

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - :

S14 98 Cr. 1023 (LAK)

SULAIMAN ABU GHAYTH, :

19 Civ. 2994 (LAK)

a/k/a "Salman Abu Ghayth," :

Defendant. :

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**GOVERNMENT’S OPPOSITION TO PETITIONER’S
MOTION TO VACATE HIS CONVICTION AND SENTENCE**

The Government respectfully submits this brief in opposition to defendant-petitioner Sulaiman Abu Ghayth’s motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. As discussed below, the Court should reject Abu Ghayth’s arguments and deny his motion.

BACKGROUND

Abu Ghayth was a senior member of al Qaeda, who served at the side of Usama bin Laden during the most important and deadly period for bin Laden’s terrorist organization—2001 through 2002. A charismatic and inspirational voice for al Qaeda, Abu Ghayth provided critical support to al Qaeda’s mission, in the months leading to and following the attacks on September 11, 2001. Prior to September 11, Abu Ghayth swore his loyalty to bin Laden and spoke to al Qaeda’s young recruits at terrorist training camps and an al Qaeda guesthouse in Afghanistan. And in the immediate aftermath of September 11—starting with a speech Abu Ghayth delivered with bin Laden and al Qaeda’s two other most senior leaders on the morning of September 12,

2001—Abu Ghayth celebrated the attacks, threatened additional attacks against the United States, and urged Muslims worldwide to join al Qaeda’s declared war against America.

A. The Indictment

Indictment S14 98 CR. 1023 (LAK) (the “Indictment”) was filed on December 20, 2013, in three counts. Count One charged Abu Ghayth with conspiracy to kill U.S. nationals in violation of 18 U.S.C. § 2332(b). Count Two charged Abu Ghayth with conspiracy to provide material support and resources to terrorists in violation of 18 U.S.C. § 2339A. Count Three charged Abu Ghayth with providing and attempting to provide material support or resources to terrorists, also in violation of Section 2339A.

B. The Trial

1. The Government’s Case

At trial, the Government called seven witnesses, including two cooperating witnesses. The Government’s evidence established Abu Ghayth’s active participation—and, indeed, essential role—in al Qaeda’s conspiracy to kill Americans.

a. Al Qaeda

Al Qaeda is an international terrorist organization, whose core purpose is and has been to support violent attacks against property and nationals, both military and civilian, of the United States and other countries. (Tr. 50-52, 61-66).¹ Bin Laden was the leader, or *emir*, of al Qaeda until his death on May 2, 2011. (Tr. 49, 813). By 2001, al Qaeda had established training camps, guesthouses, and other business operations in Afghanistan for the purposes of training its operatives and supporting its agenda of violence and murder. (Tr. 241-65, 271-87, 475-86, 494-502).

¹ “Tr.” refers to the trial transcript; “GX” refers to Government exhibits.

In 2001 and 2002, the vast majority of al Qaeda's fighters were between the ages of 18 and 25, having traveled to Afghanistan from a variety of countries in and around the Middle East. (Tr. 798-99). During that time period, al Qaeda's principal means of recruiting fighters was through video- and audio-recordings that the terrorist group would disseminate, largely through television networks such as al Jazeera. (Tr. 799, 803). These recorded speeches often featured senior al Qaeda leaders, including Abu Ghayth; bin Laden; bin Laden's deputy, Ayman al-Zawahiri; and al Qaeda's military commander, Abu Hafs al-Masri. (Tr. 803-04).

Starting in early 2002, al Qaeda began disseminating its propaganda on the Internet using websites that al Qaeda had established. (Tr. 804). Al Qaeda also operated a media wing called the As Sahab Foundation for Islamic Media Publication ("As Sahab"). (Tr. 809). As Sahab produced and released video-recordings featuring senior al Qaeda leaders, as well as footage from al Qaeda training camps and of operations that al Qaeda had carried out. (Tr. 810).

Al Qaeda's purpose for releasing material publicly was twofold: (1) to instill terror by airing often-violent footage, and (2) to attract individuals who might be sympathetic to al Qaeda's cause. (*Id.*). Its objective was to motivate individuals to contribute money to al Qaeda, or to travel to al Qaeda's training camps in Afghanistan to join the organization. (*Id.*).

b. Abu Ghayth's Participation in al Qaeda's Conspiracy to Kill Americans

i. Pre-September 11, 2001

In the spring of 2001, Abu Ghayth traveled from his home in Kuwait to Afghanistan. (Tr. 709). Abu Ghayth traveled to Afghanistan because he had an interest in jihadist movements and, in particular, the Taliban's assumption of control in Afghanistan. (*Id.*). A well-known teacher and imam in Kuwait, Abu Ghayth was seen as a prominent religious figure upon his arrival in Afghanistan. (Tr. 1161). Shortly after arriving in Afghanistan, Abu Ghayth met with bin Laden

at bin Laden's request. (Tr. 709-10). Prior to this meeting, Abu Ghayth had known about al Qaeda through the media, and was aware that bin Laden had engaged in jihadi activities and was suspected of being involved in the August 7, 1998 bombings of the U.S. Embassies in Nairobi and Dar es Salaam and the attack on *USS Cole*. (Tr. 710, 1163).

During their initial meeting, bin Laden asked Abu Ghayth to speak at training camps in Afghanistan, and Abu Ghayth agreed. (Tr. 711). After spending about 20 days in Afghanistan, Abu Ghayth traveled to Kuwait to retrieve his family and brought them to Afghanistan in approximately July 2001. (Tr. 711-12). Upon his return to Afghanistan, Abu Ghayth continued to meet with bin Laden and accepted a position within al Qaeda as a religious scholar and orator. (Tr. 712-13). In agreeing to serve in this role, Abu Ghayth made what he characterized as a "mini bayat," or oath of allegiance, to bin Laden. (Tr. 713). Abu Ghayth understood that bin Laden desired his services because Abu Ghayth was a well-known religious scholar and experienced speaker, and bin Laden was hoping to recruit to al Qaeda more individuals from the Persian Gulf region. (Tr. 713-14). Accordingly, Abu Ghayth assumed the position of al Qaeda's spokesman. (Tr. 714).

True to his pledge to bin Laden, Abu Ghayth spoke at various al Qaeda locations during mid-2001 in the months leading to the September 11 attacks. Around June 2001, Abu Ghayth spoke at two separate al Qaeda training camps, on each occasion to at least 150 trainees. (Tr. 711, 716). Abu Ghayth was aware that bin Laden supported and funded these camps, and that the training covered use of weapons, making explosives, and guerilla warfare skills. (Tr. 716). Abu Ghayth intended for the speeches he delivered at those camps to help the trainees "understand the importance of the training they were receiving at the training camps, the importance of being at the training camps, and the importance of the defense of Islam in the Islamic lands." (*Id.*).

In the summer of 2001, Abu Ghayth also spoke at an al Qaeda guesthouse in Kandahar, Afghanistan, where al Qaeda recruits, including cooperating witness Sahim Alwan, stayed as they awaited transfer to an al Qaeda training camp. (Tr. 242). The recruits at this guesthouse were indoctrinated with al Qaeda propaganda, which included being shown a video that glorified the attack on the *Cole* and sought to motivate viewers to receive training from al Qaeda and conduct similar attacks. (Tr. 246-48). Abu Ghayth and bin Laden both separately visited this al Qaeda guesthouse. (Tr. 258). Abu Ghayth spoke to a small group of recruits, including Alwan, about giving *bayat*, a solemn oath of allegiance, to bin Laden. (Tr. 272-73).

ii. September 11 and 12, 2001

In the days leading up to the attacks of September 11, Abu Ghayth evacuated his wife and children to Kuwait, but then returned to Afghanistan alone. (Tr. 1179). He returned because “[he] believed in the days or so to come, [he] would have the opportunity to offer something.” (*Id.*). Though there was no trial evidence that Abu Ghayth was aware of the specific plans for September 11, 2001, he had heard around the al Qaeda training camps that something big was going to happen. (Tr. 720).

On September 11, within hours of the attacks, bin Laden summoned Abu Ghayth to a cave in the mountains of Afghanistan. (Tr. 722, 1183-84). Bin Laden told Abu Ghayth that al Qaeda was responsible for the day’s attacks, and reminded Abu Ghayth of his agreement to speak al Qaeda’s behalf and assist bin Laden and al Qaeda as an orator and religious scholar. (Tr. 722, 1185). Abu Ghayth confirmed his agreement and in the following months delivered a series of speeches on behalf of al Qaeda, with the first occurring the following morning. (Tr. 723, 1188-89).

On the morning of September 12, 2001, Abu Ghayth met with bin Laden, Zawahiri, and al-Masri (al Qaeda's military commander), and the four recorded a video that al Jazeera aired in early October 2001. (Tr. 723-26, 742-46, 812-13). In the video, Abu Ghayth justified the attacks of September 11, threatened further attacks, and urged others to join al Qaeda's fight. With an AK-47 by his side, Abu Ghayth delivered a speech in which he said that the attacks had been the result of American policy, and that if the United States persisted in those policies, Muslims would continue to seek revenge. (GX 1-T, at 2). Abu Ghayth also called the "nation of Islam" to "jihad" against "the friends of Satan." (*Id.* at 3).

Zawahiri and bin Laden also spoke on the video. Among other things, Zawahiri exhorted Muslims to join al Qaeda's jihad against America, and bin Laden gave thanks for the attacks and the fear they had caused in the United States. (*Id.* at 4-8).

iii. Post-September 12, 2001

Following September 11 and through 2002, Abu Ghayth continued to speak on al Qaeda's behalf as its spokesman, appearing in more videos for the terrorist group. Abu Ghayth acknowledged that he intended for those videos to serve as al Qaeda propaganda. (Tr. 726).

I. The "Storm of Airplanes" Threats

In several of his post-September 11 speeches, discussed below, Abu Ghayth repeatedly threatened that al Qaeda would continue to conduct terrorist attacks using airplanes. In an October 9, 2001 speech broadcast on al Jazeera, Abu Ghayth pronounced, "America must know that the Storm of Airplanes will not abate." (GX 8-T, at 2). Abu Ghayth delivered a similar warning during another speech four days later, on October 13, 2001, which al Jazeera also broadcast: "The storms shall not lessen, especially the Storms of the Airplanes," and, "we strongly advise Muslims in America and . . . Britain . . . not to board aircraft and we advise them

not to live in high rises and tall buildings.” (GX 5-T, at 4). Lastly, in al Qaeda’s “Convoy of Martyrs” propaganda video, Abu Ghayth once again warned that “the Storm of the Airplanes” would continue. (GX 6-T, at 18).

At the same time Abu Ghayth was in Afghanistan making these “Storm of Airplanes” threats, al Qaeda’s senior leaders were in fact plotting an attack targeting airplanes, the United States, and the United Kingdom—the “shoe-bomb” operation. That operation was hatched in late September or early October 2001 in Afghanistan, and was led by bin Laden and al-Masri (al Qaeda’s military commander) (Tr. 521, 533-34), two of the al Qaeda leaders whom Abu Ghayth was with the morning of September 12, 2001 (Tr. 724-26). Abu Ghayth remained with bin Laden in the mountains of Afghanistan for weeks after September 11, 2001 (Tr. 1192), matching the time and location that bin Laden was planning the shoe-bomb plot (Tr. 521, 533).

II. The October 9, 2001 al Jazeera Statement

On October 9, 2001, less than a month after the September 11 attacks, Abu Ghayth delivered a statement on behalf of al Qaeda that al Jazeera broadcast. (GX 8-T). In addition to conveying the “Storm of Airplanes” threat for the first time (*id.* at 2-3), Abu Ghayth delivered a “message to the entire Islamic nation” that “the crusader war that Bush promised” had begun and called upon all Muslims to join al Qaeda’s war with America, because “[c]arrying out terrorism against the oppressors is a creed in our religion” (*id.* at 1-2).

During this October 9, 2001 speech, Abu Ghayth praised the September 11 hijackers—“these young men . . . who destroyed America and launched the Storm of Airplanes against it”—for having “done a good deed.” (*Id.* at 2). Abu Ghayth lauded the hijackers for “transferr[ing] the battle into the heartland of America,” and warned that “the battle will not leave [America’s] land

until [the United States] leaves our lands, and until it stops supporting the Jews, and until it lifts the unjust embargo on the Iraqi people who lost more than 1 million children.” (*Id.*).

In threatening that “the Storm of Airplanes will not abate,” Abu Ghayth assured viewers that “[t]here are thousands of the nation’s youths who are yearning to death just as the Americans yearn to live.” (*Id.* at 2-3). Finally, Abu Ghayth called on all Muslims to join in the fight: “I am addressing this speech to the sons of Muslims, to the youths, and to the men and women to take on their responsibility. . . . [T]he nation must take on its responsibility; otherwise, would be a disgrace if the nation fails to do so.” (*Id.* at 3).

III. The October 13, 2001 al Jazeera Statement

Four days later, on October 13, 2001, Abu Ghayth delivered another speech that was broadcast on al Jazeera. (SA 28). Among other things, Abu Ghayth made clear that al Qaeda would be prepared to attack Americans if they did not leave the Arabian Peninsula, threatening that “the ground shall ignite under their feet.” (GX 5-T, at 3).

Abu Ghayth concluded his October 13 speech by reiterating the “Storm of Airplanes” threat from four days earlier, sending a

message to the U.S. Secretary of State, who expressed doubt about our previous statement and who underestimated what we said that there are thousands of young Muslims who look forward to die for the sake of Allah and that the Storm of Aircrafts will not stop, by the permis-sion of God the Almighty.

(*Id.* at 4). Abu Ghayth stated that American government officials knew that if “Al-Qaeda promises or threatens, it fulfills,” and assured that “tomorrow shall come soon enough.” (*Id.*).

IV. Convoy of Martyrs

Abu Ghayth also appeared twice in a prominent al Qaeda propaganda video, “Convoy of Martyrs.” (GX 6-T). As Sahab produced Convoy of Martyrs and made it available on multiple

web forums that al Qaeda used to disseminate media; portions of the video also aired on television news. (Tr. 816). Convoy of Martyrs paid homage to al Qaeda fighters killed in Afghanistan in mid- and late 2001, glorified the September 11 attacks, and aired speeches by al Qaeda leaders emphasizing that they would continue to launch attacks against the United States in the future. (GX 6-T; Tr. 817). Much like other al Qaeda propaganda, the purposes of this video were to instill terror, inspire al Qaeda sympathizers to contribute financially, and recruit. (Tr. 818-19).

Abu Ghayth first appeared in Convoy of Martyrs delivering a speech. (GX 6-T, at 13-14). Abu Ghayth filmed this speech while still with bin Laden in the mountains of Afghanistan, within two weeks of September 11. (Tr. 1193). In that speech, Abu Ghayth spoke proudly of the success of the September 11 attacks:

God the Almighty has ordered us to terrorize the infidels, so we terrorized the infidels. God the Almighty has ordered us to battle the leaders of infidels, so we battled the leaders of infidels. . . .

* * *

Indeed, we have been able to strike at the head of disbelief, that deliberately day and night, publicly expresses its hostility toward Islam. We have been able to strike it at its heartland.

(GX 6-T, at 13-14).

Footage of this speech also aired on a foreign news station. (Tr. 74; GX 7-T). After showing footage of the speech described immediately above, the news station showed footage of Abu Ghayth sitting next to bin Laden and Zawahiri while bin Laden took pride in the financial harm that the September 11 attacks had caused the United States. (Tr. 72-75; GX 7-T, at 1-3).

Abu Ghayth appeared a second time in Convoy of Martyrs to deliver a similar threat regarding the continuing “Storm of Airplanes” that he had made in his October 13 speech. (GX 6-T, at 18). Abu Ghayth delivered “a message to the U.S. Secretary of State” that “tomorrow

shall come soon enough” and “[s]torms shall not lessen . . . especially the Storm of the Airplanes,” and cautioned “Muslims in America, and the kids, and those who reject the unjust American policy . . . not to board aircrafts and not to live in tall towers.” (*Id.*).

At another point in Convoy of Martyrs, bin Laden referred to Abu Ghayth by name and to Abu Ghayth’s threats against the United States and Great Britain, making clear that al Qaeda was targeting any countries that sided with the United States. (*Id.* at 10).

V. The June 2002 As Sahab Interview

In June 2002, As Sahab interviewed Abu Ghayth in his capacity as al Qaeda’s official spokesman. (GX 11-T, GX S-1, at 2 (stipulation that GX 11 is a June 2002 audio recording of Abu Ghayth)). Abu Ghayth used that interview—which al Qaeda published on its website, al Neda, on June 23, 2002, and al Jazeera broadcast in part in late June 2002 (Tr. 808)—to call on others to join al Qaeda’s war with America.

The interviewer began by introducing Abu Ghayth as al Qaeda’s spokesman. (GX 11-T, at 1). Consistent with that introduction, throughout the interview, Abu Ghayth spoke on behalf of al Qaeda, taking credit on al Qaeda’s behalf for prior attacks, providing updates as to the status of the organization and its leaders, threatening additional terrorist attacks, and urging Muslims to wage jihad.

For example, Abu Ghayth celebrated al Qaeda’s previous deadly attacks on America, mentioning its “victor[ies],” to include the August 1998 bombings of the U.S. embassies in east Africa, the October 2000 *Cole* bombing, and the September 11 attacks, which “broke the back of the Americans.” (*Id.* at 4). Notwithstanding those attacks, Abu Ghayth said, “We believe we are still at the beginning of the war. As a matter of fact it’s one round among other rounds and . . . we are still at the beginning of the road.” (*Id.*).

Abu Ghayth said that al Qaeda continued to function, despite the American military offensive following September 11. He assured listeners that bin Laden and Zawahiri were in good health. (*Id.* at 7). Abu Ghayth also asserted that, with al Qaeda's military, security, and media components still operational, the terrorist group not only remained capable of executing additional attacks against the United States, but intended to do so:

We are men of action and not men of words. And yes, we still possess the capability to threaten America, in fact, to carry out these threats, and in the next few coming days and months will prove to the whole world . . . the credibility of what we're saying.

(*Id.* at 8-9). To that end, according to Abu Ghayth, al Qaeda's "military and security system[s] are now conducting surveillance, investigation, and monitoring to new American targets other than those that have been previously monitored, which we will strike with-in a short amount of time." (*Id.* at 6). Abu Ghayth then warned that "America must be ready" because "we will strike them . . . where they least expect it." (*Id.*). Abu Ghayth emphasized the point, promising that al Qaeda would "launch attacks against America . . . at the time that we pick, and the place that we pick," and intended to do so using suicide operatives, what he referred to as "[o]ur martyrdom personnel" and "ammunition." (*Id.* at 6, 8; Tr. 834).

Abu Ghayth also used the interview, as he had used prior speeches, to recruit Muslims to al Qaeda's cause. For example, Abu Ghayth emphasized that jihad "is a mandatory duty on every Muslim" (GX 11-T, at 12; *see also id.* at 2 (referring to the "duty of jihad for the sake of Allah"), 12-13 (jihad "is a duty on every Muslim who believes in Allah" and "the issue of the entire nation"))).

VI. The December 2002 Statement

Abu Ghayth recorded another statement on behalf of al Qaeda on or about December 7, 2002 (GX 12-T, GX S-1, at 2 (stipulation that GX 12 is a December 7, 2002 audio recording of

Abu Ghayth)), which al Qaeda also made available on its website (Tr. 839-40). Abu Ghayth mentioned an operation “that took place in Mombasa, Kenya, against the Jewish interests” (GX 12-T, at 1), referring to a December 2002 al Qaeda attack targeting Israeli tourists in Mombasa (Tr. 841). Abu Ghayth proclaimed that “the Jewish-Crusader alliance”—a phrase al Qaeda used to refer to the alliance between the United States and other western countries, and Israel—“will not be saved, God willing, from the attacks of the mujahidin wherever that alliance is,” and al Qaeda “will strike its vital joints and strategic projects with all the means we have.” (GX 12-T, at 1; Tr. 842). Abu Ghayth voiced al Qaeda’s commitment to “chasing the enemy, which is projected as the Jewish-Crusader alliance with the weapon of terror.” (GX 12-T, at 2).

Finally, during the December 2002 statement, Abu Ghayth yet again summoned Muslims, especially Muslim youth, to join al Qaeda’s fight, reminding them of their “great duty in this sensitive phase of the nation’s history,” a duty that “consists of the direct repulsion of this enemy and serious readiness for the next phase, which will be bigger and more grave.” (*Id.* at 2-3).

c. Abu Ghayth’s Arrest in Iran with Senior al Qaeda Leaders

After Abu Ghayth left Afghanistan, he was arrested in Iran on April 23, 2003 along with three other senior al Qaeda members: Saif al Adl, Abu Mohamed al-Masri, and Abu Khair. (Tr. 526-27, 727). Abu Ghayth knew that those individuals were members of al Qaeda. (Tr. 739).

2. The Defense Case

The defense called two law enforcement witnesses, both of whom testified about taking Abu Ghayth into custody overseas on February 28, 2013, and transporting him to the United States. (Tr. 1027-45, 1060-90). Abu Ghayth himself also testified about his background, his travel to Afghanistan, and his interactions with bin Laden and al Qaeda. (Tr. 1140-1232).

3. The Jury Verdict

On March 26, 2014, the jury found Abu Ghayth guilty of the three counts charged in the Indictment.

C. The Sentence

The Court sentenced Abu Ghayth on September 23, 2014. Before the Court imposed sentence, Abu Ghayth said, among other things:

Today, and at the same moment where you are shackling my hands and intend to bury me alive, you are at the same time unleashing the hands of hundreds of Muslim youth, and you are removing the dust of their minds, and they will join the rally of the free men.

Soon, and very soon, the whole world will see, the whole world will see the end of these theater plays that are also known as trials.

(Docket Entry 1747, at 20).

The Court then sentenced Abu Ghayth principally to a term imprisonment of life on Count One, as well as 15 years on each of Counts Two and Three to run consecutively with each other and concurrently with the term on Count One. In imposing sentence, the Court stated:

You, sir, in my assessment, are committed to doing everything you can to assist in carrying out Al Qaeda's agenda of killing Americans, guilty or innocent, combatant or non-combatant, adult or babies, without regard to the carnage that's caused.

You, sir, are far from a deer in the headlights. You were, on September 12, 2001, as far from a deer in the headlights as anyone I have ever encountered.

(*Id.* at 33).

D. The Appeal

In sum, Abu Ghayth argued on appeal "that he could not commit any of the charged crimes because he lacked specific knowledge of any particular plot and did not participate in a

specific terrorist act.” *United States v. Abu Ghayth*, 709 F. App’x 718, 720 (2d Cir. 2017). He raised “four distinct issues” in furtherance of that argument:

(1) whether the jury instructions for Count I properly identified the mens rea for conspiracy to murder; (2) whether the evidence was sufficient to sustain a conviction for conspiracy to murder; (3) whether the jury instructions for Count III properly identified the intent requirement for aiding and abetting material support under *United States v. Rosemond*; and (4) whether the indictment for Counts II and III sufficiently alleged providing material support of terrorism.

Id.

The Second Circuit affirmed Abu Ghayth’s convictions in all respects, holding that the jury instructions as to Count One were correct and the evidence was sufficient to support that Count, *id.* at 720-22, the jury instructions as to Count Three were not plain error, *id.* at 722-23, and Counts Two and Three sufficiently alleged material support, *id.* at 723-24.

On April 2, 2018, the Supreme Court denied Abu Ghayth’s petition for a writ of certiorari. *Abu Ghayth v. United States*, 138 S. Ct. 1450 (2018).

E. The Current Motion

Abu Ghayth now timely moves to vacate his judgment and sentence, arguing that (1) he received ineffective assistance of counsel (Mtn. 3), (2) the Government prevented Abu Ghayth from contacting his embassy (Mtn. 5), and (3) it is “new[ly] discovered evidence” that the Government’s expert witness at trial, Evan Kohlmann, was “a law enforcement witness,” (Mtn. 7).

Abu Ghayth is currently serving his sentence.

ARGUMENT

A. Abu Ghayth's Counsel Was Not Ineffective

Abu Ghayth first argues that one of his lawyers, Zoe J. Dolan, Esq., was ineffective because she was the only defense attorney permitted to review classified discovery and “she never brought any useful evidence out of them.” (Mtn. 3). This argument is meritless and the Court should reject it: Ms. Dolan made multiple motions and argued strenuously to use certain classified information at trial.

1. Applicable Law

Abu Ghayth's ineffective-assistance claim must meet the “highly demanding” standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires him to show both that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) but for the error, the outcome would likely have been different. *Kimmelman v. Morrison*, 477 U.S. 365, 383, 381-82 (1986); *see also Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (“The standard of *Strickland* is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on it” (quotation marks and brackets omitted)).

“There is a strong presumption that counsel's performance falls within the wide range of professional assistance,” and Abu Ghayth “bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Morrison*, 477 U.S. at 381 (quotation marks omitted). The Court must evaluate counsel's performance “from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.” *Id.*; *see also Parisi v. United States*, 529 F.3d 134, 141 (2d Cir. 2008) (“With respect to the first prong . . . we are mindful of the diversity of the bar and the variety of approaches effective

attorneys might employ when dealing with a particular set of facts.”). To show prejudice, Abu Ghayth must show “that there exists a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Morrison*, 477 U.S. at 375.

2. Discussion

Abu Ghayth is simply factually wrong when he asserts that Ms. Dolan “never brought any useful evidence out of” the classified discovery provided to her (Mtn. 3), and she certainly endeavored to do so at or above an objective standard of reasonableness. Abu Ghayth’s mistake is unsurprising, as he did not himself have a right to review classified material or attend conferences where such material was discussed. *E.g.*, *In re Terrorist Bombings*, 552 F.3d 93, 130 (2d Cir. 2008); *United States v. al Fawwaz*, 2014 WL 6997604, at *3 (S.D.N.Y. 2014).

In fact, Ms. Dolan diligently and appropriately used classified information at multiple stages of the proceeding. For example, in connection with the September 2013 suppression hearing, Ms. Dolan made multiple applications to the Court to use classified material in various ways. (*See* Letter from Zoe J. Dolan to Hon. Lewis A. Kaplan (Sept. 16, 2013); Classified Conf. Tr. 4-6, Sept. 17, 2013).² Her efforts continued after the hearing in support of Abu Ghayth’s expert witness at the hearing. (*See* Letter from Zoe J. Dolan to Hon. Lewis A. Kaplan (Oct. 2, 2013)).

Then, prior to trial, Ms. Dolan moved for certain relief related to a potential defense witness. (*See* Letter from Zoe J. Dolan to Hon. Lewis A. Kaplan (Feb. 3, 2014)). Ms. Dolan later strenuously argued her position before the Court. (*See* Classified Conf. Tr. 2-6, 9-11 (Feb. 4,

² The letters and two of the transcripts cited in this section are classified. Upon request, the Government will of course provide copies to the Court ex parte and under seal, through the Classified Information Security Officer.

2014)). Finally, during trial, Ms. Dolan ensured that the defense could cross-examine certain Government witnesses consistent with information only she possessed. (*See* Tr. 901-02; Letter from Government to Zoe J. Dolan, Jan. 28, 2014).

In sum, Abu Ghayth is wrong: Ms. Dolan endeavored to and did make use of classified information, and her performance at no time fell below an objective standard of reasonableness. The Court should reject this argument.

B. The Government Never Made a Plea Offer to Abu Ghayth

Describing himself as “in fact innocent,” Abu Ghayth next argues that the Government offered him “20 years in prison for pleading ‘[g]uilty,’” but then prevented him from contacting his embassy, which would have told him to accept that offer. (Mtn. 5). This argument is easily rejected, as the Government never made Abu Ghayth a plea offer, much less an offer for him to spend 20 years in prison in exchange for pleading guilty.

In short, the Government did not extend any plea offer to Abu Ghayth, which would have required approvals from elsewhere in the U.S. Department of Justice that the prosecution team never sought. (Decl. of Michael Ferrara ¶ 6 (attached as Ex. A)). In late 2013 or early 2014, defense counsel reached out to the Government to ask whether the Government would be willing to allow Abu Ghayth to plead to a crime or crimes with a combined statutory maximum term of imprisonment in the 20-year range. (*Id.* ¶ 3). The Government responded that it would not extend such an offer. (*Id.* ¶¶ 4-5). Defense counsel did not raise the matter again, and the Government did not extend any other offer. (*Id.* ¶¶ 5-6). The Court should therefore reject this argument.³

³ The Government does not concede the other aspects of Abu Ghayth’s argument on this point, and this claim would not be a proper basis for habeas relief in any event.

C. There Is No Newly Discovered Evidence Regarding Expert Witness Evan Kohlmann

Finally, Abu Ghayth argues, in sum, that the Government failed to disclose that its expert, Evan Kohlmann, was in fact “a law enforcement witness.” (Mtn. 7). He is yet again wrong on the facts. The Government withheld nothing, Abu Ghayth had all the information to which he was entitled, and used that information to impeach Mr. Kohlmann in front of the jury.

1. Applicable Law

“New evidence in a Section 2255 proceeding is evidence that is discovered after the original hearing, and which could not, with due diligence of counsel, have been discovered sooner.” *Ajemian v. United States*, 171 F. Supp. 3d 206, 211 (S.D.N.Y. 2016) (brackets and ellipsis omitted) (quoting *Giacalone v. United States*, 739 F.2d 40, 43 (2d Cir. 1984)). Abu Ghayth bears the burden of convincing the Court that the newly discovered evidence “would have resulted in an acquittal.” *Id.* (quotation marks omitted). “Such motions based upon previously-undiscovered evidence are ordinarily not favored and should be granted only with great caution.” *Brown v. United States*, 2011 WL 3273202, at *6 (S.D.N.Y. 2011) (quotation marks and brackets omitted). The “petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Ajemian*, 171 F. Supp. 3d at 211 (quotation marks omitted) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

2. Discussion

Well in advance of trial, the Government disclosed to the defense a significant amount of information regarding Mr. Kohlmann’s relationship with the U.S. Government. (*See, e.g.*, Letter from Government to Zoe J. Dolan, Jan. 28, 2014; Letter from Government to Stanley L. Cohen & Zoe J. Dolan, Feb. 10, 2014.) And the defense used that information at trial.

For example, on cross-examination, defense counsel elicited that the U.S. Attorney's Office for the Southern District of New York had retained Mr. Kohlmann about one year prior to trial, that prosecutors had met with Mr. Kohlmann approximately seven or eight times over that year—including during an overnight break in Mr. Kohlmann's direct testimony—and that Mr. Kohlmann charged \$400 per hour. (Tr. 853). The defense also elicited—with the Government's consent (*see* Tr. 901-02)—that Mr. Kohlmann was actively working with the Federal Bureau of Investigation ("FBI") on multiple open investigations (Tr. 903).

In addition, on direct, the Government elicited that Mr. Kohlmann had worked with the FBI, the U.S. Departments of Justice and Defense, and "a variety of agencies in the U.S. intelligence community" for approximately 11 or 12 years. (Tr. 786-87). Mr. Kohlmann described his work as a consultant to the FBI (Tr. 792-95), and testified that since 2003, the FBI had paid him to assist in investigations (Tr. 796). Mr. Kohlmann also told the jury that the U.S. Government had paid him in total approximately \$1.1 to \$1.2 million. (Tr. 797).

The defense therefore fully understood, prior to trial, Mr. Kohlmann's relationship with the U.S. Government, there is no newly discovered evidence, and the Court should reject this argument.

CONCLUSION

For the foregoing reasons, the Court should deny Abu Ghayth's motion.

Dated: New York, New York
August 9, 2019

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney
Southern District of New York

By: /s/ MICHAEL FERRARA
Assistant U.S. Attorney
212-637-2526

CERTIFICATE OF SERVICE

I certify that on August 9, 2019, I caused the foregoing opposition to be served by regular mail on defendant-petitioner Sulaiman Abu Ghayth (register number 91969-054) at USP Florence ADMAX, P.O. Box 8500, Florence, Colorado 81226.

/s/ MICHAEL FERRARA
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - :

DECLARATION

SULAIMAN ABU GHAYTH, :
a/k/a "Salman Abu Ghayth," :

S14 98 Cr. 1023 (LAK)
19 Civ. 2994 (LAK)

Defendant. :

----- X

MICHAEL FERRARA, pursuant to 28 U.S.C. § 1746, hereby declares under penalty of perjury:

1. I am an Assistant U.S. Attorney ("AUSA") in the United States Attorney's Office for the Southern District of New York ("this Office"), and have at all relevant times been one of the prosecutors assigned to the investigation and prosecution of Sulaiman Abu Ghayth.

2. I submit this declaration in connection with the Government's opposition to Abu Ghayth's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

3. Sometime in late 2013 or early 2014, one of Abu Ghayth's lawyers, Stanley L. Cohen, Esq., asked me if the Government would consider allowing Abu Ghayth to plead guilty to a crime or crimes with a combined statutory maximum in the range of 20 years' imprisonment. I told Mr. Cohen, in sum and substance, that the Government almost certainly would not extend such an offer.

4. After discussing the matter with the other two AUSAs on the trial team and our direct supervisors, our supervisors discussed it with then-U.S. Attorney Preet Bharara. Though I was not present for the discussion between my supervisors and the U.S. Attorney, my

supervisors told me and the other AUSAs that the Government would not extend any such offer to Abu Ghayth.

5. To the best of my recollection, I personally conveyed that decision to Mr. Cohen, who, as far as I know, did not again raise the possibility of a guilty plea or plea offer.

6. At no stage of the prosecution did the Government make a plea offer of any kind to Abu Ghayth. Indeed, this Office could not have extended a plea offer without appropriate approvals from the U.S. Department of Justice's National Security Division, which this Office never sought in connection with Abu Ghayth's case.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to Section 1746.

Dated: New York, New York
August 9, 2018

/s/ MICHAEL FERRARA
Assistant U.S. Attorney