

18-7614

ORIGINAL

No. _____

FILED

JAN 18 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL JACOBY- PETITIONER
VS.

UNITED STATES OF AMERICA-RESPONDENT

TENTH CIRCUIT APPELLATE COURT

APPELLATE NO. 17-1431

PETITION FOR WRIT OF CERTIORARI

Michael Jacoby, Pro Se
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P.O. Box 700
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ISSUE PRESENTED

The 10th Circuit's application of a reasonable Jurist Standard as a full denial of Jacoby's §2255 under the Strickland standard is in conflict with the 9th and 8th Circuit review standard of an "undermining of the confidence of the verdict" which would have corrected the denial of Jacoby's right to effective assistance of Counsel under the 6th Amendment.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	20
CONCLUSION.....	26
CERTIFICATE OF SERVICE.....	27
DECLARATION IN COMPLIANCE.....	28

INDEX TO APPENDICES

- APPENDIX A - Court of Appeals Order, denial of petition
- APPENDIX B - District Court ruling
- APPENDIX C - Court of Appeals Order, denial of En Banc
for rehearing

TABLE OF AUTHORITIES

<u>CASES- Supreme Court</u>	<u>Page</u>
Slack v. McDonald, 529 U.S. 473, 484 (2000).....	24
Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).....	20
<u>CASES- Appellate Court</u>	
Brown v. Myers, 137 F.3d 1154 (9th Cir. 1997).....	23
Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999).....	22
Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991).....	22
Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).....	23
U.S. v. Harrison, 839 F.2d 1401 (10th Cir. 1988).....	22
U.S. v. Larson, 596 F.2d 759 (8th Cir. 1979).....	22
U.S. v. Rivera, 900 F.2d 1462 (10th Cir. 1990).....	20
<u>STATUTE</u>	
Title 28, U.S. Code, §1746.....	28
Title 28, U.S. Code, §2255.....	23

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A and C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 6, 2018, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment 6, rights of the accused, in all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and the District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 2005 and 2006, Michael Jacoby was a successful realtor/broker associate for Remax in Denver, CO. Co-defendants Derek Zar, Susanne Zar (Derek's mother), and Mike Macy purchased homes during this timeframe when Jacoby represented them as a Transaction Broker.

Simultaneous Close Real Estate Transactions

Mr. Jacoby was a preferred realtor with the nationally known builder DR Horton in 2005 and 2006 where his clients received significant 10-30% investor and cash discounts from DR Horton not offered to the general public.

Four of the nineteen properties listed in the indictment (Attachment 2, Appendix at page 4: the "Attachments listed within the Appendix" referenced here on in are on file with the Combined COA/Brief at the Appellate Court) 10740 Norfolk, 10746 Memphis, 10600 Norfolk, and 10760 Norfolk were purchased by Derek and Mike using a simultaneous close. It is the process of buying a property at a discounted price and reselling it the same day at a higher price. Derek and Mike's Limited Liability Companies (LLC), Ozette LLC and MEM Real Estate LLC, purchased these four properties with cash at a significant discount from DR Horton. On the same day, Derek and Mike's LLCs sold the properties to themselves individually at the market/appraised price, financed by a mortgage.

The jury heard from the government throughout trial that Jacoby came up with ways to falsely inflate the sale prices on the second sale transactions and that they were not supported by anything (Tr p263 L4-6, L16-21; p270 L21-23; p3152 L9-13). In addition, the government stated that properties purchased by Derek and Mike from DR Horton on the first sale were only given "small" discounts, but

the government or Jacoby's Counsel never discussed or showed the jury the actual discount amounts (Tr p3151 L25 through p3152 L2).

Government witness DR Horton sales manager Lynn White testified three times to the jury that no cash discounts were given (Tr p2068 L15-17; p2084 L11-13; p2090 L13-15). He also testified the investor discounts were only given to preferred realtor clients and not offered to the general public (Tr p2091 L13-16, L21-24; p2092 L7-15).

Jacoby's Counsel lost the ability to discuss cash discounts to the jury at a side-bar discussion from not being able to prove cash discounts were given by DR Horton (Tr p2086 L8 through p2088 L15). Jacoby's Counsel failed to recognize and admit the 10746 Memphis and 10740 Norfolk DR Horton Change Order Agreements that were in the government's DR Horton discovery file (Attachment 3, Appendix at page 4). The agreements showed Ozette LLC, Derek's LLC, received a significant \$37,000 or 14% cash and investor discount, and MEM Real Estate, Mike's LLC, received a \$30,803 or 13.1% cash and investor discount.

Jacoby's Counsel promised the jury in his opening statement "Now, the important thing to remember is that in every one of these transactions, the sale from the LLC to the individual members was always supported by an appraisal." (Tr p289 L7-9). Jacoby's Counsel did not fulfill this promise. He failed to admit the 10740 Norfolk, 10746 Memphis, 10600 Norfolk, and 10760 Norfolk second sale transaction appraisals (Attachment 4, Appendix at page 4). The jury was left to believe Derek and Mike were not given significant discounts on the first sales and that the second sale prices were fraudulently inflated without any appraisal to support it.

The jury heard from the government in their opening statement that Derek's mortgage broker was unaware he was buying 10746 Memphis for a higher price (Tr p269 L11-14).

Derek's GMAC mortgage broker and government witness Diana Rosswog wrote a letter that was sent to Land Title agent Michelle Welle. The letter stated Diana was aware 10746 Memphis, 10600 Norfolk, and 10760 Norfolk were all being resold at a significantly higher price (Attachment 5, Appendix at page 4). Jacoby's Counsel did not admit Diana's exculpatory letter during her testimony. The jury was left to believe Diana was not aware the properties were resold at a significantly higher price.

During government witness Land Title agent Michelle Welle's testimony, Jacoby's Counsel lost a side-bar discussion to admit a letter written by Mike Macy's GMAC mortgage broker Natasha Wall to Michelle regarding 10740 Norfolk (Tr p2194 L7 through p2198 L8; p2225 L3 through p2226 L9; p2264 L16 through p2265 L5). The letter stated Natasha was aware this transaction was non-arms length and being resold at a significantly higher price (Attachment 6, Appendix at page 4). In an FBI pretrial interview, Natasha stated these facts about her letter regarding 10740 Norfolk in section 7 and 11 (Attachment 7, Appendix at page 4). Jacoby's Counsel also failed to have Natasha testify. The jury was left to believe Natasha was not aware 10740 Norfolk was a non-arms length transaction and resold at a significantly higher price.

Jacoby represented Derek and Mike's LLCs as a Transaction Broker when they purchased the four properties from DR Horton. At the request of Derek and Mike, with information provided by them, Jacoby prepared the purchase contracts between their LLCs and themselves

individually. Jacoby clearly disclosed on page 9 and 10 of each purchase contract that he did not represent the buyer or seller in any way. Jacoby had no involvement with Derek or Mike's mortgages.

Government witness GMAC mortgage broker Diana Rosswog testified to the jury that Jacoby was the realtor for the sale on 10746 Memphis and 10600 Norfolk and that he gave her the purchase contracts (Tr p2319 L22 through p2320 L23). The fax header on both purchase contracts show they were sent from Susanne Zar's fax machine. Jacoby disclosed on page 9 and 10 that he did not represent the buyer or seller and was not the realtor (Attachment 8, Appendix at page 4). Jacoby's Counsel made a promise to the jury during his opening statement stating "And you will see those contracts for the purchase and sale on those second sales. And in every one of them, it spells out very clearly that Mr. Jacoby doesn't represent the buyer or the seller on that transaction." (Tr p298 L12-16). Jacoby's Counsel did not fulfill this promise and did not discuss or show the jury page 9 and 10 of the purchase contracts. The jury was left to believe Jacoby was involved with these transactions and was the realtor.

Jacoby coordinated funds, his and others, to provide Derek and Mike short-term loans at a 1-2% fee to purchase the four properties from DR Horton, and funds for their down payment on the second sale to themselves individually. For these transactions, the short-term loan proceeds were not given to Derek or Mike until the day of closing, after their mortgages were approved. The loan checks were made out directly to the title company so Derek or Mike could not deposit them into their bank accounts.

Government witness and co-defendant Mike Macy testified to the jury that Jacoby deposited money into his bank account to fraudulently

increase his balance prior to him receiving his 9/15/5 Verification of Deposit (VOD) (Tr p273 L13-17; p2759 L16 through p2760 L1; p2876 L15-22). The VOD was used as support by the lender to verify Mike had enough funds required for his 10740 Norfolk mortgage down payment. Jacoby's Counsel did not discuss to the jury or admit Mike's September 2005 bank statement, copies of checks he deposited prior to 9/15/5, and the VOD that showed Jacoby did not give Mike money prior to his 9/15/5 VOD (Attachment 9, Appendix at page 4). The jury was left to believe Jacoby deposited funds into Mike's bank account to assist him with getting an inflated fraudulent VOD.

Government witness IRS agent Janet Hukill testified to the jury explaining a spreadsheet she created showing \$45,000 Jacoby gave Mike for his 10740 Norfolk purchase (Tr p2911 L5-12). The spreadsheet showed a 9/28/5 sale date for 10740 Norfolk, but did not show the date Jacoby gave \$45,000 to Mike (Attachment 10, Appendix at page 5). Jacoby's Counsel made a promise to the jury in his opening statement saying "One thing to remember is that the hard-money loans that were made were not made for the purpose of any kind of VODs in this case." (Tr p294 L9-11). Jacoby's Counsel did not fulfill this promise and did not discuss or admit the \$3,000 and \$42,000 check copies (Attachment 11, Appendix at page 5) to show the jury the checks were dated 9/28/5, and both checks made out directly to Land Title where Mike could not deposit them into his bank account. Jacoby's Counsel also failed to show the jury Jacoby's short-term loan to Mike was given on the day of his 10740 Norfolk closing, after his VOD was submitted to the lender, and after the lender approved his mortgage. The jury was left to believe Jacoby assisted Mike with fraudulently depositing money into his bank account to get a favorable VOD and

fraudulently assisting Mike in getting his mortgage approved.

Grant Program Real Estate Transactions

Eight of the nineteen properties listed in the indictment were purchased by Derek, Susanne, and Mike using a grant program, financed by a mortgage:

- 1) 1065 Ridge Oak.
- 2) 1490 Rose.
- 3) 30848 E. 151st.
- 4) 10391 Cherryvale.
- 5) 5810 Silverleaf.
- 6) 10311 Cherryvale.
- 7) 6675 Tenderfoot.
- 8) 16381 E. 106th.

The grant process involved;

- 1) the seller agreeing to donate a portion of his sale proceeds and authorizing the title company to pay these proceeds to a third party grant company at closing,
- 2) the buyer applying for a grant with the grant company,
- 3) and if approved, the buyer would receive the grant proceeds from the grant company within five business days after closing.

The jury heard from the government throughout trial that the purchase contracts prepared by Jacoby were a lie as he did not disclose the buyer was getting grant money in the purchase contract (Tr p2462 L7-9; p3149 L7-10; p3151 L6-11; p3233 L1-3).

According to the Colorado Real Estate Commission (CREC) Manual Rule F-2(a) and F-3(a)(b), only negotiations between the buyer and seller are to be included in "additional provisions" section of the purchase contract (Attachment 12, Appendix at page 5). The grant documents were buyer and seller contractual agreements with Tara Grant, not between themselves. The Tara Grant documents were generated by Tara Grant.

In every transaction involving a grant program where Jacoby represented Derek, Susanne, or Mike as a Transaction Broker, Jacoby

correctly disclosed the grant within the purchase contract on page 2 "attachments" section according to the CREC Manual. In addition, the Tara Grant Corporate Statement, Tara Grant Pledge Confirmation, and Tara Grant Authorization to Deliver Funds were attached to every purchase contract when their grant program was involved (Attachment 13 and 39, Appendix at page 5 and 7). The grant documents fully described the grant process and that the buyer was to receive a grant, if approved, within five business days after closing.

Jacoby's Counsel did not have a Real Estate Expert or Jacoby testify to or admit the CREC Manual to show the jury Jacoby correctly disclosed the grant in the purchase contract. The jury was left to believe Jacoby fraudulently misrepresented disclosing the grant in the purchase contract.

The jury heard from the government throughout trial that Jacoby was the organizer of the mortgage fraud scheme. He was the one who aided, abetted, joined, and organized the lies. He came up with the grant amount (Tr p259 L24-25; p3145 L15-18).

Jacoby properly fulfilled his Transaction Broker responsibilities according to the CREC Manual commission statement § 12-61-807 (2) (b)(II)(IV)(V)(VII) by;

- 1) coordinating and forwarding the fully executed purchase contract and grant documents to the mortgage broker,
- 2) advising the buyer and seller to seek professional legal advice regarding the grant program,
- 3) timely updating the seller on the buyer's loan status,
- 4) and coordinating the closing.

Jacoby's Counsel did not have a Real Estate Expert or Jacoby testify to admit the CREC Manual and show the jury that Jacoby was coordinating documents and communicating with the mortgage broker,

grant company, and title company because he was properly performing his duties as a Transaction Broker. The jury was left to believe Jacoby was acting as the organizer of a fraud scheme versus seeing that Jacoby was properly performing his duties as a Transaction Broker.

During government witness Chris Stull's testimony, Jacoby's Counsel lost a side-bar discussion to admit the Real Estate Investment Disclosure (REID). The Judge also made a comment that the REID could be admitted through Jacoby if he testified (Tr p1633 L14 through p1638 L3). Jacoby's Counsel did not inform Jacoby of the Judge's comment or any of the side-bar discussion. Jacoby was unaware the REID could have been admitted through his testimony. The REID informed Chris to seek professional legal advice regarding the grant and that Jacoby was not involved in determining the grant amount or its terms (Attachment 14, Appendix at page 5). Jacoby's Counsel did not discuss these facts with the jury or admit the REID. The jury was left to believe Jacoby controlled and fraudulently determined the grant amount and terms for the buyer and seller. Jacoby could have presented the truth from the stand.

Real Estate Transactions With No Representation

Concerning six of the nineteen properties listed in the indictment, Jacoby did not represent the buyer or seller in any way.

For 10694 Lewiston, 10987 Snowcloud, and 10401 Cherryvale, the properties were refinanced by Susanne. Jacoby's Counsel did not cross-examine any of the government lender underwriter witnesses for these refinance transactions. The jury was not shown the refinance transactions took place two plus months after the initial purchase where Jacoby sold Susanne the properties, and that there was no evidence whatsoever that Jacoby was involved with or had any

knowledge of these fraudulent refinance transactions.

For 16382 E. 107th, 16221 E. 106th, and 6633 Tenderfoot, Jacoby prepared the purchase contracts at the request of Derek, Susanne, and Mike with information provided by them. Jacoby disclosed on page 9 and 11 of each purchase contract that he did not represent the buyer or seller. Jacoby had no involvement with Derek, Susanne, or Mike's mortgages for these transactions.

The jury heard from the government and government witness appraiser Mike Long that Jacoby was the realtor for 16382 E. 107th and 16221 E. 106th, and that Jacoby tried to influence the appraised values by providing sales comparables to Mr. Long which he used to complete his appraisals (Tr p2421 L7-19; p3148 L23-24).

Long received a fax from DR Horton sales representative Bobbi Gallegos listing sales comparables (Attachment 15, Appendix at page 5). These sales comparables were used by Long to complete his 16382 E. 107th and 16221 E. 106th appraisals as shown in the "Data Source" section (Attachment 16, Appendix at page 5). There is no reference or note indicating Jacoby was a data source. Jacoby's Counsel stated in his opening statement "...there is no evidence to support Jacoby had influence over the appraisals." (Tr p292 L17-19). However, Jacoby's Counsel did not support this statement during trial for the jury to see and hear. He did not cross-examine Mike, did not discuss or admit Long's appraisals and the fax from Bobbi, and did not discuss or admit page 9 and 11 of the 16382 E. 107th and 16221 E. 106th purchase contracts showing Jacoby did not represent the buyer or seller in any way (Attachment 17, Appendix at page 5). The jury was left to believe Jacoby was involved with these two sales, that he was the realtor, and that he fraudulently tried to influence the appraised values.

During government witness mortgage broker Chae Bae's testimony regarding 6633 Tenderfoot, Jacoby's Counsel erred in stating to the jury "...Jacoby, as the real estate person involved in this transaction..." (Tr p1464 L7-11). Jacoby's Counsel did not discuss or show the jury page 9 and 11 of the purchase contract stating Jacoby did not represent the buyer or seller for this transaction (Attachment 18, Appendix at page 5). The jury was left to believe Jacoby was involved with this real estate transaction and was the realtor. Jacoby could have testified as to these matters.

Jacoby Firstbank Mortgage

The last property listed in the indictment, 2163 Beechnut, was purchased by Jacoby from his business partner Ed Schultz in July 2007. Jacoby received a \$1,450,000 first position mortgage from Firstbank. Jacoby was approved for this mortgage after Firstbank's review of a mortgage application, his tax returns, and other financial information that he submitted to his Firstbank mortgage broker Laura Rogers. Jacoby also received a second position owner financed \$205,000 mortgage from Ed. The second mortgage had a 0% interest rate, a 1 year term, and no payments due until the end of the 1 year term.

During government witness Firstbank mortgage broker Laura Rogers' testimony, the government showed the jury Jacoby's Firstbank mortgage application that stated his monthly income of \$50,000 (Attachment 19, Appendix at page 5). In addition, Laura testified that she created the Personal Financial Information Analysis (PFIA) from tax returns and financial statements provided by Jacoby (Tr p377 L24 through p378 L23). The note section at the bottom of the PFIA states "We have 1099s showing Mike earned \$1,405,955 in real estate commissions

in 2006 which is double the commissions he earned in 2005 (\$692,000)" (Attachment 20, Appendix at page 6). The PFIA was admitted by the government, but was not shown or discussed to the jury by the government or Jacoby's Counsel. The jury was left to believe Jacoby fraudulently overstated his income in his mortgage application despite evidence that his income was actually grossly understated.

Laura testified she received a hand-written 2006 commission ledger from Jacoby (Tr p332 L12-15; p380 L2 through p382 L2). Jacoby's Counsel discussed and showed page 1 of this ledger to the jury, that also had a hand-written quote stating "Provided by Jacoby," but failed to discuss or show the jury the ledger's last page showing Jacoby earned \$1,400,355 of commission as of 12/18/6, and that the ledger was acknowledged and signed off by the Remax sales secretary (Attachment 21, Appendix at page 6). The jury was left to believe the ledger was fraudulently created by Jacoby to support the \$50,000 monthly income he stated in his mortgage application, and the jury still did not hear or see any documentation showing how much commission or income Jacoby made in 2005 or 2006.

Laura testified she would want to know if the transaction was non-arms length and that it would have affected her loan approval decision if she would have known it was (Tr p342 L1-11; p414 L22-24). She also testified Jacoby gave her information on properties he owned and that she had no documents showing the transaction was non-arms length (Tr p332 L12-15; p342 L12-15; p395 L4-7). Jacoby's Real Estate Owned (REO) schedule was admitted by the government, but was not discussed or shown to the jury by the government or Jacoby's Counsel. The REO schedule clearly shows Jacoby disclosed he owned four properties with his business partner and seller of 2163 Beechnut,

Ed Schultz (Attachment 22, Appendix at page 6). The jury was left to believe Jacoby fraudulently did not inform Firstbank that he was a business partner with Ed Schultz. Again, Jacoby could have testified to these truths.

The government stated within the indictment and throughout trial that Jacoby lied on his Firstbank mortgage application saying that he did not borrow his down payment (Tr p278 L11-13; p3156 L10-12).

The 2163 Beechnut transaction closed on 7/31/7. During trial, the government showed the jury Jacoby's July 2007 bank statement (which stated a \$300,000 7/26/7 and \$100,000 7/27/7 deposit), the HUD statement showing Walt Slagel of Lighthouse Custom Homes receiving \$355,000 at closing, and a \$355,000 check dated 8/2/7 from Walt to Jacoby's business partner Ed Aabak (Attachment 23, Appendix at page 6). Government witness Walt testified he did not owe this money to Aabak and that he was directed by Jacoby to give it to him (Tr p485 L6-10). Jacoby never instructed Walt to pay Aabak and had no knowledge of this payment. Aabak and Walt had various building projects between them in 2007. Aabak owed Jacoby \$603,391 as of 7/25/7 from various business projects between them. This is shown in the Jacoby/Aabak Loan Summary (Attachment 24, Appendix at page 6).

Four days before trial started on 8/8/12, Jacoby sent several detailed emails with supporting documents to his Counsel explaining the Beechnut transaction, including information and documents from money Aabak owed Jacoby (Attachment 25, Appendix at page 6). After Walt's testimony on 8/9, Jacoby had several concerns that his Counsel did not understand the Beechnut transaction and was not showing Jacoby's innocence. Jacoby wanted Aabak and himself to testify. Jacoby knew the only way for the jury to hear or see Jacoby did not

borrow money from Aabak was for Aabak or Jacoby to testify. Jacoby sent additional detailed emails on 8/9 to his Counsel further explaining the Beechnut transaction, and again on 8/14, 8/15, and 8/16 (Attachment 26, Appendix at page 6). On 8/13, Jacoby's Counsel finally determined Aabak was worthy of being a witness and made an attempt to subpoena him to testify, as shown in an email between Jacoby, his Counsel, and their Investigator (Attachment 27, Appendix at page 6). Aabak and Jacoby never did testify and Jacoby's Counsel did not discuss or admit the Jacoby/Aabak Loan Summary. The jury was left to believe Jacoby fraudulently lied in his mortgage application saying he did not borrow his down payment.

Jacoby Citibank Mortgage

In November 2007, Jacoby refinanced the 2163 Beechnut second owner financed mortgage with Ed Schultz, paid him off in full, and received a new \$205,000 Home Equity Line of Credit (HELOC) from Citibank. Jacoby was approved for the cash-out HELOC after Citibank's review of a mortgage application, his tax returns, and other financial information that was submitted to Citibank from Jacoby's mortgage broker Miguel Lucero.

The government stated to the jury that Jacoby lied about his income in his mortgage application (Tr p3159 L2-6; p3227 L17-20). During government witness Citibank representative Brent Fairchild's testimony, the government showed the jury Jacoby's Citibank mortgage application that stated his monthly income of \$58,260 (Attachment 28, Appendix at page 6), and page 1 of his 2007 tax return showing negative income of \$152,334 (Attachment 29, Appendix at page 6). Jacoby's Counsel failed to block the admittal of his 2007 tax return, which was not even in existence as of November 2007 when the Citibank

mortgage application was submitted, in a side-bar discussion because of not being able to demonstrate the 2007 tax return information was not used to calculate the \$58,260 mortgage application monthly income figure (Tr p552 L9-24). Jacoby was not informed by his Counsel what was discussed during the side-bar. Jacoby's Counsel failed to recognize, discuss and show the jury Schedule D and Form 8824-- Like Kind Exchanges from Jacoby's 2007 tax return stating \$1,058,978 (\$555,000 + \$503,978) of tax deferred income not reported on page 1. The jury was left to believe Jacoby fraudulently overstated his income in his mortgage application.

Jacoby's Counsel failed to admit Jacoby's 2005 and 2006 tax returns which showed net income of \$435,293 and \$962,957 (Attachment 30, Appendix at page 7). The 2005 and 2006 two year monthly income average of \$58,260 $[(435,293+962,957)/24]$ matched the monthly income figure Jacoby stated in his Citibank mortgage application.

Jacoby's Counsel lost a side-bar discussion and was not allowed to admit Jacoby's 2005 and 2006 tax returns because he was not able to demonstrate the tax return information was used to calculate the income figure posted in the mortgage application, and from not knowing Citibank had a copy of Jacoby's 2005 and 2006 tax returns in their file (Tr p569 L22 through p572 L16; p576 L6 through p581 L6). During the side-bar discussion, Jacoby's Counsel also tried to admit government exhibit #26 which was Jacoby's 2005 tax return, but failed again because this document was from the IRS, not Citibank's file (Attachment 31, Appendix at page 7). Jacoby's Counsel also failed to recognize discovery documents J871-872 and J845-847 were Jacoby's 2005 and 2006 tax returns from Citibank's file which Citibank received from Jacoby's mortgage broker Miguel Lucero. Again, the jury was

left to believe Jacoby fraudulently overstated his income in his mortgage application. At this point in the trial, the jury still has not heard or seen any documentation showing how much income Jacoby earned in 2005 or 2006 or his 2007 tax deferred income.

Prior to this side-bar discussion, Jacoby realized at this point how unprepared his Counsel was in understanding the Citibank transaction and that he did not understand how the \$58,260 monthly income figure in the mortgage application was calculated. Jacoby had to explain it to him and that Jacoby gave Citibank his 2005 and 2006 tax returns. Jacoby's Counsel took the information Jacoby gave him to the side-bar and still lost as he couldn't prove Citibank had a copy of Jacoby's 2005 and 2006 tax returns. The Judge even made the statement:

Judge "Excuse me, but isn't he going to testify?"

Counsel "Mr. Jacoby?"

Judge "Uh-hum."

Counsel "I don't know what his decision on that is going to be until the government's evidence closes."

Judge "...If he doesn't testify, there will be no evidence of that." (Tr p576 L24 through p577 L7).

Jacoby's Counsel did not inform Jacoby of the Judge's comments or side-bar conversation details.

Brent testified on 8/9/12. After his testimony, Jacoby was extremely upset with his Counsel because up to this point in the trial the jury had only seen Jacoby's 2007 negative income of \$152,334 and none of his 2005 or 2006 income or 2007 tax deferred income. Jacoby tried to explain his 2007 tax deferred income to his Counsel in several emails during trial between Jacoby, his Counsel, and his CPA Catherine Middlemist (Attachment 32, Appendix at page 7). Jacoby

was also concerned with getting his 2005 and 2006 tax returns admitted. He emailed his Counsel a copy of his tax returns during trial. Jacoby was never informed by his Counsel that he could have testified to his tax returns or was informed of the Judge's side-bar comments regarding this.

Brent testified that it would have changed Citibank's decision to loan funds to Jacoby if he would have known the funds were going to be routed back to Jacoby, or if the purpose of the loan was different than what Jacoby stated (Tr p538 L2-5; p541 L1-5).

Jacoby applied for and received a \$205,000 cash-out Home Equity Line of Credit (HELOC), not a mortgage, as stated in the Underwriting Summary (Attachment 33, Appendix at page 7). The HELOC was an open-end revolving line of credit which allowed Jacoby to use the loan proceeds however he may choose, as stated in the HELOC deed (Attachment 34, Appendix at page 7). Before any proceeds were given to Jacoby, Citibank had one requirement to pay off and close the existing \$205,000 mortgage with Ed Schultz (Attachment 35, Appendix at page 7). Jacoby fulfilled this requirement at closing (Attachment 36, Appendix at page 7). Jacoby's Counsel did not discuss or show the jury any of these facts. The jury was left to believe Jacoby fraudulently misrepresented to Citibank the purpose of how he was to use the loan proceeds.

REASONS FOR GRANTING THE WRIT

Jacoby comes before this court seeking a Certiori reviewing the current application of Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). While the Defendant bears the burden of proving both prongs of Strickland, the Defendant's, asserts Jacoby, are not being given the full opportunity. U.S. v. Rivera, 900 F.2d 1462 (10th Cir. 1990).

Strickland points out that the linchpin to right to Counsel is effective assistance. Effective assistance is the right to require the government's case be subject to meaningful adversarial testing.

In his 2255 petition Jacoby asserted several serious errors that his Counsel made in the following areas:

1. The failure to have a key witness testify.
2. The failure to interview witnesses.
3. The failure to introduce evidence.
4. The failure to prepare Jacoby to testify.

The District Court denied the petition without hearing. The District Court, ignoring the fact that Jacoby is in an institution hundreds of miles from the evidence in his case, further limited by phone access (15 minute calls to an approved list and 300 minutes a month) and no ability to track his witness down. How then is he to get these affidavits, experts, show a "lack of justification" for the failure to investigate or the failure to introduce, or how he was hindered in testifying by Counsel. The District Court used Strickland standard to thwart a full review of the circumstances by blanket approval of the trial it conducted, and the Circuit Court was left to rubber stamp.

Strickland gives two prongs to review the errors of Counsel. First, defendant must show that "Counsel made errors so serious that Counsel was not functioning as the Counsel guaranteed the Defendant by the Sixth Amendment." Strickland v. Washington, 466 at 687,

104 S.Ct. at 2064. To satisfy the first prong, Defendant "must show that Counsel's representation fell below an objective standard of reasonableness." Second, the Defendant must show that Counsel's errors prejudiced his defense, specifically "that Counsel's errors were so serious as to deprive the Defendant of a fair trial, whose result is reliable." Defendant must show a "reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." *Ld.* at 694, 104 S.Ct. at 2068. Defendant "need not show that Counsel's deficient conduct more likely than not altered the outcome in the case." *Ld.* at 693, 104 S.Ct. at 2068. Rather, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ld.* at 694, 104 S.Ct. at 2068.

Jacoby's Counsel was specifically informed of Jacoby's alleged fraud within the indictment. It gave Jacoby's Counsel a detailed road map for them to study, research, and understand each allegation with the perfect opportunity for him to create an attacking defense strategy to debunk each allegation.

Counsel failed to understand the dynamics of the specific fraud and property sale transactions. He failed to understand the roles, responsibilities, and disclosure requirements of a licensed Colorado real estate broker. He was denied pretrial to have a crucial real estate Expert testify by not selecting an Expert with the proper qualifications for the Trial Court, nor made any effort to replace the Expert. He failed to recognize and interview key witnesses. He failed to introduce crucial evidence that showed Jacoby's factual innocence. He failed to properly cross-examine government witnesses which did not present the jury with a clear picture of all the facts favorable to Jacoby. He was unprepared to attack the evidence or offer evidence

contradicting the conclusions the government drew from it. The impact of the cumulative errors and sub standard strategic decisions made by Jacoby's Counsel, resulted in Jacoby not receiving a fair trial and the jury finding Jacoby guilty on all counts.

The Strickland standard above is being applied with different standards in the Circuits. In Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991), the court found "...viewing the totality of the circumstance, and viewing the cumulative effect of the errors and omissions, there is a substantial probability that correction of constitutional error at retrial will effect a different result."

In U.S. v. Harrison, 839 F.2d 1401 (10th Cir. 1988), the court found "An attorney's trial decisions must be based on a proper exercise of judgment based on an adequate knowledge of the facts and be on correct legal grounds."

In Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999), the court found "A counsel who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."

A defendant's right to testify in a criminal proceeding against him is so basic to a fair trial that its infraction can never be treated as harmless error, which is in essence the inquiry required to be made by the second, prejudice to the defense, prong of Strickland. Ineffective assistance of counsel which results in a deprivation of the defendant's right to testify transcends conventional sixth amendment analysis and prejudice is sufficiently proven, if not to be presumed from, the resulting denial of the defendant's right to testify.

In U.S. v. Larson, 596 F.2d 759 (8th Cir. 1979), the court found

"Walker's testimony had 'exculpatory potential' and would have enhanced appellant's defense."

In Brown v. Myers, 137 F.3d 1154 (9th Cir. 1997), the court found "...because his trial attorney's failure to present witnesses was ineffective assistance and there was a reasonable probability that such deficiency affected the jury's verdict; defendant did not need to show prejudice by a preponderance of the evidence, only a reasonable probability."

In Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), the court found "We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulative, compel affirmance."

As in Henderson, Harrison, Hart, Larson, Brown, and Mak, Jacoby's Counsel had at his fingertips information that could have undermined the government's case, yet chose not to develop this evidence and use it at trial. The failure of Counsel to prepare a defense on the available evidence and witness was fatal to the defense. There was one long shot chance to save this failure. Jacoby himself could have taken the stand; yet Counsel failed to avail the defense of this option. Therefore, under Strickland Jacoby deserves to have his conviction set aside.

The 10th Circuit, herein, is using no reasonable jurist could debate the outcome. Using the 10th Circuit standard the District Court and the Appellate Court wiped away Jacoby's points by requiring the prisoner Jacoby to seek out affidavits and witnesses without hearing from FPC Yankton, South Dakota. Having shown reasonable prejudice Jacoby's opportunity for hearing on his §2255 by 2 factors; a) his position, and b) points ignored by the unreasonable standard.

This slight of hand occurring by use of 10th Circuit standard undermines the 6th Amendment and Strickland. While the 8th Circuit is using a substantial probability standard under Strickland, the 9th Circuit uses a standard stated as "defendant did not need to show prejudice by a preponderance of the evidence, only a reasonable probability." The 10th Circuit actually expands to a reasonable jurist could debate whether should have been granted; further, limiting it by the Motion should have been granted or the issues presented deserve encouragement to proceed further. Slack v. McDonald, 529 U.S. 473, 484 (2000). Ignoring the fact that the District Court limit the Defendant by no hearing because the Defendant didn't go out and get affidavits. Defendant is incarcerated and unable to go out and get them.

It is important to highlight how the District Court quashed Jacoby without hearing:

1. The failure to have a key witness testify. Throwing it away because this prisoner could not present affidavits from a Colorado real estate Expert or from Ed Aabak. He is limited to 15 minute calls and only to people that would accept a call from a Federal prison. He was not given a fair opportunity to address because of the 10th Circuit standard.
2. Larson, the failure to interview witnesses. Jacoby asserts he has shown it would change the outcome and if Hart (9th Circuit) had been applied he would have at least had a hearing to accomplish #1.
3. Failure to introduce evidence. Counsel failed to introduce;
 - a) his 2005 and 2006 tax returns showing he had substantial income,
 - b) that he had tax deferred income of \$1,058,978 in 2007,
 - c) that Firstbank and Citibank had his 2005 and 2006 tax returns and knew he owned four properties with Ed Schultz,
 - d) that he was entitled to use the Citibank HELOC however he chose,
 - e) that Ed Aabak owed Jacoby \$603,391,
 - f) that he made a short-term loan to Mike Macy after, not before, Macy was approved for one of the mortgage loans,
 - g) appraisals on various properties,

h) that some sales contracts disclosed that Jacoby was not making any representations,

i) cash and investor discounts were given by DR Horton to Derek Zar and Mike Macy,

j) letters from mortgage brokers stating they were aware some of the transactions were not arms-length.

All 10 of these pieces of evidence go to the heart of the government's case and Counsel did nothing with it. It certainly satisfies Strickland as asserted by this Court. Yet, the 10th Circuit rigid application blocks it like a steel wall. Indeed, they effectively destroy the deferential Strickland standard.

4. Failure to prepare him to testify. Counsel advised Jacoby not to testify, asserted that Counsel would decide if Jacoby testify, and did not prepare him to testify so that at trial it was too late to change course. Counsel advised him wrongly and adversely as to his right to testify in emails and in conference. Evidenced in emails that Jacoby could not gather from FPC Yankton.

Jacoby believes, he knows, these facts to be true. Yet ignoring these possibilities the 10th Circuit essentially says the "reasonable jurist" would ignore and hold the same. However, the 9th and 8th Circuit would say the existence of these failures undermine the confidence in the jury verdict. The undermining of confidence in the Jacoby verdict justifies correction. Jacoby should, at the least, be entitled to a full hearing under the Strickland standard to show correction is justified.

CONCLUSION

The 10th Circuit standard and application of Strickland resulted in Jacoby being denied a full review of the prejudicial deficiencies through at least a hearing. The 10th Circuit's standard prejudiced Jacoby because of his status as a prisoner and weighing heavier than the other circuits such as the 9th Circuit standard set out in Brown. Thereby resulting in the denial of Jacoby's 6th Amendment right.

A defendant, such as Jacoby, should have the opportunity to be heard before the jail door closes forever.

Date: January 18, 2019

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