No. 21-

IN THE
SUPREME COURT OF THE UNITED STATES

RAFIQ SABIR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Could reasonable jurists debate whether the district court abused its discretion by denying as untimely Petitioner's motion to amend to add a *Brady v. Maryland* claim when government suppression was the reason for the earlier unavailability of the exculpatory evidence at issue?

2. Where a key factual dispute at trial was if Petitioner understood Arabic words spoken during a recorded conversation with an undercover agent, could reasonable jurists debate whether trial counsel provided ineffective assistance by failing to consult or retain an Arabic language expert to opine on the recording and government's translation?

PARTIES TO THE PROCEEDINGS BELOW

This Petition arises from a habeas corpus proceeding under 28 U.S.C. § 2255, where Petitioner Rafiq Sabir was the petitioner before the United States District Court for the Southern District of New York, as well as the appellant and movant before the United States Court of Appeals for the Second Circuit. Respondent United States of America was the respondent before the district court and the appellee before the court of appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

RELATED CASES

This Petition arises from the following habeas corpus proceedings in the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit:

- *Sabir v. United States*, No. 20-4141, U.S. Court of Appeals for the Second Circuit. Judgment entered May 5, 2021.

- *Sabir v. United States*, No. 12-cv-8937, U.S. District Court for the Southern District of New York. Judgment entered Oct. 16, 2020.

This Petition relates to Petitioner's criminal trial and conviction before the United States District Court for the Southern District of New York and direct appeal to the United States Court of Appeals for the Second Circuit:

- *United States v. Farhane*, Nos. 07-1968-cr (L), 07-5531-cr (CON), 634 F.3d 127, U.S. Court of Appeals for the Second Circuit. Judgment entered Feb. 4, 2011.

- *United States v. Sabir*, No. 1:05-cr-00673-LAP, U.S. District Court for the Southern District of New York. Sentenced Nov. 28, 2007.

Petitioner's case does not directly relate to any other proceedings in the federal trial or appellate courts.

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PETITION FOR A WRIT OF CERTIORARI

Rafiq Sabir respectfully petitions for a writ of certiorari to review the Order of the United States Court of Appeals for the Second Circuit.

OPINION AND ORDER BELOW

On May 5, 2021, the Second Circuit issued an Order denying Petitioner's Motion for Issuance of a Certificate of Appealability. The Order is unpublished but available at *Sabir v. United States*, No. 20-4141, 2021 U.S. App. LEXIS 18034 (2d Cir. May 5, 2021). It is attached as Appendix A.

On October 16, 2020, the district court issued an Order denying Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence and denying his Motion for Leave to File an Amended § 2255 Petition. The Order is unpublished but available at *Sabir v. United States*, No. 12-cv-8937, 2020 U.S. Dist. LEXIS 192391 (S.D.N.Y. Oct. 16, 2020). It is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over Petitioner's habeas motion under 28 U.S.C. §§ 2241 and 2255. Under 28 U.S.C. § 2253, the Second Circuit had jurisdiction over uncertified issues presented in Petitioner's Motion for Issuance of a Certificate of Appealability. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This Petition is timely submitted. The Second Circuit entered its Order on May 5, 2021. This Court's July 19, 2021 Order provides that for any case in which the judgment or order was entered between March 19, 2020 and July 19, 2021, the deadline to petition for a writ of certiorari extended to 150 days from the date of the

lower court's judgment or order. Petitioner files this Petition on September 28, 2021, within 150 days of the Second Circuit's Order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the U.S. Constitution:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Title 28 of the U.S. Code § 2255:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

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

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(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Title 28 of the U.S. Code § 2253(c):

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. The FBI's Undercover Investigation

Dr. Sabir is a Columbia University-educated physician who was born and raised in Harlem, New York.[1] Dr. Sabir is not of Arab descent and was not raised in the Muslim faith. He converted to Islam as an adult. In the early 2000s, he moved his family from New York to Florida and, around that same time, completed a six-month contract with a hospital while temporarily living on an expat compound in Saudi Arabia.

This case started not with the FBI's investigation of Dr. Sabir, but of his friend in New York, Tarik Shah. In 2003, Shah met a man named Saeed Torres. The two discussed assistance that Shah could give to Torres' "friend," Ali Soufan. Unbeknownst to Shah, Torres was an FBI informant and Soufan an undercover FBI agent posing as an al Qaeda recruiter. Soufan is a native Arabic speaker, born in Lebanon. During their conversations, Shah told Torres and Soufan (together, "the agents") that he was willing to provide martial arts training to al Qaeda. And he represented to them that Dr. Sabir was willing to provide medical assistance to fighters. Although the agents encouraged Shah to set up meetings with Dr. Sabir in Florida to discuss al Qaeda, Shah did not tell Dr. Sabir about his representations or schedule any meetings.

The agents did not encounter Dr. Sabir until May 20, 2005, when they spontaneously visited Shah's apartment and secretly recorded the conversation that

[1] Dr. Sabir's birth name is Rene Wright.

ensued. At the apartment, Soufan introduced himself and initially spoke to Dr. Sabir in Arabic. After some confusion, Dr. Sabir indicated that he "speaks Arabic little" and Soufan translated what he had just said in Arabic into English. Soufan continued to speak in Arabic and then translate for Dr. Sabir throughout the visit. At one point, Dr. Sabir asked Soufan how to pronounce the Arabic word for "car."

Toward the end of the visit, Soufan asked Dr. Sabir whether he was familiar with the *bayat*. Dr. Sabir answered yes and discussed his understanding of its religious and cultural significance. Historically in Islam, *bayah* or "*bayat*" was a pledge to obey God and the Prophet Muhammad to ensure peaceful rule.[2] Soufan proceeded to give the *bayat* in Arabic and asked Dr. Sabir to repeat after him. Dr. Sabir attempted to follow along. Although Soufan used the phrase "*al Qaidah*" (meaning al Qaeda), he employed a pronunciation and dialect with which Dr. Sabir was unfamiliar.[3] Before the end of the visit, at Soufan's request, Dr. Sabir wrote down his phone number, allegedly "in code."

While there are hours of recorded conversations with Shah, there are no other recordings with Dr. Sabir.

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[2] *See* Wan Mohd Yusof Wan Chik et al., *A Comparative Analysis of Bay'ah during the Time of the Prophet S.A.W.*, Vol. 7, No. 8 INT'L J. OF ACAD. RSCH. IN BUS. & SOC. SCIS. 325 (2017) (discussing the history of the *bayat*).

[3] During the visit, Soufan told Dr. Sabir he is from the "Levant region," a geographical region "characterized by similar linguistic, cultural, and religious traits." *Where is the Levant?*, WORLD ATLAS, https://www.worldatlas.com/articles/where-is-the-levant.html (last visited Sept. 10, 2021). Lebanon is part of this region. Saudi Arabia is not. The primary language spoken in the region is known as "Levantine Arabic or Mediterranean Arabic." *Id*.

B. The Criminal Proceedings

The government charged Dr. Sabir and Shah with two counts: conspiring to and attempting to provide material support to al Qaeda in violation of 18 U.S.C. § 2339B.[4] Central to the government's indictment were (1) Shah's recorded representations to the agents that he and Dr. Sabir discussed supporting al Qaeda and (2) the *bayat* the government claimed Dr. Sabir understood and took in Arabic.

Shah admits to prosecutors that Dr. Sabir was not involved. In mid-2005, Shah agreed to cooperate with the government shortly after his arrest. He told prosecutors at a proffer meeting that Dr. Sabir did not know about Shah's conversations with the agents and that Dr. Sabir never agreed with Shah to assist al Qaeda. Yet the 302-form prepared by agents after the proffer meeting suggested that Shah told the government Dr. Sabir wanted to assist al Qaeda. In other words, the 302-form not only omitted Shah's exculpatory statement, but may have substituted it with an incriminating one. Shah pleaded guilty to conspiracy and stated in his allocution that he conspired "with others" to provide material support in the form of martial arts training. The government did not require Shah to testify as a condition of his plea, nor did it later call him as a witness at trial. At no time did the government

[4] Title 18 U.S.C. § 2339B imposes criminal liability on any person who "knowingly provides material support or resources to a foreign terrorist organization [FTO], or attempts or conspires to do so." § 2339B(a)(1). For attempt, the government must prove that the defendant (1) intended to provide material support to an FTO, (2) intended to work under its direction and control, (3) knew the group was an FTO, and (4) performed a substantial step toward committing that crime. *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005). For conspiracy, the government must prove that the defendant (1) entered into an agreement to provide material support to an FTO with knowledge that the group was an FTO, (2) had knowledge of and participation in the conspiracy, and (3) committed an overt act in furtherance thereof. *United States v. Moalin*, 973 F.3d 977, 1006 (9th Cir. 2020).

disclose that Shah admitted during his proffer that he did not talk to Dr. Sabir about the agents or about assisting al Qaeda.

Trial counsel does not challenge the government's Arabic translation. Dr. Sabir hired Edward D. Wilford to serve as his lead defense counsel, with Natali J.H. Todd as co-counsel. Dr. Sabir maintained his innocence throughout the proceedings. He informed counsel that he disputed the Arabic-to-English translated transcript offered by the government, in part because the transcript used the word "al Qaeda" when Dr. Sabir believed Soufan said the word "*al aqeedah*," which has a similar pronunciation but means "unwavering faith" in God.[5] Further, he urged his counsel to challenge the transcript because it did not reflect how Dr. Sabir heard the words, pronounced the words, or understood the words. Although both lead and co-counsel assured Dr. Sabir that they would consult with an Arabic language expert to address these issues, they never did. And they never retained an expert to opine on whether the recording showed Dr. Sabir understood Arabic or the al Qaeda references.[6] Instead, counsel ultimately asked Dr. Sabir to sign a testimonial stipulation that if called as a witness, the government's translator would testify the transcript was accurate.

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[5] A.F. Djunaidi & Siska Sulistyorini, *The Actualization of Aqeeda in Professional Work Ethos of Academic World*, 99TH INT'L INST. OF ENG'RS & RESEARCHERS INT'L CONF., Mecca, Saudi Arabia at 27 (Mar. 23-24, 2017).

[6] Trial counsel did obtain an expert in Islamic and Middle Eastern Studies, Dr. Bernard Haykel. Dr. Haykel defined certain religious terms (e.g., *sharia*, *hajj*, *hadith*, and *bayat*) to provide context for his opinions about Islam and al Qaeda. Dr. Haykel did not appear as a language expert or translator. He *did not* opine on whether Dr. Sabir correctly pronounced or appeared to understand the words in the May 2005 recording—the ultimate issue at trial.

Dr. Sabir's proficiency in Arabic was a key factual issue at trial. He testified that he was an American convert. He testified that because he had limited Arabic proficiency and difficulty pronouncing Arabic words, he did not understand critical parts of the conversation with Soufan. And he testified that he believed he was giving a traditional religious *bayat*, not an oath of allegiance to al Qaeda. Meanwhile, Soufan testified that he believed Dr. Sabir understood Arabic. Dr. Sabir's counsel had no expert to corroborate Dr. Sabir's testimony or to challenge Soufan.

When Dr. Sabir's counsel sought to call Shah as a witness to rebut the government's allegations, Shah's attorney indicated that if called he would invoke the Fifth Amendment privilege against self-incrimination.

The jury convicted Dr. Sabir on both counts.

The district judge concludes that Dr. Sabir perjured himself. At sentencing, the government argued that Dr. Sabir committed perjury when he testified that he spoke little Arabic and did not know the oath was to al Qaeda. Gov't Sentencing Mem. 9-15, ECF No. 174, *United States v. Sabir*, No. 1:05-cr-00673-LAP. Thus, in addition to the terrorism enhancement, the government requested a two-level enhancement for obstruction of justice. In total, the government sought an adjusted offense level of 42, Criminal History Category of VI, and consecutive sentences for each count. The judge granted the government's requests. In support of the obstruction enhancement, the judge concluded that Dr. Sabir's testimony regarding whether he understood Arabic was "important" to the jury's determination

about whether he took the *bayat* to al Qaeda. Sentencing Tr. 8:20-23, *United States v. Sabir*, No. 1:05-cr-00673-LAP.

Applying the enhancements, the maximum possible sentence was 360 months total or 180 months for each offense. *See* U.S.S.G. § 3A1.4 (increasing offense level to level 32 and criminal history category to Category VI for terrorism); U.S.S.G. § 3C1.1 (increasing the offense level by two levels for obstruction). The judge sentenced Dr. Sabir to 300 months. His sentences for conspiracy and attempt run consecutively.

Dr. Sabir appeals the conviction arguing insufficient evidence. Dr. Sabir argued on direct appeal to the Second Circuit, among other things, that the evidence was insufficient to prove conspiracy or attempt. *See United States v. Farhane*, 634 F.3d 127, 132 (2d Cir. 2011) (App. C). A majority on the panel at the court of appeals disagreed and affirmed Dr. Sabir's convictions. The majority concluded that Shah's recordings with the agents fell under the co-conspirator exception to the hearsay rule. *Id.* at 161. According to the court, those recordings and the May 2005 recording were sufficient to prove Shah and Dr. Sabir conspired to provide material support to an FTO. *Id.* at 144-45. Next, as to the attempt conviction, the majority decided that the *bayat* was more than association or "mere membership" in al Qaeda: "Here there is no question that Sabir was providing himself to work under the direction and control of al Qaeda – the jury heard him solemnly swear to do so [on the recording]." *Id.* at 152. As a result, the court held that Dr. Sabir's statements in the May 2005 recording were sufficient evidence of a substantial step toward materially supporting an FTO. *Id.*

In his dissent, Chief District Judge Raymond J. Dearie (of the E.D.N.Y., sitting by designation) noted that "[t]he only evidence tending to show such control is the oath. . . . At best, the oath reflects an agreement and intention to follow directions, but mere intention to commit a specified crime does not amount to an attempt." *Id.* at 159 (Dearie, J., dissenting) (arguing that the oath may be sufficient to support a conspiracy but is insufficient to prove an attempt) (internal quotation omitted). As to Dr. Sabir's attempt conviction, Judge Dearie lamented, "a man stands guilty, and severely punished, for an offense that he did not commit." *Id.* at 159-60.

C. The Habeas Proceedings

Dr. Sabir files the Habeas Motion alleging ineffective assistance. On December 6, 2012, Dr. Sabir filed his *pro se* Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. Dr. Sabir asserted, among other things, that his counsel was ineffective for (a) stipulating to the government's Arabic-to-English transcript when Dr. Sabir disputed the translation and (b) failing to obtain an Arabic language expert to testify regarding Dr. Sabir's lack of Arabic proficiency. The motion inexplicably lingered for over three years.[7]

On September 14, 2016, habeas counsel appeared *pro hac vice*. Habeas counsel consulted Charles P. Schmitz, Ph.D., an Arabic language expert.[8] Dr. Schmitz

[7] During this time, Dr. Sabir's lead counsel died. Ms. Todd, co-counsel at Dr. Sabir's trial and on appeal, is still practicing law in New York.

[8] Dr. Schmitz is fluent in Arabic. He studied and then taught the Arabic language in the 1990s. He served as an Arabic translator with the U.S. Office of Military Commissions in Guantanamo Bay, Cuba from 2004 to 2011. He has a Ph.D. in geography with a concentration on Middle Eastern societies.

assessed the May 2005 recording and opined in a sworn affidavit that it was clear Dr. Sabir was not fluent in Arabic and did not understand the oath was to al Qaeda:

> I can confidently state that Dr. Sabir's capabilities in Arabic are extremely limited. Dr. Sabir's Arabic is that of a beginning student who recognizes a few words and can put together very simple sentences, but cannot comprehend, much less converse in, ordinary conversation. He knows some basic religious greetings and expressions, but his conversational Arabic is extremely limited.
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> ***
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> When Dr. Sabir makes the oath, it is clear he does not understand what he is saying in Arabic because he cannot pronounce the words. He stumbles significantly in trying to repeat the Arabic words of the oath. Of course, the terms used in the oath are not words used in daily conversation, so Dr. Sabir has little chance of even recognizing the words, much less their meaning. The last word of the oath is al-Qaeda, meaning the organization, but Dr. Sabir appears not to recognize the term because he is trying to replicate the pronunciation of the native speaker [Soufan]. . . .

Aff. of C. Schmitz, Exh. B to Mem. of Law at ¶¶ 9, 12, ECF No. 45, *Sabir v. United States*, No. 1:12-cv-08937-LAP. Dr. Sabir attached and offered the Schmitz Affidavit in his May 22, 2017 Memorandum of Law and requested an evidentiary hearing.

Dr. Sabir moves to amend to add a* Brady *claim. Habeas counsel also promptly contacted Shah, the alleged co-conspirator. Shah signed a declaration in February 2017 swearing that during his proffer meeting twelve years' prior, he told the government that Dr. Sabir was not involved:

> It was during this Florida meeting that Soufan again stated he wanted me to train "brothers" overseas. At that time I brought up Sabir. I knew that training in martial arts would naturally lead to injuries and believed that Sabir would be able to treat these injuries. I had not mentioned this to Sabir, nor did Sabir know that I was bringing him up to Soufan. . . .

> Throughout my entire relationship with Ali Soufan, Sabir had no knowledge of Soufan or my relationship with Soufan. We never discussed Soufan or the topic of my conversations with Soufan.
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> ***
>
> About a month after my arrest, I had a meeting with the New York Antiterrorism Task Force where I was asked to testify against Sabir. I refused and attempted to vindicate Sabir. After this meeting, I was not approached to testify against Sabir again.

Aff. of T. Shah, Exh. A to Mem. of Law at ¶¶ 8-9, 12, ECF No. 44, *Sabir v. United States*, No. 1:12-cv-08937-LAP. To be sure, the Shah Affidavit does not recant earlier testimony. It provides evidence that Shah made exculpatory statements to the government before Dr. Sabir's trial and before his own risk of prosecution passed. On August 25, 2017, Dr. Sabir filed a Motion for Leave to Amend seeking to add a claim under *Brady v. Maryland* based on the discovery that the government may have suppressed Shah's proffer statement. The government denied in its pleadings that it suppressed the statement, but never submitted any affidavit or other evidence in support of its denial. *See* Mem. in Opp'n to Def. Rafiq Sabir's Mot. to Am. 28 U.S.C. § 2255 Mot. at 15, ECF No. 56, *Sabir v. United States*, No. 1:12-cv-08937-LAP.

The district court denies Dr. Sabir's motions. On October 16, 2020, the district court denied Dr. Sabir's Habeas Motion and Motion for Leave to Amend on both merits and procedural grounds. At the outset, the district court stated, "[t]he culmination of Mr. Sabir and Shah's conspiracy to provide material support to al Qaeda was a meeting with Ali [Soufan], the undercover agent posing as an al Qaeda recruiter, in which Mr. Sabir swore *bayat*—an oath of allegiance—to al Qaeda and Osama bin Laden." App. B at 3a. Just like during trial, at sentencing, and on direct

appeal, the case against Dr. Sabir again turned on whether he took the *bayat* to al Qaeda on May 20, 2005.

The district court rejected Dr. Sabir's ineffective assistance claim but only addressed the stipulation issue, concluding that the stipulation was merely testimonial and counsel's strategic decisions are "virtually unchallengeable." *Id*. at 5. It did not explain its reasoning for rejecting Dr. Sabir's argument that the failure to obtain an Arabic language expert was deficient. Nor did it acknowledge the Schmitz Affidavit, which related back to the original Habeas Motion. *Id*.

The district court also concluded that Dr. Sabir's *Brady* claim was time-barred by the one-year statute of limitations because it did not relate back and because the evidence in the Shah Affidavit was "newly available," not "newly discovered" under Federal Rule of Civil Procedure 33. *Id.* at 12-13. The judge did not address Dr. Sabir's allegation that his habeas counsel obtained the Shah Affidavit years later only because the government suppressed evidence before and at trial. Last, the district court decided that the Shah Affidavit itself was entitled to little weight because, according to the court, it constituted a "recanting affidavit" "submitted long after the threat of further prosecution [] passed." App. B at 14a.

The district court declined to hold an evidentiary hearing on any claim and declined to issue a certificate of appealability (COA). Dr. Sabir filed a timely notice of appeal on December 14, 2020.

Dr. Sabir requests a COA. On January 6, 2021, Dr. Sabir moved for issuance of a COA from the Second Circuit. The court of appeals denied Dr. Sabir's motion,

stating that "Appellant has not 'made a substantial showing of the denial of a constitutional right.'" App. A.

This petition follows.

REASONS FOR GRANTING THE PETITION

"There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). The district court refused to fulfill this duty and by failing to issue a COA, the Second Circuit looked the other way.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended the federal habeas statute, defendants must obtain a COA as a jurisdictional prerequisite to appeal the denial of a habeas petition. 28 U.S.C. § 2253(c). A COA should issue so long as the petitioner makes a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This standard is undemanding. Courts of appeals must ask "whether the issues presented were adequate to deserve encouragement to proceed further." *Id.* They may not determine the merits of the appeal or whether it will ultimately succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). Rather, courts should issue a COA where the underlying § 2255 motion presents a substantial constitutional question and a reasonable jurist might find the ultimate ground of the decision to be debatable. *Id.* at 336. This Court explained in *Miller-El* that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. The same standard applies when the district court denies a habeas petition on procedural grounds. *Slack*, 529 U.S. at 484. In that instance, the petitioner must also show that

reasonable jurists could find it debatable whether the district court's procedural ruling was correct. *Id.*

Reasonable jurists could disagree with the district court's resolution of Dr. Sabir's Habeas Motion and Motion for Leave to Amend. Because the Questions Presented apply to different counts—conspiracy and attempt—and Dr. Sabir was sentenced to consecutive terms for those counts, this Court's review of either question could impact his sentence.[9] *See* Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 6.25(h) (11th ed. 2019) (noting that this Court frequently limits its grant of certiorari to certain questions, eliminating review of others). As a result, this Court's intervention is urgently needed to remedy the court of appeals' wholesale denial of a COA.

I. REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED DR. SABIR'S MOTION TO AMEND TO ADD A *BRADY* CLAIM.

The court of appeals failed to apply this Court's standard for a COA to whether the district court abused its discretion by denying Dr. Sabir's request to amend to add a claim under *Brady v. Maryland*, 373 U.S. 83, 86 (1963). Federal Rule of Civil Procedure 15 requires courts to "freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2); 28 U.S.C. § 2242 (A habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions."). AEDPA imposes a one-year statute of limitations on federal habeas petitions, and amendments thereto, which runs from "the date on which the facts supporting the

[9] Dr. Sabir has completed approximately 14 years of his 25-year sentence.

claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). What constitutes "due diligence" depends on the petitioner's circumstances and the facts and claims at issue. *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 285 (3d Cir. 2021). "A habeas petitioner's *Brady* claim is timely under [AEDPA] so long as it is filed within one year of the date on which the petitioner has reason to believe that the prosecution may have violated its duty of disclosure." *Id.* at 293.

As discussed above, Dr. Sabir did not have reason to believe the government violated its duty of disclosure until early 2017, when habeas counsel learned that Shah made exculpatory statements to prosecutors during his proffer. *See Brady*, 373 U.S. at 84 (prosecutor suppressed co-defendant's exculpatory statement admitting that while Brady participated in the crime, he did not do the "actual killing"). Habeas counsel filed the motion to amend six months later seeking to assert a *Brady* violation and requesting an evidentiary hearing. Dr. Sabir's *Brady* claim had significant implications, first because Shah's proffer statement—had it been available before trial—would have permitted Dr. Sabir to challenge admission of the recordings under the co-conspirator hearsay exception. *See* FED. R. EVID. 801(d)(2)(E). This exception was the basis for admitting every recording between Shah (the declarant) and the agents. And even if Shah's recordings were nevertheless admitted, disclosure of Shah's proffer statement would have permitted Dr. Sabir to challenge the government's theory by questioning the agents at the proffer and confronting Soufan with the contradictory evidence. *See Giglio v. United States*, 405 U.S. 150, 154-55

(1972) (noting that the government's case "depended almost entirely on [an alleged co-conspirator's] testimony"). These possibilities undermine confidence in the outcome and demonstrate a reasonable probability of a different result. *See Smith v. Cain*, 565 U.S. 73, 75-76 (2012).

Unfortunately, it is unnecessary to consider the merits of Dr. Sabir's *Brady* claim at this stage because the district court would not even allow him to present it.[10] Reasonable jurists could debate whether the district court erred when it denied leave to amend on the grounds that Shah's proffer statement was not newly discovered evidence for purposes of the "due diligence" requirement.

A. Rule 33's Newly Discovered Evidence Standard Does Not Apply to *Brady* Claims Alleging Government Suppression of Evidence.

The district court abused its discretion in denying the motion to amend because it erroneously applied Federal Rule of Civil Procedure 33's newly discovered evidence standard to Dr. Sabir's *Brady* claim. In *United States v. Owen* and *United States v. Forbes*, the Second Circuit held that "evidence is excluded from the meaning of 'newly discovered' *under Rule 33* where (1) the defendant was aware of the evidence before or during trial, and (2) there was a legal basis for the unavailability of the evidence at trial . . . ." *Forbes*, 790 F.3d 403, 408 (2d Cir. 2015) (emphasis added). In its Order, the district court claimed to follow *Owen* and *Forbes*. App. B at 13a-14a, n.2 (quoting *Forbes*, 790 F.3d at 407 (finding that invoking the Fifth Amendment constituted a

[10] *See In re Siggers*, 615 F.3d 477, 481 (6th Cir. 2010) (considering whether the evidence, "if true, establishes a prima facie case of a *Brady* violation . . . . so as to require the district court to engage in additional analysis").

legal basis) and *Owen*, 500 F.3d 83, 91 (2d Cir. 2007) (same)). It concluded that because he asserted his innocence, Dr. Sabir was aware of the existence of the evidence reflected in the Shah Affidavit before trial, and that Shah's invocation of the Fifth Amendment was a "legal basis" for its unavailability. *Id*. This, it found, excluded the evidence from the meaning of "newly discovered." *Id*.

The district court failed to recognize the distinction between Rule 33 motions based on newly discovered evidence and *Brady* claims for government suppression of evidence. The Second Circuit in *Owen*, on the other hand, *did* recognize the distinction. It noted that a *Brady* claim the defendant raised in supplemental briefing was "irrelevant to the issue of whether [the co-conspirator's] post-trial exculpation of Owen [was] newly discovered evidence within the meaning of Rule 33." 500 F.3d at 91, n.5; *see also United States v. Helmsley*, 985 F.2d 1202, 1207 (2d Cir. 1993) (identifying an exception to the newly discovered requirement where the government engaged in prosecutorial misconduct by failing to notify the defendant of a witness's false testimony at trial). As a result, the court stated that its holding did not preclude Owen from pursuing his *Brady* claim on remand to the district court. *Owen*, 500 F.3d at 91, n.5. And in fact the district court later permitted briefing on the merits of that claim. *United States v. Owen*, No. 1:04-cr-00649-RPP-1, Owen Letter to Judge June 30, 2009, ECF No. 127 (on remand, the parties ultimately entered into a plea agreement and Owen voluntarily dismissed his *Brady* claim).

Several other circuit courts have also expressly addressed the difference between Rule 33 motions and *Brady* claims; they include the Third, Fifth, Sixth,

Ninth, Tenth, and District of Columbia Circuits. *See, e.g., Bracey*, 986 F.3d at 291-93 (noting that sister circuits agree that "[a] petitioner's failure to search for *Brady* material of which he is unaware and which he is entitled to presume is non-existent does not fall short of the diligence require[ment]") (collecting cases from the Fifth, Sixth, Ninth, and Tenth Circuits); *Lebere v. Abbott*, 732 F.3d 1224, 1234 (10th Cir. 2013) (explaining that "a *Brady* claim is grounded in the constitutional principle of due process, which is not true of a motion based on newly discovered evidence"); *Marshall v. United States*, 436 F.2d 155, 159 (D.C. Cir. 1970) ("[T]he 'due diligence' standard which ordinarily governs disposition of motions for a new trial based on alleged newly discovered evidence . . . should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction."). These decisions do not let criminal defendants off the hook—they still require a *Brady* claim to be filed within one year from the date the petitioner discovered facts leading him to believe the government suppressed exculpatory evidence. *Bracey*, 986 F.3d at 293. Reasonable jurists could therefore debate whether the district court erred in applying Rule 33's standard to Dr. Sabir's new claim under *Brady v. Maryland*.

B. Government Suppression Cannot be a "Legal Basis" for Unavailability of Evidence Under Rule 33.

Even if Rule 33's standard for newly discovered evidence could be fairly applied to *Brady* claims, the district court still erred because suppression of evidence cannot be a legal basis for the unavailability of a witness statement before trial. Here, the district court simply assumed that, like in *Owen* and *Forbes*, Shah's invocation was the reason for the unavailability of evidence in Dr. Sabir's case. This was wrong. In

Forbes, the Second Circuit explained that to decide whether evidence was newly discovered, it "considered not only whether the defendant was aware of the evidence prior to trial, but also the reason that the evidence was not available at trial." 790 F.3d at 408 (citing *Owen*, 500 F.3d at 91). The court of appeals concluded in both of those cases that because the evidence was unavailable due to a valid privilege (a legal basis), "*in those circumstances*" the evidence did not qualify as newly discovered. *Id.* (emphasis in original) (cleaned up). Significantly, *Forbes* distinguished its facts from a hypothetical situation involving no legal basis for the unavailability:

> for example, [where] a defendant on trial for a murder that he did not commit is *aware* that Witness X saw someone else pull the trigger, but cannot locate Witness X to testify to that fact at trial. The unavailability of Witness X is not law based: it is not the product of a fundamental constitutional right, but rather a matter of circumstance. If the defendant is later able to locate Witness X, provided that the other requirements for Rule 33 are satisfied, his testimony would be newly discovered within the meaning of Rule 33.

Id. at 409 (emphasis in original). As in *Forbes'* hypothetical, the invocation of a valid privilege was not the basis for the unavailability of the evidence at Dr. Sabir's trial—quite the opposite. Dr. Sabir alleged in his *Brady* claim that government suppression was the reason for the unavailability of Shah's exculpatory evidence. This is because but for the suppression, the evidence would have been available even if Shah had still invoked his Fifth Amendment privilege. Suppression of evidence is not akin to invoking a valid privilege. It is not a legal basis; it is a constitutional violation. *See Brady*, 373 U.S. at 86 (holding that nondisclosure of the co-defendant's exculpatory statement violated the Due Process Clause). The district court erred when it allowed the government to hide behind Shah's invocation of the Fifth Amendment as a "legal

basis" when prosecutors had an independent obligation to disclose Shah's proffer statement.[11] As a result, reasonable jurists could debate whether Shah's suppressed proffer statement is excluded from the meaning of "newly discovered" in Rule 33.

By denying Dr. Sabir's motion to amend, the district court failed to apply the proper standard in *Brady* claims. And the Second Circuit let that failure stand. Dr. Sabir asks this Court to review and remedy the lower courts' abdication of their Constitutional duties to carefully consider and process his claim.

II. REASONABLE JURISTS COULD DEBATE WHETHER TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBTAIN AN ARABIC LANGUAGE EXPERT ON A KEY FACTUAL DISPUTE.

The court of appeals failed to apply this Court's standard for a COA to whether the district court erred when it denied Dr. Sabir's ineffective assistance of counsel claim. Under the Sixth Amendment, a criminal defendant's conviction cannot stand if he does not receive the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show ineffective assistance, this Court requires a defendant to demonstrate (1) that counsel's performance was deficient and (2) a reasonable probability that but for counsel's errors, the result would have been different, *i.e.*, prejudice to the defendant. *Id.* at 687. The *Strickland* test necessarily involves "a case-by-case examination of the evidence" and district courts must hold an evidentiary hearing except in highly unusual circumstances. *Williams v. Taylor*, 529 U.S. 362, 391 (2000); *see also Eze v. Senkowski*, 321 F.3d 110, 136 (2d Cir. 2003)

[11] The government knew before Dr. Sabir's trial that Shah expressly corroborated Dr. Sabir's claim of innocence. It knew that Shah was not a good witness for the government and did not call him or require him to testify as part of his plea, an unusual move given his alleged status as Dr. Sabir's co-conspirator.

(discussing the importance of evidentiary hearings in ineffective assistance claims). Dr. Sabir's allegations and the Schmitz Affidavit satisfy both prongs of the *Strickland* test and called for—at a minimum—an evidentiary hearing.

A. Trial Counsel's Performance Was Deficient.

Reasonable jurists could debate whether counsel's performance was deficient by failing to consult with or call an Arabic language expert on a key factual issue and advising Dr. Sabir to sign a testimonial stipulation regarding the government's Arabic-to-English translation.

1. Trial counsel failed to investigate the government's translation or retain an Arabic language expert.

Counsel's failure to reasonably investigate the government's Arabic-to-English translation and its implications renders his decision not to obtain an expert deficient under *Strickland*. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The investigative duty identified in *Strickland* reflects the obligations of defense counsel set out in the American Bar Association Standards for Criminal Justice:

> Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter. . . . Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. . . . Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) . . . .

ABA Standards for Criminal Justice 4-4.1(c) (4th ed. 2017); *see also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("[W]e long have referred [to these ABA Standards] as guides

to determining what is reasonable."). Investigation is especially important when counsel must decide whether to retain an expert. *Lindstadt v. Keane*, 239 F.3d 191, 201-02 (2d Cir. 2001); *see also United States v. Hayat* ("*Hayat Habeas*"), No. 2:05-cr-240-GEB, 2019 U.S. Dist. LEXIS 126970, at *36 (E.D. Cal. July 30, 2019) (vacating defendant's conviction because defendant's counsel "failed to adequately search for an Arabic language expert to counter the government's Arabic language expert testimony"). In the May 2005 recording—before his arrest—Dr. Sabir told Soufan that he spoke little Arabic. He then consistently maintained before trial, during trial, and at sentencing that he was not fluent in Arabic and did not understand that the *bayat* was to al Qaeda. In the Habeas Motion, he alleged that he repeatedly informed his counsel of this fact, urged them to consult with an Arabic language expert about it, and received assurances that they would.

Trial counsel had no knowledge about the Arabic language. Dr. Sabir's counsel was entirely unfamiliar with the Arabic language. As a result, he could not make an independent determination about Dr. Sabir's understanding of Arabic words spoken in the recording and could not reasonably deem further investigation unnecessary. *See Pavel v. Hollins*, 261 F.3d 210, 224 (2d Cir. 2001) (noting that "there [was] no indication in the record that [counsel] had the education or experience necessary to assess relevant physical evidence, and to make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand"). Notwithstanding his ignorance, he did not consult with an Arabic language expert on the issue. It seems that although counsel believed Dr. Sabir was telling the

truth about his lack of Arabic proficiency, counsel performed no investigation and made no meaningful effort to corroborate Dr. Sabir's testimony. *See, e.g.*, Trial. Tr. at 57:22-23, *United States v. Sabir*, No. 1:05-cr-00673-LAP (counsel himself argued in opening statement and throughout trial that Dr. Sabir did not understand the Arabic words in the May 2005 recording).

Trial counsel's decision was neither reasonable nor strategic. The decision not to call an expert is only acceptable if based on appropriate strategic considerations. *Pavel*, 261 F.3d at 223. Here, Petitioner can discern no reasonable strategy that would justify failing to call an Arabic language expert. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.") (quoted by *Issa v. Bradshaw*, 904 F.3d 446, 461-62 (6th Cir. 2018) (explaining that "'strategic' decisions can be unreasonable depending on the circumstances and therefore deficient under *Strickland*")).

The crux of the government's case, and particularly the "under direction and control" element of the attempt charge, depended on the May 2005 recording and the discussion with Soufan surrounding the *bayat*. At trial, the case presented a credibility contest. It required the jury to decide whether to believe Soufan, who testified that Dr. Sabir understood the *bayat* was to al Qaeda, or to believe Dr. Sabir, who testified that he did not. As the Second Circuit discussed in *Pavel*, in a "credibility contest," expert testimony is the kind of "'neutral, disinterested' testimony that may well tip the scales and sway the fact-finder." 261 F.3d at 224 (quoting *Williams v.*

Washington, 59 F.3d 673, 682 (7th Cir. 1995) (noting that the excluded witnesses would have bolstered the defendant's credibility)).

Courts widely hold that a medical expert's testimony is critical in an assault case involving disputes about the victim's injuries. *See, e.g., Bell v. Miller*, 500 F.3d 149, 156-57 (2d Cir. 2007) (finding no tactical justification for failing to call a medical expert that could challenge the government's witness). And an accountant's testimony is "obvious[ly]" necessary in a complex tax fraud case involving allegations that the defendant illegally distributed funds. *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983). Likewise, a language expert's testimony is essential in a terrorism case involving disputes about whether the defendant understood allegedly incriminating Arabic words. *See United States v. Hayat*, 710 F.3d 875, 901 (9th Cir. 2013) (in a terrorism case, affirming admission of Arabic expert testimony regarding the meaning of a written supplication found in the defendant's wallet); see also *see also Hayat Habeas*, 2019 U.S. Dist. LEXIS 126970, at *36. In this case, the failure to consult with an Arabic language expert about whether Dr. Sabir understood the words spoken in the recording "cannot fairly be attributed to a strategic decision arrived at by diligent counsel." *Bell*, 500 F.3d at 157 (noting that cross examination was not a sufficient strategy to rebut the government's case) (internal quotations omitted). Counsel's failure was not just incompetent—it was also deficient under *Strickland*.

2. It was objectively unreasonable for trial counsel to advise Dr. Sabir to sign a testimonial stipulation about the government's translation.

Compounding his deficiencies, it was objectively unreasonable for trial counsel to advise Dr. Sabir to sign a testimonial stipulation because Dr. Sabir disputed the translated transcript. Circuits hold that "where [a] recorded conversation is conducted in a foreign language, an English language transcript may be submitted to permit the jury to understand and evaluate the evidence." *See, e.g.*, *United States v. Ben-Shimon*, 249 F.3d 98, 101 (2d Cir. 2001). If there is no dispute regarding the translated transcript, the parties typically sign a stipulation to that effect. *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985). But "[i]n cases where the defense and prosecution disagree as to the contents of the tape, the proper procedure is for the jury to receive transcripts of both sides' versions" to decide which, if any, to accept. *Ben-Shimon*, 249 F.3d at 101. In that instance, each side can offer evidence to support its version or to challenge the other side's version. *Cruz*, 765 F.2d at 1023. As the Seventh Circuit explained, "this procedure is not only desirable, but we believe it is the obligation of well-prepared defense counsel to attempt to facilitate the presentation of evidence and to see that true justice is rendered . . . ." *United States v. Zambrana*, 841 F.2d 1320, 1336 (7th Cir. 1988).

The government's case against Dr. Sabir did not just *include* a translated transcript, his case was *about* the words in the translated transcript. His counsel knew that Dr. Sabir adamantly disputed the government's translation of the recording and knew it was important to the government's case. But rather than object to the government's offered transcript or offer an alternative, counsel affirmatively

stipulated to it. This foreclosed any real debate about what the parties said or understood on May 20, 2005.

B. There is a Reasonable Probability That the Outcome Would Have Been Different Had the Factfinders Heard an Arabic Language Expert.

There is a reasonable probability that the result would have been different if the jury received an alternative translation or heard an expert testify that Dr. Sabir did not understand the *bayat* was to al Qaeda. That includes the verdict, sentence, and direct appeal. A "reasonable probability" is not a certainty. Rather, it is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

To sustain a claim of ineffective assistance based on failure to call an expert, the defendant should submit evidence of what an expert would have testified to at trial. *Rodela-Aguilar v. United States*, 596 F.3d 457, 462 (8th Cir. 2010); *see also Gersten v. Senkowski*, 426 F.3d 588, 615 (2d Cir. 2005) (after counsel failed to investigate the veracity of the prosecution's medical evidence, the defendant submitted contrary expert evidence on habeas suggesting that the alleged victim was lying or mistaken). Here, Dr. Sabir's habeas counsel investigated his allegations and consulted with an experienced Arabic language expert in 2017. The expert, Dr. Schmitz, opined that based on his analysis of the recording, Dr. Sabir was not fluent in Arabic and did not understand many of the Arabic words throughout the conversation and during the *bayat*.

1. There is a reasonable probability that expert testimony would have changed the verdict or direct appeal.

There is a reasonable probability that an Arabic language expert would have had a significant impact on the fact finders' and appellate court's decisions. The translated transcript was the government's principal evidence purporting to show that Dr. Sabir intended to work under the direction and control of an FTO. In his very first breath during opening statements, the prosecutor claimed that in a recording on May 20, 2005, Dr. Sabir swore an oath of allegiance called the *bayat*, committing to serve al Qaeda by providing medical services to fighters. Trial Tr. 25:23-26:24, *United States v. Sabir*, No. 1:05-cr-00673-LAP. Although this theme persisted throughout trial, the only evidence Dr. Sabir's counsel employed to combat it was the testimony of Dr. Sabir—the defendant on trial. *See Gersten*, 426 F.3d at 611-12 (concluding that counsel's decision not to call an expert precluded him from offering a persuasive argument attacking the government's theory). The fact finders, who had no independent knowledge of Arabic or the traditional *bayat*, were left to judge the credibility of the defendant verses the undercover agent and stipulated transcript. *See Hayat*, 710 F.3d 875 at 915 (Tashima, J., dissenting) (Because the jurors were unfamiliar with Islam, they "were particularly susceptible to deferring to [the government's expert testimony] not only as to the translation and meaning of the supplication, but also as to the ultimate question of whether the supplication proved that Hayat was a [terrorist]."). An expert's knowledge of and fluency in a foreign language is the type of specialized knowledge that could have helped the jury understand the main fact in issue: whether Dr. Sabir understood the *bayat* was to al

Qaeda. FED. R. EVID. 702(a). "There is also a reasonable probability that the trial court would credit such expert testimony offered by petitioner." *Gersten*, 426 F.3d at 612; *see also Eze*, 321 F.3d at 128.

Likewise, the Second Circuit on direct appeal considered whether there was sufficient evidence to convict Dr. Sabir of conspiracy and attempt to provide material support. *See generally United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011). Throughout its decision affirming the conviction, the majority cited to the translated transcript as evidence that Dr. Sabir took an oath to al Qaeda. This, it held, suggested both the intent to support terrorism and a substantial step to do so. *See id.* at 144-50.

In the credibility contest between Dr. Sabir and the government's witnesses, Dr. Sabir lost. This is significant because the jury, the district judge, and a majority of the appellate judges gave the May 2005 recording—and specifically the *bayat*—great weight. As a result, there is a reasonable probability that the verdict or appeal would have been different if counsel had challenged the government's Arabic translation and obtained an expert to support Dr. Sabir's testimony. *See Hayat Habeas*, 2019 U.S. Dist. LEXIS 126970, at *47-49 (finding that counsel's failure to obtain an Arabic language expert prejudiced the defendant).

2. There is a reasonable probability that expert testimony would have changed the outcome of sentencing.

The district judge spent considerable time during sentencing discussing her conclusion that Dr. Sabir perjured himself when he testified that he was not fluent in Arabic and did not understand the *bayat* was to al Qaeda. Sentencing Tr. at 8:1-12:19, *United States v. Sabir*, No. 1:05-cr-00673-LAP. She concluded that a two-level

upward enhancement for obstruction of justice was necessary because the issue of whether Dr. Sabir understood Soufan was so important to the trial:

> [] Dr. Sabir's testimony on this topic [of his Arabic comprehension] was important. Because if the jury had believed his testimony that he understood very little Arabic, the jury might have doubted his understanding of many of the statements made during the crucial May 20, 2005 meeting.

Id. at 8:20-23. Had counsel called an expert to corroborate Dr. Sabir's testimony (during either the guilt or punishment phase), there is a reasonable probability that the district judge would not have imposed an obstruction enhancement as it is less likely she would have concluded Dr. Sabir outright perjured himself. *See Williams*, 529 U.S. at 396-97 (concluding there was a reasonable probability that sentencing would have gone differently had the jury heard favorable evidence counsel failed to introduce at trial). And there is a reasonable probability that Dr. Sabir's sentence would have been shorter without it. *See Ben-Shimon*, 249 F.3d at 104-05 (finding that "the two-point enhancement for obstruction of justice is not harmless error" because the enhancement increased the sentencing guidelines range).

Counsel's failure to call an Arabic language expert and his recommendation that Dr. Sabir sign a stipulation fell below the objective standard of reasonableness and prejudiced Dr. Sabir. The district court not only denied Dr. Sabir's Habeas Motion on this claim, but it did not even permit an evidentiary hearing to question trial counsel or Dr. Schmitz.[12] *See Hayat Habeas*, 2019 U.S. Dist. LEXIS 126970, at *37-

[12] Had the district court held an evidentiary hearing, habeas counsel could have subpoenaed Ms. Todd, who served as co-counsel and was present at attorney-client meetings where Dr. Sabir alleges she assured him they would obtain an expert.

38, *47-48 (concluding that, based on the testimony of trial counsel and an independent language expert at an evidentiary hearing, counsel failed to perform an adequate search and prejudiced the defendant) (citing *Wiggins*, 539 U.S. at 527). The Second Circuit should have issued a COA because reasonable jurists could find the district court's resolution of Dr. Sabir's ineffective assistance of counsel claim debatable. Its failure to do so requires review.

CONCLUSION

Dr. Sabir respectfully requests that this Court grant the petition for a writ of certiorari and remand to the court of appeals with instructions to issue a certificate of appealability.

Respectfully submitted,

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