his § 2255 motion is that he was denied evidence by the prosecution which would have allowed him to impeach Kohlmann. [redacted]

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"The Due Process Clause requires the prosecution to disclose upon request evidence that is favorable to the defense and material to guilt or punishment." United States v. Sterling, 724 F.3d 482, 511 (4th Cir. 2013) (citing United States v. Higgs, 663 F.3d 726, 734–35 (4th Cir.2011)). Evidence is favorable if it is exculpatory, Brady v. Maryland, 373 U.S. 83 (1963), or if it may be used for impeachment, Giglio v. United States, 405 U.S. 150 (1972). "The government breaches its duty if it fails to produce evidence that it is obligated to turn over to the defense, or if it fails to timely comply with a discovery order in turning over required evidence." Sterling, 724 F.3d at 511. "A failure to disclose violates due process only if the evidence in question (1) is favorable to the defendant because it is either exculpatory or impeaching; (2) was suppressed by the government; and (3) is material in that its suppression prejudiced the defendant." Id. (citing Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Vinson v. True, 436 F.3d 412, 420 (4th Cir. 2006)). Undisclosed evidence is material when its cumulative effect is such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (internal quotation marks and citation omitted). A reasonable probability is one sufficient to undermine confidence in the outcome. Id. at 434.

[redacted]

None of the documentation contained in addresses the facts of this case or the conduct of petitioner. (See (United States v. Kabir, ED No. CR 12-00092(B)-VAP *2 (C.D. Cal. Aug. 18, 2014))).

Kohlmann testified at trial that "[s]ince approximately 2003, I have provided ongoing support and assistance to the FBI in a number of different matters." (Trial Tr. Day 6 at 189:15-19). Additionally, Kohlmann testified as to how much money that he had been paid by the FBI as compensation for his work. (Trial Tr. Day 6 at 189:20-25). Kohlmann's testimony provided the jury with the information it needed to evaluate Kohlmann's testimony for bias: that Kohlmann had a prior relationship working with law enforcement, and that he was paid for his work. Thus, the are not material, because there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the

[redacted]

proceeding would have been different." Kyles, 514 U.S. at 433 34 (internal quotation marks and citation omitted).

Petitioner asserts that [redacted] is "critical to a jury's assessment of Mr. Kohlmann's credibility, bias, and independence." (See Dratel Decl. (DE 2217-32) ¶ 25). Petitioner's assertion is without merit. Nondisclosure [redacted] did not prejudice petitioner, because the jury already knew of the risks to bias, credibility and independence posed by the working relationship. [redacted] (United States v. Kabir, ED No. CR 12-00092(B)-VAP *2-3 (C.D. Cal. Aug. 18, 2014))). Consequently, the court dismisses petitioner's second ground for relief under § 2255 for failure to state a claim pursuant to Rule 12(b)(6).

4. Admission of Kohlmann's Expert Testimony

Petitioner's third alleged ground for relief is that Kohlmann's testimony amounts to "junk science." (Pet. Supp. Mem. (DE 2290) at 9–10). Challenging the admissibility of Kohlmann's testimony in petitioner's § 2255 petition is procedurally barred because the issue was raised on direct appeal and rejected by the court of appeals. United States v. Hassan, 742 F.3d 104, 130–31 (4th Cir. 2014); United States v. Roane, 378 F.3d 382, 396 n.7 (4th Cir. 2004) (citing Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976)). Petitioner's third ground for relief in his § 2255 petition is dismissed for failure to state a claim under Rule 12(b)(6).

5. Actual Innocence

Petitioner does not specifically object to any finding of the M&R as to his claim that he is actually innocent. See Orpiano, 687 F.2d at 47. The M&R finds that petitioner is procedurally

[redacted]

barred from asserting his actual innocence, and that petitioner failed to show actual innocence based on the strength of the evidence against him. (See M&R (DE 2268) at 36-38). The court finds no clear error in the M&R and adopts the analysis set forth therein. Petitioner's claim of actual innocence is dismissed under Rule 12(b)(6).

6. Government Misconduct

Petitioner does not specifically object to any finding of the M&R as to his claim that the government threatened witnesses. See Orpiano, 687 F.2d at 47. The M&R finds that petitioner's claim is procedurally barred because he did not raise the issue on direct appeal, and he does not allege facts supporting his allegations of new evidence and his attorney's failure to assert the claim. (See M&R (DE 2268) at 38). The court finds no clear error in the M&R and adopts the analysis set forth therein. Petitioner's claim of government misconduct is dismissed for failure under Rule 12(b)(6).

C. Access to Sealed Documents

On January 5, 2018, petitioner's counsel moved for access to sealed documents "to ensure substantive accuracy in its references to the actions of [p]etitioner's trial counsel." (Mot. To Access (DE 2271) at 1). Subsequent to filing the motion, counsel filed his motion to withdraw from the case on January 23, 2018, which was granted by the court on February 8, 2019. In the meantime, instead of continuing to seek access to the sealed information, petitioner filed his objections to the magistrate judge's M&R on February 7, 2018. Where the court has disposed of petitioner's § 2255 motion, and where counsel withdrew from the action, counsel's previous motion for access to sealed documents is denied as moot.

D. Certificate of Appealability

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

For the foregoing reasons the government's motion to dismiss, or in the alternative, for summary judgment (DE 2235) is GRANTED, and petitioner's motion to vacate, set aside, or correct his sentence (DE 2207) is DENIED. Petitioner's motion for access to sealed documents (DE 2271) is DENIED AS MOOT. A certificate of appealability is DENIED. The government is DIRECTED to serve on petitioner a redacted copy of this order within 21 days of the date below. The clerk is DIRECTED to close this case.

SO ORDERED, this the 29th day of March, 2019.

LOUISE W. FLANAGAN
United States District Judge

FILED: April 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6500
(5:09-cr-00216-FL-8)
(5:15-cv-00523-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ZIYAD YAGHI

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Keenan, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

ORDER
SUPREME COURT OF THE UNITED STATES
2020 U.S. LEXIS 1643
No. 589.
March 19, 2020, Decided

Editorial Information: Subsequent History

Later proceeding at In re Order, 2020 U.S. LEXIS 2196 (U.S., Apr. 15, 2020)

Judges: {2020 U.S. LEXIS 1}Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari: IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3. IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted**{2020 U.S. LEXIS 2}** by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument. These modifications will remain in effect until further order of the Court.

1d

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:09-CR-216-FL-8
5:15-CV-523-FL

ZIYAD YAGHI,	)	
	)	
Petitioner,	)	
	)	**MEMORANDUM AND**
v.	)	**RECOMMENDATION**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

This case comes before the court on the motion (D.E. 2207) by petitioner Ziyad Yaghi ("petitioner" or "Yaghi") to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 ("§ 2255") and the motion (D.E. 2235) by the government to dismiss petitioner's motion or, in the alternative, for summary judgment. These motions were referred to the undersigned magistrate judge for a memorandum and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8(b) and 10 of the Rules Governing Section 2255 Proceedings ("§ 2255 Rules"). For the reasons and on the terms stated below, it will be recommended that the government's motion to dismiss be allowed; that petitioner's motion be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6); and, alternatively, that certain claims also be denied pursuant to Fed. R. Civ. P. 56.

BACKGROUND

I. CASE HISTORY

Petitioner was charged in this case along with seven other defendants in an initial indictment returned on 22 July 2009 (D.E. 3), a superseding indictment returned on 24 September 2009 (D.E. 145), and a second superseding indictment, the final indictment, returned on 24 November 2010 (D.E. 670). In the second superseding indictment, petitioner was charged in 2 of

the 13 counts with: conspiracy to provide material support to terrorists from no later than 9 November 2006 through at least July 2009, in violation of 18 U.S.C. § 2339A (Count One); and conspiracy to murder, kidnap, maim, and injure persons in a foreign country during the same period, in violation of 18 U.S.C. § 956(a) (Count Two).

Petitioner was represented initially by J. Douglas McCullough. *See* 28 July 2009 Am. Notice of App. of McCullough (D.E. 59). On 21 December 2010, James M. Ayers II entered his appearance as counsel for petitioner (D.E. 689) and on 14 January 2011, following a transitional period of dual representation with McCullough, proceeded as sole counsel for petitioner (*see* 21 Dec. 2010 Ord. (D.E. 688)).

Petitioner was tried before a jury with two other defendants—Hysen Sherifi ("Sherifi") and Mohammad Omar Aly Hassan ("Hassan")—from 19 September 2011 to 13 October 2011, encompassing 17 trial days. *See, e.g.*, Minute Entries for 19 Sept. 2011 (D.E. 1463) and 13 Oct. 2011 (D.E. 1503). Petitioner was convicted on both counts. *See* Minute Entry for 13 Oct. 2011; 13 Oct. 2011 Verdict Forms (D.E. 1508). On 13 January 2012, he was sentenced to 180 months of imprisonment on Count One and 380 months on Count Two to run concurrently. *See* Minute Entry for 13 Jan. 2012 (D.E. 1644); Sentencing Hrg. Tr. (D.E. 2037) 133:8 to 174:12[1]; 13 Jan. 2012 J. (D.E. 1666) 2.[2,3]

[1] A log prepared by the court providing docket entry citations to transcripts and related information relevant to petitioner's motion appears at D.E. 2267.

[2] Citations herein to page numbers in all documents in the record are to those assigned by the court system's CM/ECF electronic filing system.

[3] Sherifi and Hassan were also convicted and received lengthy prison terms. *See, e.g.*, 13 Jan. 2012 J. (D.E. 1663, 1668). Their appeals were denied in the same decision denying petitioner's appeal, which is cited in the text immediately *infra*.

Petitioner appealed on 26 January 2012. *See* Notice of Appeal (D.E. 1678). The Fourth Circuit affirmed the judgment against petitioner on 4 February 2014. *United States v. Hassan*, 742 F. 3d 104 (4th Cir. 2014). On 6 October 2014, the Supreme Court denied petitioner's motion for a writ of certiorari. *Yaghi v. United States*, __ U.S. __, 135 S. Ct. 192 (2014) (Mem).

Petitioner filed his § 2255 motion pro se on 2 October 2015. On 19 January 2016, with leave of court (*see* D.E. 2216), an attorney for petitioner filed a memorandum (D.E. 2217) with 34 exhibits (D.E. 2217-1 to 2217-34) in support of the petition.[4] On 12 May 2016, the government filed its motion to dismiss or, in the alternative, for summary judgment (D.E. 2235) with a statement of material facts pursuant to Local Civil Rules 56.1 (E.D.N.C.) and other supporting documents.[5] Petitioner subsequently filed a memorandum in response (D.E. 2243). It was not supported by a statement of material facts pursuant to Local Civil Rule 56.1.[6]

II. FOURTH CIRCUIT'S RULING ON SUFFICIENCY OF EVIDENCE AGAINST PETITIONER

The Fourth Circuit provided the following overview of the trial:

> During the trial itself—which was conducted in New Bern over a three-week period in September and October of 2011—the government presented approximately forty witnesses. Of those, about twenty-two were law enforcement officers, including FBI agents and employees. Other prosecution witnesses included expert [Evan] Kohlmann, three informants, and three named coconspirators ([Daniel] Boyd and his sons Dylan and Zakariya), as well as former friends and associates of the

[4] Exhibit 1 (D.E. 2217-1) is a list of the other exhibits. Most of the exhibits are not text-searchable, in violation of Local Civ. R. 5.1(a)(1), E.D.N.C. (Dec. 2015, Dec. 2016, Mar. 2017). Petitioner's current counsel shall ensure that future filings meet the text-searchabilty requirement.

[5] The additional supporting documents include a memorandum (D.E. 2236), a notice of filing with the classified information security officer of a classified appendix to the motion (D.E. 2239), and a redacted version of a portion of the classified appendix (D.E. 2240). There is also an appendix to the statement of material facts (D.E. 2241), consisting of a table of contents (pp. 1-2), a declaration by Ayers (pp. 3-12), and 17 exhibits to the declaration (pp. 13-32).

[6] As discussed further below, by not responding to the government's statement of material facts, petitioner has admitted the truth of such facts for purposes of the government's alternative motion for summary judgment, pursuant to Local Civil Rule 56.1(a)(2).

defendants. Of the three appellants, only Sherifi presented evidence. During his trial presentation, Sherifi called three witnesses, including himself.

Hassan, 742 F.3d at 114-15 (footnote omitted).

Taking the evidence in the light most favorable to the government, the Fourth Circuit explained the sufficiency of the evidence against petitioner to support the convictions against him as follows:

> After our de novo assessment of the evidentiary record, we, like the trial court, are satisfied that there was sufficient evidence to support each of Yaghi's conspiracy convictions. That evidence includes the following:
>
> • In 2006, Yaghi sought out Boyd at an Islamic center in Durham to ask about Boyd's experiences in Afghanistan. Yaghi and Boyd became friends, and Yaghi shared Boyd's beliefs in the necessity of violent jihad;
>
> • In the fall of 2006, Yaghi travelled to Jordan, seeking to reach the battlefield. Yaghi maintained contact with Boyd during the trip;
>
> • Prior to and during his 2006 trip to Jordan, Yaghi discussed violent jihad with Boyd. Before his departure, Yaghi asked Boyd how and where he could find the "best brothers," and mentioned "finding a wife." Those terms were coded references for seeking others who shared Yaghi's beliefs in violent jihad and could help Yaghi make his way to the battlefield;
>
> • After returning from his 2006 trip to Jordan, Yaghi brought Hassan to Boyd's home, thus recruiting another man to the terrorism conspiracies;
>
> • Yaghi thereafter again sought Boyd's assistance in travelling to the Middle East, and Boyd purchased plane tickets for Yaghi and Hassan to fly to Israel in the summer of 2007;
>
> • In 2007, as he prepared to travel to the Middle East with Hassan, Yaghi indicated a "readiness to join" Boyd in waging violent jihad;
>
> • Yaghi flew to the Middle East with Hassan in 2007 with the hope of engaging in violent jihad. Yaghi and Hassan were denied entry into Israel and were unable to reach the battlefield. The men thereafter returned to the United States;
>
> • Yaghi and Hassan made unsuccessful efforts to contact Boyd while they were in the Middle East in 2007;

• Yaghi facilitated an introduction between Boyd and defendant Jude Kenan Mohammad in 2008. Coupled with Mohammad's subsequent departure for Pakistan and his "insistence" on finding "a way to the battlefield," this evidence shows that Yaghi recruited Mohammad into both conspiracies. *See* Sufficiency Opinion I [D.E. 1494] at 17;

• Yaghi posted messages on Facebook promoting his radical and violent jihadist beliefs. Those postings continued after Yaghi's contacts with Boyd diminished, justifying the jury's finding that Yaghi and Hassan—independent of Boyd—continued to engage in initiatives in furtherance of the conspiracies; and

• In late 2007, Yaghi made a speech to an Islamic group in Raleigh, advocating that its members consider violent jihad. From such statements, and from Yaghi's efforts to convert others to his beliefs in violent jihad, the jury was entitled to find Yaghi's continuing participation in the conspiracies.

The trial evidence fully supports the jury's finding that Yaghi believed in violent jihad and acted on those beliefs in concert with coconspirators. Yaghi understood and acquiesced in the objectives of the Count One and Count Two conspiracies, i.e., providing material support and resources for, and committing acts of murder outside the United States. Moreover, numerous overt acts were undertaken in furtherance of each conspiracy, including Yaghi's 2007 trip to the Middle East and his efforts to recruit others into the conspiracies. The verdict against Yaghi must therefore be sustained.

Hassan, 742 F.3d at 139, 141-42 (footnote omitted).

APPLICABLE LEGAL PRINCIPLES

I. STANDARD OF REVIEW FOR § 2255 MOTIONS

Pursuant to § 2255, a prisoner may seek correction, the setting aside, or vacation of a sentence on the grounds that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A § 2255 motion must be filed within one year from the latest of:

(1) the date on which the judgment of conviction becomes final;

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

"In a § 2255 proceeding, the burden of proof is on petitioner to establish his claim by a preponderance of the evidence." *Toribio-Ascencio v. United States*, Nos. 7:05-CR-00097-FL, 7:08-CV-211-FL, 2010 WL 4484447, at *1 (E.D.N.C. 25 Oct. 2010) (citing *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958)). Generally, an evidentiary hearing is required under § 2255 "[u]nless it is clear from the pleadings, files, and records that the prisoner is not entitled to relief." *United States v. Rashaad*, 249 F. App'x 972, 973 (4th Cir. 2007) (citing *Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970)).

II. MOTIONS TO DISMISS UNDER RULE 12(b)(6) IN § 2225 PROCEEDINGS

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of claims for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court may consider a motion to dismiss pursuant to Rule 12(b)(6) challenging the legal sufficiency of a § 2255 motion. *See United States v. Reckmeyer*, No. 89-7598, 1990 WL 41044, at *4 (4th Cir. 2 Apr. 1990); Rule 12, § 2255 Rules (expressly permitting application of the Federal Rules of Civil Procedure where "they are not inconsistent with any statutory provisions or these [§ 2255] rules"); Fed. R. Civ. P. 81(a)(4) (providing that the Federal Rules of Civil Procedure may be applied in § 2255 proceedings where a particular practice has not been specified by § 2255 and where such practice has "previously conformed to the practice in civil actions").

A motion to dismiss should be granted only if "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). In analyzing a Rule 12(b)(6) motion, a court must accept as true all well-pleaded allegations of the challenged pleading. *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). All reasonable factual inferences from the allegations must be drawn in the plaintiff's favor. *Kolon Indus., Inc.*, 637 F.3d at 440 (citing *Nemet Chevrolet Ltd.*, 591 F.3d at 253). However, case law requires that the factual allegations create more than a mere possibility of misconduct. *Coleman v. Md. Ct. of App.*, 626 F.3d 187, 190 (4th Cir. 2010) (citing *Iqbal*, 556 U.S. at 679). The allegations must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In other words, "plaintiffs' '[f]actual allegations must be enough to raise a right to relief above the speculative level,' thereby 'nudg[ing] their claims across the line from conceivable to plausible.'" *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Likewise, a pleading purporting to assert a claim is insufficient if it offers merely "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555 (internal quotation marks omitted)). "'[V]ague and conclusory allegations contained in a § 2255 [motion] may be disposed of without further investigation by the District Court.'" *United States v. Dyess*, 730 F.3d 354, 359 (4th Cir. 2013) (quoting *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000)).

III. MOTIONS FOR SUMMARY JUDGMENT IN § 2255 PROCEEDINGS

Motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure may be used to resolve § 2255 motions. *See, e.g., Lewis v. United States*, Nos. 4:12-CR-00068-FL-2, 4:13-CV-00182-FL, 2015 WL 2401514, at *2-3 (E.D.N.C. 20 May 2015) (applying the summary judgment standard); *Warford v. United States*, Nos. 7:11-CR-136-FL, 7:13-CV-6-FL, 2014 WL 793319, at *6 (E.D.N.C. 26 Feb. 2014) (granting in part the government's motion for summary judgment); *Whitley v. United States*, Nos. 7:07-CR-142-FL, 7:09-CV-144-FL, 2011 WL 2036704, at *6 (E.D.N.C. 24 May 2011) (granting the government's motion for summary judgment); *Murphy v. United States*, 5:04-CR-241-FL-2, 5:07-CV-35-FL, 2008 WL 9485484, at *5 (E.D.N.C. 22 Apr. 2008) (same); *cf. United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007) ("When the district court denies § 2255 relief without an evidentiary hearing, the nature of the court's ruling is akin to a ruling on a motion for summary judgment."). Thus, contrary to petitioner's contention, use of summary judgment is not barred by the provision of § 2255 specifying that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." 28 U.S.C. § 2255(b). *Contra* Pet.'s Resp. 19 (citing *United States v. Thomas*, 627 F.3d 534, 539 (4th Cir. 2010)).[7]

[7] Petitioner also argues that summary judgment is premature in this case because he has not had an opportunity to conduct discovery, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("[T]he [nonmovant] must present affirmative evidence in order to defeat a properly supported motion for summary judgment . . . even where the evidence is likely to be within the possession of the [non-movant], as long as the [movant] has had a full opportunity to conduct discovery.)). *See* Pet.'s Resp. 19. *Anderson*, though, was a diversity libel action, not a § 2255 proceeding. "[A] habeas movant, 'unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course,' but instead is allowed discovery only for good cause." *United States v. Echols*, 671 F. App'x 64, 65 (4th Cir. 2016) (citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) and Rule 6(a), § 2255 Rules). "A habeas movant must make specific allegations establishing reason to believe that, if the facts are fully developed, he is entitled to relief." *Id.* (citing *United States v. Roane*, 378 F.3d 382, 403 (4th Cir. 2004)); *see also* Rule 6(b), § 2255 Rules. Moreover, the party requesting discovery must submit "any proposed interrogatories and requests for admission, and must specify any requested documents." Rule 6(b), § 2255 Rules. Even under Rule 56, a showing of need is required for a non-movant to obtain time to take discovery before responding on the merits to a summary judgment motion: "If a

A motion for summary judgment pursuant to Rule 56 should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In analyzing whether there is a genuine issue of material fact, all facts and inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). The burden is on the moving party to establish the absence of genuine issues of material fact, and "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323; *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991) ("[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate."). If the movant meets its burden, then the non-moving party must provide the court with specific facts demonstrating a genuine issue for trial in order to survive summary judgment. *Celotex*, 477 U.S. at 323. The non-moving party is not permitted to rest on conclusory allegations or denials, and a "mere scintilla of evidence" will not be considered sufficient to defeat a summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Local Civil Rule 56.1 requires that a movant for summary judgment file with the motion "a separate statement, in numbered paragraphs of the material facts as to which the moving party contends there is no genuine dispute." Local Civ. R. 56.1(a)(1). A party opposing a motion for summary judgment must file with its memorandum a separate statement including a response to each numbered paragraph in the moving party's statement in correspondingly numbered

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nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time . . . to take discovery." Fed. R. Civ. P. 56(d)(2). Here, petitioner has not demonstrated a need for discovery precluding summary judgment with respect to any of the issues as to which the court finds herein that summary judgment should be granted in the alternative to dismissal under Rule 12(b)(6).

paragraphs. *Id.*(a)(2). "Each numbered paragraph in the moving party's statement of material facts will be deemed admitted for purposes of the motion unless it is specifically controverted by a correspondingly numbered paragraph in the opposing statement." *Id.*

ABSENCE OF NEED FOR AN EVIDENTIARY HEARING

The court has considered the record in this case and applicable authority to determine whether an evidentiary hearing is needed to resolve the matters before the court. The court finds that the existing record clearly shows that petitioner is not entitled to relief on his claims and that an evidentiary hearing is not needed. The court will therefore proceed without an evidentiary hearing.

ANALYSIS OF PETITIONER'S CLAIMS

In his motion, petitioner asserts five grounds or claims for the relief he seeks: ineffective assistance of counsel by Ayers ("his counsel" or "petitioner's counsel") (claim 1) (§ 2255 Mot. 4-5); violation of *Giglio v. United States*, 405 U.S. 150 (1972) by the government (claim 2) (§ 2255 Mot. 5-6)[8]; improper admission of government expert Kohlmann's testimony (claim 3) (*id.* at 6-8); actual innocence (claim 4) (*id.* at 8-9); and government misconduct regarding witnesses (claim 5) (*id.* at 16). Each claim is examined in turn below.

I. CLAIM 1—INEFFECTIVE ASSISTANCE OF COUNSEL

A. Applicable Law

To state a claim of ineffective assistance of counsel, a petitioner must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a petitioner must show that the representation he received fell below an objective standard of reasonableness. *Id.* at 687-88. The

[8] Although petitioner casts this claim as one under *Brady v. Maryland*, 373 U.S. 83 (1963), petitioner's current counsel (*see* Pet.'s Mem. 2, 24-26) and the government (*see* Gov.'s Mem. 17-23, 24) view it as a claim under *Giglio*. The court agrees.

reviewing court must be "highly deferential" of counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." *Id.* at 689. Therefore, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Further, "[a] petitioner seeking post-conviction relief bears a heavy burden to overcome this presumption, and the presumption is not overcome by conclusory allegations." *Hunter v. United States*, Civ. No. 1:09cv472, Crim. No. 1:06cr251-3, 2010 WL 2696840, at *3 (W.D.N.C. 6 July 2010).

Concerning the second prong, a petitioner must demonstrate that he was prejudiced by the ineffective assistance. *Strickland*, 466 U.S. at 687. Specifically,

> [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. The court may address the prejudice prong before the performance prong or even address only one prong if the petitioner has made an insufficient showing on the other prong. *Id.* at 697. Further, "it is not appropriate to consider the cumulative effect of attorney error when the individual claims of ineffective assistance do not violate the defendant's constitutional rights." *United States v. Russell*, 34 F. App'x 927, 927 (4th Cir. 2002) (citing *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998)); *Bellamy v. United States*, Nos. 7:99-CR-49-1-F, 7:03-CV-24-F, 2009 WL 1064888, at *5 (E.D.N.C. 3 Feb. 2009). "On the other hand, when it is determined that counsel's performance was deficient, the Court will examine whether the cumulative effect of counsel's errors prejudiced the defendant." *Christian v. Ballard*, No. 3:05–cv–00879, 2013 WL 4068214, at *19 (S.D.W. Va. 6 June 2013) (citing *Russell*, 34 F. App'x at 928 and *Huffington v. Nuh*, 140 F.3d 572, 583 (4th Cir. 1998)).

B. Failure to Object to Prosecution's Statements

Petitioner contends that his counsel was ineffective for not objecting to statements by the government's counsel during trial "that were unsupported by the evidence and prejudicial." § 2255 Mot. 13. *Contra* Gov.'s Mem. 23-24. He cites as examples unobjected-to references by the prosecution to various individuals by name as members of the conspiracy in the absence of any charges against them or presentation of any evidence of their involvement in the conspiracy, and an unobjected-to comment by the prosecution in closing argument about the increase in the crowd in the gallery when Dylan Boyd, again, a co-defendant son of the purported leader of the conspiracies, Daniel Boyd, testified. *See, e.g.*, Trial Day 15 Tr. (11 Oct. 2011; D.E. 2034 & 2217-11) 167:25 to 168:3 (statement regarding crowd). Petitioner has not shown that counsel's non-objection to these statements was anything other than the product of a strategic decision due deference. This claim therefore fails to satisfy the deficient performance prong of *Strickland* and is subject to dismissal pursuant to Rule 12(b)(6) on this ground alone.

In addition, petitioner has not shown in light of the weight of the evidence against him a reasonable probability that but for the non-objections the result of the trial would have been different. This contention therefore also fails to satisfy the prejudice prong of *Strickland.* This claim for ineffective assistance of counsel should accordingly be dismissed pursuant to Rule 12(b)(6) due to this additional deficiency.

C. Failure to Fulfill Promises Made in Opening Statement

Petitioner contends that his counsel failed to fulfill any of the promises he made in his opening statement. § 2255 Mot. 15; *see also* Trial Day 2 Tr. (20 Sept. 2011; D.E. 2038 & 2217-6) 129:13 to 134:2 (opening statement by petitioner's counsel). He alleges specifically that counsel failed to present evidence of his innocence as promised in opening.

It is frankly not apparent that petitioner's counsel made any promises in his brief opening statement. Perhaps the closest he came was to stating, in reference to people petitioner met on his trips to the Middle East, that "[w]e believe we'll hear from some of them." *Id.* at 132:16. In any event, petitioner's counsel's opening statement clearly met an objective standard of reasonableness. Aside from other considerations, counsel's choice of the information included in his opening statement was manifestly a strategic decision entitled to deference. Petitioner has therefore not satisfied the performance prong of *Strickland.*

Nor has petitioner shown that he was prejudiced by the alleged deficiency regarding his counsel's opening statement. This claim should accordingly be dismissed pursuant to Rule 12(b)(6) for failure to satisfy either *Strickland* prong.[9]

D. Failure to Conduct Proper Cross-Examination of Majed Musa and Any Cross-Examination of Humza Ismail

Petitioner contends that his counsel was ineffective for failing to properly cross-examine Majed Musa, a former employer of petitioner's who petitioner contends knows of his innocence, and to cross-examine at all Humza Ismail, an apparent friend of Hassan and acquaintance of petitioner who petitioner alleges harbors extreme views and has an aggressive nature. § 2255 Mot. 15; *see* Trial Day 5 Tr. (23 Sep. 2011; D.E. 1742 & 2217-4) 131:20 to 136:24 (testimony of Majed Musa); Trial Day 8 Tr. (29 Sept. 2011; D.E. 1774 & 2217-10) 103:7 to 126:16 (testimony of Humza Ismail). *Contra* Gov.'s Mem. 23-24. But counsel's approach to cross-examination of these witnesses was a strategic decision entitled to deference. Petitioner has not shown that the tack taken by his counsel fell below an objective standard of reasonableness and therefore satisfies the performance prong of *Strickland.* Further, given the weight of the evidence against petitioner,

[9] While not relying on it in its ruling, the court notes that petitioner and his counsel changed strategy during the course of trial, as discussed *infra* note 23.

he has also failed to show that he was prejudiced by these alleged deficiencies. This claim of ineffective assistance of counsel should therefore be dismissed pursuant to Rule 12(b)(6) for failure to meet either *Strickland* prong.

E. Failure to Interview Amber Mohammad

At the trial, the mother of defendant Jude Mohammad, Elena Mohammad, testified for the government regarding involvement by petitioner with Jude Mohammad's trip to Pakistan in 2008, which came after a trip by him there in 2007. Petitioner describes this testimony and its purported significance as follows:

> [T]he government also offered the testimony of Jude Mohammad's mother, Ms. Elena Mohammad, that when she went to retrieve Jude's laptop from Mr. Yaghi, he told her that Jude was in the same place that he was a year ago. This brief but emotional testimony was particularly damaging because it had the dual implication that Mr. Yaghi had played a role in Mr. Mohammad's recruitment and because it indicated that Mr. Yaghi had been contemplating fighting in foreign jihad, as Mr. Mohammad was at the time.

Pet.'s Mem. 21-22.

Petitioner argues that counsel did not interview Jude Mohammad's sister, Amber Mohammad; that, had he done so, he would have learned that Elena Mohammad abused Jude Mohammad; and that "a strong motive existed for her to fabricate Mr. Yaghi as the reason her son had gone to Pakistan, rather than attribute his actions to her own conduct." *Id.* at 22; *see also* § 2255 Mot. 14. In support of this contention, petitioner filed a declaration by Amber Mohammad (D.E. 2217-16). In his declaration filed by the government, petitioner's counsel indicates that he did, in fact, interview Amber Mohammad. Ayers Decl. (consisting of pp. 3 to 12 of D.E. 2241),

Ex. 17 (consisting of pp. 30 to 32 of D.E. 2241) ("Investigative Witness List") 30; *see generally* Gov.'s Mem. 16-17.[10]

Assuming for purposes of Rule 12(b)(6) that petitioner's counsel did not interview Amber Mohammad, the court finds that petitioner has failed to show by his allegations that, had counsel conducted the interview, there is a reasonable probability that the outcome of the trial would have been different. Even treated as true, the statements in the declaration by Amber Mohammad do not necessarily establish a motivation by Elena Mohammad to assert lies against petitioner and his involvement in Jude Mohammad's travel to Pakistan. Rather, the declaration speaks of Elena Mohammad's neglect of not only Jude Mohammad, but her other children as well. Amber Mohammad Decl. (D.E. 2217-16) ¶¶ 8-15. Indeed, the declaration states that Jude Mohammad's motivation for returning to Pakistan in 2008 was to protect one of his younger sisters from abuse by a relative. *Id.* ¶ 15. The sibling was then living with her father and obviously not under the care of Elena Mohammad. Thus, the implication is that if there was neglect at that point, it was not by Elena Mohammad, lessening any motivation for her to scapegoat on petitioner.

Further, petitioner's counsel did cross-examine Elena Mohammad, pointing out an inconsistency between her testimony and her statements to the FBI. *See* Trial Day 8 Tr. (D.E. 1774 & 2217-10) 137:7-23. Therefore, Elena Mohammad's credibility did not go unchallenged. For this and the other reasons stated, petitioner's contention regarding Elena Mohammad should be dismissed pursuant to Rule 12(b)(6) for failure to satisfy the prejudice prong of *Strickland.*

[10] In the event the court determined petitioner to have stated a claim with respect to interviewing Amber Mohammad, the government requested a hearing on the issue of whether his counsel or a representative of his interviewed Amber Mohammad. Gov.'s Mem. 17. The recommended disposition of this claim moots this request.

Alternatively, the court finds that the government should be granted summary judgment pursuant to Rule 56 denying this claim under the performance prong of *Strickland.* Petitioner's counsel stated in his declaration:

> [S]trategically it was not, in my opinion, necessary to berate Jude Mohamm[a]d's crying mother. She had nothing good to say about Petitioner. A crying mother that blames Petitioner for her missing son and who is determined to compromise Petitioner is best removed from the stand as soon as practical.

Ayers Decl. ¶ 20. Petitioner did not file evidence countering this statement. To the contrary, the government included a partial recitation of it in its statement of material facts and, by not responding to this recitation, petitioner admitted to the truth of it. This recitation read: "Counsel made a strategic decision not to question or confront Jude Mohammad's mother, concluding that a 'crying mother that blames Petitioner for her missing son and who is determined to compromise Petitioner is best removed from the stand as soon as practical.' [Exhibit A at 7-8, ¶ 20]." Gov.'s Stmt. of Material Facts ¶ 14. This strategic decision by petitioner's counsel, who, again, did conduct some cross-examination of Elena Mohammad, is appropriately given deference.

F. Failure to Review Recording of Meeting between Jude Mohammad and Daniel Boyd

At trial, the government elicited testimony from Daniel Boyd, again, the purported leader of the conspiracies, about a meeting among him, petitioner, and Jude Mohammad, as well as others, at Daniel Boyd's grocery store, Blackstone Halal Market. Trial Day 7 Tr. (28 Sept. 2011; D.E. 1751 & 2217-3) 110:23 to 114:14. As Daniel Boyd surmised in his testimony, there is an audio recording of the meeting. *See id.* at 114:13. At trial, the government argued that petitioner introduced Jude Mohammad to Daniel Boyd at this meeting and cited this introduction as evidence of petitioner's involvement in the conspiracies. *See, e.g.*, Trial Day 15 Tr. (D.E. 2034 & 2217-11) 30:13-14; 170:17-21; 182:18-20 (government's closing argument).

Petitioner alleges that the recording discredits this contention because it shows that Daniel Boyd already knew Jude Mohammad and that petitioner had come to the store to wrestle someone there. Petitioner therefore contends that his counsel provided ineffective assistance by purportedly not reviewing the recording and by not cross-examining Daniel Boyd using it.[11] Pet.'s Mem. 20-21; Pet.'s Resp. 15. *Contra* Gov.'s Mem. 14-16. In support of this argument, petitioner has filed a transcript his current attorney had prepared of selected portions of the recording, which indicates that the meeting occurred on 9 May 2008. 9 May 2008 Mtg. Tr. (D.E. 2217-12 at 3-8).

An initial concern regarding this contention by petitioner is the timing of its assertion. Petitioner did not assert this contention in his § 2255 motion. It is raised for the first time in the memorandum his current counsel filed on petitioner's behalf. That memorandum was filed on 19 January 2016. This was well after the deadline for filing a § 2255 motion, which expired on 6 October 2015, one year after denial of petitioner's petition for a writ of certiorari to the Supreme Court. *See* 28 U.S.C. § 2255(f). To be sure, petitioner had sought and obtained an extension until 19 January 2016, but the extension requested and granted—using the order petitioner proposed (D.E. 2211-2)—was to file "a memorandum in support of his [motion]," not to amend the § 2255 motion. *See* 6 Oct. 2016 Ord. (D.E. 2212); Pet.'s Mot. for Leave (D.E. 2211). Petitioner's contention regarding the recording is therefore arguably subject to dismissal as untimely.[12]

[11] The government disputes that petitioner's counsel did not review the recording. *See* Gov.'s Mem. 14 n.10. In the event the court found that petitioner stated a claim on this ground, the government sought a hearing or discovery "to determine the full and accurate content of the audio recording, whether counsel listened to that audio recording, and the extent to which not using the audio recording at trial was a strategic decision." *Id.* Given the recommended disposition of this contention, the court finds such a hearing or discovery unnecessary.

[12] The court is raising this deficiency sua sponte and it may therefore not be subject to petitioner's contention that the government is barred from challenging petitioner's claims on the basis of procedural default, which the court finds baseless in any event. *See infra* note 24.

Even if the contention is considered on the merits pursuant to Rule 12(b)(6) and the transcript filed by petitioner is deemed an accurate translation and transcription, the contention fails to satisfy the prejudice prong of *Strickland*. As to Daniel Boyd's having previously met Jude Mohammad, Daniel Boyd does refer in the transcript to having done so:

> I met you, you were younger I think.
>
> . . . .
>
> Yea, you had a backpack one time in the community center . . . .
>
> . . . .
>
> [Y]ea Jude I remember cause you told me your father was in Pakistan.
>
> . . . .
>
> [Y]ou were in the front hall while they were doing construction. . . .

9 May 2008 Mtg. Tr. 4. But his statement is consistent with Daniel Boyd's trial testimony that he "saw [Jude Mohammad] a couple times at the Islamic center" before meeting him through petitioner. Trial Day 7 Tr. (D.E. 1751 & 2217-3) 112:4-7 to 113: 4-10. Thus, the recording could not be used to materially impeach Daniel Boyd on this point.

In addition, contrary to petitioner's contention, the recording provides scant support for the notion that petitioner came to the store to wrestle and that the meeting between Jude Mohammad and Daniel Boyd was coincidental. The entire discussion of wrestling in the transcript reads:

> **Jasmin Smajic:** Listen man. This is the brother I've been telling you about that wants to wrestle you man
>
> **Ziyad Yaghi:** Ah, wrestle you?
>
> **Daniel Boyd:** I need someone to rescue me. [unintelligible]
>
> **Daniel Boyd:** to rescue me
>
> **Jasmin Smajic:** Oh [laughter]
>
> **Daniel Boyd:** Alhamdulillah. We'll hike first and then in sha Allah wrestle after.

9 May 2008 Mtg. Tr. 4 (bolding original).

In any event, petitioner's counsel elicited testimony from another witness on cross-examination, Sherifi, that petitioner had come to Daniel Boyd's store in May 2008 to wrestle Jasmin Smajic. Trial Day 14 Tr. (10 Oct. 2011; D.E. 1813, 2043 & 2217-8) 100:19 to 101:7. Sherifi further testified that petitioner stayed at the store for only "ten minutes or less," did not discuss "killing or maiming anybody" or "providing material support to anybody," and, in fact, "did not have any discussions with anybody at that time." *Id.* at 101:10-21.

Thus, the recording, had it been used in cross-examination of Daniel Boyd, would have added little, if anything, beyond what had already been presented to the jury. This consideration alone establishes that there is not a reasonable probability that the outcome would have been different had the recording been used by petitioner's counsel to cross-examine Daniel Boyd. The likelihood of any change in outcome is further diminished when the weight of the evidence against petitioner is also taken into account. Petitioner's contention that counsel provided ineffective assistance by not reviewing and using on cross-examination the recording should accordingly be dismissed pursuant to Rule 12(b)(6) for failure to satisfy the performance prong of *Strickland.*

G. Failure to Challenge Testimony of Government Expert Kohlmann

Kohlmann, the government's only expert witness, was qualified by the court as an expert in and testified about the trend of decentralized terrorism and home-grown terrorism, including certain criteria that comprise the profile of a home-grown terrorist network and such topics as the manner and location of overseas travel as it relates to home-grown terrorist networks. *See* 16 Sept. 2011 Ord. (D.E. 1443) ("*Daubert*[13] Ord.") 6; Trial Day 6 Tr. (27 Sept. 2011; D.E. 1745 & 2217-7) 180:7 to 272:12 (Kohlmann's trial testimony); Trial Day 7 Tr. (D.E. 1751 & 2217-3) 15:20 to 32:11 (same); Kohlmann's Supp. Rep. (D.E. 1315-1); *see also* Trial Day 2 Tr. (D.E. 2038 & 2217-

[13] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

6) 71:12 to 72:2; 81:7-13; 84:25 to 85:11 (references to Kohlmann in government's opening statement); Trial Day 15 Tr. (D.E. 2034 & 2217-11) 14:3 to 17:2; 26:9-12; 37:12-14; 63:23 to 64:2; 83:21-24 (references to Kohlmann in government's closing argument). Petitioner contends that his counsel was ineffective for not challenging in several ways the testimony of government expert witness Kohlmann—namely, by not cross-examining him at all at trial, not cross-examining him in a particular way at the *Daubert* hearing in this case on 16 August 2011 (*see Daubert* Hrg. Tr. (D.E. 1409 & 2217-2), not presenting countervailing testimony, and not addressing Kohlmann's testimony in closing argument. § 2255 Mot. 14; Pet.'s Mem. 16-18; Pet.'s Resp. 12-13. *Contra* Gov.'s Mem. 6-9.

The court finds that petitioner has failed to show a reasonable probability that the outcome of the trial would have been different had the alleged deficiencies not occurred. This claim should therefore be dismissed pursuant to Rule 12(b)(6) for failure to satisfy the prejudice prong of *Strickland.* Among other reasons, the weight of the other evidence against petitioner dictates this conclusion, as illustrated by the Fourth Circuit's review of the evidence, albeit in the government's favor. *See Hassan*, 742 F.3d at 141-42. The focus of the government's evidence was petitioner's actions and statements, not Kohlmann's opinions.

Further, Kohlmann was not the only witness testifying to certain matters. Specifically, Daniel Boyd provided testimony corroborating Kohlmann's testimony that use of language coding is an indication of a violent home-grown extremist movement. Trial Day 6 Tr. (D.E. 1745 & 2217-7) 229:16 to 230:1 (testimony by Kohlmann on coding). For example, Daniel Boyd testified that when petitioner asked him where the "best brothers" were, he understood petitioner to be asking "up to and including if I were to, you know, want to try to get somewhere and help with the

resistance somewhere, where would be the best brothers to discuss this with and try to, you know, gain access." Trial Day 7 Tr. (D.E. 1751 & 2217-3) 62:21-25.

Similarly, Daniel Boyd testified that when petitioner, along with Hassan, spoke to him of "getting married" he understood them to be using the phrase as a code for reaching the battlefield:

> Q. "Getting married"?
>
> A. "Getting married," I heard it all the time, yeah. But —
>
> Q. Used as a code word?
>
> A. I think it was used as a code word, yes, but —
>
> Q. Okay. From the context, you think that?
>
> A. Yes.
>
> Q. Describe that?
>
> A. Mr. Yaghi and Mr. Hassan said they were going to get married. They were saying it sheepishly, like kidding each other, like maybe two, you know, guy friends would do. They were very — they were very close friends. But I also understood that they had an understanding to try to get to a battlefield somewhere.
>
> So, I took that to mean — *we say "going to get married" because, literally, yeah, we do want to get married, but only as a stepping stone to getting to the battlefield –*
>
> . . . .
>
> A. — *going to get married is a safe way to say we're over there looking for whatever it was they were looking for to help them, you know, get to a front line somewhere.*

Trial Day 7 Tr. (D.E. 1751 & 2217-3) 104:1-22 (emphasis added). Daniel Boyd further testified that the phrase "find a way" was used frequently by him and others in his community and that he used it to mean "find a way to one of the battlefronts." Trial Day 7 Tr. (D.E. 1751 & 2217-3) 66:9-13.

In the alternative to dismissal pursuant to Rule 12(b)(6) based on nonsatisfaction of the prejudice prong of *Strickland*, the court finds that summary judgment should be entered pursuant to Rule 56 denying this claim for failure to satisfy the performance prong of *Strickland*. Petitioner's counsel explained in the declaration filed with the government's motion that he did not cross-examine Kohlmann at trial for strategic reasons:

> Prior to trial the government's expert witnesses were vetted and subjected to broad examination and objection. Examination took place during the "Daubert" hearing. Objections raised included the very same objections raised by Petitioner, with the exception of the classified material(s) not presented in discovery. I have not seen the alleged classified materials referenced by Petitioner as they appear not to have been discovered until Petitioner's trial was concluded. As a result of the Daubert hearing and objections, the government's expert opinions were restricted and limited. Because of the restrictions and limitations, no questions were asked at trial. To ask questions, when the witness was prevented from commenting on the particular defendant, would have opened the door to additional testimony which was not otherwise allowed. The remaining expert was withdrawn following the Daubert hearing.[14] This was a matter of trial strategy and was discussed with Petitioner.

Ayers Decl. ¶ 15; *see also Daubert* Hrg. Tr. (D.E. 1409 & 2217-2); *Daubert* Ord. Petitioner did not contest petitioner's counsel's explanation. *See, e.g.*, Stmt. of Material Facts ¶ 5.[15]

Among the limitations imposed by the court, as alluded to by petitioner's counsel in his declaration, was a prohibition against Kohlmann testifying as to any defendant's mental state. *See* 16 Sept. 2011 Ord. 11-12. Petitioner's counsel, as well as counsel for the other two defendants, were vigilant in securing enforcement of this prohibition at trial. *See, e.g.*, Trial Day 6 Tr. (D.E. 1745 & 2217-7) 219:10 to 220:21. Petitioner's counsel had joined in the motion that resulted in the restrictions the court imposed. *See* Pet.'s Mot to Join in *Daubert* Mot. (D.E. 1127). He also

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[14] Although not material, the government's other expert witness was withdrawn, on 15 August 2016, prior to the *Daubert* hearing, on 16 August 2011. *See* Gov.'s Notice of Filing of Kohlmann's Supp. Rep. (D.E. 1315) 1.

[15] Ayers' explanation belies petitioner's contention that he did not cross-examine Kohlmann as a result of the testimony of the Boyds. *See* Pet.'s Mem. 20 n.27. The Boyds' testimony did, though, impact defense strategy in a different way, as discussed *infra* note 23.

actively participated in cross-examination of Kohlmann at the *Daubert* hearing *See Daubert* Hrg. Tr. 96:8 to 102:12. The strategic decision by *Daubert* to handle cross-examination of Kohlmann at trial as he did is entitled to deference.

Counsel's selection of the questions for Kohlmann at the *Daubert* hearing is also a strategic matter due deference. His questions were not perfunctory, but focused on the extent to which Kohlmann had studied statistics and conducted any statistical studies relating to the association of marriage and jihad. *See Daubert* Hrg. Tr. 96:8 to 102:12. Petitioner's counsel's cross-examination came after, and therefore supplemented, cross-examination of Kohlmann by other defense counsel (as well as defendant Subasic), which covered such issues as Kohlmann's use of open-source materials and translations in his research, the subject matter of prior reports and testimony by him, the sources upon which he relied in this case, and the conclusions he reached in this case. *See id.* at 41:5 to 96:6.

The court finds that the related concerns raised by petitioner—his counsel's not presenting evidence specifically countering Kohlmann's testimony and not mentioning Kohlmann's testimony in closing argument—were also strategic decisions entitled to deference. Petitioner's contention as to these aspects of his counsel's performance are therefore also subject to denial through summary judgment. Thus, the entirety of petitioner's contention that his counsel did not adequately challenge the admission of Kohlmann's testimony is subject to denial pursuant to Rule 56 for failure to satisfy the *Strickland* performance prong.

H. Failure to Interview Witnesses regarding Petitioner's Travel to Jordan

In his § 2255 motion, petitioner contends that his counsel provided ineffective assistance by not interviewing five witnesses regarding petitioner's travel to Jordan: Walid Musafer Al-Shishani, Muwafaq Shibley Yaghi, Ahmed Yaghi, Mohammad Shibley Yaghi, and Khaled Shibley

Yaghi.[16] § 2255 Mot. 13. In his memorandum, petitioner argues that his counsel erred by not interviewing four witnesses. They are three of the witnesses named in his § 2255 motion—Walid Musafer Al-Shishani, Ahmed Yaghi, and Mohammed Shibley Yaghi—and Adnan Al-Shishani.[17] Pet.'s Mem. 18-20. Petitioner filed declarations by these four people. Walid Musafer Al-Shishani Decl. (D.E. 2217-17); Ahmed Yaghi Decl. (D.E. 2217-13); Mohammed Shibley Yaghi Decl. (D.E. 2217-14); Adnan Al-Shishani Decl. (D.E. 2217-17). Petitioner also filed the declarations of seven other witnesses purportedly having knowledge of petitioner's travel to Jordan and discusses them in the factual background section of his memorandum, but not in his argument on this issue.[18] Pet.'s Mem. 9-11; *see also* Pet.'s Resp. 13-16.[19]

In the declaration by Ayers filed in response, he discusses his investigation in the case, including into persons with possible knowledge about petitioner's travel. *See* Ayers Decl. ¶¶ 8-15. As previously referenced, he also appended to his declaration copies of related records of his (*see id.* ¶ 13 & Exs. 1-6 (consisting of pp. 13-18 of D.E. 2241)) and a list of witnesses who were or were not included in the investigation, indicating whether or not they were interviewed by him, someone else on petitioner's behalf, or the government (*see id.* ¶ 27 & Investigative Witness List). *See generally* Gov.'s Mem. 9-14.

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[16] In instances in which the record contains different versions of a person's name, the court has used the version appearing in petitioner's memorandum. In addition, the court assumes that the person identified by petitioner as Walid Musafer Al-Shishani is the same person identified in the Investigative Witness List as Walid Musafer.

[17] Petitioner is arguably barred on grounds of tardiness from citing in his memorandum witnesses not mentioned in his § 2255 motion. *See supra* p. 17.

[18] The seven witnesses, along with citations to their declarations, are: Aamir Tariq (D.E. 2217-15); Amber Mohammad (D.E. 2217-16); Bryant Rivera (D.E. 2217-18); Saleh Hamdan (D.E. 2217-20); Naji Sarsour (D.E. 2217-21); Jade Ghanim (D.E. 2217-22); and Mosed Ghanim (D.E. 2217-23). Petitioner does discuss the declaration of Amber Mohammad in his argument on another issue. *See* Pet.'s Mem. 21-22.

[19] Petitioner states in his memorandum that he obtained declarations from Burhan Haque and Anes Askar (Pet.'s Mem. 9), but he did not file any such declarations.

The court finds that petitioner's contention of failure to investigate should be dismissed pursuant to Rule 12(b)(6) because it does not satisfy the prejudice prong of *Strickland*, taking the declarations petitioner filed as true. Petitioner argues specifically that Adnan Al-Shishani, Ahmed Yaghi, and Mohammed Yaghi "would have confirmed that [petitioner] was actively pursuing marriage." Pet.'s Mem. 19. But even if petitioner were actually seeking a wife, that fact would not be incompatible with his also attempting to reach a battlefield or travelling to Jordan in 2006 for that purpose.

Moreover, the three declarations petitioner cites in his argument do not explicitly state that petitioner went to Jordan to find a wife. In fact, the declarations by Mohammed Shibley Yaghi and Adnan Al-Shishani do not address petitioner's interest in marriage at all. *See* Mohammed Shibley Yaghi Decl. (D.E. 2217-14); Adnan Al-Shishani Decl. (D.E. 2217-17). The declaration by Ahmed Yaghi, an uncle of petitioner's with whom petitioner stayed in Jordan, does mention marriage, but identifies another uncle of petitioner's living in the same home, Ali Yaghi, as the person who prompted the issue: "In 2006, after about a week of being in the Jordan, Ali Yaghi told Ziyad that you should consider marrying a girl from Jordan. Ali Yaghi, who is well connected, introduced Ziyad to a potential bride." Ahmed Yaghi Decl. (D.E. 2217-13) ¶12; *see also id.* ¶¶ 4, 5. The marriage did not occur. *Id.* ¶¶ 13, 14.

In his declaration, Aamir Tariq states that petitioner was in Jordan to find a wife: "During my meetings with Ziyad in Jordan we discussed that he was in Jordan to visit his relatives and find a bride." Aamir Tariq Decl. (D.E. 2217-15) ¶ 8. But he also states that he met with Ayers and told Ayers about his meetings with petitioner in Jordan. *Id.* ¶ 12. Thus, there was no lack of investigation as to Aamir Tariq.

Although not cited by petitioner in connection with his interest in marriage, the declaration of Walid Msuafer Al-Shishani states, "I was aware that Ziyad Yaghi was traveling to Jordan and my understanding was he was going there to find a wife." Walid Musafer Al-Shishani Decl. (D.E. 2217-19) ¶ 13. This statement, though, worded in terms of the declarant's "understanding," is somewhat muted. It certainly does not establish a reasonable probability that the testimony of Daniel Boyd regarding petitioner's 2006 trip to Jordan would be rejected.

In the background section of his memorandum, not in the argument section, petitioner characterizes two declarations he filed as "showing that . . . [it] is a common practice for members of petitioner's community to go overseas to find wives." Pet.'s Mem. 10. The two declarations are those of Saleh Hamdan and Naji Sarsour. These declarations, however, state simply that the respective declarants met their wives in the Middle East. *See* Saleh Hamdan Decl. (D.E. 2217-21) ¶ 5; Naji Sarsour Decl. (D.E. 2217-21) ¶ 5. While one, that of Saleh Hamdan, indicates that the wife was from Jordan, the other does not indicate whether or not the wife was from the Middle East.

In any event, the notion that petitioner was seeking a wife did come before the jury. As the government notes, petitioner's counsel mentioned in his opening statement that petitioner was attempting to find a wife (Trial Day 2 Tr. (D.E. 2038 & 2217-6) 130:25 to 131:8), and he developed evidence of petitioner's interest in marriage in his cross-examination of FBI special agent Michael Greer (Trial Day 6 Tr. (D.E. 1745 & 2217-7) 130:8 to 1341:2). Specifically, Greer acknowledged that petitioner made internet searches about finding a wife, conducted email conversations with regard to becoming married, and met with people in Jordan about becoming married. *Id.* In addition, Majed Musa testified that petitioner told him he was going to Jordan "to get married," in addition to meet his cousins. Trial Day 5 Tr. (D.E. 1742 & 2217-4) 134:17-18.

Petitioner also argues that interviews by his counsel of Adnan Al-Shishani and Walid Musafer Al-Shishani would have shown that petitioner's visit to the Majid Al-Shishan mosque in Zarqa, Jordan in 2006 was benign. Daniel Boyd testified to the effect that he recommended to petitioner that he go to the mosque to meet others seeking to engage in violent jihad. Trial Day 7 Tr. (D.E. 1751 & 2217-3) 62:15 to 63:7; Trial Day 8 Tr. (D.E. 1774 & 2217-10) 31:17 to 33:22. In his declaration, Adnan Al-Shishani, petitioner's stepfather, states that the mosque is a well-known landmark in Zarqa and that he told petitioner to meet family members there because anyone on the street could have told him where it was. Adnan Al-Shishani Decl. (D.E. 2217-17) ¶ 3, 5-7. In his declaration, Walid Musafer Al-Shishani similarly states: "Majid Al-Shishan is a historical landmark in the city of Zarqa. Wherever you are in the city of Zarqa you can see Masjid Al-Shishani, and it is used by the locals as a meeting point." Walid Musafer Al-Shishani Decl. (D.E. 2217-19) ¶ 12.

These statements by Adnan Al-Shishani and Walid Musafer Al-Shishani, though, are not necessarily inconsistent with Daniel Boyd's testimony relating to petitioner's visit to the mosque. Daniel Boyd's testimony regarding the mosque visit can be true even if all these statements are true.

While not addressed by petitioner, the declarations he filed also do not squarely contradict Daniel Boyd's testimony regarding the meaning of "good brother" or "best brother" as used by petitioner. Saleh Hamdan, for example, defines "good brother as someone you can trust and a person of good moral character." Saleh Hamdan Decl. (D.E. 2217-20) ¶ 7. Naji Sarsour defines "good brothers" as "good people to be around." Naji Sarsour Decl. (D.E. 2217-21). Daniel Boyd testified that "best brothers," as used by petitioner, meant the following:

Q. And specifically by "best brothers," what did you understand he was saying?

. . . .

> A. I understood like — the same answer, that up to and including if I were to, you know, want to try to get somewhere and help with the resistance somewhere, where would be the best brothers to discuss this with and try to, you know, gain access. It's not discussed like that specifically, but that's what I understood.
>
> Q. Okay. You understood that's what he was asking?
>
> A. Up to and including that, yes. I mean, I also knew he was meaning, you know, a place where they were going to pray, and, you know, keep me within the bonds of fellowship and Islam and these kind of things. But, yes, up to and including the understood obligation of jihad at that point.

Trial Day 7 Tr. (D.E. 1751 & 2217-3) 62:15 to 63:7; *see also* Trial Day 8 Tr. (D.E. 1774 & 2217-10) 32:14-21.[20] Thus, the definition of "good brother" or "best brother" as Daniel Boyd understood petitioner to be using the term appears to encompass the definition provided by Hamdan and Sarsour.

In addition, the declarations filed by petitioner leave largely unaddressed evidence regarding petitioner's trip to the Middle East in 2007. In particular, Daniel Boyd testified that when discussing with petitioner and Hassan plans for the trip, at the prompting of petitioner, they showed him a rifle hidden in the apparently modified center console of the vehicle in which they were travelling and told him they used it for "target practice and training." Trial Day 7 Tr. (D.E. 1751 & 2217-3) 88:11 to 89:21. Daniel Boyd understood such training to include preparing "to go and fight somewhere." *Id.* at 89:4-9.

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[20] This trial day 8 testimony by Boyd reads:

> They had asked me, since I had just — he came to me and asked me, I understand you have just gone to Jordan. In your travels around, where did you find the best brothers to be. So, I took that to mean the best Muslims. You know, where there's going to be people praying and following the tenets of Islam. And anything else up to and including, you know, if it were people to get him into a front line or people who would know how to do it.

Trial Day 8 Tr. (D.E. 1774 & 2217-10) 32:14-21.

For this and the other reasons stated, the court concludes that petitioner's allegations fail to show a reasonable probability that the outcome of his trial would have been different had his counsel not performed the alleged deficient investigation. This contention should therefore be dismissed pursuant to Rule 12(b)(6).

Alternatively, summary judgment pursuant to Rule 56 should be entered denying petitioner's challenge to the sufficiency of counsel's investigation for failure to satisfy the performance prong of *Strickland*—namely, to show that his performance fell below an objective standard of reasonableness. Ayers' declaration states that he or others on behalf of petitioner interviewed or attempted to interview 15 witnesses: Laila Al-Shishani, Amber Mohammad, Ahmed Yaghi, Anes Askar, Mohammad Askar, Hisham Sarsour, Jihad Dorgham, Bryant Rivera, Hassan, Majed Musa,[21] Muamer Dahnoun, Faraz Fareed, Fuad Sheikh, Aamir Tariq, and Shabeer/Shabil Tariq. *See* Investigative Witness List 30-32. Of these, only two deny being contacted by the defense—Amber Mohammad (*see* Amber Mohammad Decl. (D.E. 2217-16) ¶ 16) and Bryant Rivera (*see* Bryant Rivera Decl. (D.E. 2217-18) ¶ 11). Both, however, state in their declarations that they were interviewed by the government, and Ayers indicates in his declaration that he received copies of the reports on the interviews. Amber Mohammad Decl. (D.E. 2217-16) ¶ 16; Bryant Rivera Decl. (D.E. 2217-18) ¶ 11; Investigative Witness List 30, 31. According to the Ayers' declaration, the defense was provided reports on the interviews of an additional ten witnesses whom Ayers did not claim the defense contacted: Walid Musafer Al-Shishani, Jade Mohammad Ghanim, Mosed Ghanim, Thaer Ali, Saleh Hamdan, Sonya Zaghloul, Imam Amr Dabour, Imam Bainonie, Rashid Ali Salahat, and Abdel Nasser Zouhri. *Id.* at 30-31.

[21] Majed Musa confirmed in Ayers' cross-examination of him at trial that Ayers had interviewed him. *See* Trial Day 5 Tr. (D.E. 1742 & 2217-4) 136:10-14.

The persons conducting the investigation for the defense were Ayers; his predecessor, McCullough; and an investigator. Ayers Decl. ¶ 8. The witness interviews supplemented Ayers' review of "thousands of pages of discovery, audio tapes and transcripts." Ayers Decl. ¶ 5. Therefore, as a whole, the defense clearly undertook a substantial investigation.

Turning specifically to petitioner's defense that he travelled to Jordan in 2016 to find a wife, as discussed, he relies on the declarations of three witnesses—Ahmed Yaghi, Mohammed Shibley Yaghi, and Adnan Al-Shishani. While petitioner claims in his motion that he identified Mohammed Yaghi as a potential witness (§ 2255 Mot. 13), Ayers indicates in his declaration that petitioner did not (Investigative Witness List 30). More significantly, petitioner did not deny the statement in the government's statement of material facts that he did not identify Mohammed Yaghi as a potential witness (Gov.'s Stmt. of Material Facts ¶ 7), thereby admitting that he did not. Without dispute by petitioner, Ayers states as to Adnan Al-Shishani that he was "not a witness suggested to us by [petitioner]. Family issues." Investigative Witness List 30.

And there is also no dispute that the defense did interview Ahmed Yaghi. Petitioner acknowledges in his memorandum that Ayers' predecessor, McCullough, did so.[22] Pet.'s Mem. 9; *see also* Gov.'s Stmt. of Material Facts ¶ 7. Ayers described the defense's contacts with Ahmed Yaghi without contradiction as follows:

> Doug [McCullough] interviewed him. We tried to contact him numerous times by letter and phone, one time that we thought we had him on the phone he hung up on us. Sent him a subpoena. [Ziyad] Yaghi told us that Ali Yaghi had been intercepting the calls. Untrustworthy and unreliable. Changed his mind about travel to US at last minute. Refused to be subpoenaed via State Department.

Investigative Witness List 30; Ayers Decl. ¶ 13; Gov.'s Stmt. of Material Facts ¶ 6.

[22] Petitioner makes this acknowledgment notwithstanding his statement elsewhere that "all counsel had to do was interview" Ahmed Yaghi and the other two witnesses to learn of the purportedly benign purpose of the 2006 trip. Pet.'s Mem. 19.

There is also no dispute that Ayers interviewed at least one other witness about petitioner's traveling to Jordan for the purported purpose of finding a wife, Aamir Tariq. In his declaration, Aamir Tariq stated: "During my meetings with Ziyad in Jordan we discussed that he was in Jordan to visit his relatives and find a bride." Aamir Tariq Decl. (D.E. 2217-15) ¶ 8. He also stated that he "met with Attorney Jim Ayers once prior to trial." *Id.* ¶ 12. Petitioner acknowledges in his memorandum that Aamir Tariq met with the defense, although he erroneously states that Aamir Tariq was unclear whether the attorney with whom he met was Ayers or McCullough. Pet.'s Mem. 9.

Ayers states in his declaration without contradiction that he had taken the deposition of a foreign witness, Nebil Hussein Al Shyal, on 10 November 2010 regarding petitioner's wife search. Ayers Decl. ¶ 9; Gov.'s Stmt. of Material Facts ¶ 4. Thus, contrary to petitioner's contention, the undisputed record establishes that his counsel did conduct a significant investigation into his wife-search claim.

Petitioner's counsel's investigation in this area and otherwise belies petitioner's suggestion that his counsel's not calling witnesses at trial was grounded in the lack of an adequate investigation. Ayers confirmed in his declaration that his not calling any witnesses was a strategic decision based on the fruits of the defense's investigation as well as other factors. Ayers explained:

> 10. Certain witnesses were helpful and confirmed that Petitioner was looking for a bride.
>
> 11. Certain witnesses were not helpful or did not wish to be involved.
>
> 12. Certain witnesses were not trust worthy and simply were not of good moral character.
>
> 13. Petitioner's family, Amad Yaghi and Ali Yaghi, misrepresented who they were during phone calls to Jordan. Amad Yaghi said he would testify and changed his mind prior to trial and refused to meet with the State Department to process his visa to enter the United States. Naturally, this occurred immediately prior to trial.

> Petitioner would not tell me if he was testifying or explain certain facts related to the case. I have attached correspondence and memoranda addressing these issues in Exhibits 1 through 6 [consisting of pp. 18 of D.E. 2241].
>
> 14. Petitioner's bride claim and defense were compromised by certain information that I received during my investigation of the Jordan trip.
>
> . . . .
>
> 22. Because the government's case was compromised by the Boyd[s'] failure to confirm that there was a conspiracy with the Petitioner, and after consulting with me, Petitioner chose not to present witnesses. . . . I remain certain, that had we moved forward with witnesses during Petitioner's case in chief, that Petitioner's defense of seeking a bride and simply visiting with family in Jordan would have been compromised in many ways.
>
> 23. Prior to trial I reviewed classified material. This classified material cannot be discussed specifically. (See Exhibit 16 [consisting of p. 29 of D.E. 2241]). However, with the government's permission, I can disclose that the classified material had a significant impact on my formulation of trial strategy. The classified information, when combined with the fact that certain witnesses were not trust worthy and not of good moral character, convinced me that Petitioner's defense would have simply opened the door for more evidence to be introduced by the government. Likewise, had Petitioner's family not misrepresented who they were during phone calls to Jordan and had they not changed their mind about their testimony prior to trial, I may have considered an alternative strategy. I discussed strategy with Petitioner and Petitioner made the final decision about testifying and his defense.
>
> 27. Witnesses supporting Petitioner's defense were available as needed. Subpoenas were not necessary. Witnesses were not called to establish Petitioner's bridal search or Jordan travels in accordance with Petitioner's instructions during trial. . . . .

Ayers Decl. ¶¶ 10-14, 22 (partial), 23 (partial), 27; Gov.'s Stmt. of Material Facts ¶ 10 (quoting excerpt from Ayers Decl. ¶ 22); 11 (quoting excerpt from Ayers Decl. ¶ 14); 12 (quoting excerpt from Ayers Decl. ¶ 22); 13 (quoting excerpt from Ayers Decl. ¶ 27).

Petitioner has not adduced any evidence contradicting these statements by Ayers and, as noted, has admitted to those included in the government's statement of material facts by not responding to it. In particular, petitioner has not refuted Ayers' statement that petitioner withheld

information from him despite his request for it. Petitioner therefore finds himself attacking his attorney for not conducting a sufficiently thorough investigation when he himself was impeding it. In any event, the strategic decisions made by Ayers are entitled to deference.

In sum, for this and the other reasons stated, petitioner's challenges to the sufficiency of Ayers' investigation fails to satisfy the performance prong of *Strickland* and is subject to denial pursuant to Rule 56 in the alternative to dismissal pursuant to Rule 12(b)(6) for failure to satisfy the prejudice prong.[23]

II. CLAIM 2—*GIGLIO* VIOLATION

A. Applicable Law

"The Due Process Clause requires the prosecution to disclose upon request evidence that is favorable to the defense and material to guilt or punishment," *United States v. Higgs*, 663 F.3d 726, 734-35 (4th Cir. 2011), on the following terms:

> Evidence is favorable if it is exculpatory, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or if it may be used for impeachment, *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). The government breaches its duty if it fails to produce evidence that it is obligated to turn over to the defense . . . . A failure to disclose violates due process only if the evidence in question (1) is favorable to the defendant because it is either exculpatory or impeaching; (2) was suppressed by the government; and (3) is material in that its

[23] Ayers states in his declaration that after Daniel Boyd and his co-defendant sons (Dylan and Zakariya), unexpectedly to all counsel, denied having entered into a specific conspiracy with petitioner, Ayers and petitioner agreed to change trial strategy to concentrate on freedom of speech and religion. Ayers Decl. ¶¶ 16-18, 23; Gov.'s Stmt. of Material Facts ¶¶ 8-9. Petitioner argues that Ayers thereby adopted the "legally indefensible strategy of arguing the First Amendment as a defense" in contravention of the court's order on defendants' motion in limine (12 Jul. 2011 Ord. (D.E. 1222) 8-9) and jury instructions (Trial Day 16 Tr. (12 Oct. 2011; D.E. 2035) 25:21 to 26:9). But in its order in limine, the court did not approve the government's request for a directive "prohibiting defendants from arguing to the jury . . . that what the government contends is defendants' unlawful conduct is protected by the First Amendment." 12 July 2011 Ord. 8. Instead, the order recognized that, while there is no First Amendment defense to the crimes charged against defendants, defendants could permissibly challenge what conduct the government contends is unlawful. *Id.* at 9. Similarly, in its instructions to the jury, the court noted the First Amendment rights to freedom of speech and religion, as well as assembly, but also admonished that the First Amendment was not a defense to the crimes charged. Trial Day 16 Tr. (D.E. 2035) 25:21 to 26:9. In his closing argument, Ayers towed the line drawn by the court, contending without objection or intervention by the court that as result of petitioner exercising his right to freedom of speech about his religion the government was asking the jury to find him guilty of the crimes charged. *See* Trial Day 15 Tr. (D.E. 2034 & 2217-11) 159:11 to 161:23. Petitioner's contention that Ayers' approach to the First Amendment was legally deficient is meritless.

> suppression prejudiced the defendant. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999); *Vinson v. True*, 436 F.3d 412, 420 (4th Cir. 2006). Undisclosed evidence is material when its cumulative effect is such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks and citation omitted). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 434, 115 S. Ct. 1555.

United States v. Sterling, 724 F.3d 482, 511 (4th Cir. 2013). More specifically, "[a] reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine [ ] confidence in the outcome of the trial." *United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013) (internal quotation marks omitted; alteration original) (quoting *Smith v. Cain*, 556 U.S. 73, 75 (2012) (quoting *Kyles*, 514 U.S. at 434)).

B. Analysis

Petitioner contends that the government violated *Giglio* by not producing over 600 pages of documents that could have been used to impeach Kohlmann on the basis of bias ("Kohlmann Information"). Pet.'s § 2255 Mot. 5-6; Pet.'s Mem. 24-26; Pet.'s Resp. 16-18. *Contra* Gov.'s Mem. 17-23. The documents are classified, and petitioner's current counsel has not reviewed them. However, petitioner has filed a declaration by an attorney who has reviewed the Kohlmann Information as defense counsel in other cases outside this district and believes it constitutes *Giglio* material essential to cross-examination of Kohlmann in this case. *See* Joshua L. Dratel ("Dratel") Decl. (D.E. 2217-32). Petitioner does not contend that the government attorneys handling this case knew of the Kohlmann Information prior to its disclosure by the government in July 2014 in another case (*United States v. Ahmad*, No. 3:04CR301 (JCH) (D. Conn.)). *See* Pet.'s Mem. 25 & n.53; Dratel Decl. (D.E. 2217-32) ¶ 11. Petitioner's current counsel requests that the court schedule conferences under 28 U.S.C. § 2255(b) and 18 U.S.C. App. 3 § 2; order disclosure of the

Kohlmann Information to him; allow further discovery as warranted; and grant petitioner leave to file a classified memorandum on the *Giglio* claim. The government has filed with the classified information security officer a classified appendix containing a copy of the Kohlmann Information and a discussion of it (*see* D.E. 2239) and has publicly filed with the court a redacted version of such discussion (*see* D.E. 2240). *See* Gov.'s Mem. 23 & n.12.

As previously discussed, because of the weight of the other evidence against petitioner and the limits placed by the court on Kohlmann's testimony, the court found that petitioner's counsel's decision not to cross-examine Kohlmann did not satisfy the prejudice prong of *Strickland* when considered pursuant to Rule 12(b)(6). For the same reasons, the court finds that petitioner has not shown that the Kohlmann Information is material—that is, that there is a reasonable probability that had Kohlmann been impeached as petitioner posits with the Kohlmann Information the result of the trial would have been different. *See Sterling*, 724 F.3d at 511. In other words, petitioner has not shown that the likelihood of a different result was great enough to undermine confidence in the outcome of the trial. *See Bartko*, 728 F.3d at 340. Petitioner's *Giglio* claim should accordingly be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). In light of this recommended disposition, review of the Kohlmann Information and the government's description of it is moot, and the court has not undertaken it.

III. CLAIM 3—IMPROPER ADMISSION OF GOVERNMENT EXPERT KOHLMANN'S TESTIMONY

In claim 3, petitioner challenges the admission of the testimony of Kohlmann on the ground that it amounted to junk science. § 2255 Mot. 6-8; Pet.'s Mem. 2 n.6. *Contra* Gov.'s Mem. 24-25. Citing due process, petitioner appears to be contending that Kohlmann's testimony failed to meet the reliability requirements for admission under Fed. R. Evid. 702, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *Daubert*. Petitioner, though, acknowledges in his motion

that he raised this issue in his appeal. § 2255 Mot. 7 ¶ (b)(1). The Fourth Circuit rejected it. *Hassan*, 742 F.3d at 130-31. Petitioner is therefore procedurally barred from asserting this claim. Absent a change in the law, a defendant cannot relitigate in a collateral proceeding issues resolved in a direct appeal. *United States v. Roane*, 378 F.3d 382, 396 n.7 (4th Cir. 2004); *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curiam). While petitioner appears to contend that unspecified new evidence justifies his reassertion of this claim (*see* § 2255 Mot. 7 ¶ (b)(2)), he does not identify any change in applicable law. Counsel for petitioner acknowledges in his memorandum that this claim is procedurally barred. Pet.'s Mem. 2 n.6; 18 n.40.[24] Claim 3 should accordingly be dismissed pursuant to Rule 12(b)(6).

IV. CLAIM 4—ACTUAL INNOCENCE

In claim 4, petitioner contends that he is actually innocent. § 2255 Mot. 8-9; Pet.'s Mem. 2. n.6. *Contra* Gov.'s Mem. 25. Petitioner indicates in his § 2255 motion that he raised this issue on appeal. § 2255 Mot. 8 ¶ (b)(1). But he also indicates that he did not raise the issue on appeal and that it is based on new evidence. *Id.* at 8 ¶ (b)(2). The facts petitioner cites in support of this claim are potential witness testimony regarding his activities on his 2006 trip to Jordan; this trip

[24] Notwithstanding this admission, petitioner's counsel argues elsewhere that the government is barred from arguing procedural defaults because it did not timely file an answer to petitioner's § 2255 motion is meritless. *See* Pet.'s Resp. 20. The case upon which petitioner relies is from another circuit and is therefore not binding authority in this case; concerns the issue of waiver of a defense in a different context than here, namely, waiver of the qualified immunity defense in an action under 42 U.S.C. § 1983 based on its assertion in a post-answer dismissal motion rather than in a pre-answer dismissal motion that was denied; and finding there to have been no waiver, does not clearly support the proposition for which petitioner cites it. *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994). More fundamentally, the premise of petitioner's contention that the government has acted tardily is unfounded. In its initial order on petitioner's motion, the court allowed the government 40 days to respond. 5 Oct. 2015 Ord. (D.E. 2209). The court thereafter extended the deadline to 12 May 2016 pursuant to three orders (2216, 2223, 2230 ("Extension Orders")) the government sought without objection by petitioner (*see* D.E. 2215 ¶ 4; 2222 ¶ 4; 2229 ¶ 5). The government timely filed its motion to dismiss and alternative motion for summary judgment on the date due, 12 May 2016. Pursuant to the court's orders, the government could properly file its motion in lieu of an answer. *See* 5 Oct. 2015 Ord. (D.E. 2209) (directing the government "to file an Answer pursuant to Rule 5, [§ 2255 Rules], or to make such other response as appropriate" to petitioner's § 2255 motion); Extension Ords. (allowing the government additional time in which "to respond" to petitioner's § 2255 motion (D.E. 2216) or "to file a response or other appropriate motion in response to" petitioner's § 2255 motion (D.E. 2223 & 2230)); *see also* Rule 12, § 2255 Rules (providing that Federal Rules of Civil Procedure apply to the extent not inconsistent with any statutory provision or the § 2255 Rules).

as the principal difference accounting for his conviction on Count Two and Hassan's acquittal on that count; and Daniel Boyd's purported propensity to lie. *Id.* at 8 ¶ (a).

In his memorandum, petitioner's current counsel states that he is not pursuing this claim. *See* Pet.'s Mem. 2 n.6. The claim has therefore been abandoned and is subject to dismissal under Rule 12(b)(6). Irrespective of this ground for dismissal, the claim is also subject to dismissal pursuant to Rule 12(b)(6) as procedurally barred.

Specifically, to the extent that petitioner was contending that he did raise the claim of actual innocence on appeal, he appeared to be alluding to his challenge to the sufficiency of the evidence to support his convictions. The Fourth Circuit rejected this contention. *Hassan*, 742 F.3d at 140-42. Petitioner has not shown a change in the law relating to this claim. This claim, construed as having been raised on appeal, is therefore procedurally barred and subject to dismissal on this ground pursuant to Rule 12(b)(6). *Roane*, 378 F.3d at 396 n.7; *Boeckenhaupt*, 537 F.2d at 1183.

Alternatively, to the extent that petitioner was arguing that the claim of actual innocence could have been, but was not, asserted in the direct appeal, it is again procedurally barred. A defendant who brings a direct appeal cannot raise in a collateral proceeding issues that he could have, but did not, raise in the appeal unless he can show cause and prejudice, or actual innocence. *United States v. Pettiford*, 612 F.3d 270, 280 (2004) (citing *Dretke v. Haley*, 541 U.S. 386, 393 (2004)). The existence of cause must turn on something external to the defense, such as ineffective assistance of counsel. *Id.* (citing *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999)). To show prejudice on a claim of failure to raise issues on appeal, "a petitioner must establish 'a reasonable probability . . . he would have prevailed' on his appeal but for his counsel's unreasonable failure to raise an issue." *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015)

(quoting *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000)). Actual innocence must be established by clear and convincing evidence. *Mikalajunas*, 186 F.3d at 493.

For the reasons previously discussed, petitioner has failed to show a reasonable probability that he would have prevailed on his appeal but for the issue of the potential testimony of the various witnesses regarding his 2006 trip to Jordan not having been raised. Nor has he made the requisite showing as to the credibility of Daniel Boyd, which was challenged at trial by, among other means, cross-examination. *See* Trial Day 7 Tr. (D.E. 1751 & 2217-3) 219:25 to 271:16; Trial Day 8 Tr. (D.E. 1774 & 2217-10) 34:19 to 51:22. As to actual innocence, based on the strength of the evidence against him, petitioner has not shown it by clear and convincing evidence. Claim 4, construed as not having been raised on appeal, is therefore also subject to dismissal pursuant to Rule 12(b)(6).

V. CLAIM 5—GOVERNMENT MISCONDUCT

In claim 5, petitioner alleges that the "government threatened witnesses if they cooperated with my defense team that charges could be levied against them as well." § 2255 Mot. 16; Pet.'s Resp. 20. *Contra* Gov.'s Mem. 25-26. Petitioner alleges no facts in support of this allegation. It should accordingly be dismissed as impermissibly conclusory pursuant to Rule 12(b)(6).

The claim is also procedurally barred. As noted, a defendant who brings a direct appeal cannot raise in a collateral proceeding issues that he could have, but did not, raise in the appeal unless he can show cause and prejudice, or actual innocence. *Pettiford*, 612 F.3d at 280. Petitioner did not raise this claim in his direct appeal. Although petitioner cites as cause new evidence and his attorney's failure to assert the claim, he alleges no facts in support of these allegations, which therefore fail for vagueness. Procedural default therefore provides an independent basis for dismissal pursuant to Rule 12(b)(6) of petitioner's claim of government misconduct.

CONCLUSION

For the reasons and on the terms set forth above, IT IS RECOMMENDED that the government's motion (D.E. 2235) to dismiss or, in the alternative, for summary judgment be ALLOWED; that petitioner's § 2255 motion (D.E. 2207) be DISMISSED in its entirety pursuant to Rule 12(b)(6); and, alternatively, that certain claims also be DENIED pursuant to Rule 56.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on each of the parties or, if represented, their counsel. Each party shall have until 4 January 2018 to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. *See, e.g.*, 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b), E.D.N.C.

If a party does not file written objections to the Memorandum and Recommendation by the foregoing deadline, the party will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, the party's failure to file written objections by the foregoing deadline will bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

Any responses to objections shall be filed within 14 days after the filing of objections.

SO ORDERED, this 21st day of December 2017.

James E. Gates
United States Magistrate Judge