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[ORAL ARGUMENT SCHEDULED FOR MARCH 15, 2011]

No. 10-5319

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAHMOAD ABDAH, *et al.*,
Petitioners

ADNAN FARHAN ABD AL LATIF
Petitioner-Appellee,

v.

BARACK H. OBAMA *et al.*,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

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GLOSSARY

Br. ..... Appellee's Brief

[redacted]

JA ..... Joint Appendix

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INTRODUCTION AND SUMMARY OF ARGUMENT

As we explained in our opening brief, the district court made three critical legal errors that require reversal or remand. Latif's response brief unsuccessfully attempts to downplay or ignore these errors. The reality, however, is that these errors were critical to the decision below and that the district court ruling cannot be permitted to stand.

First, the district court failed to grapple with a key issue [redacted] Contrary to Latif's half-hearted claim (Br. at 47 & n.13), the district court's statements about Latif's credibility are

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undeniably equivocal and do not provide a sufficient basis to reject the accuracy of key evidence in this case – an intelligence report [redacted] Latif suggests that his credibility was not important because the accuracy of the [redacted] report was "a threshold and dispositive issue" (Br. at 47) – but the only significant evidence drawing the report into question was Latif's claim [redacted] that claim rests on his credibility; and even if the accuracy of the report is the key "threshold" issue, Latif's credibility is central to evaluating and resolving that issue. Thus, at the very least, Latif's credibility must be evaluated and findings thereon must be made; accordingly, at a minimum, a remand is necessary.

Second, in rejecting the accuracy of the key [redacted] report, the district court expressly held the government to an improperly high burden of proof. Latif cannot ignore the fact that when evaluating the government's evidence, the court invoked a burden of proof higher than a preponderance of the evidence and, likewise, when addressing Latif's evidence, found weak evidence sufficient to defeat the government's case. *See* JA 195 (government must "ensure" the report's accuracy while Latif need only "present[] a plausible alternative story"). This plain legal error infected the district court's factual findings and requires a remand with directions to apply the correct burden of proof.

Third, the court erred as a matter of law in not evaluating the evidence as a whole – including, most importantly, the significant evidence that helped establish and corroborate the accuracy of the key [redacted] report and undermine Latif's

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credibility in repudiating it. When the evidence is viewed together, a reasonable factfinder would have to conclude that it is more likely than not that the report was accurate [redacted] and the district court's contrary finding that the government failed to meet its burden was clearly erroneous.

The district court failed to examine all of Latif's statements viewed together. When they are properly looked at together, they both confirm the accuracy of nearly every detail in the [redacted] report, and at the same time contain key inconsistencies that are highly suggestive of the development and refinement of a cover story. In his brief, Latif focuses on his claim that he suffered an injury in 1994 for which he sought medical treatment in Afghanistan. This, however, says almost nothing about whether he became a Taliban fighter in 2001 [redacted] Instead, the much more important corroboration is the similarity of the details in Latif's story that were in the [redacted] report, and which he [redacted] confirmed in interrogations and in this litigation. Those similarities – which square with the external evidence about [redacted] – make it highly unlikely the report resulted from a mistranslation or misattribution.

Moreover, the court improperly gave no weight to – and indeed, failed to even acknowledge – several factors supporting the accuracy of the intelligence report, including background expert declarations attesting to the accuracy of such

reports, the presumption of regularity of government officials carrying out their reporting duties, and the fact that the report was created for intelligence, not litigation, purposes. Further, the court gave no adverse weight to the conclusory nature of Latif's declaration, his decision not to testify, and the lack of corroboration for his account of his trip to Afghanistan, all factors which, when taken together, should have weighed heavily against the credibility of his self-serving claim in a five-page declaration (JA 525) [redacted]

In sum, the court failed to properly "consider all of the evidence taken as a whole," *Awad v. Obama,* 608 F.3d 1, 7 (D.C. Cir. 2010), and when so viewed, a reasonable factfinder would have concluded that the [redacted] report was accurate and that Latif was part of Taliban forces.

ARGUMENT

THE DISTRICT COURT'S FACTUAL FINDINGS WERE INFECTED BY LEGAL ERRORS THAT REQUIRE REMAND OR REVERSAL

A. The District Court Failed to Resolve Latif's Credibility, Which Requires Remand Given The Importance of Latif's Credibility To His Claim [redacted]

As both sides acknowledge, *see* Br. at 46, the key issue in this case was the accuracy of the [redacted] report [redacted] But Latif is mistaken in suggesting on appeal that his credibility was

unimportant to this determination. Br. at 47. Latif's denial of the [redacted] report was the most important evidence drawing the accuracy of the report into question. His credibility is therefore key. Contrary to Latif's claim, it was legal error for the district court to find the report inaccurate without assessing Latif's credibility. *See Awad*, 608 F.3d at 7.

1. Latif first argues that the accuracy of the report was the "*threshold* and dispositive issue." Br. at 47 (emphasis added). He contends that "[o]nce the district court rejected the report's reliability, the Government's case necessarily collapsed," irrespective of whether Latif's denial [redacted] was a lie. Br. at 47. But atomizing the evidence in this manner is precisely the sort of approach that this Court has rejected as legally erroneous; as this Court has explained, the district court must "consider all of the evidence taken as a whole." *Awad,* 608 F.3d at 7; *see also Salahi v. Obama*, 625 F.2d 745, 753 (D.C. Cir. 2008). If, as Latif himself suggests (Br. 47), the court in fact considered the accuracy of the report as a "threshold" issue *without* evaluating Latif's credibility [redacted] this was error that requires remand. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1110 (D.C. Cir. 2010) (finding it "particularly striking" that a habeas court granting relief "never made any findings about whether [petitioner] was generally a credible witness or whether his particular explanations for his actions were worthy of belief"); *Awad*, 608 F. 3d at 10 ("self-serving statements of innocence" must be "credit[ed]" to have significant evidentiary weight "[a]gainst [the government's] evidence" showing detainability).

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Latif argues that there is a distinction between cases [redacted] We do not dispute that the two types of cases may raise different factual questions, but in both cases, the petitioner's credibility is the central issue: in a case of [redacted] the credibility of the detainee's claim [redacted] Indeed, given the many factors we identified in our opening brief supporting the accuracy of this type of government report and its corroboration by other evidence in the record, it is particularly essential that a district court examine and render a clear factual finding regarding Latif's credibility [redacted] In short, the district court's blindered method of assessing the factual record cannot be squared with the district court's legal obligation to assess all of the evidence together and with the emphasis this Court has placed on assessing the government's evidence in relation to the plausibility of a detainee's [redacted] cover stories. *See Salahi*, 625 F.3d at 752 (remand necessary where the district court "did not make definitive findings regarding certain key facts"); *Adahi*, 613 F. 3d at 1110 (district court should have addressed petitioner's credibility).

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2. Perhaps realizing the critical nature of the credibility of his claim [redacted] Latif next argues that the district court in fact found him to be credible because it described his story as being "plausible" and "not incredible." Br. at 47-48 (quoting JA 195-96). But as we explained in our opening brief, these terms are decidedly equivocal, and cannot be equated with an actual finding by the district court that Latif was credible. To this end, the court's central conclusion on the credibility [redacted] is *plausible*," and that he "has presented *a plausible* alternative story to explain his travel." JA 195 (emphasis added). The court made the same error in assessing what it described as "inconsistencies and unanswered questions" regarding his alternative story, [redacted]

Latif argues that the court found him credible because it stated that his claim that he was seeking medical care in Afghanistan was "'supported by corroborating evidence,'" Br. at 47 (quoting JA 196), namely, hospital records showing that he was hospitalized seven years earlier, in 1994, JA 510. But as we explained in our opening brief, the court's ultimate conclusion regarding this alternative story was that it was "plausible" (JA 195) and that Latif "might . . . have sought treatment" in Afghanistan rather than going to fight. JA 197. Again, these equivocal findings do not add up to a conclusion that Latif was credible because they suggest a

possibility without ascribing a probability, something this Court held to be improper. *See Adahi*, 613 F. 3d at 1110 ("Valid empirical proof requires not merely the establishment of possibility, but an estimate of probability.").

Latif all but acknowledges the failure of the district court to assess his credibility, stating carefully that the district court "*considered* the credibility of Latif's account" and found his "account is '*plausible*,'" Br. 47 (emphasis added), the same equivocal finding that the government has shown to be inadequate and to suggest a likelihood of *under* fifty percent. *See Moberly v. Secretary of HHS*, 592 F.3d 1315, 1322 (Fed. Cir. 2010) (distinguishing "traditional 'more likely than not' standard" from "something closer to proof of a 'plausible' or 'possible' causal link"). To state the case the other way makes the district court's error obvious: if the government needed only to prove that it was "plausible" that a detainee was a Taliban or al-Qaida fighter or that he "might be" a fighter, to use the district court's words, it would be apparent that the government's burden was lower than the applicable preponderance standard. *See Adahi*, 613 F.3d at 1104-05.

Latif argues in a footnote that a finding that his story was "not incredible" was equivalent to a finding that his story was, in fact, credible. Br. at 47 n.13. This equivalence is false: the phrase "not incredible" suggests a story that is within the range of possible stories that could be true; it does not equate to a finding that the story told was in fact true. This phrase further underscores, as we explained in our opening brief (p. 21), that the terms the district court used to describe Latif's story squarely evoke a deferential review standard (such as clear error review

conducted by an appellate tribunal), not a factual finding in the first instance. *See, Awad*, 608 F.3d at 7 (factual finding affirmed if its "account of the evidence is plausible"); *United States v. Drews*, 877 F.2d 10, 13 (8th Cir. 1989) ("[a]ccomplice testimony is sufficient to support a conviction [challenged on appeal] when it is not incredible"); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). But of course, it would be patently inappropriate for the district court to have simply deferred to Latif's account in the same manner an appellate court defers to a lower court's factual findings – especially while, at the same time, the district court effectively elevated the government's burden to establish the reliability of the report. *See* pp. 10-12, *infra;* JA 195 (government must "ensure" the report's accuracy while Latif need only "present[] a plausible alternative story").

In sum, the district court very carefully avoided calling Latif a credible witness. Instead, it sought to do what is not permitted in these cases: base its assessment of the accuracy of the report on everything *other than* the most critical evidence relating to the report's accuracy, namely, Latif's claim he did not make the statement described in the report. This was error. At best, the terminology used by the district court was highly ambiguous, but such an ambiguity requires a remand because the factfinder must "articulate its [findings] with sufficient clarity to allow" the reviewing court to determine whether the review "standard[] ha[s] been met." *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1093 (D.C. Cir. 1979); *see also Ballard v. C.I.R.*, 544 U.S. 50, 59-60 (2005) (in cases that "involve critical credibility assessments," "obscuring" the findings of the trier of fact "impedes

fully informed appellate review"). Thus, this Court must, at a minimum, remand to the district court with instructions to make a clear finding regarding Latif's credibility [redacted]

B. The District Court Erroneously Held the Government To A Burden of Proof Higher than a Preponderance of the Evidence.

As we explained in our opening brief, the district court's error in failing to assess Latif's credibility was compounded by its imposition of a burden of proof on the government higher than a preponderance of the evidence. Latif points out, as is true, that the district court paid lip service to the proper burden of proof by citing the preponderance standard. *See* Br. at 48 (citing JA 194 & 197). In assessing the government's evidence, however, it repeatedly invoked a higher standard of proof. And in addressing Latif's "alternative story," as we have just discussed, the court similarly applied this higher standard in finding that a merely "plausible" or "not incredible" alternative account was sufficient to defeat the government's case.

As discussed above, the court described Latif's alternative story as "plausible" (JA 195); as "not incredible" (JA 196); and as something that "might . . . have" occurred (JA 197). [redacted]

These findings all suggest either that the probability was not determined, in violation of *Adahi*, 613 F. 3d at 1110, or that the probability was under fifty percent.

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On the other hand, as we detailed in our opening brief, when considering the government's challenges to Latif's alternative story, it stated that the government was expected to show that Latif "*must be lying* because he has told more than one cover story" and cited explanations for inconsistencies that "*may be*" true. JA 196 (emphasis added); *see also* JA 192. And in evaluating the accuracy of the report, the court stated that the government must "*ensure* that each summary was accurate." JA 195 (emphasis added). In other words, the court seemed to expect the government to establish that it was *not possible* that Latif was telling the truth or that the report could contain an error, a standard that effectively would require the government to prove a negative and exceeds the preponderance standard. This was error that, at a minimum, requires remand.

Latif argues that the district court's approach was not erroneous because the burden of proof was "entirely on the Government, and there was no requirement that Latif prove anything." Br. at 48. This is a correct statement of the governing law. But Latif ignores the reality that the district court had two competing stories before it. By accepting Latif's story using findings that do not suggest it to be more likely than not true, and by rejecting the government's story because it did not meet a higher standard, the court did not properly apply a preponderance of the evidence standard. *See Adahi*, 613 F. 3d at 1110 (district court erred because "[a]t no point did the court make any finding about whether [petitioner's] alternative was more likely than the government's explanation"). Importantly, the court nowhere stated plainly that it was more likely than not that the summary was

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inaccurate.

Latif argues that in spite of these multiple statements that are strongly suggestive of the imposition of an improper burden of proof, the court in fact applied the correct burden because it not only called the contention that the report was inaccurate "plausible," [redacted] *See* Br. at 49-50 [redacted] the district court's claim that the report lacked corroboration). We agree that marshaling the evidence in support of a finding is critical to enabling adequate appellate review, and address that evidence specifically in the next section. But in spite of those citations, Latif cannot avoid the fact that the district court's ultimate assessment of Latif's challenge to the report's accuracy was to conclude that it was "plausible." JA 195. Such a finding is an inadequate basis for rejecting the government's key evidence in this case and for granting the writ.[1]

C. The District Court Erred by Not Considering The Evidence Together And Its Ultimate Conclusion That The Government Had Not Met its Burden Was Erroneous.

The district court also erred as a matter of law by not looking at all of the

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[1] Latif also argues that the district court was "experienced . . . and there is no basis for concluding" that he was not correctly applying the preponderance standard in spite of repeatedly using terms such as "plausible" in its analysis. Br. at 48. But this Court has recognized the Guantanamo cases are unique, and has carefully examined whether even experienced district court judges have "unduly atomized" the evidence or applied the appropriate standard of proof to the facts. *See Salahi*, 625 F. 3d at 753; *Adahi*, 613 F.3d at 1111.

evidence together, most importantly the evidence that showed the key [redacted] report to be accurate and undermined Latif's alternative story. As a result, the district court's ultimate conclusion that the government had not carried its burden, when the evidence is looked at as a whole, was clearly erroneous, as we explained in our opening brief (pp. 22-57), and a reasonable factfinder would have to conclude that it is more likely than not that the report was accurate and the government carried its burden.

First, as we explained in our opening brief, the district court erred by not looking at the evidence together and, in doing so, by disregarding evidence showing the [redacted] report to be accurate. The district court nowhere addressed the fact that [redacted] Further, the manner in which Latif's story has changed over time is suggestive of the development of an innocuous cover story [redacted] *Id.* at 36-41. Finally, other record evidence helps corroborate the accuracy of that [redacted] report. *Id.* at 47-52.

i. As we explained in our opening brief, the accuracy of the [redacted] report was strongly supported by the fact that [redacted] Opening Br. at 42-45. The government identified nine different details from the report that Latif [redacted] confirmed to be accurate – almost every piece of information in the

report [redacted]

[redacted] It was clear error for the district court to disregard the corroboration these similarities provided.

Latif does not dispute [redacted] but argues that the "fact . . . that a few details are correct does not make the document reliable with respect to its Taliban allegations." Br. at 60. However, given that the central issue is the *accuracy* of the [redacted] report and the *care* taken in writing it, the fact that nearly every detail in it is concededly accurate is highly probative of the accuracy of the report as a whole. *See Awad*, 608 F.3d at 8 (observing that the "correlation of [information in different reports] . . .is too great to be mere coincidence"). Yet in spite of the obligation to look at all of the evidence in the case together, *ibid.*, the district court nowhere addressed these similarities. *See Adahi*, 613 F.3d at 1111.

[redacted]

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[redacted] As we explained in our opening brief, however (pp. 45-46), other than speculation from Latif's counsel, there is nothing in the record to support his assertion [redacted] For example, nowhere in his declaration does Latif state tha[redacted] Latif points out that there is "no reason to assume that any minor inconsistencies originated with Latif rather than with the . . . interrogator" (Br. at 56), but the district court's finding that the report was inaccurate rested on just such an assumption with respect to a very minor detail in the report: [redacted] In fact, this minor difference pales next to the many similarities between the report and Latif's [redacted] statements, showing the report to be overwhelmingly accurate, and does not [redacted]

[redacted]

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ii. In addition to the corroboration provided by Latif's [redacted] statements, those statements are suggestive of a cover story designed to hide the inculpatory aspects of his travel to Afghanistan, as we pointed out in our opening brief (pp. 39-40). As we explained earlier, at a minimum, remand is required because the district court made no actual finding with respect to Latif's credibility, concluding at most that his alternative account was "plausible" (JA 195), that discrepancies "may" be the result of misunderstanding, mistranslation, or misstatement (JA 196); and that because he had suffered a documented medical problem in the past, he "might . . . have sought treatment." JA 197. Given that Latif's cover story was only deemed "plausible," it should not have provided support for the district court's ultimate finding that the government had not met its burden. *See Awad*, 608 F. 3d at 10.

In any event, even if the district court had credited the cover story, that would have been clearly erroneous. As we pointed out (Opening Br. at 40), his story contained significant discrepancies that cannot readily be explained [redacted]

Latif argues that the various inconsistencies in his story do not "show

[redacted]

involvement with the Taliban" (Br. at 56). To the contrary, inconsistencies establish that he failed to offer a credible explanation for the most pertinent inconsistency: [redacted] that he was a Taliban fighter, which he has since denied. Such "false exculpatory statements are evidence – often strong evidence – of guilt." *Adahi*, 613 F. 3d at 1107. Other inconsistencies directly relate to his attempts to exculpate himself, so they are highly relevant to his detainability under *Adahi*. *See, e.g.*, JA 473 (claiming he was arrested in Pakistan without ever entering Afghanistan); JA 525, 510 (claiming his injuries were so severe he could not fight because he required three months of treatment in Jordan when medical records in fact showed a five day hospitalization). In any event, as Latif concedes, other inconsistencies do serve to "'undermine [Latif's] own credibility'" (Br. at 56 (quoting *Bensayah*, 610 F.3d at 727)), which as we have explained, is the key issue in this case given his assertion that he never [redacted] was part of Taliban forces.

Latif next argues that some of the cited inconsistencies "do not represent changes in Latif's general account," as if the only issue were whether he has offered one "general account" to explain away his admissions, and not whether his "general account" is a credible story reflecting consistency about material details one would expect if the story were true. Br. at 57. For example, Latif cites the possibility that he went to Afghanistan to seek medical care, but ended up working at the Islamic center "while he was waiting for Ibrahim to take him for medical treatment" and that he "helped teach 20 students per day" while he was there. Br.

at 58. But he makes no claim in his trial declaration that he was working at the Islamic center, and instead his declaration suggests that this would have been impossible given the severity of his claimed injuries. JA 526-27 (my "injuries . . . cause me severe pain to this day"; "I was unable to work because of these injuries"; and "given my medical conditions and disabilities, I was in no shape to be a fighter"). It is discrepancies like this that undermine his credibility and call out for hearing directly from him to provide an explanation. *See Warafi v. Obama*, 704 F. Supp. 2d 32, 40 (D.D.C. 2010).[3]

Latif does not address some of the other significant inconsistencies identified by the government surrounding his contacts with Ibrahim: He told interrogators that he met Ibrahim in Kandahar and provided a detailed account, JA 462, 465, but now claims it was in Kabul where he met Ibrahim, JA 527, and once said he met Ibrahim in Pakistan, where he claimed he was treated and arrested at the hospital without ever setting foot in Afghanistan (JA 473). He said he was with Ibrahim when the war started, JA 581, but now claims Ibrahim had left before the war. JA 527. And he said he knew in advance that Ibrahim was in Afghanistan (JA 462), but now claims he only learned this once he got to Pakistan, JA 526 (and,

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[3] Latif states that the government's brief "includes . . . [an] inconsistency" as to Latif's story on how he paid for his trip to Afghanistan. Br. at 59. On the cited page, Opening Br. at 23, the government was attempting to describe the skeletal nature of the story Latif submitted to the court in his sworn trial declaration, in which he does not explain how the trip was paid for, and did not intend to describe everything he had told interrogators over the years. *See* Opening Br. at 22 (beginning that section of brief by explaining that his "declaration does not address" various issues).

as explained, at one point he said Ibrahim was, in fact, in Pakistan (JA 473)). These all suggest a growing effort to hide or obfuscate his ties to Ibrahim, which makes sense given that Ibrahim was an al-Qaida and Taliban recruiter. *See* Opening Br. at 49 (citing JA 262, 267, 270, 275, 284, 297, 636, 923).[4]

Latif also argues that "Latif's account . . .bears little resemblance to al Qaeda's instructions" training fighters to tell cover stories. Br. at 59. [redacted]

JA 562-63, each of which square with information Latif has provided about helping work at Ibrahim's charity in Kabul; [redacted] significantly exaggerating the extent of his prior injuries. JA 525, 528, 575.

Latif places significant weight on the fact that there is evidence documenting medical treatment he received in 1994, which he claims corroborates his general story that he went to Afghanistan in 2001 to seek further treatment. *See* Br. at 44 (Latifs "detailed account was corroborated . . . by medical records"). But as we pointed out in the opening brief, those records show a much less serious injury than

[4] Latif notes in the fact section of his brief that some people identified the recruiter by the name Ibrahim Ba'Alawi, which is slightly different from the name Latif used, Ibrahim Alawi. Br. at 16. To the extent the district court addressed the issue in its findings, it appeared to agree that the similarity in the names was significant [redacted]

what he claims, and the fact that he previously suffered an injury that required hospitalization seven years before going to Afghanistan only provides the thinnest of corroboration for his alternate story. *See* Opening Br. at 38 n.3.

Indeed, Latif's medical records show his trial declaration to be false in discussing the severity of his condition: in it, he claims he "spent three months at the Islamic Hospital" in Jordan (JA 525), but the medical records show he was there only for five days. JA 510. That inaccurate assertion directly concerned the viability of Latif's cover story given that it rested on his claim that he suffered medical problems so severe that they caused him to make an extraordinary journey to Afghanistan in an effort to find treatment. The inaccuracy should have been weighed in evaluating Latif's credibility, but it was not. *See* JA 197 (it is "not a crucial question" whether Latif was seriously physically impaired).[5]

Further, as we have explained, the district court at most found that the medical records showed that he "might . . . have sought treatment" (JA 197) and, accordingly, if this case turns on the issue of whether his cover story was

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[5] The records also do not describe severe injuries or suggest invasive treatment, but state that he received only "medicine and clinical monitoring" in 1994. JA 501. Other records show that he remained closely associated with the military a year after this claimed severe injury (JA 512), but was apparently seeking disability benefits, and that, as of 1999, a medical report shows only that he was "hard of hearing" due to a hole in his eardrum. JA 513. A government medical expert also disputed the alleged severity of Latif's prior injuries, explaining that a CT scan performed at Guantanamo was "within normal limits" and that Latif suffered only a "mild [hearing] deficit" in one ear. JA 603; *see* JA 596-600. In short, these records do little to corroborate his alternative story, but cast significant doubt on the truthfulness of his trial declaration.

sufficiently credible to defeat the government's preponderance showing, a remand is necessary.

iii. Finally, other record evidence helps corroborate the accuracy of that [redacted] report. Opening Br. at 47-52. As we explained in our brief, the timing of Latif's flight from Afghanistan, the details he provided about Ibrahim Alawi, [redacted] all are consistent with independent events and tend to corroborate [redacted] that he was part of Taliban forces. These similarities are of critical importance – as we explained [redacted]

[redacted]

Latif does not address this remarkable similarity between the story [redacted] in the [redacted] report; the story he [redacted] told interrogators; and the actual facts we know about the recruiter Alawi. *See* Br. at 60-63.

Alawi points out that the Abu Fazl he described might in fact be an Imam named Abu Fadel who he has later named in interrogations. Br. at 61. But the similarity between the two accounts bolsters the accuracy of the [redacted] report, and the similarity with actual wartime events in Afghanistan helps show Latif's account to be true. In short, contrary to the district court's erroneous

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assertion, this dual-corroboration with respect to Fazl, and especially with respect to Ibrahim, is "evidence [that] links Latif to . . .the Taliban" and further shows his [redacted] account to be accurate and reliable.[6]

Second, as we explained in our opening brief (pp. 22-32), the court erred by not giving any weight to several factors supporting the accuracy of the intelligence report, including background expert declarations attesting to the accuracy of such reports, the presumption of regularity of government officials carrying out their reporting duties, and the fact that the report was created for intelligence, not litigation, purposes.

Latif argues that these factors are not entitled to any weight because he "had no opportunity to examine his accusers." Br. at 51. This concern is always legitimate in cases in which hearsay is considered, and would be of special relevance when a substantive source is anonymous, *see Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), but is of far less concern when addressing an [redacted] report that sets out a petitioner's own statement and the only "accusers" are, in fact, government officials conducting, translating, and transcribing a detainee interview. In those circumstances, as we explained in our opening brief (pp. 30-31), whereas a habeas petitioner has every motivation to lie as to activity that would render him

[redacted]

detainable, *Awad*, 608 F.3d at 8, there is a significant body of law supporting the presumption that government officials will properly carry out their duties in recording information [redacted] *See Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004). Further, in such circumstances, the petitioner has the opportunity to testify or otherwise explain the circumstances that might have led to the interview being recorded inaccurately. Here, Latif declined that opportunity and provided only an entirely conclusory statement disclaiming the report. JA 528.

Latif further argues that the district court could reject the reliability of the government report based on factors that showed it to be faulty. Br. at 54. In doing so, however, the court needed to consider the baseline likelihood that government officials would have had every incentive to accurately record the information in the report. [redacted]

Latif also cites (Br. at 53) this Court's decision in *Parhat v. Gates*, 532 F.3d

834 (D.C. Cir. 2008), where this Court declined to rely on an unsourced intelligence report as it would come "'perilously close to suggesting that whatever the government says must be treated as true.'" Br. at 53 (quoting *Parhat*, 532 F.3d at 849). But the concerns this Court expressed about the unsourced report in *Parhat* are a far cry from the situation here, where we know the source of the statement in the report, and the source is the habeas petitioner himself. Given the wartime context of these cases, the government's background declarations, and the presumption that government officials are carrying out their duties properly, the concerns the *Parhat* Court expressed about the lack of sourcing of a document making factual assertions should not rotely be applied to question the accuracy of government translators and interviewers who are simply recording the statements made by the habeas petitioner himself. *See Bihani*, 590 F.3d at 877; *see also National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

Third, the court gave no adverse weight to the conclusory nature of Latif's declaration, his decision not to testify, and the lack of corroboration for his account of his trip to Afghanistan, all factors which should have weighed against the probative value of his self-serving claim tha[redacted] See Opening Br. at 22-26.

In response to this point, Latif first argues that the government waived its opportunity to cross-examine Latif. Br. at 51. But the issue is not whether the government should have called Latif involuntarily as a witness in this case – a

action that would raise a host of difficult and fraught issues.[7] Instead, the question is the weight that should be accorded a self-serving and conclusory five-page declaration in these circumstances where the petitioner seeks a court ordered release, but is unwilling to utilize his "opportunity to testify" (Br. at 51) in court to back up those conclusory statements. We submit that in such circumstances, the declaration should carry little weight. *See Awad*, 608 F.3d at 8 ("it accords with common sense that [a detainee] may have had a motivation to lie about his own involvement in nefarious activity").

As we explained in our opening brief, Latif's declaration says nothing about [redacted] why the report he claims is wrong includes so many details that he concedes are accurate. *See* Opening Br. at 41-47.

Latif also argues that there is no rule that a "habeas petitioner must be penalized if he does not testify live." Br. at 52. But it is "common sense" (*Awad*, 608 F. 3d at 8) that Latif's unwillingness to testify was suggestive of the weakness

[7] For example, the prospect of a court order directing the government to move a habeas petitioner, perhaps forcibly, over his objection, from his cell to the examination area where detainees testify via secure video-conference could raise force protection, security and detainee discipline concerns within the detention facility. This scenario also raises the prospect of additional, significant collateral litigation to enjoin such a process.

of his claim of innocence, and as we explained in our opening brief, there is significant case law in a variety of contexts (involving detention, no less) holding that one's failure to testify to rebut a factual claim may in some circumstances give rise to an adverse inference. *See* Opening Br. at 24 (citing, *inter alia*, *Mitchell v. United States*, 526 U.S. 314, 328 (1999)).

Latif cites a criminal procedure case (Br. at 52), where such an adverse inference is normally barred by the self-incrimination clause, but that clause does not apply in a habeas case like this one. *See Bihani*, 590 F.3d at 879; *see also Boumediene v. Bush*, 553 U.S. 723, 783 (2008). More importantly, even in the criminal context, the voluntary submission of a written allocution of the facts may lead to an "adverse inference from a defendant's failure to testify as to that to which he has allocuted." *United States v. Whitten*, 610 F.3d 168, 199 (2d Cir. 2010). In other words, the reason we don't see criminal defendants submitting declarations to support their claim of innocence is because it would subject them to cross-examination or a *devastating* adverse inference should they decline to testify. *See id.* There is no good reason to give a habeas petitioner more substantial protection from the need to present his own persuasive story to the factfinder. Instead, a self-serving declaration in conjunction with a refusal to testify as to its contents should normally lead the court to give little evidentiary weight to that declaration. *See Warafi v. Obama*, 704 F. Supp. 2d 32, 40 (D.D.C. 2010) ("a self-serving [declaration] . . . submitted in lieu of live testimony" has very limited probative value); *see also Awad*, 608 F.3d at 8.

In sum, and as we explained in our opening brief, the district court made three critical legal errors that require reversal or remand: it failed to resolve a key factual issue, Latif's credibility; it imposed a higher burden on the government than a preponderance of the evidence; and it failed to look at all of the evidence as a whole that, when looked at together, showed it was more likely than not that the [redacted] report, [redacted] was accurate.

CONCLUSION

For the foregoing reasons and the reasons in the government's opening brief, the judgment of the district court should be reversed or remanded to the district court, with instructions to render a clear finding regarding Latif's credibility and to consider all of the evidence together.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 6690 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ August E. Flentje
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, I filed and served the foregoing Brief for Respondents-Appellants by delivering an original and eight copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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