[ORAL ARGUMENT NOT YET SCHEDULED]

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

BRIEF FOR RESPONDENTS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioners in the district court are, in addition to appellee Adnan Farhan Abd Al Latif Ala'Dini (ISN 156), the following individuals: Mahmoad Abdah, Mahmoad Abdah Ahmed, Majid Mahmoud Ahmed, Mahmoud Ahmed, Abdul Malik Abdul Wahhab Al-Rahabi, Ahmed Abdul Wahhab, Makhtar Yahia Naji Al-Wrafie, Foade Yahia Naji Al-Wrafie, Aref Adb Il Rheem, Aref Abd Al Rahim, Yasein Khasem Mohammed Esmail, Jamel Khasem Mohammad, Adnan Farhan Abdul Latif, Jamal Mar'i, Nabil Mohamed Mar'i, Uthman Abdul Raheem Mohammad Uthman, Araf Abdul Raheem Mohammed, Adil El Haj Obaid, Nazem Saeed El Haj Obaid, Mohamed Mohamed Hassan Odaini, Bashir Mohamed Hassan Odaini, Sadeq Mohammed Said, Abd Alsalem Mohammed Saeed, Farouk Ali Ahmed Saif, Sheab Al Mohamedi, Salman Yahaldi Hsan Mohammed Saud, Yahiva Hsane Mohammed Saud Al-Rbuaye.

The district court opinion in this appeal pertains only to Latif, who is the party in interest and appellee in this Court.

The respondents are Barack Obama, President of the United States; Robert Gates, Secretary of Defense; Admiral Jeffrey Harbeson, United States Navy, Commander, Joint Task Force-GTMO; and Army Col. Donnie Thomas, Commander, Joint Detention Group, Guantanamo Bay.

Charles B. Gittings, Jr., participated as amicus in the district court. The New York Times Company, USA Today, and the Associated Press were movants in the

district court.

B. Rulings Under Review

The government appeals from the July 21, 2010 order of the district court (Kennedy, J.) granting Adnan Latif's petition for a writ of habeas corpus. The classified opinion is reproduced in the appendix at JA 170. The unclassified opinion is reported at 2010 WL 3270761.

C. Related Cases

This case was previously before this Court. *See Abdah v. United States*, Nos. 05-5115, 05-5116 (D.C. Cir.). These appeals were remanded to the district court for further proceedings in light of the Supreme Court's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008). *See Al Odah v. United States*, Judgment, No. 05-5064 (D.C. Cir. June 25, 2008).

This case was also before this Court on appeal from a discovery order. *See Abdah v. United States*, No. 05-5127. It was remanded to the district court. *See Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009).

There is also an appeal currently pending before this Court regarding the district court's order requiring the government to give petitioners 30 days notice before any transfer. *See Abdah v. Obama*, Nos. 05-5224 (D.C. Cir.).

There are several other appeals of district court orders granting or denying a writ of habeas corpus to individuals detained at Guantanamo Bay, Cuba. Those cases, however, do not involve the "same parties," and are thus not related pursuant to Circuit Rule 28(a)(1)(c).

Counsel is not aware at this time of any other related cases within the meaning

of Circuit Rule 28(a)(1)(c).

/s/ August E. Flentje
August E. Flentje
Counsel for Respondents-Appellants

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GLOSSARY

AUMF ..... Authorization for Use of Military Force

[redacted]

CSRT ..... Combatant Status Review Tribunal

ISN ..... Internment Serial Number

PE ..... Petitioner's Trial Exhibits

[redacted]

TE ..... Joint Trial Exhibits

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BRIEF FOR RESPONDENTS-APPELLANTS

STATEMENT OF JURISDICTION

Petitioner, Adnan Farhan Abd al Latif, invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2241, as well as directly under the Constitution. *See Kiyemba v. Obama*, 561 F.3d 509, 512-513 (D.C. Cir. 2009); *Boumediene v. Bush*, 128 S. Ct. 2229, 2278 (2008) (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that there must be constitutionally based jurisdiction or none at all."). The district court issued an order on July 21, 2010, granting the writ of habeas corpus to Latif. Joint Appendix (JA)

169. The Government filed a timely notice of appeal on September 17, 2010. JA 198. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUE

According to a report [redacted] and the district court declined to rely on the [redacted] report based on concerns about its accuracy.

The primary question on appeal is whether the district court erred in declining to rely on the report when it did not resolve [redacted] and failed to consider other evidence showing the report to be accurate.

STATUTORY PROVISION

The Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001) (AUMF) provides that:

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

The Government appeals the district court's order granting the writ of habeas corpus to Adnan Farhan Abd Al Latif (ISN 156).[1] Following cross-motions by the parties for judgment on the record and a hearing, the district court entered judgment for Latif. JA 169. The district court held that the Government had "not proven by a preponderance of the evidence that Latif was in Afghanistan to train and fight with the Taliban." JA 197.

STATEMENT OF FACTS

A. The Evidence Showing Latif To Be Part Of Taliban or Al-Qaida Forces.

1. In the district court habeas proceeding, the government submitted an intelligence report detailing [redacted]

[1] ISN stands for "Internment Serial Number." The Department of Defense assigns each detainee held at Guantanamo Bay such a number. *See* Department of Defense Directive 2310.01E at 3 (Sept. 5, 2006).

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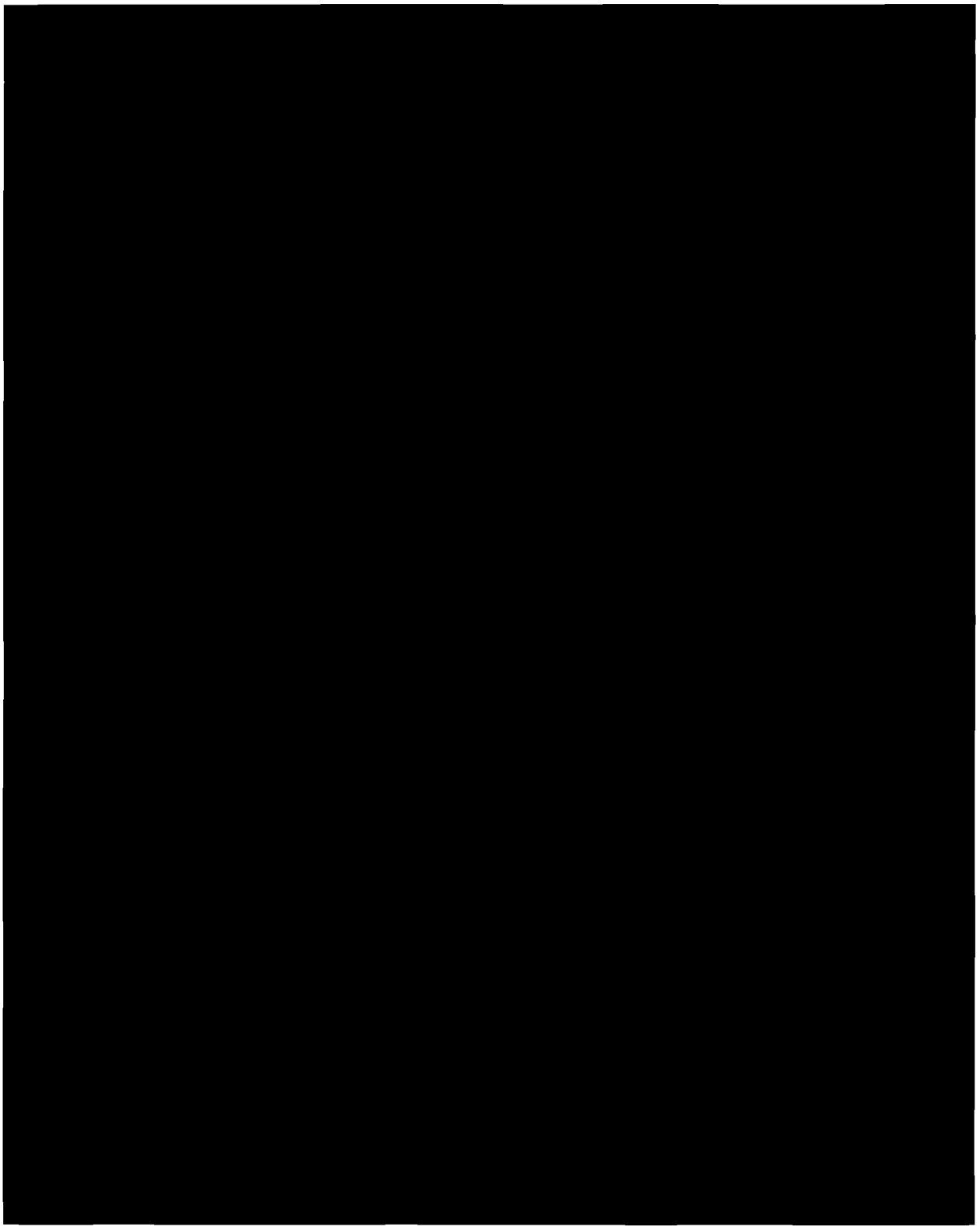

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[redacted]

2. In [redacted] interviews and in a 2009 declaration prepared by his attorneys for use at trial, Latif has denied that he trained with and was deployed with Taliban forces. *See, e.g.*, JA 487 (TE 31) (ARB Detainee Election Form) (Mar. 28, 2005) (went to Afghanistan to "meet with an aid worker, not to fight or train"). Because the case turned on the accuracy of this [redacted] report, the government submitted evidence corroborating information [redacted] in the report.

a. First, the government submitted several [redacted] statements made by Latif [redacted]

Latif [redacted] on at least 6 occasions [redacted] traveled to Afghanistan at the behest of [redacted] his Taliban recruiter – Ibrahim Alawi. *See*, e.g., JA 526 (TE 34) (declaration). He [redacted] provide details about his meeting with Ibrahim in Kandahar [redacted] *See* JA 464-65 (TE 25) (ISN 156 SIR (Mar. 6, 2002)).

Latif's [redacted] interviews also described his travel to Afghanistan [redacted] And Latif identified names [redacted] *See* JA 465; JA 579 (TE 49) [redacted]

Latif also confirmed that his only prior trip outside Yemen was to Jordan, in

connection with medical care. *See, e.g.*, JA 461 (TE 24) (FD-302 (April 26, 2002)). And Latif confirmed [redacted] many of his background and family details [redacted] *See, e.g.*, JA 461; JA 568 (TE 46) (Intake Form).

b. The government also submitted external evidence to corroborate the details provided in the [redacted] report. First, a man with a name very similar to [redacted] his recruiter – "Ibrahim Ba'alawi" – was a well-known Al Qaeda and Taliban recruiter operating in the same area of Yemen, and living in Kandahar with his family, who used the kunya Abu Khulud and sent potential recruits along a travel route [redacted] *See, e.g.*, JA 250 (TE 3) (ISN 39 FM40).

Second, [redacted] Taliban fighting was in fact occurring north of Kabul in late 2001 against the Northern Alliance. *See* JA 437-38 (TE 21) (Brooks Decl.) [redacted]

Third, [redacted]

[redacted] One of the names [redacted] is very similar to a shortened version of the names Latif admits to using. *See* JA 528 (TE 34) (Latif Decl.) (Latif's legal name is "*Adnan Farhan* Abdul Latif" and he uses religious name "Abdelrahman Abdulla Abdel *Jalil*") (emphasis added).

3. As noted above, Latif [redacted] disputed the accuracy of the [redacted] report. At his habeas hearing, however, he did not testify in support of his claim that this report was inaccurate. Rather than testify and face cross-examination, he elected to submit a sixteen paragraph declaration of slightly over four pages. In that 2009 declaration, Latif stated:

> I have never received weapons training, from the Taliban, at any training camp, or anywhere else. I have never participated in military fighting in Afghanistan or anywhere else. I have never told anyone that I received weapons training, attended a training camp, or participated in military fighting.

JA 528. Latif explained that he "went to Afghanistan . . . in the summer of 2001 to find Ibrahim, who had promised me that he could help me get free medical treatment in Pakistan." JA 526.

In the declaration, Latif further stated he had suffered medical problems ever since he had been involved in a car accident in 1994. JA 525-26. Immediately following the automobile accident, Latif "travel[ed] to Jordan to receive medical treatment" and "spent three months" hospitalized there JA 525. He said his medical problems continued, and he "began to look for charitable organizations that would pay for my medical treatment." JA 526. Whereas he [redacted]

[redacted] stated that a man named Ibrahim "promised me that, if I went to Pakistan, he would take me to a charitable medical clinic." JA 526.

Finally, in his 2009 declaration, Latif claimed that "[i]n the summer of 2001" he "traveled to Pakistan"; "took a bus to Quetta, and then a taxi from Quetta into Afghanistan." JA 526-27. Once in Afghanistan, Latif said he "went to Kabul and located Ibrahim at an Islamic studies institute." JA 527. Ibrahim was too busy to help, so Latif "waited several weeks at the institute, but Ibrahim never returned." *Id.* Instead, bombing started and Latif was told he "needed to leave Afghanistan." *Id.* Latif "traveled for many days and was arrested by Pakistani forces after [he] crossed the border into Pakistan." *Id.*

B. District Court Proceedings and Decision

The district court held a hearing where it considered the documentary evidence. Latif elected not to testify on his own behalf. The court then granted the writ.

The court concluded that the [redacted] report – [redacted] was "not sufficiently reliable to support a finding . . . that Latif . . . trained and fought with the Taliban." JA194. The court explained that if the statement in the [redacted] report was [redacted] it "would support a conclusion that Latif's detention is lawful." JA 195. The court, however, rejected the report's accuracy for three reasons.

First, the court stated that Latif's claim that [redacted] Nothing in the report

allowed the court to [redacted] The report, the district court concluded, contained [redacted]

Second, the court considered Latif's story to be "plausible" and "not incredible." JA 195-96. The court reasoned that discrepancies in Latif's story either did not contradict his current story; or "may be" the result of "misunderstanding," "misstatements or mistranslations." JA 196. And the court observed that "even if some details of Latif's story have changed over time, for whatever reason, its fundamentals have remained the same." *Id.*

Third, the court explained that there was "no corroborating evidence for any of the incriminating statements [redacted] JA195. The court dismissed the fact that Latif's story is consistent with historical events [redacted]

The court ordered the government to take "all necessary and appropriate

diplomatic steps to facilitate Latif's release forthwith." JA 169.

SUMMARY OF ARGUMENT

The primary evidence in this case was a report [redacted] As the district court correctly reasoned, if the statement in the report can accurately be [redacted] would support a conclusion that Latif's detention is lawful." JA 195. The district court, however, declined to rely on the report, expressing concerns about its accuracy. This conclusion was erroneous for two reasons.

First, the only evidence that could raise serious doubts about the accuracy of the report was [redacted] The district court, however, failed to resolve the crucial question [redacted] That equivocal finding is not a sufficient basis to reject the key evidence in this case. At a minimum, this Court should remand to the district court with instructions to make a clear finding regarding Latif's credibility [redacted]

Second, even had the district court unambiguously found Latif to be credible and tha [redacted] such findings would be clearly erroneous, requiring this court to reverse, for the following reasons.

A. The court improperly gave no adverse weight to the conclusory nature of Latif's declaration, and the lack of corroboration for his account of his trip to

Afghanistan, both factors which should have weighed heavily against his credibility. Further, in these circumstances, the court also should have taken into account Latif's failure to testify in evaluating the credibility of this vague and self-serving declaration.

B. The court placed a special burden on the government to establish the accuracy of the report under a standard that was greater than a preponderance of the evidence. In doing so, the court failed to consider the relevant evidence showing [redacted] reports of this nature to generally be accurate. Contrary to the district court's assertion, the government provided background expert declarations attesting to the accuracy of such reports. Given those declarations and the presumption of regularity, it is more likely than not that government officials are properly carrying out their reporting duties. Moreover, the fact that the report was created for intelligence, not litigation, purposes during wartime further supports its accuracy. The district court erred by considering none of these factors.

C. The court failed to evaluate all of Latif's statements together. When they are looked at together, they [redacted] contain key inconsistencies that are highly suggestive of the development of a cover story. Latif's cover story has changed over time with respect to the purpose of his trip to Afghanistan. [redacted]

Likewise, the court erred in failing to properly address the remaining evidence

in the record [redacted] that tended to corroborate the accuracy of the [redacted] report and the fact that Latif was a Taliban recruit who served with Taliban forces until their retreat. In short, the court failed to "consider all of the evidence taken as a whole." *Awad v. Obama,* 608 F.3d 1, 7 (D.C. Cir. 2010).

When the evidence is looked at together, a reasonable factfinder would have concluded that the earlier report was accurate and that Latif was part of Taliban Forces. Thus, this Court should reverse the grant of the writ in this case. At a minimum, however, this Court should remand to the district court, with instructions to render a clear finding regarding Latif's creditibilty and to consider all of the evidence together.

STANDARD OF REVIEW

This Court reviews de novo the district court's conclusions of law, including its ultimate determination concerning the writ of habeas corpus. *Bensayah v. Obama*, 610 F.3d 718, 722 (D.C. Cir. 2010). This Court reviews for clear error a district court's factual determinations, including inferences drawn from findings of fact. *Al Odah v. United States*, 611 F.3d 8, 14-15 (D.C. Cir. 2010).

"Whether a detainee was 'part of' al Qaeda is a mixed question of law and fact." *Bensayah*, 610 F.3d at 723. Whether a detainee's alleged conduct justifies detention under the AUMF is a legal question, but whether the government has proved that conduct occurred is a factual question. *Ibid.*; *see Barhoumi v. Obama,* 609 F.3d

416, 423 (D.C. Cir. 2010). Likewise the district court's overall approach to the evidence – *e.g.*, looking at each item of evidence separately, as opposed to taking into account the mutually reenforcing nature of the evidence – can be considered a fundamental mistake that infects the court's analysis of the record, and is therefore subject to *de novo* review. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010).

ARGUMENT

THE DISTRICT COURT ERRED IN REJECTING THE ACCURACY OF THE [redacted] REPORT [redacted]

The primary evidence in this case was a report [redacted] As the district court correctly reasoned, if the statement in the report can accurately be [redacted] would support a conclusion that Latif's detention is lawful." JA 195; *see Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (President can lawfully detain "'an individual who was part of . . . Taliban . . . forces'"); *Barhoumi*, 609 F.3d at 431.

The district court, however, declined to rely on the report, concluding that the government had not "proven by a preponderance of the evidence that Latif was in Afghanistan to train and fight with the Taliban." JA 197. This conclusion was the product of the court's failure to address Latif's credibility [redacted] and the lack of any menaingful assessment of the evidence supporting the overall accuracy of the [redacted] report.

The only evidence that could have raised serious doubts about the accuracy of the [redacted] report was [redacted] The district court, however, failed to resolve the crucial question [redacted] Instead, the court observed that Latif's story set out in his 2009 declaration appeared to be, at most, "plausible." JA 195. That equivocal finding is not a sufficient basis to reject the key evidence in this case. At a minimum, this Court should remand to the district court with instructions to make a clear finding regarding Latif's credibility [redacted] as will be explained in Part A.

And as will be explained in Part B, even if the district court had unambiguously found Latif to be credible and that [redacted] such findings would be clearly erroneous. First, the court improperly gave no adverse weight to the conclusory nature of Latif's declaration, the lack of corroboration for his story, and his decision not to testify. Second, the court placed a special burden on the government to establish the accuracy of the report beyond a preponderance, and failed to consider expert declarations and other factors showing it more likely than not to be an accurate summary of [redacted] Third, the court failed to evaluate all of the evidence – [redacted] together. Together, the evidence both confirm the accuracy of the [redacted] report, and Latif's [redacted] statements contain key inconsistencies that are highly suggestive of the development of a cover story. In short, even if the district court had unambiguously made the necessary findings, it clearly erred because it failed to "consider all of the evidence taken as a whole." *Awad,* 608 F.3d at 7.

A. The Court Failed to Properly Address Latif's Credibility or the Report's Accuracy.

[redacted] Yet the district court made no finding regarding Latif's credibility either generally or as to his specific assertion that [redacted] in turn, the court did not find it more likely than not that the report was inaccurate. This error infected the district court's assessment of the government's case for detention, and requires reversal.

In a circumstance like this one, [redacted] credibility [redacted] is necessarily a central issue in the case. As this Court has explained, remand is necessary where the district court "did not make definitive findings regarding certain key facts necessary for us to determine as a matter of law whether [the detainee] was in fact 'part of'" enemy forces when captured. *Salahi v. Obama*, — F.3d —, 2010 WL 4366447, at *7 (D.C. Cir. Nov. 5, 2010).

An assessment of Latif's credibility is essential [redacted] As this Court has explained, "self-serving statements of innocence" must be "credit[ed]" to have significant evidentiary weight "[a]gainst [the government's] evidence" showing detainability. *Awad*, 608 F. 3d at 10. And if not worthy of belief, Latif's [redacted] cover story tends to *support* the government's case for detention, as a detainee's "false exculpatory statements are evidence – often strong evidence – of guilt." *Adahi*, 613 F. 3d at 1107. As this Court explained in *Adahi,* it is "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." *Adahi*, 613 F. 3d at 1110.

Here, the court did not adequately evaluate or make a sufficient factual finding that Latif was credible generally [redacted] The "precision required in . . . findings . . . is directly related to the level of judicial scrutiny." *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1093 (D.C. Cir. 1979). Thus, the district court should "articulate its [findings] with sufficient clarity to allow" the court of appeals to determine whether the review "standard[] ha[s] been met." *Id.* In the case of witness credibility, "there should be some sort of finding regarding credibility, either explicit or implicit." *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 151 (3d

Cir. 2004). Thus, in the administrative law context, when "credibility . . . is crucial to the reviewing court's conclusion . . . the [agency] must have made a sufficient finding as to the witness' credibility." *Tieniber v. Hecker*, 720 F.2d 1251, 1254 (11th Cir. 1983). As the Supreme Court has explained, in cases that "involve critical credibility assessments," "obscuring" the findings of the trier of fact "impedes fully informed appellate review" and "the appellate court will be at a loss" to apply the appropriate review standard. *Ballard v. C.I.R.*, 544 U.S. 50, 59-60 (2005).

Accordingly, when a factfinder does not "expressly state [whether a key witness is credible], the [factfinder] has succeeded in muddying the waters." *Boyd v. Heckler*, 704 F.2d 1207, 1210 (11th Cir. 1983); *see Allen v. Schweiker*, 642 F.2d 799, 801 (5th Cir. 1981). And for a credibility finding to be implied, the "implication must be obvious to the reviewing court." *Tieniber*, 720 F.2d at 1255. In the administrative law context, one cannot properly "infer such a finding . . . solely from the [factfinder's] ultimate finding" because it does not "measure up to the degree of precision required of adjudicative fact-finding." *Id.*; *see United States v. Mitchell*, 82 F.3d 146, 151 (7th Cir. 1996) ("explicit findings about . . . [specific] conversation" not necessary when court generally found officer's testimony "'credible'" and defendants testimony "'not credible'").

Further, as this Court explained in *Adahi*, "[v]alid empirical proof requires not just an establishment of possibility, but an estimate of probability" in light of all of the evidence. 613 F. 3d at 1110. There, the district court had erred when it "spoke only of a possible alternative explanation" for events without "mak[ing] any finding about

whether this alternative was more likely than the government's explanation." *Id.*

The district court made the same error here. The court did not find Latif to be credible and it is not clear at all – much less "obvious to the reviewing court" – that a credibility finding can be implied. *Tieniber*, 720 F.2d at 1255. Indeed, the district court's several findings about Latif's story are notable because they *very carefully avoid the conclusion that Latif was a credible declarant.* [redacted] JA 195 [redacted] the Court concluded that "Latif has presented *a plausible* alternative story to explain his travel." *Id.* (emphasis added). The court's core findings that Latif's [redacted] cover story were "plausible" is undoubtedly *not* a finding – either express or implied – that it was more likely than not that his alternative version of events was true. This was error.

The court's subsidiary statements about Latif's credibility confirm that the court failed to make a finding as to his credibility. In addressing Latif's cover story, the court describes it as containing "inconsistencies and unanswered questions," but reasoned that it "*is not incredible*." JA 196 (emphasis added). The court stated one major inconsistency in Latif's story – his claim, in some interviews, that he went to Afghanistan to help work at an Islamic center – "*may be* the result of a misunderstanding or mistranslation." *Id.* (emphasis added). Similarly, the court concluded that what it described as other "smaller inconsistencies . . . *may be* no more than misstatements or mistranslations." *Id.* (emphasis added). And in addressing

Latif's claim that he was seeking medical treatment in Afghanistan, the court concluded that Latif "*might . . . have sought* treatment" in Afghanistan. JA 197 (emphasis added). In these subsidiary findings, the district court carefully avoided making any determination about whether Latif's accounts were credible or could be reconciled.

The district court here made the same error when assessing the overall accuracy of the [redacted] report, stating that Latif's [redacted] The court then stated that there was a [redacted]

In stark contrast, the court imposed a *higher* standard on the government. The court reasoned that the government would not meet its burden by showing it more likely than not that Latif is lying, but that the government was expected to show that Latif "*must be lying* because he has told more than one cover story." JA 196 (emphasis added). In other words, the court seemed to expect the government to establish that Latif's multiple cover stories made it impossible for him to have been telling the truth – effectively, to prove a negative – but such a standard makes no sense and is well above a preponderance standard. *See also* JA 192 (expecting government's showing to "exclude the possibility" that Latif's version of events was correct). Similarly, the court expected a special showing from the government to

"*ensure* that each summary was accurate." JA 195 (emphasis added). In other words, the court expected a showing by the government that it was *not possible* for the report to be erroneous.

These conclusions made by the district court – that Latif's story was "not incredible"; was "plausible" and "might" have occurred; and that the government had not shown that Latif "must be lying," "ensure[d]" the accuracy of the report, or "exclude[d] the possibility" that Latif was telling the truth – are inadequate because they hold the petitioner to a lower burden of proof and make the government's burden higher than is appropriate. Under *Adahi*, the district court was required to examine the all of the evidence together and determine the critical question of whether Latif was part of the Taliban forces. Here, that required a determination of whether the 2009 litigation declaration [redacted] was credible. As we discuss below in detail, in undertaking that analysis, the district court was required to look at all of the indicia of reliability [redacted] In finding Latif's new story to be "plausible," the district court only supports the "possibility" that Latif was telling the truth in 2009. *Adahi*, 613 F. 3d at 1110. It does not tell us whether [redacted] was more likely than not true, in light of all of the other evidence taken as a whole. Thus, the findings evoke only an "establishment of possibility" that Latif was telling the truth, which was error. *Adahi*, 613 F. 3d at 1110. And to the extent these findings suggest a probability, the conclusions of the district court – such as the statement that Latif's claim is "plausible" – suggest a probability of *under* fifty percent. *See Moberly v. Secretary*

of HHS, 592 F.3d 1315, 1322 (Fed. Cir. 2010) ("By that formulation, however, they appear to mean not proof . . . by the traditional 'more likely than not' standard, but something closer to proof of a 'plausible' or 'possible' causal link . . . which is not the statutory standard"). And with respect to the government's showing (that the report's accuracy must be "ensure[d]" and Latif "must be [shown to be] lying"), the court's analysis suggests the imposition of a burden that is *over* fifty percent.

Indeed, terms like "plausible" and "not incredible" invoke a review standard, not a factual finding in the first instance. *See*, *Awad*, 608 F.3d at 7 (court of appeals must affirm district court's factual finding if its "account of the evidence is plausible in light of the record"); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (if finding is based on "facially plausible" story that is "not contradicted by extrinsic evidence," it "can virtually never be clear error"); *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").

In sum, the court failed to resolve "whether [Latif's account] was more likely than the government's explanation." *Adahi*, 613 F. 3d at 1110.

B. Even If The Court Had Unambiguously Found Latif to Be Credible, Such A Finding Would Be Clearly Erroneous.

Even if the lower court had unambiguously found Latif to be credible and the report inaccurate – which as just explained above did not occur – such findings would have been clearly erroneous.

1. Latif's Declaration is Conclusory and Not Corroborated And The District Court Should Have Considered Latif's Failure to Testify in Evaluating His Credibility

Latif's factual "assert[ion] that he did not make [redacted] statements" in his 2009 declaration [redacted] is entirely conclusory . *See* JA 528 ("I never told anyone that I received weapons training, attended a training camp, or participated in military fighting"). His declaration does not address the [redacted] and provides no information about [redacted] or other circumstances surrounding it that would allow a court to evaluate the veracity of this bare denial. It is well established that credibility is undermined when an explanation is "vague or conclusory" or "constructed entirely of gauzy generalities." *United States v. Rodriguez*, 858 F.2d 809, 815 (1st Cir. 1988). And as this Court has explained, "it accords with common sense that [a detainee] may have had a motivation to lie about his own involvement in nefarious activity." *Awad*, 608 F.3d at 8. [redacted]

[redacted]

Latif also provided no corroboration for his account of his trip to Afghanistan. He submitted no evidence from a family member, from Ibrahim, or from anyone to corroborate his claim that he was traveling to Pakistan in 2001 to seek medical treatment. Latif has provided no explanation as to how he paid for his trip or any details about the organization that would provide him with the free medical care, including where it was located, who was on its staff, what Latif had learned about its medical services, or any other details someone seeking medical care thousands of miles from home would know before making a long journey to a foreign country for that purpose. He has not explained why he would simply hang around at an Islamic Center in Kabul for a period of months after the war had begun. *See* JA 527. He provided minimal details about his departure from Afghanistan. [redacted] These gaps in his story should have weighed heavily against his credibility. *See, e.g., Al Odah*, 648 F. Supp. 2d 1, 15 (D.D.C. 2009) (making adverse inference because, in part, "[i]n almost every significant respect, Al Odah has failed to provide credible explanations for his travel to Afghanistan and the choices he made as to his movements and activities within Afghanistan"); *Anam v. Obama*, 696 F. Supp. 2d 1, 12 (D.D.C. 2010) (similar); *cf. Al-*

Adahi, 608 F.3d at 1107 (noting the "well-settled principle that false exculpatory statements are evidence – often strong evidence – of guilt"); *Kandari v. United States*, — F. Supp. 2d —, 2010 WL 3927309, at *19 (D.D.C. Sept. 15, 2010) ("the provision by a detainee of an implausible explanation for his activities in Afghanistan is a relevant consideration in these habeas proceedings"); *Rodriguez*, 858 F.2d at 815 (story that is "thoroughly implausible" or "constructed entirely of gauzy generalities" is insufficient to raise genuine question of material fact).

In the face of an entirely conclusory and uncorroborated 2009 declaration, the district court should have also weighed Latif's failure to testify (and face cross-examination) in evaluating the credibility of his declaration. [redacted], the detainee's unwillingness to testify in court to support his claim should be taken into account by the district court. *See Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion") (prison disciplinary proceeding); *INS v .Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984) (immigration proceedings); *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 285-86 (1998) (clemency). As the Supreme Court has explained, when a defendant in a prison disciplinary proceeding "remained silent at the hearing in the face of evidence that incriminated him," that silence is entitled to "evidentiary value." *Baxter*, 425 U.S. at 318. And even in the criminal context, when a defendant chooses to testify or submits

an "unsworn, uncrossed allocution," it "allows . . . an adverse inference from a defendant's failure to testify as to that to which he has allocuted" or "facts within his knowledge" about which he refuses to testify. *United States v. Whitten*, 610 F.3d 168, 199 (2d Cir. 2010). The "uncrossed allocution" in a criminal case is analogous to the litigation declaration produced by Latif here – both reflect an effort to present one side of the story to the trier of fact while avoiding cross-examination.

As one district court explained in addressing this issue in the context of Guantanamo habeas cases, a declaration like the one submitted by Latif "is a self-serving document . . . submitted in lieu of live testimony." *Warafi*, 704 F. Supp. 2d at 40 (D.D.C. 2010). Such a submission precludes "cross-examin[ation] . . . on the contents of the declaration" and a court "cannot adequately assess the reliability of petitioner's explanations for taking certain actions or the statements for which he failed to provide an explanation." *Id.* Such an examination is particularly appropriate when detention is based upon the [redacted] Here, the district court failed to consider the self-serving nature of the 2009 declaration, the lack of corroboration for key aspects of his story, and Latif's failure to testify. This was error.

2. The District Court Erroneously Placed A Special Burden on the Government To Ensure the Accuracy Of The [redacted] Report and Failed To Consider Factors Showing It More Likely Than Not to be an Accurate Summary [redacted]

The district court also clearly erred because it should have considered several general factors that show it more likely than not that the [redacted] report accurately recorded the information [redacted] By not considering these factors, the ability of the courts and the government to rely on the realm of reporting documents that form the basis of nearly all of these cases is severely undermined. That does not mean that the district court should have presumed the information in the report to be true; instead, it must give some weight to the constellation of factors that together show that an [redacted] report of the type submitted here is more likely than not accurate. But rather than consider these factors, the district court erred by imposing on the government a special burden [redacted]

[redacted]

This special burden [redacted] was erroneous and amounted to imposing a burden of proof well beyond a preponderance of the evidence.

a. The evidence [redacted] submitted in the case, which the district court erroneously failed to address, make it more likely than not that the report was accurate. It was simply not correct, as the district court stated, that the government did "not provide any information" to show the [redacted]

[redacted] In addition to the evidence corroborating the accuracy of the report that will be discussed in the next section of the brief, the government submitted detailed declarations attesting to the training of [redacted] officers [redacted] involved on the scene and the accuracy of reports of this nature. *See Bihani*, 590 F.3d at 879 ("declaration from a government official describing his expertise . . . [is] an example of reliable hearsay") [redacted]

[redacted]

This record evidence, which the court did not address, supported the accuracy of the report.

b. [redacted]

[redacted]

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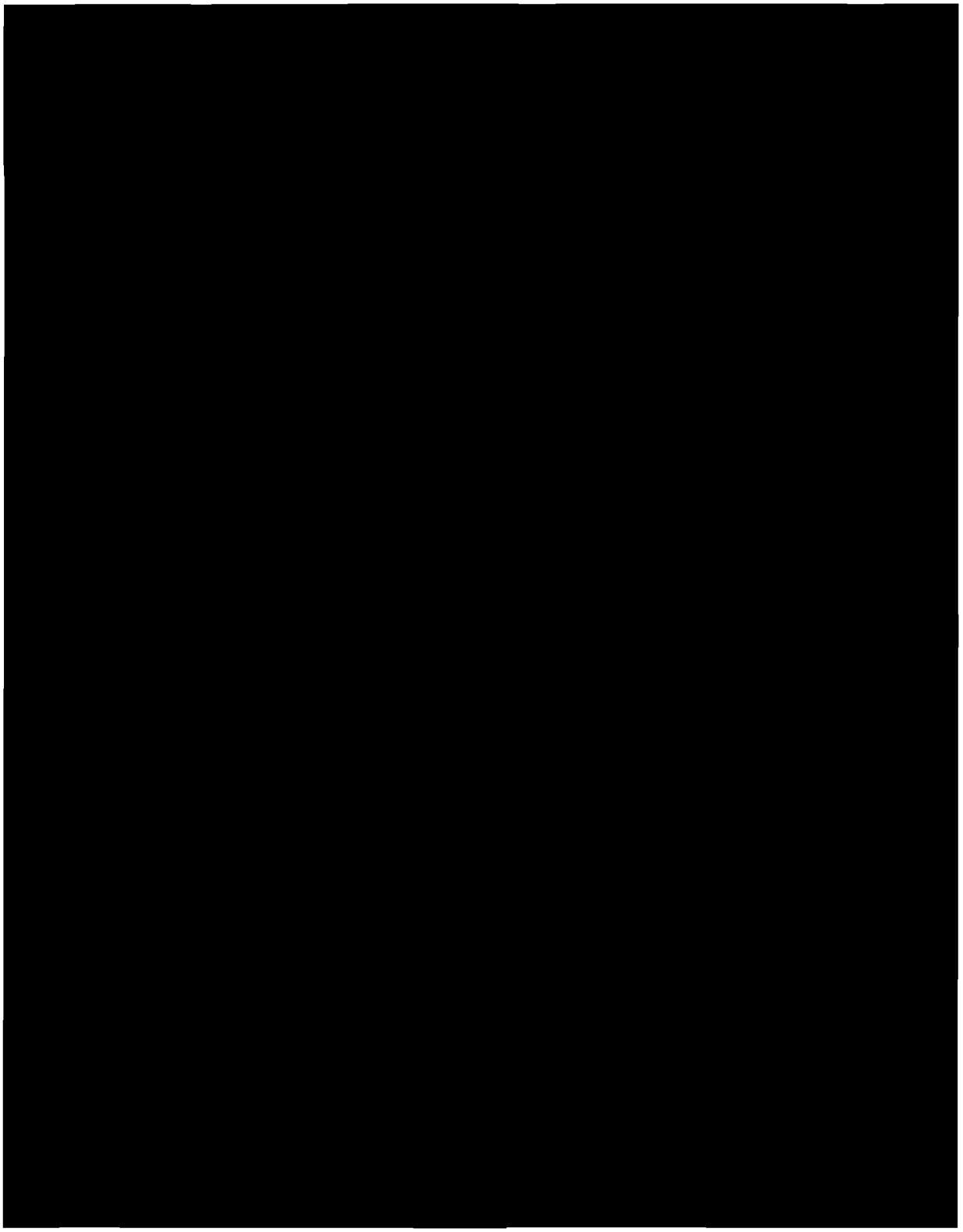

c. The expert declarations also should have been considered in light of the general presumption that government officials are properly carrying out their duties. It is well established that there is a strong "presumption of regularity" for actions of government officials taken in the course of their official duties. *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Clear evidence is normally required to overcome this presumption. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). It is for this basic reason that government reports that are hearsay may be admitted into evidence under the Federal Rules, namely, the "*assumption* that a public official will perform his duty properly." Fed. R. Evid. 803(8), Advisory Cmte. Notes, 1972 Proposed Rules (emphasis added); *see also* 28 U.S.C. § 1773(a).

A similar principle applies in the context of immigration proceedings to obviate the need for government officials to appear in court and vouch for the accuracy of their interview accounts. In immigration cases, when a report is based on "information out of the alien's mouth," the officer who recorded the information "cannot be presumed to be any[thing] . . . other than an accurate recorder." *Espinoza v. I.N.S.*, 45 F.3d 308, 311 (9th Cir. 1995); *see I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032, 1049 (1984) ("At present an officer simply completes a 'Record of Deportable Alien' that is introduced to prove the INS's case at the deportation hearing; the officer rarely must attend the hearing.").[2] "This rule is 'premised on the assumption that

[2] *See also Ruckbi v. I.N.S.*, 285 F.3d 120, 124 & n.7 (1st Cir. 2002) (rejecting (continued...)

public officials perform their duties without motive or interest other than to submit accurate and fair reports.'" *Espinoza,* 45 F.3d at 310 (citations omitted). Indeed, the incentive here – where the screening interview was conducted to gain actionable intelligence during an armed conflict, and not in anticipation of litigation – makes the factors supporting accuracy even stronger than in the immigration context, where litigation can generally be anticipated to follow and be based on the statements made during the immigration interview. And, in the context of battlefield screening interviews, even more so than in the immigration context, there would be a "'great inconvenience that would be caused to the public business if public officers had to be called to court to verify in person every fact that they certify.'" *Id.* (citation omitted).

[redacted]

This established law, together with the expert declarations, should have been taken into account by the district court when assessing the accuracy of the [redacted] report.

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[2](...continued)
argument that government had to call forensic expert who prepared a report, citing *Espinoza*); *Felzcerek v. I.N.S.,* 75 F.3d 112, 117 (2d Cir. 1996) ("Other courts have agreed that a Form I-213 is presumptively reliable and can be admitted in deportation proceedings without giving the alien the opportunity to cross-examine the document's author, at least when the alien has put forth no evidence to contradict or impeach the statement in the report.").

3. When Evaluated Together, Latif's Statements Confirm the Accuracy of the Report and Are Highly Suggestive [redacted] with a Cover Story.

The statements Latif has made to interviewers during the period of his detention have two critical elements: [redacted] These aspects of Latif's story *strongly suggest* the development and refinement of a cover story [redacted] *See Adahi*, 613 F. 3d at 1107 ("false exculpatory statements are . . . often strong evidence . . . of guilt"). Such a conclusion is all but compelled when all of Latif's statements are looked at together, which the district court failed to do. *See Salahi*, 2010 WL 4366447, at *7-8 (court must "view the evidence collectively rather than in isolation").

a. Latif's Shifting Statements.

[redacted]

And his explanation about what he was doing instead of serving with Taliban forces is both inconsistent and vague.

Thus, when he was turned over to U.S. forces on December 31, 2002, he stated that he went to Pakistan "for treatment of [an] ear problem" and was in "Kabul . . . just to look around [for] about 4-5 months" and that a man named "Abdul Fadel welcomed [him] as he came into AF (at Mosque)." JA 569.

A month later, in February 2002, his story did not involve seeking medical treatment at all, but instead he went to help with an Islamic center and became ill once in Afghanistan. He told an interviewer he "traveled to Afghanistan to help Ibrahim (Aliwee) improve the Islamic studies center in Kabul." JA 581. In that account, he said that he "became ill [in Kabul] and stayed with a doctor . . . while receiving treatment." *Id.*

In March 2002, Latif's story changed again to more closely reflect the one he maintains now. Then, Latif stated that he "met an individual named Ibrahim (Aliwee) who offered him help" with his medical problems. JA 464. Ibrahim "paid his way" to Pakistan; he landed in Karachi, "took the bus to Quetta" and then a car and driver took "him to Kandahar." JA 465. It was in a mosque in Kandahar that he located Ibrahim; the two went to Ibrahim's house where he stayed with Ibrahim's family "for three days"; then Ibrahim took him to "a teaching center" in "the center of Kabul." *Id.* He stayed "at the center for five months" where he "learned and memorized the Koran with the other students." *Id.* Latif told the FBI a similar story in April 2002. JA 461.

But the details of his account continued to change when convenient. In that same month, he told the Defense Department "he spent . . .five months in the . . . center of Kabul" but when "I began to ask questions as to the location . . . he changed his story and told me that he spent the five months . . . in a village outside of Kabul . . . at the [teaching] center" JA 575 (TE 48) (MFR April 2002); *see* JA 831 (TE 86) (Interview Notes, May 29, 2002) (Latif "stayed in center of Kabul"); JA 465. And in that same April interview, he described himself as a teacher rather than a student. *See* JA575 (Latif "helped teach 30 students per day in the village"). [1] [redacted] [1] [redacted] JA 576 [1] [redacted] [redacted] *see* JA 575 (Latif had previously said he had seen

armed men at the center, but now claimed to have seen only one armed man at the center).

In May 2003, Latif's story shifted again to eliminate any reference to being in Afghanistan. Then, Latif stated that he only went to Pakistan for "a short time"; that while there, Ibrahim actually "took [me] to the hospital" in Pakistan. JA 473 (TE 28) (FD-302 (May 18, 2003)). And in that account, Latif explained that he "gave [Ibrahim] his passport . . . to be able to check him into the hospital" but that "[Ibrahim] never came back;" he was then arrested "at the hospital in Pakistan." *Id.*

During CSRT proceedings, Latif's story mixed elements of his prior accounts. He stated that he "was told I could receive treatment in Pakistan" but he "went [to Afghanistan] for treatment," rather than Pakistan, because the "person that could treat me for a reasonable price was in Afghanistan." JA 480, 482, 484 (TE 30) (CSRT statement). He explained that in Afghanistan he lived in " a school" and "was at the school receiving shots for my treatment." JA 484. He was "treated . . . for five days" while in Afghanistan. *Id.*

In his short 2009 trial declaration, Latif's story returns to something more similar to the one he told in March and April of 2002. He claims that he met Ibrahim at "one of the charitable organizations . . . in Yemen" and he "told me that he was going to Pakistan soon and suggested that I find him there." JA 526. He "traveled to Pakistan" but "discovered that Ibrahim had gone to Kabul" so he "followed him to Afghanistan." *Id.* Latif "went to Kabul and located Ibrahim at an Islamic studies institute" but Ibrahim "was too busy to accompany me to Pakistan." JA 527. Ibrahim

then "offered to let me stay at the Islamic studies institute" where he "waited for several weeks, but Ibrahim never returned." *Id.* Once the United States began bombing, Latif "fled" and "traveled for many days and was arrested by Pakistani forces after I crossed the border." *Id.*

b. Inconsistencies in Latif's Statements Strongly Suggest the Development of a Cover Story.

i. The statements made by Latif are inconsistent with each other and with Latif's current story in several significant respects relating to the key details of his trip to Afghanistan. First, the claimed purpose of Latif's trip to Afghanistan has changed – in February 2002 he stated that he went to "help Ibrahim (Aliwee) improve the Islamic studies center in Kabul" (JA 581), but he has also claimed that he went to Afghanistan to find Ibrahim in connection with medical treatment that he was seeking in Pakistan. See JA 526; JA 464; JA 461. Latif never explained this significant discrepancy, and the district court's conclusion that it "may be the result of a misunderstanding or mistranslation" was entirely speculative.

That speculation about mistranslation or misunderstanding also does not account for other aspects of Latif's February 2002 statement that he has since abandoned. In February 2002 he claimed to have "bec[o]me ill and stayed with a doctor in Kabul," but made no claim of suffering prior injuries that led him to travel to Afghanistan for treatment. JA 581. And Latif stated that he was with Ibrahim at the time of the war, and together were "warned that they should leave [Afghanistan] . . . to avoid anti-Taliban forces," *id.* Latif now states that Ibrahim had left "several

weeks" before the bombing started and he was warned to flee after Ibrahim had abandoned him. JA 527. Further, in February 2002, Latif stated that Ibrahim had planned to "catch up [with Latif] in [Pakistan] and help [Latif] with the trip back to [Yemen]." JA 581. Latif no longer suggests a plan to meet up with Ibrahim, saying simply that Ibrahim abandoned him and "never returned." JA 527. The district court failed to assess any of these other significant discrepancies in Latif's February 2002 account.

Latif now claims to have met up with Ibrahim in Kabul – Latif explains in his declaration that he "went to Kabul and located Ibrahim at an Islamic studies institute." JA 527. But Latif previously stated several times that he met Ibrahim in Kandahar. JA 465 ("located Ibrahim" at a mosque in Kandahar); JA 462 (same). And in May 2003, Latif stated that he in fact met up with Ibrahim in Pakistan, where Ibrahim took his passport and "never came back." JA 473. The district court did not address these significant discrepancies.

Additionally, Latif now claims that he sought medical treatment in Pakistan. *See* JA 526. But at his CSRT hearing, he stated that the "person who could treat me for a reasonable price was in Afghanistan" and stated that he was "treated . . . for five days" in Afghanistan. JA 482, 484. Indeed, Latif told interrogators he knew when he left Yemen that he was headed to Afghanistan to find Ibrahim. JA 462 (Latif "decided to join [Ibrahim] in Afghanistan"). But now he claims he initially believed he would find Ibrahim in Pakistan. JA 526 ("I traveled to Pakistan and tried to find Ibrahim" but "discovered that Ibrahim had gone to Kabul").

Latif now states that Ibrahim abandoned him without providing the medical assistance he had sought (JA 527), but in May 2003 stated that "Ibrahim . . . took him to the hospital" in Pakistan. JA 473. Indeed, at one point Latif claimed that he was "arrested at the hospital in Pakistan" because "the Pakistanis collect the Arabs and sell them to the Americans by turning them in." *Id.*

Latif has stated that while in Kabul he was a student (JA 465 (Latif "learned and memorized the Koran with the other students"), and that he was a teacher. JA 575 (Latif "helped teach 30 students per day . . . at the village mosque"). Latif now claims to have spent "several weeks" at the Islamic institute in Kabul (JA 527), but earlier stated that he was "at the center for five months." JA 465.

Latif's explanation of his activities also include several other inconsistencies. He has called the charitable organization that Ibrahim ran "Jamiat al Nur," "Gameiat Al Hekmat," and other names; he now calls it "Jam-eiah Islam." JA 526; *see* JA 464 ("Jamiat al Nur"); JA 470 (TE 27) (ISN 156 FD-302 (May 29,2002)) ("Gameiat al Hekma"); JA 461 ("Al Hijma"). Latif has also changed his story about who paid for his treatment in Jordan. *See* JA470 ("Hady Hassan Hady" who was driving the truck that crashed, "paid for his initial treatment in Jordan"); JA 473 (Ibrahim "helped him get into the hospital in Jordan"); JA 525 ("the Government of Yemen paid for me to travel to Jordan to receive medical treatment").[3]

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[3]Latif's story was further undermined by the evidence in the record showing that he had not provided credible information about his alleged injuries. *Compare* JA 525 ("I spent three months at the Islamic Hospital" in Jordan) *with* JA 510 (TE 32) (Islamic (continued...)

ii. Latif's shifting story is strongly suggestive of the development and refinement of a cover story. *See* JA 562 (TE 44) ([3] Decl.) ([1] [1] [1] [1]). But the district court, without extended discussion, dismissed all of these discrepancies on account that they "*may be* no more than misstatements or mistranslations." JA 196 (emphasis added). Such a conclusion is not only entirely speculative, it does not amount to a factual finding worthy of deference from a reviewing court. *Adahi*, 613 F. 3d at 1110 (findings must include "an estimate of probability," not just an "establishment of possibility"). And in spite of concluding that Latif made "mistatements . . . for whatever reason" (JA 196), the court ignored the most compelling "reason" to make "misstatements" in this context: to deny conduct that would render one detainable. *See Sulayman v. Obama*, — F. Supp. 2d —, 2010 WL 3069568, at *18 (D.D.C. July 20, 2010) (comparing "one statement that is entirely self-serving, and another inculpatory statement that likely would not have been uttered unless it was true"), *appeal pending*, No. 10-5292 (D.C. Cir.).

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[3](...continued)
Hospital record) (Latif spent five days at Islamic Hospital in Jordan). His medical records show he was treated with "medicine and clinical monitoring" after "suffering from aches and a headache," (JA 510), not invasive procedures like those he previously described. JA 470 (Latif "unconscious for one month . . . Latif was taken to the Jordanian Islamic Hospital" which "drained the blood from his skull, and fixed a large wound in his scalp").

The district court also dismissed its concern that Latif had misstated his story by stating that "even if some details of Latif's story have changed . . . its fundamentals have remained the same." JA 196. The district court did not explain the nature of Latif's "fundamental" story that it thought to be consistent. But other than a story that he went to Afghanistan to do something *other than* join Taliban forces, almost every detail about his trip to and motivation for traveling to Pakistan and Afghanistan has, in fact, changed over time:

- he said went to Afghanistan to seek medical treatment, and he said he went to help with an Islamic center, JA 526, 581;
- he said he sought treatment in Pakistan, and he said he sought treatment in Afghanistan, JA 526, 473;
- he said he became ill in Afghanistan, and he said the illness for which he needed treatment predated his trip, JA 526, 581;
- he said he received treatment (in both Afghanistan and Pakistan), and he said that he was never treated, but was awaiting treatment when the war started, JA 526, 484, 473;
- he said he met Ibrahim in Kandahar, he said he met him in Kabul, and once he said he met him in Pakistan, JA 527, 465, 473;
- he said he knew Ibrahim was in Afghanistan when he began his journey; and he said he discovered Ibrahim had gone to Afghanistan only after he got to Pakistan, JA 526, 462.

In the face of these many significant changes to Latif's cover story, the district court clearly erred in disregarding them as "small[] inconsistencies" in "Latif's story [that] changed over time, for whatever reason," reasons the court did not require Latif to explain. JA 196.

c. Latif's [redacted] Statements Include Many Elements [redacted]

The district court entirely failed to consider the fact that Latif's [redacted]

[redacted] *See Bensayah*, 610 F.3d at 726 ("reliability of evidence can be determined not only by looking at the evidence alone but, alternatively, by considering 'sufficient additional information . . . permit[ting the factfinder] to assess its reliability'"); *cf. United States v. Hoover-Hankerson*, 511 F.3d 164, 172 (D.C. Cir. 2007) (asking whether evidence had "sufficient indicia of reliability to support its probable accuracy"). [redacted]

i. First, Latif [redacted] admitted that he traveled to Afghanistan on behalf of [redacted] his recruiter – [redacted] in February 2002, Latif stated that he had "trave[l]ed to Afghanistan to help Ibarhim (Aliwee) improve the Islamic Studies Center in Kabul." JA 581. And in March 2002, Latif stated that in an effort to find medical treatment, he "met an individual named Ibrahim (Aliwee)" and "Ibrahim paid his way" to Pakistan and he then "proceeded to Kandahar" where he "located Ibrahim." JA 464; *see* JA 473 ("Ibrahim Alawi . . . took him to the hospital [in Pakistan]"); JA 461; JA470; JA 475 (TE 29) (FM40 (Jan. 9, 2004)) ("met Ibrahim Aliwee" and "traveled to Kabul to see Aliwee"); JA 487 ("Ibrahim Aliwee . . . . only provided humanitarian aid"); JA 516 ("[t]he reason for me going to Afghanistan in 2001 was to meet with Ibrahim").

[redacted] Latif also has provided details of a meeting with Ibrahim in Kandahar [redacted] In March 2002, Latif provided [redacted] details of this meeting: in Kandahar, Latif confirmed that he "proceeded to a Mosque in the central bazaar area [of Kandahar] . . . located Ibrahim and the two went to Ibrahim's house, where they stayed with Ibrahim's wife and two children for three days." JA 465; *see also* JA 462 (Latif "gave the driver a piece of

paper containing an address in Kandahar where he was to meet Ibrahim" and "arrived at a large mosque . . . where he was re united with Ibrahim").

Third, Latif also [redacted] admitted to traveling to Afghanistan [redacted] he [redacted] told the FBI that he "flew from Saana, Yemen to Karachi, Pakistan" and "then traveled by bus to Quetta" and "boarded a taxi that would take him to Kandahar." JA 462; *see* JA 465 (flew to Karachi; took "bus to Quetta" and "rented a car and driver to take him to Kandahar").

Fourth, Latif also [redacted] names [redacted] individuals [redacted] In his cover story, he names [redacted] teachers or roommates. *See* JA465 (describing "three teachers who stayed with him" at an Islamic center in Kabul including "--Awba–, from Kuwait" and " --Hafz–, from Saudi"); JA 575-76 (Latif lived with "Hafs . . . from SA" and "Bakr . . . from the Emirates" while at the Islamic center); JA 579 ("two gulf individuals . . Abu Bakr . . . and Hafiz" where he stayed).

Fifth, Latif [redacted] claimed that he was

a "refugee" and that a man named "Muhammad had paid the guide [because] . . . he was a nice guy," but he confirmed that he "and [the] guide walked across the border into PK" and "[t]he guide was named Taqi (Ullah)." JA 465.

Sixth, [redacted] JA 461 (Latif "claims to have suffered a cerebral hemorrhage . . . and was flown under emergency circumstances to a hospital in Amman, Jordan for treatment"); JA 464 ("went to Jordan with . . . Hassan (Hadi) . . . following a car accident"); JA 470 ("taken to the Jordanian Islamic Hospital by Hady").

Seventh, [redacted] 1, 6 *see* JA 461 ("[h]is mother is . . . [redacted] 1, 6 JA 568 (listing marital status as divorced); JA 740 (Latif "wants to go home. He would like to get married and have some children"); JA 773 (Latif "states that if released he would return to Yemen and marry"). The location of Latif's residence and birthplace are also consistent with Latif's later-made statements. *Compare* JA 208 (birthplace and residence are "Udayn, Ibb, Yemen") *with* JA 464 (Latif "was living with his family . . . at the family home in Al-Udayn").

[redacted] *See* JA 598 (TE 54) (January 2002 medical examination listing "age: 20"); JA 568 (listing age, in

2001, as "20 years"); JA 460 (Latif "approximately 21 years old" in April 2002); JA 464; JA 473 (Latif "twenty-two years old" in May 2003). Latif's height and weight stated in the interview report – 5'3", 120 pounds – are generally consistent with later medical reports. *See* JA 599 ("height: 65 [inches]"; "weight: 114").

Finally, Latif's "pocket litter" [redacted] "from . . . [ISN] 156," "Quantity: 4. One Thousand Rupees From State Bank of Pakistan." JA 591 (TE 53) (Property Custody Document); *see also* JA 588 (pocket litter "consisted of . . . four 1000 rupee bills").

[redacted]

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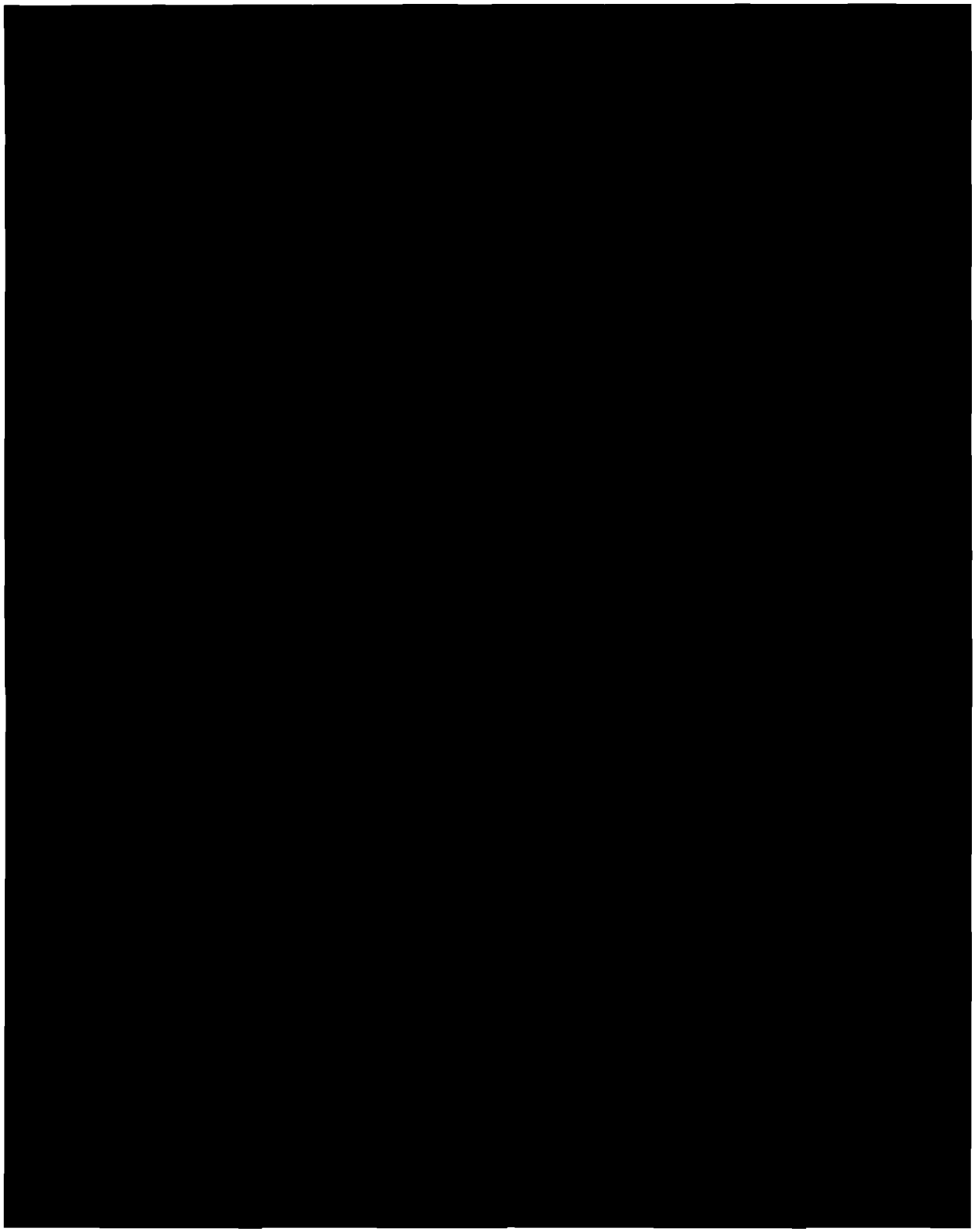

[redacted]

4. The Court Failed To Consider Other Evidence in the Record Corroborating the Accuracy of the Report.

The [redacted] report was also corroborated by other evidence in the record that suggest the report was accurate and square with the conclusion that Latif was a Taliban recruit who served with Taliban forces until their retreat. First, the report was corroborated by the timing of Latif's flight from Afghanistan – which squared not only with the facts provided in the report, as we have explained, but the timing of fighting in and around Kabul and the location and timing of the retreat of Taliban forces. *See* JA 229, 258, 425, 435, 639. Rather than consider this fact [redacted] the district court improperly isolated that fact [redacted] concluding that the "timing of his departure from Kabul is not sufficient to create an inference *that he was involved in fighting*." JA 196 (emphasis added). The district court should have instead considered this fact as one that corroborated the accuracy of the report, which it failed to do. *See* JA 195 (concluding there "is no corroborating evidence for any of the incriminating statements in the" report). As this Court explained in *Salahi*, even evidence that might "fail independently to prove that he was 'part of'" enemy forces, the evidence "must be considered in its entirety" and cannot be "unduly atomized" from the other evidence in the record. *Salahi*, 2010 WL 4366447, at *7-8.

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[redacted]

Finally, Latif provided details [redacted] that match up with actual events and individuals that we know were involved with al Qaida and the Taliban. Most importantly, the main

character in Latif's [redacted] story, Ibrahim Alawi – the man who [redacted] recruited him to go to Afghanistan and join the Taliban – was, in fact, a Taliban and al-Qaida recruiter operating in Yemen and Afghanistan, as numerous other detainees have reported. *See* JA 262 (TE 5) (Moqbill [ISN 193] "stated Abu (Khloud), also known as . . . Ibraheim (Ba'alawi) . . . paid for Moqbill's travel to Pakistan and Afghanistan); JA 251 (TE 3) ("Al-Bahlul [ISN 39] advised Abu Khalud . . . (known to investigators as Al-Qa'ida facilitator Ibrahim . . . Ba'alawi) assisted in facilitating his travel from Yemen to Afghanistan" and "Bahlul assumes Abu Khalud wrote a report vouching . . . Al-Bahlul to Al-Qa'ida"); JA 267 (TE 6) (Sulayman [ISN 223] reported that "Ibrahim (B[']Alawi) A.K.A. Abu (Khalud) was a recruiter in Taiz, YM" who moved between Yemen and Kabul); JA 270 (TE 7) (Haidel [ISN 498] reported that Khalud "help[ed] pay for his travel to Afghanistan"); JA 275 (TE 8) (Ismail [ISN 522] reported that Khalud facilitated his travel and "explained that Ismail should first go to Afghanistan where he could receive the proper military training"); JA 284 (TE 9) (same); JA 293 (TE 11) (Al-Hajj [ISN 1457] reported that "Ibrahim (Balaalawi}, AKA Abu Khulud, was a facilitator in Taiz, YM" who "returned to AF circa April 2001"); JA 297 (TE 13) ("Abu Khalud . . . traveled between YM and AF to recruit . . . for military training"); JA636 (TE 57) (ISN 688 reports that "Allawi['s] . . . job was to take people to jihad"); JA 923 (PE 1) ("Ibrahim ((Alawi))" a recruiter).

Latif has also stated that he "gave [Ibrahim] his passport," JA 473; *see* JA 915 (TE 103), which is consistent with Ibrahim's practice and the handling of passports for Taliban or al-Qaida recruits. *See* JA 433 (TE 20) [3] [redacted] Decl.) [1] [redacted]

[redacted][1]

[redacted][1] JA 881 (TE 96) (ISN 498 reports that "Al-Balawi took detainee's passport"). [redacted] Sulayman, for example, explained that he "departed YM . . . with instructions from Ibrahim. [Sulayman] was told to wait in Kandahar AF for Ibrahim to arrive. Ibrahim arranged for source to travel to AF by airplane via Karachi, PK. . . . Ibrahim told source to catch a bus to Quetta, PK, then arrange for travel to Kandahar." JA 268. The same is true of another recruit, Esmail, who with Ibrahim's help flew to Karachi, then "took a bus to Quetta, switching buses to Qandahar." JA 275-76. He then "proceeded to a guesthouse in Qandahar" and "Khalud was already at the guesthouse awaiting Ismail." JA 276; [redacted] As two district courts have concluded when faced with this evidence, Ibrahim was a Taliban or al-Qaida recruiter who assisted men in getting from Yemen to Afghanistan for jihad. *See Sulayman*, 2010 WL 3069568, at *13 ("[Sulayman's] travel to Afghanistan was facilitated by a Taliban operative," Khulud, who "recruited (and ultimately persuaded) [Sulayman] to travel to Afghanistan"); *Esmail,* 709 F. Supp. 2d at 25, 38 (the "Court finds that Esmail traveled to Afghanistan [from Yemen] with the assistance of Abu Khalud, a member of Al Qaeda"). [redacted] as in *Al Odah*, the "interrogation report[] . . . concerning al Qaeda and Taliban travel routes" was

"corroborated by 'multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad.'" *Al Odah*, 611 F.3d at 14.

[redacted]

The district court's conclusion with respect to these similarities between Latif's story and actual events was that i[redacted]

[redacted] In sum, the court's assessment of the [redacted] report and Latif's credibility leaves a "definite and firm conviction that a mistake has been committed." *Awad*, 608 F.3d at 7.

CONCLUSION

For the foregoing reasons, 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 creditibilty 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 13,977 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 November 23, 2010, I filed and served the foregoing Brief for Respondents-Appellants by delivering an original and seven copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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