No. 18A-_____

In the Supreme Court of the United States

Emmanuel I. Mekowulu, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

APPLICATION FOR EXTENSION OF TIME

TO FILE PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to this Court's Rules 13.5 and 30.2, petitioner Emmanuel I. Mekowulu prays for a 60-day extension, or until January 14, 2019, to file his petition for a writ of certiorari in this Court.

1. Timeliness, Jurisdiction, and Opinion Below. On August 14, 2018, the United States Court of Appeals for the Eleventh Circuit issued a decision denying a Certificate of Appealability from an order of the United States District Court for the Middle District of Florida, Tampa Division, denying Mr. Mekowulu's motion pursuant to 28 U.S.C. § 2255. The decision denying the Certificate of Appealability is attached as Appendix A, and the district court's orders denying the

original motion and the Certificate of Appealability at the district court level are attached as Exhibit B. The Original § 2255 Motion is Exhibit C. The petition for writ of certiorari is currently due, pursuant to this Court's Rules 13.1, 13.3, and 30.1 on or before November 13, 2018. This application is being filed more than ten days before that date. *See* Rule 30.2. The jurisdiction of this Court is to be invoked under 28 U.S.C. § 1254(1).

2. Reasons for Granting the Extension.

a. Procedural History.

The applicant, Emmanuel I. Mekowulu, a former licensed pharmacist in Florida, was convicted of conspiring to distribute and dispense controlled substances (oxycodone) not for a legitimate medical purpose in violation of 21 U.S.C. §§ 841 (b(1)(C), and § 846. He was sentenced to 120 months in prison and three years of supervised release, and is currently incarcerated in the federal correctional institution at Estill, South Carolina.

At trial, the Government called an expert witness, Paul Doering, who was allowed to testify as to his opinion, formed and presented years after Mr. Mekowulu's acts, material to the determination of whether that Mr. Mekowulu "knew or should have known that the prescriptions he was filling were being diverted for illicit uses," District Court Doc. 33, P. 6, and "he expressed opinions, based on his experience, training, knowledge and education, on what

he considered to be indicators of drug diversion which should alert a practitioner," Ruling of District Court, Doc. 33, P. 6 (Exhibit B). The District Court granted Mr. Mekowulu a hearing on his motion, and ultimately denied all relief. Mr. Mekowulu sought a Certificate of Appealability on the following issues:

Issue One: (Ground Two in Motion): Whether the Government's Pharmacy Expert's standards are unconstitutionally vague rendering the conviction unconstitutional.

Issue Two: (Ground Four in Motion): Whether Mekowulu's conviction based on the Government's Pharmacy Expert's testimony is a violation of the prohibition of convictions based on ex post facto laws.

Issue Three: (Ground Five in Motion): Whether the Government's Pharmacy Expert's testimony coupled with the deliberate ignorance instruction unconstitutionally shifted the burden of proof to the defendant,

Issue Four: Whether the District Court Erred in Ruling that Mekowulu was Procedurally Defaulted on Motion Grounds Two, Four, and Five for Failure to Raise Said Grounds on Direct Appeal.

Issue Five: Whether Mekowulu Should Be Denied § 2255 Review on Motion Ground Two as the Eleventh Circuit has held that the failure to object at trial waives appeal on this issue, trial counsel did not object at trial, and appellate

counsel filed an affidavit stating that he did not raise issues for multiple reasons, including failure to object.

The District Court, and the Eleventh Circuit, held that Mr. Mekowulu was procedurally barred due to failing to raise these claims on direct appeal. The courts otherwise rejected Mr. Mekowulu's contentions. Mr. Mekowulu's argument, as stated in this excerpt from his 2255 petition, includes the following:

> Emmanuel Mekowulu was convicted by Professor Doering testifying to an after-the-fact opinion of improper conduct of a pharmacist in light of "red flags" but his opinion was unknown and unpublished at the time of the transactions. No pharmacist could reasonably understand what conduct is prohibited by Professor Doering's opinion because the opinion did not exist until three to four years after the alleged crime when he testified in court. Professor Doering's opinion did not exist in any tangible form in 2009 so it was impossible for Mr. Mekowulu to know in 2008 - 2009 that, if he failed to comply with. Professor Doering's opinion of what a pharmacist was required to do, he could be convicted of closing his eyes to a conspiracy. Indeed, the first Mr. Mekowulu learned of what he should have known or done was .in trial. Mr. Mekowulu had no idea of what Professor Doering believed was prohibited, nor did anyone else, because Mr. Mekowulu was not convicted of violating a statute. He was convicted of violating Professor Doering's personal and private opinion of a code of conduct that was unknown to anyone, possibly even unknown to Professor Doering, at the time of the indictment, 2008 — 2009. The first time it was communicated was during Professor Doering's testimony at the 2012 trial. Clearly, it was impossible for Mr. Mekowulu to understand what was prohibited in 2008 2009 because it was impossible for Mr. Mekowulu know what Professor Doering would opine in 2012. As stated by Dr. Lee, the Florida Administrative Code, copy attached to his affidavit, states, "[t]he following criteria shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose," and lists five criteria: frequent loss of controlled substance medication, only controlled substances are prescribed for a patient, one person. presents controlled substance prescriptions with different names, the same or similar controlled substance is prescribed by two or more prescribers at the same

time, and the patient always pays in cash and insists on brand name product. Importantly, if any of these criteria are present, the code does not prohibit delivering the prescription, but instead, requires compliance with a verification procedure. (Mekowulu's § 2255 Motion, P. 24, Ex. C).

b. Grounds for Certiorari Exist.

This case presents a federal issue worthy of presentation to this Court in a petition for writ of certiorari. Reasonable jurisits would find that it is debatable whether or not these claims are procedurally barred for failure to raise on direct appeal. Mekowulu narrowed his request for a Certificate of Appeal to the following issues:

Issue One: (Ground Two in Motion): Whether The Government's Pharmacy Expert's Standards are Unconstitutionally Vague Thereby Rendering the Conviction Unconstitutional.

Issue Two: (Ground Four in Motion): Whether Mekowulu's Conviction Based on Doering's Testimony Is a Violation of the Prohibition of Convictions Based on Ex Post Facto laws.

Issue Three: (Ground Five in Motion): Whether Doering's Testimony and the Deliberate Ignorance Instruction Unconstitutionally Shifted the Burden of Proof to the Defendant.

Issue Four: Whether the District Court Erred in Ruling that Mekowulu was Procedurally Defaulted on Motion Grounds Two, Four, and Five for Failure to Raise Said Grounds on Direct Appeal.

Issue Five: Whether Mekowulu Should Be Denied § 2255 Review on Motion Ground Two (Issue One) as the Eleventh Circuit has held that the failure to object at trial waives appeal on this issue, trial counsel did not object at trial, and appellate counsel filed an affidavit stating that he did not raise issues for multiple reasons, including failure to object.

The Eleventh Circuit ruled that these arguments were procedurally defaulted for failure to raise on direct appeal. Mekowulu intends to ask this Court through a Petition for Writ of Certiorari to consider that there are no reported pharmacist cases where the criminal standard of conduct was defined by a pharmacy expert's opinion. Here, the conviction was challenged on the basis that the pharmacy expert's opinion created an unconstitutionally vague standard that was applied as an ex post facto law. This qualifies as a novel claim to avoid procedural default. A "novel," claim is one not previously addressed to a court, or where, "various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal," *Smith v. Murray*, 477 U.S. 527, 536-37, 106 S. Ct. 2661, 2667 (1986). In his Request for Certificate of Appeal to the Eleventh Circuit, Mekowulu contended:

> As stated earlier, the specific pronouncement of the United States Supreme Court on June 1, 2015, in Elonis v. United States, ___U.S.___, 135 S.Ct. 2001, 1912 L.Ed.2d 1, 2015 U.S. LEXIS 3719 (June 1, 2015) ("Elonis') which Mekowulu filed as supplemental authority on June 1, 2015 (App. 247), is sufficient to support a determination that the negligence standard claim raised here was sufficiently novel to avoid procedural default for failure to raise on direct appeal. Here, Mekowulu is, to the knowledge of undersigned counsel, advancing a theory that has never been presented to any court. Should this theory ultimately be accepted, then those defendants attempting to follow that theoretical future precedent will be the "novel" class of litigants defined by the Court in *Hargrave v. Dugger*, 832 F.2d 1528, 1531 (11th Cir. 1987).

Mekowulu also contends that "actual innocence" avoids procedural default,

House v. Bell, 547 U.S. 518, 538, 126 S. Ct. 2064, 2077 (2006).

3. The need for an extension of time.

The petition is currently due November 13, 2018. This Motion is filed October 30, 2018. Undersigned counsel seeks additional time to both complete the petition and to allow Mr. Mekowulu to review the proposed petition and consult on the positions argued before filing the same. In addition, counsel requires more time to complete the research and writing that is required to present these issues. Undersigned counsel has a confluence of other commitments in other matters prior to the due date of this Petition.

An additional 60 days past the current deadline of November 13, 2018, through an including January 14, 2019 is requested to allow counsel time to finish the Petition and transmit it to Mr. Mekowulu, who is incarcerated, for review prior to filing.

WHEREFORE, the Applicant-Petitioner requests that an Order be entered extending by 60 days the time within which he may petition this Court for certiorari, to and including January 14, 2019.

Respectfully submitted,

Emmanuel I. Mekowulu,
Applicant-Petitioner

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October 29, 2018

No. 18A-_____

In the Supreme Court of the United States

Emmanuel I. Mekowulu, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 29.5(b), I certify that I am counsel for Emmanuel I. Mekowulu. I further certify that on October 29, 2018, at the time of express delivery to this Court, I served the foregoing Application, pursuant to Rules 29.3 and 29.4(a), on counsel for the respondent, by depositing a copy of the same, first class postage prepaid, in the United States mails, addressed to:

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Thomas Palermo, Esq.
US Attorney's Office - FLM
Suite 3200, 400 N Tampa St
Tampa, FL 33602-6

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.

Respectfully submitted,

Emmanuel I. Mekowulu,
Applicant-Petitioner

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October 29, 2018

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11255-C

EMMANUEL MEKOWULU,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Emmanuel Mekowulu is a federal prisoner serving 120 months' imprisonment for conspiracy to distribute and dispense Oxycodone not for a legitimate medical purpose, 21 U.S.C. §§ 841(b)(1)(C), 846. This Court affirmed his conviction and sentence, and Mekowulu filed the instant counseled 28 U.S.C. § 2255 motion, raising several issues, but, as relevant here, the following:

(1) his conviction was unconstitutional because the government's expert witness, Professor Paul Doering, testified to an unconstitutionally vague standard of care;

(2) Prof. Doering's testimony violated the Ex Post Facto Clause; and

(3) Prof. Doering's testimony, together with the court's deliberate ignorance instruction, unconstitutionally shifted the burden of proof to Mekowulu.

The district court denied the motion. As an initial matter, it noted that this Court, on direct appeal, already had determined that a deliberate-ignorance instruction was proper. Next, it

Exhibit A

found that the claims were procedurally barred because Mekowulu had not raised them on direct appeal, and he was not entitled to either exception to the bar. It subsequently denied a certificate of appealability ("COA").

Mekowulu, through counsel, appealed, and now moves this Court for a COA. In his motion for a COA, Mekowulu argues that his claims are novel, not because they were not readily available at trial, but because they "advance[ed] a theory that has never been presented to any court," to wit, where an expert testifies that a defendant-pharmacist must explain his reasons for filling a prescription, as he alleged Professor Doering did here, the government should then have the burden not only to show a breach of the standard of care, but also the inadequacy of a defendant's explanation. Specifically, Mekowulu asserts that Professor Doering's testimony informed the jury that Mekowulu had the burden at trial to provide an adequate explanation for his actions. Further, Mekowulu argues an alternative basis for cause, in that it was not possible to raise his claims on direct appeal because trial counsel failed to object to Professor Doering's testimony, which precluded any appellate review. Finally, Mekowulu argues that his affidavit constituted new reliable evidence of his actual innocence.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Claims that could have been raised on direct appeal are procedurally barred from review in a § 2255 proceeding, absent a showing of cause and prejudice or actual innocence. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). A defendant can overcome this procedural bar by establishing either (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted. *Id.*

Here, reasonable jurists would not dispute the district court's decision that Mekowulu's claims were procedurally barred because he did not raise them on direct appeal. *See id.* Nor would they dispute whether Mekowulu was entitled to either exception to the bar. Mekowulu argues that his claims are novel because he is the first petitioner to argue that, where a pharmacy expert testifies to a standard of care in which a defendant-pharmacist must provide an explanation for filling the prescriptions at issue, then the government should have the additional burden to show that such explanation is inadequate. Mekowulu, however, did not raise this claim concerning the government's additional burden in his § 2255 motion, and it cannot be raised for the first time on appeal. *See Walker v. Jones*, 10 F. 3d 1569, 1572 (11th Cir. 1994) (holding that an issue not raised in the district court, and raised for the first time in an appeal, will not be considered by this Court). Further, he could not have established its novelty, because it did not involve a constitutional principle that had not been previously recognized, but which has been held to have retroactive application. *See Hargrave v. Dugger*, 832 F. 2d 1528, 1530-31 (11th Cir. 1987). No new constitutional right was created or recognized here; Mekowulu could have articulated and raised this claim as soon as Professor Doering testified.

Next, contrary to Mekowulu's argument that he was prohibited from raising these claims on direct appeal because counsel failed to object at trial, such a failure does not preclude appellate review, but, rather, causes this Court to review only for plain error. *See United States v. Turner*, 474 F.3d 1265, 1275 (11th Cir. 2007).

Even assuming that Mekowulu had shown cause for his failure to raise these claims on direct appeal, he did not address the actual prejudice prong of the exception. *See Lynn*, 365 F.3d at 1232. In order to establish prejudice, a petitioner must show that the errors "substantially disadvantaged his defense so that he was denied fundamental fairness." *Wright v. Hopper*, 169 F. 3d 695, 706 (11th Cir. 1999). The record showed no evidence of unconstitutional burden-

shifting—the trial court properly instructed the jury that it was the government's burden to prove Mekowulu's guilt beyond a reasonable doubt, and that Mekowulu had no affirmative duty to prove his innocence. *See United States v. Stone*, 9 F. 3d 934, 938 (11th Cir. 1993) (holding that a jury is presumed to follow a trial court's instruction). Further, contrary to Mekowulu's argument, Professor Doering's statement—that, under the circumstances here, he would have required an explanation before filling the prescriptions—did not improperly inform the jury that Mekowulu had the burden at trial to provide an explanation for his actions. Additionally, counsel extensively cross-examined Professor Doering as to the "red flags." Thus, Mekowulu made no showing of the denial of fundamental fairness.

Finally, Mekowulu argues that he was entitled to the actual-innocence exception. Even assuming, as the district court did, that Mekowulu's affidavit was "new" evidence, it was not improper for the district court to find that it was not reliable. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (holding that a court should "consider how the timing of the submission and the likely credibility of the affiant[] bear on the probable reliability of that evidence."). Nor did he show that, if he had testified to his innocence at trial, no reasonable juror would have found him guilty, in light of the substantial evidence against him.

Because reasonable jurists would not find debatable the district court's finding that the claims were procedurally barred, Mekowulu's motion for a COA is DENIED. *See Slack*, 529 U.S. at 478.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EMMANUEL I. MEKOWULU,

Petitioner,

v.

CASE NO. 8:15-cv-1158-T-27MAP
CRIM. CASE NO. 8:12-cr-170-T-27MAP

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

BEFORE THE COURT are Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, memorandum and affidavits in support (cv Dkts. 1, 2-7), the Government's response and affidavits in opposition (cv Dkt. 21), Petitioner's reply and affidavits (cv Dkt. 24), and his supplemental authority (cv Dkts. 11, 12, 25). Upon consideration, Petitioner's motion is DENIED *in part*. An evidentiary hearing is necessary with respect to Petitioner's claims of ineffective assistance of counsel raised in Grounds One B, C, and D.

Procedural Background

Petitioner was charged with conspiracy to distribute and dispense controlled substances not for a legitimate medical purpose in violation of 21 U.S.C. §§ 841(b)(1)(C), and 846 (cr Dkt. 1). He was convicted and sentenced to 120 months and three years of supervised release (cr Dkts. 81, 90). The Eleventh Circuit affirmed, finding that there was substantial evidence of guilt. *United States v. Mekowulu*, 556 Fed. Appx. 865, 867 (11th Cir. 2014).

Petitioner's Section 2255 motion (cv Dkt. 1) raises five grounds for relief:

Exhibit B

Ground One: trial counsel were ineffective in failing to:[1]

A. object to the Government's expert, Professor Doering, testifying to the ultimate issue of Petitioner's guilt or innocence;

B. call Petitioner as a witness;

C. retain and call a pharmacist expert to rebut Professor Doering's testimony; and

D. advise Petitioner on the "deliberate ignorance" jury instruction, thereby rendering Petitioner's waiver of his right to testify unknowing and involuntary;

Ground Two: whether Professor's Doering's standards are unconstitutionally vague rendering the conviction unconstitutional;

Ground Three: the Government's claim that Mr. Mekowulu violated federal law regarding DEA Form 222 violated Mr. Mekowulu's right to be convicted only of crimes charged in the Indictment;

Ground Four: whether Mr. Mekowulu's conviction based on Professor Doering's testimony is a violation of the prohibition of convictions based on *ex post facto* laws; and

Ground Five: whether Professor Doering's testimony and the deliberate ignorance instruction unconstitutionally shifted the burden of proof to the defendant.

Standard of Review for Ineffective Assistance of Counsel Claims

Strickland v. Washington, 466 U.S. 668 (1984), governs Petitioner's ineffective assistance of counsel claims. *Sims v. Singletary*, 155 F.3d 1297, 1305 (11th Cir. 1998):

> The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

[1]At trial, Petitioner was represented by Dale R. Sisco and Franklyn Louderback.

Strickland requires proof of both deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims v. Singletary*, 155 F.3d at 1305 ("When applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds."). And "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Where, as here, counsel is experienced, the presumption of competence is even higher. *Chandler v. United States*, 218 F.3d 1305, 1314-16 (11th Cir. 2000); *Reynolds v. United States*, 233 Fed. Appx. 904, 905 (11th Cir. 2007).[2] "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," Petitioner must demonstrate that counsel's error prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 691-92. To meet this burden, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694-95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

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[2]Petitioner's trial attorneys are experienced criminal defense lawyers who regularly represent clients before this court. Since 1992, Mr. Sisco has devoted a significant part of his practice representing medical professionals in criminal, administrative, and civil matters (cv Dkt. 21-4, p. 1, ¶ 3). And Mr. Louderback has practiced law for more than 41 years (cv Dkt. 21-5, p. 1, ¶¶ 2, 3).

Discussion

Ground One

In Ground One, Petitioner asserts four claims of ineffective assistance of trial counsel.

Ground One A: Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel Regarding Professor Doering's Testimony.

Professor Paul Doering was called by the United States as an expert witness. Petitioner contends that counsel were ineffective in: 1) failing to object or move for a mistrial when Professor Doering "exceeded the permissible boundaries of testimony" by repeatedly testifying as to the ultimate question of guilt; and 2) "invit[ing]" Doering "to opine on whether or not something Mr. Mekowulu did was illegal, and then agreed with the expert that the prescriptions were illegal until proven legal by responding, 'okay,' after Professor Doering wrongly made this claim." These contentions are without merit.

"An expert may offer opinion testimony on an ultimate issue of fact. . . ." *United States v. Caro*, 454 Fed. Appx. 817, 843 (11th Cir. 2012) (citing Fed. R. Evid. 704). However, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b). Accordingly, an expert cannot "expressly stat[e] an opinion as to the defendant's state of mind at the time of the offense. . . ." *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988) (citation omitted).

Before Doering testified, Petitioner's counsel filed a Motion in Limine directed to the scope of Doering's anticipated testimony (cr Dkt. 44). He challenged, among other things, whether Doering could testify on the ultimate issue of Petitioner's guilty knowledge, the existence of "red flags," or

"imdicators," which pharmacists should use to identify potential drug diverters and which impose an "affirmative duty" on the pharmacist to inquire into the legitimacy of the prescription. The motion was granted to the extent that Doering was prohibited from offering any "opinions about the ultimate guilt or innocence" of Petitioner, that is, "[w]hether he actually knew or didn't know . . ." But he was permitted to testify to the "red flags," "the indicia, indications that would put a pharmacists on knowledge or at least on alert; however you want to frame it, that these prescriptions - - those purported prescriptions may be illegitimate." (Cr Dkt. 103 at 7-9).

Accordingly, Doering was permitted to testify about "indicators," including, based on hypothetical facts, "pattern prescribing,"cash payments, presenting prescription from distant sites, multiple prescriptions for different patients from one doctor presented by one individual, multiple prescriptions for different patients from a distant source, the delivery of prescriptions to a person in a parking lot or on the side of a road or interstate highway, and the receipt of two prescriptions for the same drug for the same person simultaneously or within a day of each other. (Id. at 36 - 42; 44 - 46).

Notwithstanding the ruling on the motion in limine, Petitioner contends that Professor Doering testified several times on the ultimate issue in the case, Petitioner's knowledge of the criminal conspiracy involving diversion of Oxycodone to illicit uses. He argues, with commentary, that the following testimony "can reasonably be construed as a comment on the ultimate guilt or innocence of" Petitioner:

- Professor Doering testified that a person who had a stack of prescriptions in other people's names would be a "deal-breaker," and state[d], "I can't contemplate any legitimate reason that may be."

- Professor Doering directly testified, without objection, that Mr. Mekowulu's

> filling of two prescriptions back to back was "a huge indicator of diversion." This is not testimony as to a red flag that would put a pharmacist on notice of criminality of others. Instead, this is direct testimony of Professor Doering's opinion that Mr. Mekowulu had personally been involved in diversion.
>
> • on the topic of back to back prescriptions, Professor Doering was allowed to testify, "In fact, there's probably no explanation that would satisfy my concern."
>
> • Professor Doering specifically testified that he would not have honored certain prescriptions, stating, "I wouldn't honor that because I can't think of a valid reason for that to happen[.]"
>
> • Regarding prescriptions for Oxycodone without no [sic] corresponding log sign-out sheet, he stated, "Well, that's a violation of the law. And it would be a further indicator to me that something is going on that would aid or abet diversion of these drugs." This testimony constitutes Professor Doering's opinion that actions of Mr. Mekowulu were a violation of the law and an indicator that Mr. Mekowulu was aiding and abetting the diversion of drugs[.]

(cv Dkt. 2, pp. 11-12).

Considered in the proper context, these snippets of Doering's testimony do not reflect opinions on Petitioner's guilt, that is, that he knew that Oxycodone was being diverted for illicit uses. Although Doering's testimony addressing the indicators was certainly material to the determination of whether Petitioner knew or should have known that the prescriptions he was filling were being diverted for illicit uses, it was not directed to the ultimate question of guilt or innocence. Doering was not asked whether Petitioner knew the drugs were being diverted, and did not express an opinion on that. Rather, to assist the jury in understanding and evaluating the evidence, he expressed opinions, based on his experience, training, knowledge and education, on what he considered to be indicators of drug diversion which should alert a practitioner. Accordingly, since Doering's testimony did not violate Rule 704(b), counsel were not ineffective in failing to object to his testimony or move for a mistrial.

Petitioner further contends that counsel's cross examination of Doering was deficient when he "asked Professor Doering to comment on whether facts that can be attributed to Mr. Mekowulu were illegal, allowed Professor Doering to testify that the burden of proof was shifted to the Defendant and wrongly inform the jury that the prescriptions were illegal until proven to be legal, requiring an explanation, and supports the issue that the Defendant has to testify and offer the explanation." (cv Dkt. 2, pp. 12-13). Petitioner refers to this exchange between defense counsel and Doering:

Q Okay. Now, you were shown a number of prescriptions for patients that you put on a spreadsheet that the government introduced as Exhibit 69; is that right?

A That's correct, yes.

Q And with regard to those prescriptions, you - other than the fact that there were multiple prescriptions issued, and that they were dispensed on simultaneous -- or one day after the -- after the first, that it raises your index of suspicion; correct?

A That is correct.

Q Okay. But the fact that that was done in and of itself doesn't make those prescriptions illegal; right?

A Well, it's kind of opposite of our legal system. To me they're illegal until they're proven legal.

Q Okay.

A I'd have to hear a very convincing reason why that was done before I would dispense them.

Q Okay. Well, you'd need an explanation?

A Yes, yes, absolutely.

Q Okay. But as you sit here today, you don't know what was communicated to

Mr. Mekowulu about those; right?

A That is correct.

Q All right. Now, you're aware, are you not, that there have been fluctuations in the availability of Oxycodone 30 milligram in the State of Florida?

A Yes.

Q There have been some wholesalers or distributors who were not able to distribute Oxycodone 30 for a period of time; is that right?

A Yes. And I'm biting my lip because -- yes, that's true.

Q Okay. And a pharmacist can dispense a partial prescription; is that right?

A That is correct.

Q Okay. And so let me make sure I understand how that works. If there's a prescription that's issued for a patient, and let's assume that that's a legitimate prescription, there's no indicators in your -- as you've described them. Okay? And that is presented to you as a pharmacist, and you look at what you have in your supply and there are -- you only have 75 available.

A Yes, sir.

Q Okay. You could dispense those 75; right?

A Yes.

Q And then you would have to dispense the balance, 75 pills, within 72 hours; is that right?

A That is the law, yes.

Q And if you didn't dispense the balance of the prescription within 72 hours, the balance of that prescription is void; right?

A That is correct, yes.

Q And the patient would have to go back to the doctor and have the doctor issue another prescription; is that right?

A That's correct.

Q Your investigation in this case did not include reviewing the availability of Oxycodone 30 during any period of time between June of 2008 and March of 2009; is that right?

A That's correct.

(cr Dkt. 103, pp. 90-93).

It is apparent from this exchange that counsel was making the point that it is not illegal to dispense Oxycodone to a patient on consecutive days when the supply of Oxycodone is not sufficient to fill the prescription, in an attempt to undercut Doering's testimony that his suspicion of diversion was raised because of the multiple prescriptions dispensed on simultaneous days. And after Doering stated that to him, the prescriptions were "illegal until they're proven legal," counsel brought out that Doering was not privy to "what was communicated to Mr. Mekowulu" about the prescriptions, again, to undercut Doering's testimony.[3] Counsel was therefore able to gain admissions from Doering that (1) a pharmacist is allowed to "dispense a partial prescription" and dispense the balance of the prescription within 72 hours, (2) he did not know what explanation was given to Petitioner, and (3) he made no investigation regarding the shortage of Oxycodone during the relevant period.

As noted, there is a strong presumption that counsel's conduct falls within the "wide range

[3] Petitioner's contention that counsel allowed Doering to shift the burden of proof takes Doering's testimony out of context. Indeed, Doering acknowledged the distinction between his perspective on a practitioner's responsibility under the circumstances and the burden of proof in a criminal trial when he testified that "[w]ell, it's kind of opposite of our legal system. To me they're illegal until they're proven legal." That gratuitous statement did not, as Petitioner contends, shift the burden of proof, and certainly cannot be attributed to counsel. Counsel was making the point that filing prescriptions on simultaneous days was not, "in and of itself," illegal. Implicitly conceding the point, Doering acknowledged that he was holding the practitioner to a burden that was inconsistent with the burden of proof applicable to the case. If anything, Doering's testimony reiterated the correct burden of proof.

And even if the comment was arguably improper, there was no prejudice in light of counsel's argument (see cr Dkt. 105, p. 46) and the court's instruction to the jury (see cr Dkt. 105, pp. 69-70, 81) that the Government had the burden of proof, and Petitioner had no burden to prove anything. *See United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir. 1992) ("[T]he prejudice from the comments of a prosecutor which may result in the shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof.").

of professional norms." *Strickland*, 466 U.S. at 689. Petitioner has not rebutted that presumption. Counsel's decision on the manner of cross-examination is a strategic decision entitled to deference. *Dorsey v. Chapman*, 262 F.3d 1181 (11th Cir. 2001), *cert. denied*, 535 U.S. 1000 (2002). Counsel's cross examination of Doering and his subtle challenges to the foundation underlying Doering's suspicions was a reasonable strategy which brought out weaknesses in Doering's opinions. *See Minton v. Sec'y, Dep't of Corr.*, 271 Fed. Appx. 916, 918 (11th Cir. 2008) ("The Supreme Court has 'declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'") (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

I therefore find that counsel's cross examination of Professor Doering was reasonable, that is, well within the "wide range of professional norms." And I find that even if, arguendo, counsel's cross examination of Doering was in some way deficient, Petitioner has not shown prejudice. Specifically, counsel's cross examination of Doering did not render the result of the trial unreliable or the proceedings fundamentally unfair, considering the strength of the Government's case.

Petitioner has not demonstrated ineffective assistance of counsel or resulting prejudice with respect to Doering's cross examination.[4] Accordingly, Ground One A is without merit and therefore does not warrant relief.

Ground One B: Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel By Resting Without Calling Mr. Mekowulu as a Witness.

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[4] To prevail on this claim, Petitioner is required to demonstrate that counsel's strategy was unreasonable, that is, "that no competent counsel would have made such a choice." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). This he has not done. And the "reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof." *Id.*. Accordingly, Attorney Palmieri's views on the effectiveness of Doering's cross examination and counsel's strategic choices during trial are immaterial (cv Dkt. 6). And finally, the deference to which Sisco's cross examination is entitled "is even greater where those decisions were made by experienced criminal defense counsel." Id.

Ground One C: Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel By Failing to Retain and Call a Pharmacist Expert to Rebut the Testimony of Professor Doering.

Ground One D: Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Assistance of Counsel Regarding Mr. Mekowulu's Waiver of the Right to Testify Rendering the Waiver Not Knowing or Voluntary By Failure of Counsel to Advise Mr. Mekowulu on the Deliberate Ignorance Instruction When Advising and Recommending that Mr. Mekowulu Waive the Right to Testify.

In Ground One D, Petitioner contends that his waiver of the right to testify was not knowing and voluntary because, before waiving his right to testify, defense counsel was ineffective in failing to counsel him on the deliberate ignorance instruction, and by telling him that the case was "in our favor" and "no jury would convict."[5] He asserts that on December 6, 2012, he told Sisco that he would testify (cv Dkt. 3, p. 1, ¶ 6), but on December 11, 2012, Sisco told him and his wife that he and Louderback "had made the decision that [he] would not be testifying[,]" that they "were very comfortable that the case was in our favor" (Id., p. 2, ¶ 8), and that "there was no evidence against [him]." (Id., p. 22, ¶ 22). He further asserts that he "was not advised by Mr. Sisco or Mr. Louderback before [he] advised the court that [he] would not testify that I could be convicted on what I now understand is the 'deliberate ignorance' theory. . . " (Id., p. 3, ¶ 11), and that "Mr. Louderback and Mr. Sisco never, at any time, discussed with me the 'deliberate ignorance' instruction, its meaning, or its implications on whether I should testify." (cv Dkt. 24-1, p. 6, ¶ 5a).

[5] "A criminal defendant has a fundamental right to testify in his defense." *United States v. Hung Thien Ly*, 646 F.3d 1307, 1313 (11th Cir. 2011) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). "Although often framed as a right to testify, it is more properly framed as a right to choose whether to testify." *Id.* (citing *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc)). That right "is truly protected only when the defendant makes his decision knowingly and intelligently." *Id.* (citation omitted). "In cases where a defendant is represented by counsel, counsel is responsible for providing the advice needed to render the defendant's decision of whether to testify knowing and intelligent." *Id.* (citing *Teague*, 953 F.2d at 1533). "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *Topete v. United States*, 628 Fed. Appx. 1028, 1029 (11th Cir. 2015) (citing *Teague*, 953 F.2d at 1532-33).

He also contends that counsel "never told [him] why they would like to put [him] on the witness stand, or why they did not want to put [him] on the witness stand," and never asked him how he "would testify. . . in response to any of the government's witnesses . . ." (cv Dkt. 24-1, pp. 4-5, ¶ 4d).

Finally, he avers that had counsel adequately advised him about the "deliberate ignorance" instruction and its implications, he "would have refused to waive [his] right to testify. . . ." (Id., pp. 8-9, ¶ 7). He avers that "[t]here was no reason for [him] to not testify[,]. . .[he had] clear responses to all of the claims of the government witnesses[,]. . .and [he] would have testified. . .that [his] actual belief was that no crime was being committed by Mr. Wubbena or Mr. Ridenour." (Id.).

As for Petitioner's contention that counsel never discussed the deliberate ignorance instruction with him, Sisco avers that "my recollection is that this matter was discussed in detail with [Petitioner] both before and during the trial" (cv Dkt. 21-4, p. 2, ¶ 7), and Louderback avers that "the [deliberate ignorance instruction] was discussed with [Petitioner]." (cv Dkt. 21-5, p. 2, ¶ 10). Both maintain that before Petitioner waived his right to testify, he was aware that the deliberate ignorance instruction would be given, since he was present when the Government argued that the instruction applied and the court announced that the instruction would be given (cv Dkt. 21-4, p. 2, ¶ 8; Dkt. 21-5, pp. 2-3, ¶¶ 10-11). Sisco further avers that "[a]t no time did I ever tell [Petitioner] or his wife that 'there was no way he could be convicted.'" (cv Dkt. 21-4, p. 5, ¶ 16).

Sisco's and Louderback's affidavits indicate that they discussed the deliberate ignorance instruction with Petitioner. Petitioner's affidavit, however, indicates that the instruction was never discussed or explained to him. And there is a factual dispute regarding whether before Petitioner waived his right to testify, Sisco told Petitioner "that no jury would convict anyone with this kind

of evidence. . . ." (see cv Dkt. 4, p. 2, ¶ 5). Finally, counsel do not indicate whether they discussed the advantages and disadvantages of testifying with Petitioner, while he avers that they did not (see cv Dkt. 24-1, p. 4, ¶ 4d).

An evidentiary hearing is necessary on whether Petitioner's waiver of his right to testify was knowing and intelligent, and whether the failure to call him to testify constituted ineffective assistance.[6] *See Aron v. United States*, 291 F.3d 708, 714-715 (11th Cir. 2002) ("[I]f the petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.") (citations and internal quotation omitted).

Ground One C: Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel By Failing to Retain and Call a Pharmacist Expert to Rebut the Testimony of Professor Doering.

Petitioner argues that counsel was ineffective in failing to retain a pharmacology expert. He asserts that "there was no reason not to call an expert pharmacy witness for the defense to testify that [he] should not be deemed to be on notice of at least five of Professor Doering's 'red flags.'" (cv Dkt. 2, p. 18). He further asserts that an "expert should have been called to rebut Professor Doering's incorrect claim that blood or marriage relation is required to pick up a prescription for someone else, that Mr. Mekowulu's actions in relation to a log book were a violation of the law, that DEA Form 222 had anything to do with this case, and to rebut the remainder of Professor Doering's testimony." (Id.).

In support, Petitioner submits the affidavit of Dr. Matthew C. Lee, M.D., who is not licensed

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[6] If, after the evidentiary hearing, it is determined that Petitioner knowingly and intelligently waived his right to testify, Petitioner's claim that counsel was ineffective in failing to call him to testify would necessarily fail, since the decision to testify was ultimately Petitioner's, as he confirmed in the in camera colloquy with the court during trial. (Dkt. 129-6).

in Florida (see cv Dkt. 5). Dr. Lee avers that he was available as an expert witness at the time of Petitioner's trial, his "availability was generally obtainable through common internet searches," and he was not contacted by Petitioner's attorneys (cv Dkt. 4, p. 10). He states that if he had been retained, he would have testified that, in his opinion, Petitioner "should not be deemed to be on notice" of the majority of Professor Doering's "red flags" because they were not "listed criteria in the Florida Administrative Code as [] criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose" (Id., pp. 4-9), and "by 2009 Professor Doering had not published his opinions. . . ." (Id., p. 10).[7]

The decision not to call an expert witness is not, in and of itself, "so patently unreasonable a strategic decision that no competent attorney would have chosen this strategy." *Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001). The petitioner must show that, under the circumstances, no reasonable counsel would have chosen to forego an expert, and but for that decision, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687.

Sisco's affidavit indicates, in pertinent part, that:

> I consulted with a number of pharmacy experts regarding his case, including a former member of the Florida Board of Pharmacy; a clinical professor from the University of Florida School of Pharmacy and the Chief Pharmacist at Shands Hospital; and a licensed pharmacist formerly employed by the Drug Enforcement Administration as a Diversion Program Manager. None of these experts were supportive of the

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[7] That Petitioner's current counsel located an expert (Dr. Lee) willing to testify on Petitioner's behalf does not establish that Sisco's investigation was outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. *See also Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.").

Moreover, Dr. Lee is not licensed in Florida and has not practiced in Florida. Consistent with *Gonzalez v. Oregon*, 546 U.S. 243 (2006), the applicable standards of professional practice in this case are to be judged based on the professional standards in Florida. *United States v. Tobin*, 676 F.3d 1264, 1275 (11th Cir. 2012) ("When Congress enacted the CSA, it thus manifested its intent to leave it to the states to define the applicable standards of professional practice.").

> dispensing activities of Mr. Mekowulu. The results of these expert consultations were discussed with Mr. Mekowulu.

(cv Dkt. 21-4, p. 3).

It is undisputed that Sisco consulted with several pharmacology experts. He was only required to make a reasonable investigation in his search for an expert. *See Fondren v. Allen*, 2012 U.S. Dist. LEXIS 117189, at *57 (N.D. Ala. Aug. 20, 2012) ("The court's 'principal concern' in deciding whether Fondren's counsel were ineffective for failing to retain an appropriate expert is not whether counsel should have presented expert testimony; rather, it is 'whether the investigation supporting counsel's decision not to introduce [expert testimony] was itself reasonable.'") (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)). He was not required to continue contacting experts until he found one willing to testify on Petitioner's behalf. *See Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir.), *opinion withdrawn in part on denial of reh'g*, 833 F.2d 250 (11th Cir. 1987) ("We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to 'shop' for a psychiatrist who will testify in a particular way."); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998) ("Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion.") (quotation marks omitted).

Notwithstanding, Sisco's assertion that "[n]one of these experts were supportive of the dispensing activities of Mr. Mekowulu[,]" without more, is not sufficient to make a determination of whether he conducted a reasonable investigation or that his decision not to retain one of the experts was reasonable trial strategy.[8] Specifically, his affidavit does not provide sufficient detail of

[8]In his reply affidavit, Petitioner indicates that Sisco decided not to retain any of the experts with whom he consulted not because they were unsupportive of his "dispensing activities," but rather because the first expert's "integrity would be questioned," the second expert "was unlikely. . .[to] testify," the third expert did "not appear as an expert witness[] anymore," and the fourth expert "was a former DEA agent." (cv Dkt. 24-1, p. 9, ¶ 8).

the results of those consultations to definitively resolve this claim. An evidentiary hearing is therefore necessary on this claim of ineffective assistance of counsel.

Grounds Two, Three, Four, and Five

The Government contends that Grounds Two through Five are procedurally defaulted because Petitioner failed to raise those grounds in the district court or on direct appeal (cv Dkt. 26-31). The Government is correct. Since these grounds were available on direct appeal from Petitioner's conviction and he failed to raise them, they are procedurally defaulted.

A claim that was available but was not raised in the district court or on appeal is procedurally defaulted from consideration on collateral review, absent cause and prejudice or actual innocence. *McCoy v. United States*, 266 F.3d 1245, 1258-59 (11th Cir. 2001); *Bousley v. United States*, 523 U.S. 614, 622 (1998). To show cause for not raising a claim, a petitioner must show that "some objective factor external to the defense" impeded his ability to raise the claim previously. *Lynn v. United States*, 365 F.3d 1225, 1235 n.20 (11th Cir.), *cert. denied*, 543 U.S. 891 (2004); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show prejudice, the petitioner must demonstrate that "errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." *Wright v. Hopper*, 169 F.3d 695, 706 (11th Cir. 1999) (internal citations omitted). To establish actual innocence, the petitioner must demonstrate factual innocence, not mere legal insufficiency. *Bousley*, 523 U.S. at 623-24. This requires the petitioner to identify new reliable evidence demonstrating actual innocence. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). "The demanding nature of the *Schlup* standard ensures that only the 'extraordinary' case will merit review of the procedurally barred claims." *Melson v. Allen*, 548 F.3d 993, 1002 (11th Cir. 2008) (citing *House v. Bell*, 547 U.S. 518, 538 (2006)).

To the extent Ground Five challenges Doering's testimony and the deliberate ignorance instruction, Petitioner unsuccessfully challenged that instruction on direct appeal. *United States v. Mekowulu*, 556 F. App'x at 868:

> We also conclude that the district court properly instructed the jury on deliberate ignorance. A district court properly instructs a jury on deliberate ignorance when the facts support an inference that the defendant was aware of a high probability of the existence of a fact in question and purposely avoided learning all of the facts in order to have a defense in the event of a subsequent prosecution. (citation omitted). . . Here, the district court instructed the jury that a finding of deliberate ignorance requires proof beyond a reasonable doubt. And nothing in the record undermines the presumption that the jury followed the district court's instructions. Thus, we find no reason to believe the jury convicted Mekowulu on a deliberate ignorance instruction based on insufficient evidence.

Once an issue has been adversely decided on appeal, it cannot be relitigated in a collateral attack under § 2255. *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir.), cert. denied, 531 U.S. 1131 (2001).

To the extent Petitioner purports to raise new claims in Grounds Two, Three, Four, and Five, those claims are procedurally defaulted, and he makes no showing of cause for his procedural default, or prejudice. Nor does he make a showing of actual innocence to overcome his procedural default.

Petitioner fails to satisfy the cause and prejudice standard

Petitioner has not demonstrated that these claims are novel

Petitioner contends that "the omission on direct appeal of any issues raised herein is the result either of the novelty of the issues or ineffective assistance of appellate counsel." (cv Dkt. 2, p. 34). He therefore contends that cause exists to excuse the procedural default of Grounds Two through Five.

"The novelty of a claim will constitute cause sufficient (when joined with actual prejudice)

to excuse procedural default if the legal basis for the claim was 'not reasonably available to counsel,' *Reed v. Ross*, 468 U.S. 1, 16 (1984)], or if petitioner's counsel 'lacked the tools to construct' the constitutional claim, *Engle [v. Isaac*, 456 U.S. 107, 133 (1982)]." *Pitts v. Cook*, 923 F.2d 1568, 1572 (11th Cir. 1991) (alterations added). "In procedural default cases, the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all." *Lynn v. United States*, 365 F.3d at 1235; *Wallace v. Lockhart*, 12 F.3d 823, 826 (8th Cir. 1994) ("When determining whether a claim is novel, 'the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all.'") (*quoting Smith v. Murray*, 477 U.S. 527, 537 (1986)).

Petitioner's conclusory assertion that Grounds Two through Five are novel does not demonstrate cause for his procedural default. He fails to explain how or why these claims are novel, and more importantly, why these claims were not reasonably available either in the district court or on appeal. In any event, the legal bases for his claims were readily available when he appealed from his conviction. *See Hargrave v. Dugger*, 832 F.2d 1528, 1530-31 (11th Cir. 1987) ("In order to establish the novelty of a constitutional claim sufficient to provide cause, a defendant must initially demonstrate that his situation is one where a court has 'articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application.'") (quoting *Reed*, 468 U.S. at 17).

Petitioner's legal bases for these claims are: his conviction violates "void-for-vagueness" principles (Ground Two); there was a constructive amendment to the Indictment, since he was convicted of a crime that was not charged in the Indictment (Ground Three); allowing Professor

Doering to testify regarding standards that did not exist at the time of the crime constitutes an unconstitutional *ex post facto* enlargement of the criteria that should cause a pharmacist to question the legitimacy of a prescription (Ground Four); and Doering's testimony coupled with the deliberate ignorance instruction shifted the burden of proof to Petitioner (Ground Five). None of these bases are novel in the context of federal criminal law.

Petitioner has not demonstrated ineffective assistance of counsel caused the default

Petitioner alleges, without any supporting facts, evidence, or argument, that ineffective assistance of appellate counsel was the cause for his procedural default of Grounds Two through Five.[9] His conclusory allegation is therefore insufficient to satisfy the cause and prejudice standard. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1318 (11th Cir.2014) ("conclusory allegation [of ineffective assistance of counsel], bereft of details and unsupported by evidence, was insufficient to satisfy the cause and prejudice standard.") (citing *Henderson v. Haley*, 353 F.3d 880, 897 (11th Cir.2003)). Specifically, without argument under *Strickland*, Petitioner fails to demonstrate that appellate counsel's failure to raise Grounds Two through Five on appeal "fell below an objective standard of reasonableness"or otherwise constituted ineffective assistance of counsel. *See Strickland*, 466 U.S. at 688. Moreover, the record demonstrates that he received effective assistance of appellate counsel.

Petitioner was represented by David T. Weisbrod, Esq., on direct appeal (cv Dkt. 21-6). Weisbrod, who has been licensed to practice law in Florida since 1980 (Id., p. 1, ¶ 2), avers that "[a]ll the issues briefed on direct appeal were the result of [his] considered judgment that they had

[9] While ineffective assistance of counsel may be cause for a procedural default, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), "attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." *Id.* at 492.

the best chance for achieving a successful outcome for [Petitioner]." (Id., p. 2, ¶ 5). He filed a thorough and well-reasoned brief on direct appeal (cv Dkts. 21-2, 21-3).

The Sixth Amendment does not require appellate counsel to raise every non-frivolous issue, and even though an issue not appealed might have been successful, the actions of appellate counsel must be viewed in their entirety. *Heath v. Jones*, 941 F.2d 1126, 1131 (11th Cir. 1991). The record therefore demonstrates, and I so find, that Weisbrod's performance was not deficient under prevailing professional norms. *Strickland*, 466 U.S. at 688. Since the bases for Grounds Two through Five were available when Petitioner's direct appeal was filed, and Weisbrod exercised reasonable profession judgment in selecting the issues to raise on appeal, Petitioner has not shown that Weisbrod's failure to raise these grounds on appeal fell below an objective standard of reasonableness Accordingly, this cause argument fails.

Finally, to the extent Petitioner may be arguing that trial counsel was ineffective in failing to preserve these claims for review and that this constitutes cause for his procedural default (see cv Dkt. 2, p. 35; cv Dkt. 24, pp. 17-19), he fails to show that trial counsels' performance was constitutionally ineffective under *Strickland*. The mere failure to preserve a claim for appeal does not establish *Strickland* prejudice. Rather, "the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.'" *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1269 (11th Cir. 2015) (quoting *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) (per curiam)). Petitioner fails to present any argument and otherwise demonstrate that there is a reasonable likelihood that the outcome of the appeal would have been different if trial counsel had preserved these claims for appeal. Grounds Two through Five are therefore procedurally barred from review.

No credible showing of actual innocence

Petitioner has not made a credible showing of actual innocence because he presents no new *reliable* evidence of actual innocence. As the Government correctly points out, "[n]one of [Petitioner's] claims raised in either ground would establish [Petitioner's] actual innocence of the charged offense . . ." And to the extent he relies on his own declaration that he is actually innocent and his proposed testimony (cv Dkt. 3), this does not constitute sufficiently reliable *new* evidence of actual innocence, since it was necessarily known to him at the time of his trial. *See, e.g., Hay v. Sec'y, Dep't of Corr.*, 2017 U.S. Dist. LEXIS 123851, at *13 (M.D. Fla. Aug. 4, 2017) ("Pursuant to *Schlup* and its progeny, Petitioner is required to offer new reliable evidence that was not available at the time of his trial."); *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004) ("A defendant's own late-proffered testimony is not "new" because it was available at trial.").

Even assuming that it constitutes "new" evidence, it is self-serving and uncorroborated and therefore does not constitute sufficiently reliable evidence of actual innocence. *See Schlup*, 513 U.S. at 332 (court assessing actual innocence claim may consider "how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of [the new] evidence"); *Mize v. Hall*, 532 F.3d 1184, 1198 n. 13 (11th Cir. 2008) ("the [defendant's former girlfriend's] affidavit is of inherently little value because [she] has not been subject to cross-examination as to its contents.") (citing *Herrera v. Collins*, 506 U.S. 390, 417 (1993)); *Florez v. United States*, 2009 U.S. Dist. LEXIS 63826, at *30, 2009 WL 2228121, at *7 (E.D. N.Y. July 24, 2009) (finding that petitioner's new evidence, in the form of his own testimony, was not sufficient to call into question "sworn testimony subject to cross-examination and upheld on appeal").

Other than his own declaration, Petitioner presents no direct evidence of his actual innocence.

And there was substantial evidence of guilt supporting the jury's verdict. For example, there was testimony that Petitioner: (1) only accepted cash payments for the Oxycodone (cr Dkt. 101, p. 145); (2) told Troy Wubbena to give the prescriptions only to him and not to anyone else at the pharmacy, and would call Wubbena's cell phone to let him know when he was in the pharmacy (Id., pp. 152-53); (3) charged $1.00 to $3.00 per pill when he purchased each pill wholesale for 40 cents to 45 cents per pill, and the average cash price at other pharmacies was 70 to 80 cents per pill (Id., 154-55, 157); (4) allowed Wubbena to help him unpack boxes of Oxycodone, then filled 20 to 30 prescriptions that night (Id., pp. 156-57); (5) did not give Wubbena receipts for the cash payments (Id., p. 158); (6) dropped off large amounts of Oxycodone to Wubbena in various parking lots not typically associated with legitimate pharmaceutical transactions (Id., pp. 161-63); and (7) never called the Pain Center to verify any of the prescriptions (Id., p. 194).

Although Petitioner denies that: (1) he stated he would accept cash only (cv Dkt. 3, pp. 13-14, 19); (2) he never confirmed prescriptions (Id.); (3) his prices for the Oxycodone were not comparable to other pharmacies (Id., p. 17); (4) he told Wubbena to give the prescriptions only to him (Id., p. 19); (5) he allowed Wubbena to unpack boxes of Oxycodone with him (Id., p. 17); and (6) he did not provide receipts (Id., p. 22), he presents no evidence to support his denials. His proposed testimony is little more than an attack on the credibility of Wubbena and Ridenour, and is therefore not new, reliable evidence of his factual innocence.

Because the evidence against Petitioner was strong, I find that a reasonable juror would not, more than likely, accept Petitioner's testimony as credible over Wubbena's and the evidence supporting Wubbena's testimony. In addition, while Petitioner states that the deliveries of Oxycodone he made to Wubbena in parking lots and off an interstate "were made out of genuine

customer service from my heart as I have always done for other people and this one off Interatetate [sic]-4 was because I was heading that way" (Id., pp. 21-22), he presents no other evidence to corroborate this statement. Although he attaches an advertisement from his pharmacy that indicates, in pertinent part, that "if we do not have what you need, when we get it the next day we deliver it to your house unless otherwise requested" (Id., p. 27), he presents no evidence or testimony that he actually delivered prescriptions to customers' homes. And even if he did present such evidence, it would not be helpful, since he was delivering prescriptions for multiple patients to one person in parking lots and along the interstate. Accordingly, I cannot find that it is more likely than not that no reasonable juror would find Petitioner guilty beyond a reasonable doubt had it heard him testify. *Schlup*, 513 U.S. at 324.

I likewise cannot find that it is more likely than not that no reasonable juror would have convicted Petitioner in light of Dr. Lee's affidavit. Dr. Lee's averments do not constitute reliable evidence of *actual innocence,* since they do not establish that Petitioner did not know that the prescriptions he filled were being diverted for illicit uses. Dr. Lee avers that, in his opinion, Petitioner should not be deemed to be on notice of some of Professor Doering's "red flags," since they were not listed in Florida Administrative Code 64B16-27.831 as criteria that would cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose (cv Dkt. 5).[10] But he goes on to say that the criteria in the Florida Administrative Code is not even applicable

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[10]In 2008-09, Florida Administrative Code 64B16-27.831 provided:

> Standards of Practice for the Dispensing of Controlled Substances for Treatment of Pain.
> (1) An order purporting to be a prescription that is not issued for a legitimate medical purpose is not a prescription and the pharmacist knowingly filling such a purported prescription shall be subject to penalties for violations of the law.
> (2) The following criteria shall cause a pharmacist to question whether a prescription was issued

where a practitioner (as here), rather than patients, may be diverting controlled substances (cv Dkt. 5, p. 3). Nor does he identify any indicators that a practitioner is diverting controlled substances. Finally, he does not aver that Petitioner's dispensing activities with Wubbena and Ridenour were appropriate.

In sum, Petitioner's proffered evidence is not reliable new evidence establishing that he is factually innocent, particularly considering the compelling evidence presented at trial.[11] He has not

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for a legitimate medical purpose:
(a) Frequent loss of controlled substance medications,
(b) Only controlled substance medications are prescribed for a patient,
(c) One person presents controlled substance prescriptions with different patient names,
(d) Same or similar controlled substance medication is prescribed by two or more prescribers at same time,
(e) Patient always pays cash and always insists on brand name product.
(3) If any of the criteria in (2) is met, the pharmacist shall:
(a) Require that the person to whom the medication is dispensed provide picture identification and the pharmacist should photocopy such picture identification for the pharmacist's records. If a photocopier is not available, the pharmacist should document on the back of the prescription complete descriptive information from the picture identification. If the person to whom medication is dispensed has no picture identification, the pharmacist should confirm the person's identity and confirmation is based.
(b) Verify the prescription with the prescriber. A pharmacist who believes a prescription for a controlled substance medication to be valid, but who has not been able to verify it with the prescriber, may determine not to supply the full quantity and may dispense a partial supply, not to exceed a 72 hour supply. After verification by the prescriber, the pharmacist may dispense the balance of the prescription within a 72 hour time period following the initial partial filling, unless otherwise prohibited by law.
(4) Every pharmacy permit holder shall maintain a computerized record of controlled substance prescriptions dispensed. A hard copy printout summary of such record, covering the previous 60 day period, shall be made available within 72 hours following a request for it by any law enforcement personnel entitled to request such summary under authority of Section 465.017(2), F.S. Such summary shall include information from which it is possible to determine the volume and identity of controlled substance medications being dispensed under the prescription of a specific prescriber, and the volume and identity of controlled substance medications being dispensed to a specific patient.
(5) Any pharmacist who has reason to believe that a prescriber of controlled substances is involved in the diversion of controlled substances shall report such prescriber to the Department of Health.
(6) Any pharmacist that dispenses a controlled substance subject to the requirements of this rule when dispensed by mail shall be exempt from the requirements to obtain suitable identification.

[11]During the sentencing hearing, this court observed, in pertinent part, that "[t]he evidence in this case was compelling. As the presiding judge, I don't see that the jury could have reached anything but the verdict it reached." (cr Dkt. 106, p. 57). And the Eleventh Circuit, in affirming Petitioner's conviction, observed:

demonstrated that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. He is not, therefore, entitled to review of these defaulted claims based on a claim of actual innocence.

Accordingly, Grounds One A, Two, Three, Four, and Five of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (cv Dkt. 1) are **DENIED**. An evidentiary hearing on Grounds One B, C, and D will be scheduled by separate order.

DONE AND ORDERED on December 19th, 2017.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

The Government presented sufficient evidence to support the jury's conclusion that Mekowulu was guilty beyond a reasonable doubt. The jury heard evidence of numerous "red flag" indicators of illegal drug diversion that Mekowulu's coconspirators presented to him. The jury also heard evidence of Mekowulu's own suspicious conduct, including: accepting only cash payments for the prized-on-the-street "blue" Oxycodone pills (R. 101 at 142, 145); charging $1 to $3 per blue Oxycodone pill when he purchased each pill wholesale for 40 cents to 45 cents per pill (R.102 at 155); and dropping off large quantities of Oxycodone to his coconspirators in various parking lots at various times of day not typically associated with legitimate pharmaceutical transactions. (R.101 at 161–62).

United States v. Mekowulu, 556 F. App'x at 867.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EMMANUEL I. MEKOWULU,

Petitioner,

v.

CASE NO. 8:15-cv-1158-T-27MAP
CRIM. CASE NO. 8:12-cr-170-T-27MAP

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

An evidentiary hearing was conducted on Grounds One B, C, and D of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (cv Dkt. 1). Upon consideration, Grounds One B, C, and D of the Section 2255 motion are DISMISSED and Petitioner's Section 2255 motion is DENIED.[1]

Procedural Background

Petitioner, a licensed pharmacist, was charged with conspiracy to distribute and dispense controlled substances not for a legitimate medical purpose in violation of 21 U.S.C. §§ 841(b)(1)(C), and 846 (cr Dkt. 1). He was convicted and sentenced to 120 months followed by three years of supervised release (cr Dkts. 81, 90). The Eleventh Circuit affirmed, finding that there was substantial evidence of guilt. *United States v. Mekowulu*, 556 Fed. Appx. 865, 867 (11th Cir. 2014).

[1] Grounds One A, Two, Three, Four, and Five of the Section 2255 motion were denied in a prior order (see cv Dkt. 33).

Grounds

In Ground One B, Petitioner alleges that his attorneys, Dale Sisco and Franklyn Louderback,[2] were ineffective in failing to call him as a witness. In Ground One C, he contends that his attorneys were ineffective in failing to retain a pharmacology expert. And in Ground One D, he alleges that his waiver of his right to testify was unknowing and involuntary because his attorneys: 1) failed to advise him regarding the "deliberate ignorance" jury instruction; and 2) told him that the evidence was in his favor and no jury would convict him.

These claims are readily disposed of. The testimony and evidence presented during the evidentiary hearing demonstrate that: 1) Sisco conducted a reasonable investigation before deciding not to retain a pharmacology expert and his decision not to call one was reasonable; and 2) Petitioner's waiver of his right to testify was knowing and voluntary.[3]

Standards

To prevail on these claims of ineffective assistance of counsel, Petitioner must demonstrate that (1) counsels' performance was deficient, and (2) he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Where, as here, counsel is experienced, the presumption of competence is even higher. *Chandler v. United States*, 218 F.3d 1305, 1314-16 (11th Cir. 2000); *Reynolds v. United States*, 233 Fed. Appx. 904, 905 (11th Cir.

[2] Since 1992, Sisco has devoted a significant part of his practice representing medical professionals in criminal, administrative, and civil matters (cv Dkt. 21-4, p. 1, ¶ 3). And Louderback has practiced law for more than 41 years (cv Dkt. 21-5, p. 1, ¶¶ 2, 3).

[3] As discussed below, Petitioner's claim that counsel were ineffective in failing to call him to testify at trial necessarily fails in light of his knowing waiver of his right to testify.

2007). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Discussion

Based on the testimony and evidence presented, I find that Sisco and Louderback's representation did not fall below an objective standard of reasonableness.

A. Decision not to retain pharmacology expert

Petitioner contends that Sisco was ineffective in failing to retain a pharmacology expert.[4] At trial, the government presented an expert, Professor Doering, who testified about "indicators" which pharmacists should use to identify potential drug diverters and which impose an "affirmative duty" on the pharmacist to inquire into the legitimacy of a prescription. Petitioner contends that the only way to rebut Professor Doering's testimony and the deliberate ignorance instruction was through expert testimony. Although he concedes that Sisco contacted at least four potential expert witnesses, he argues that Sisco's decision not to retain an expert was not based on a reasonable investigation. I disagree.

Sisco contacted four pharmacology experts: Thomas Johns, Robert Parrado, Michael Jackson, and Louis Fisher. Sisco had his associate schedule telephonic calls with Johns and Parrado (Exh. 1). Sisco first spoke with Johns, who he knew from prior professional dealings. While Johns had no recollection of conversations with Sisco about this case, he knew Sisco and has spoken with him several times over the years, possibly on this case.

[4]Sisco "was handling the expert witnesses. . . ." (p. 152).

Sisco recalled speaking with Johns and having described the facts and issues in the case. He also recalled advising Johns that Doering, a former colleague of Johns, would be testifying for the Government, and that Johns had no problem with that. Sisco recalled:

> I called him, we caught up because we hadn't talked in a little while before that. We talked about another case that he had been involved in he as well as another -- an administrative case in which that I had talked to him about. After we caught up, I talked to him about this case, gave him a little bit of background on Mr. Mekowulu and went over some of the issues, but in particular the issue of these authorizations and one person picking up multiple prescriptions.

(pp. 185-86). Referring to the facts confronting his client, Sisco recalled that "the concept of delivering drugs along the interstate or delivering prescriptions for multiple patients to one person was something [Johns] couldn't get past." (p. 179). Based on their conversation, "[Johns] was not comfortable supporting the conduct of [Petitioner]." (p. 159). Sisco accordingly concluded that Johns' "testimony would [not] be favorable or supportive of Mr. Mekowulu." (p. 186).

Sisco then contacted Parrado. Sisco "had several telephone conversations with him," and sent the government's discovery CD to Parrado to review (p. 135-36; Exh. 2). Parrado confirmed that he reviewed the discovery and after doing so, e-mailed Sisco, stating that "I do not believe I would be able to serve as your expert in this case due to a possible conflict of interest." (p. 9-10; Exhs. 3, 4)). Parrado's "conflict of interest" was that Petitioner's actions contradicted Parrado's teachings and lectures on controlled substances and diversion (p. 10). What concerned Parrado the most in Petitioner's case "was one person presenting at a pharmacy for multiple patients and paying in cash for controlled substances," a 'major red flag."(p. 13). Sisco decided not to retain Parrado "primarily because of his statement to me that he couldn't support the conduct of Mr. Mekowulu." (p. 137).

After Sisco sent Petitioner a letter advising him that Parrado was not "comfortable rendering a favorable opinion following his review of the records provided to him" and "was not willing to testify on your behalf,"(cv Dkt. 54-5; Exh. 5), Petitioner suggested that Sisco contact Michael Jackson at the Florida Pharmacist Association (p. 145). Sisco contacted Jackson, but Jackson stated that "he doesn't appear [as an] expert witness anymore." (p. 200). Jackson referred Sisco to Fisher (p. 145).

Sisco contacted Fisher (Id.; Dkt. 54-8, p. 1). Although Sisco did not provide Fisher with documents, he discussed some of the issues in the case with Fisher, including the patient authorizations (Exh. 11) and delivery of the prescriptions to Wubbena (p. 150-51). Based on Fisher's responses to some of his questions regarding the facts confronting Petitioner, Sisco had concerns about hiring Fisher (p. 152), and ultimately concluded that he would not be helpful (p. 178).[5]

According to Sisco, the nature of the evidence compounded the difficulty of finding an expert who could support his client. At some point, he and Louderback discussed with Petitioner whether it would be a better approach, considering the facts, to cross examine the Government witnesses in lieu of calling an expert. And that is the strategic approach Sisco and Louderback took.

An attorney has a constitutional duty only to conduct a reasonable investigation. *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987) ("A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). I find without question that Sisco fulfilled that duty by conducting a reasonable investigation into hiring an expert. He contacted and spoke to three pharmacology experts regarding

[5]At the hearing, Fisher testified, in pertinent part, that he had no recollection of his conversation with Sisco and what he told Sisco during their conversation (pp. 52-53).

the facts of the case, and none of them were supportive of Petitioner's actions.

Sisco was not required to continue contacting experts until he found one willing to testify on Petitioner's behalf. *See Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir.), *opinion withdrawn in part on denial of reh'g*, 833 F.2d 250 (11th Cir. 1987) ("We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to 'shop' for a psychiatrist who will testify in a particular way."); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998) ("Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion.") (quotation marks omitted). And the fact that Petitioner now offers an expert willing to testify for him does not establish that Sisco's investigation was unreasonable. *See Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.").

In light of the experts' responses, Sisco's decision not to retain a pharmacology expert and instead aggressively cross-examine the government's witnesses was a sound, strategic one. *See Harrington v. Richter*, 562 U.S. 86, 109 (2011) (decision to cross-examine government expert rather than call defense expert was a reasonable strategy because "sometimes [it] is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates"). Indeed, Sisco and Louderback were successful in many respects in impeaching Professor Doering and the cooperating witnesses, Wubbena and Ridenour, through aggressive cross examination.

In sum, Sisco conducted a reasonable investigation into retaining a pharmacology expert and had a sound strategic reason not to retain one. He therefore was not deficient in failing to hire an

expert. Accordingly, Ground One C does not warrant relief.[6]

B. Whether Petitioner's waiver of his right to testify was knowing and voluntary

After the Government rested, the Court conducted an in camera colloquy with Petitioner during which he confirmed his decision not to testify(see cv Dkt. 1-1). Notwithstanding that colloquy, he now contends that his waiver was not knowing and voluntary because his attorneys: 1) failed to counsel him on the deliberate ignorance instruction; and 2) told him that he would not be testifying, since the case was "in our favor" and "no jury would convict."

A criminal defendant has a fundamental constitutional right to testify on his own behalf at trial, a right that cannot be waived by defense counsel. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc). "A claim that a defendant's right to testify was violated by defense counsel is analyzed as a claim of ineffective assistance of counsel." *Topete v. United States*, 628 F. App'x 1028, 1029 (11th Cir. 2015) (citing *Teague*, 953 F.2d at 1534). "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. . . .Counsel may advise the client in the strongest possible terms not to testify, but the choice whether to testify lies with the defendant. . . .Counsel has the responsibility of ensuring that any waiver of the right to testify is knowing and voluntary." *Id.* (internal citations omitted).

During the evidentiary hearing, Louderback and Sisco testified that they had experience trying cases in which the deliberate ignorance instruction was given (pp. 61, 131). Louderback was

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[6]Because there was no deficient performance, the court need not decide whether Petitioner was prejudiced. *See Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

very "comfortable" with that instruction (p. 62). He recalled explaining the deliberate ignorance instruction to Petitioner during trial at Sisco's office during a lunch break (pp. 83-85). Sisco likewise recalled discussing the instruction with Petitioner and Louderback at his office during lunch that day, and further, that the "[d]eliberate ignorance instruction came up a number of times during [their] conversations. . . ." (pp. 164-65). He believed that when he discussed the instruction with Petitioner, he used "deliberate ignorance" and "willful blindness" interchangeably. (p. 185). Sisco was "confident" that between he and Louderback, the deliberate ignorance instruction was explained to Petitioner "in great detail." (pp. 182, 185).[7]

Louderback testified that he and Sisco discussed the advantages and disadvantages of testifying with Petitioner (pp. 117-18). Sisco specifically recalled meeting with Petitioner during a lunch break in the trial and counseling him on the strategic implications of testifying and not testifying. He and Louderback shared concerns with Petitioner about cross examination and that it would be difficult for him to answer some of the questions he would be asked. But Sisco was adamant that he made it clear to Petitioner that it was Petitioner's decision, and that he did not express an opinion, only things for Petitioner to consider. (p. 163). Sisco also discussed Professor Doering's report with Petitioner and how they could attack his opinions, and reviewed the government's discovery with Petitioner (pp. 168-72, 181).

In Sisco's opinion, he "saw little to be gained from Petitioner's testimony because. . .there was more to lose in the cross-examination." (p. 164). And because Louderback never received satisfactory answers from Petitioner regarding the facts of the case, he was concerned that Petitioner

[7]Sisco described Petitioner as educated and intelligent, actively involved in his case, and having asked a lot of questions (pp. 112-14). Petitioner acknowledged having had numerous meetings with his attorneys during the course of the case (p. 176).

testifying would "make the case worse" or expose Petitioner to "a guideline obstruction issue." (p. 94). Louderback "had [a] feeling that [Petitioner] wouldn't come across well and that under cross-examination he wouldn't bear up well and that his explanations [in response to the indicators of diversion] to me were not the type of things that a jury would go for." (p. 108). He was certain that he expressed his opinion to Petitioner that his testimony would not hold up well at trial (p. 110). Sisco was certain that he told Petitioner "that there were areas of cross-examination that were going to be dangerous to his case and it would be difficult for him to answer certain questions that [they] anticipated to be presented to him." (p. 164). Specifically, Sisco discussed with Petitioner what his responses would be to the testimony of the government's witnesses (p. 167).

After the government rested on December 6, 2012, Louderback and Sisco met with Petitioner in the conference room outside the courtroom and discussed whether he would testify (p. 97). Louderback testified that Petitioner "was consistent with the idea that he was not going to testify." (p. 98). When they returned to the courtroom, Louderback told the court "we are not going to call him." (cr Dkt. 103, p. 105). Sisco said that at that time it "was very clear that [Petitioner] did not intend to testify." (p. 183).[8]

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[8] Sisco's and Louderback's responses to the Court's inquiry of whether the defense would present evidence support their testimony that Petitioner had decided not to testify and reaffirmed that decision before the Court engaged him in the colloquy concerning his right to testify:

December 6, 2012:

> Mr. Sisco: We need to just reconfirm with our client, but at this point I don't believe we're going to put on any evidence. (Exh. 10 at p. 102)
>
> . . .
>
> Mr. Louderback: From the defense perspective, we're -- we re not going to call him. So we'd be prepared to go with a Rule 29 motion and announce on Tuesday, however you want to do it."

December 10, 2012:

> The Court: . . . You still don't intend to put on a defense, Mr. Sisco?

Odini Mekowulu, Petitioner's wife, testified that the weekend before she and Petitioner went to Sisco's office on December 11, 2012, Petitioner was preparing for his testimony, and told her that he was going to testify (p. 190). When they went to Sisco's office on December 11, they sat in the conference room, and she heard Petitioner say that he was going to testify (p. 191). According to her, Sisco responded that there was no need for him to testify because "they have it under control and that no juror will convict him because they have the case." (p. 191).

According to Petitioner, on December 6, 2012, after trial recessed for the night, he went to Sisco's office and told Sisco that he wanted to testify (p. 213). Sisco asked him if he had ever

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Mr. Sisco: At this point we still do not intend to do that. I haven't heard from my client that he's changed his mind.
The Court: Well. In the morning before we get started, I will conduct a sidebar colloquy in camera to ensure that's his decision . . .

December 11, 2012:

THE COURT: All right. I think under the circumstances, I should conduct a brief colloquy at sidebar with counsel and their client.
(At which time the following sidebar discussion was held:)
THE COURT: Good morning, sir.
THE DEFENDANT: Good morning.
THE COURT: his discussion will be sealed, in other words, it would not be accessible. to anyone without an order from me.
THE DEFENDANT: Okay.
THE COURT: What I want to make sure of is that you understand you have the right to testify and you also have the right not to testify.
THE DEFENDANT: Yes.
THE COURT: And that this decision is yours and yours alone to make, after conferring with your lawyers.
THE DEFENDANT: Yes.
THE COURT: Do you have any questions about your. rights?
THE DEFENDANT: No.
THE COURT: Is it your decision to testify or not to testify?
THE DEFENDANT: Not to testify.
THE COURT: All right. And that is your decision?
THE DEFENDANT: Yes, sir.
THE COURT: All right. Thank you. THE DEFENDANT: Yes, Your Honor.
(At which time the sidebar discussion was concluded and the proceedings resumed as follows:)

testified before, explained the process of testifying, and informed him that another client who was a doctor had testified on his own behalf in another case and "it worked." (p. 213). Petitioner left Sisco's office with the impression that he would be testifying (p. 214). That weekend, he prepared for his testimony (Id.).

Petitioner testified that on the morning of December 11, 2012, he and his wife went to Sisco's office (p. 216). Petitioner asked Sisco:"I'm testifying today, right?" (Id.). Sisco responded that he and Louderback had decided that he would not testify "because they [were] comfortable where the case is. . . ." (Id.). According to Petitioner, he said "okay," but reiterated that he wanted to testify (Id.). Sisco stated something to the effect that they did not want him to testify and make mistakes (p. 217).[9] Notwithstanding, when asked during the evidentiary hearing what his understanding of whose decision it was as to whether he would testify, Petitioner answered: "Well, I was following my attorney's advice. I want to testify, but also I realize that their advice is important, but my decision was that I want to testify." (p. 218). Of course, the in camera colloquy the Court conducted with Petitioner belies this testimony.

While Sisco had no recollection of meeting with Petitioner on the morning of the final day of trial (December 11, 2012) and being told by Petitioner that he wanted to testify, Sisco was adamant that if Petitioner had told him that, he would have informed the court that Petitioner had changed his mind and wanted to testify (p. 174 - 75). And Sisco denied having told Petitioner or Petitioner's wife that "the case was going in [their] favor and that no jury would convict[.]" (p. 184). In fact, Sisco has never said that to a client (Id.).

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[9] According to Petitioner, at the end of the trial, ha and Sisco had "a very heated argument" "because [he] was very upset with [Sisco] for not allowing [him] to testify." (pp. 216-17).

Petitioner testified that Sisco and Louderback never talked to him about the deliberate ignorance instruction (pp. 220-22). He stated that the first time he read and understood that instruction was when he read the appellate court decision (p. 220). He also testified that had the instruction been explained to him, he would not have waived his right to testify (pp. 221-22). He denied that during trial, his attorneys asked him how he would testify in response to the government's witnesses (pp. 8-9). He also testified that his attorneys never counseled him regarding the advantages and disadvantages of testifying (pp. 30, 33, 219-20). He claimed that before the trial started, he anticipated that he would testify, and never told Sisco that he would not be testifying (p. 204).

Petitioner's testimony that Sisco and Louderback never explained the deliberate ignorance instruction to him or discussed the advantages and disadvantages of testifying is not credible. Sisco and Louderback both specifically recalled counseling Petitioner regarding the deliberate ignorance instruction during trial in Sisco's office over lunch. Sisco was certain that the instruction was explained to Petitioner "in great detail." Sisco and Louderback are experienced criminal defense attorneys who have tried numerous cases involving the deliberate ignorance instruction. Their testimony that they discussed the deliberate ignorance instruction with Petitioner is credible, and persuasive.

Petitioner's testimony that the first time he read and understood the deliberate ignorance instruction was when he read the appellate court's decision is not believable. He is an intelligent, educated individual who was actively involved in his defense. The instruction was discussed with Petitioner by his attorneys, and he was present during the charge conference when the instruction was extensively discussed and during which Mr. Louderback objected to the instruction and argued that

it should not be given (see cr Dkt. 103, pp. 135, 143-48). It therefore defies logic that Petitioner was not aware of and did not understand the deliberate ignorance instruction until after he appealed his conviction.

Likewise, Petitioner's testimony that Sisco and Louderback never counseled him regarding the advantages and disadvantages of testifying is not credible. Sisco and Louderback testified that they discussed the advantages and disadvantages of testifying with Petitioner, and I find their testimony credible. Moreover, at the critical point when Petitioner had to decide whether to testify, they discussed the advantages, disadvantages, and risks of testifying with him, including the difficult questions he would be asked on cross-examination. Even Petitioner acknowledges that they had concerns that he would make mistakes while testifying, and that his testimony may not be well received by a jury. Additionally, Louderback testified that he was concerned that if Petitioner testified and made mistakes, it could expose him to a sentencing enhancement for obstruction of justice for testifying falsely under oath.[10]

It is apparent from their testimony that Sisco and Louderback extensively discussed with Petitioner the evidence as they expected it to be, including Professor Doering's report and anticipated testimony. Petitioner acknowledges that his attorneys discussed the government's discovery and Professor Doering's report with him. He acknowledges that they provided him with a copy of Professor Doering's report. And it is undisputed that Sisco advised Petitioner that he was having difficulty finding an expert to support his actions (see Exh. 5). Sisco and Louderback "absolutely" discussed with Petitioner the evidence as it was presented during the course of the trial, and met

[10] Indeed, having heard Petitioner's explanations for his conduct, I find that those concerns were well founded, as his explanations lacked credibility.

regularly with him during the course of the trial.

I further find that Petitioner and his wife's testimony that Sisco told Petitioner that he and Louderback decided Petitioner would not testify because the case was in their favor and no jury would convict him is not credible. Sisco unequivocally denied making that statement, and I find his testimony credible. He explained that in all of his years of practicing law, he has never made a statement like that to a client because he has "done this too long" and "been surprised too many times." (p. 184).

If Petitioner had actually decided that he wanted to testify, but believed his attorneys had decided that he would not, he would not have responded as he did during the Court's colloquy regarding the his right to testify.[1] The colloquy demonstrates that Petitioner understood that he had the right to testify or not to testify, and that he knew the decision was his alone to make, and that he had no questions about those rights (cv Dkt. 1-1, p. 3). He informed the court that his decision was not to testify, and that the decision was his decision (Id., pp. 3-4). His testimony that he had actually decided to testify, but that Sisco made the decision that he would not testify is entirely inconsistent with his responses to the Court's in camera colloquy and not credible. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (explaining that statements made under oath in open court "carry a strong presumption of verity," and therefore present "a formidable barrier in any subsequent collateral proceedings").

Finally, to the extent Petitioner implicitly argues that his attorneys should not have discouraged him from testifying, they had such a duty if they believed that it was the wiser course

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[1]As noted, Petitioner is a highly educated and intelligent man, was actively involved in his own defense, and asked questions of his attorneys if he did not understand something.

of action. *Teague*, 953 F.2d at 1533. As discussed, Sisco and Louderback expressed to Petitioner sound reasons why he should not testify.

In sum, considering the testimony and evidence presented and the colloquy the Court engaged in with Petitioner concerning his right to testify, I find that he made a knowing and voluntarily decision not to testify, after having conferred with experienced defense counsel about the advantages and disadvantages of testifying, both of whom expressed legitimate doubts that testifying would be beneficial. Accordingly, he has not shown that his waiver of the right to testify was the product of ineffective assistance of counsel. Accordingly, Ground One D does not warrant relief.

C. Failure to call Petitioner to testify

Petitioner contends that counsel were ineffective in failing to call him as a witness. He argues that they should have called him so he could explain his conduct and why he believed Wubbena and Ridenhour were not diverting the oxycodone to illicit use. This claim necessarily fails because, as discussed, Petitioner knowingly and voluntarily waived his right to testify.

He was well aware that it was his decision, alone, whether to testify, and he affirmed that understanding during the Court's colloquy. Sisco and Louderback could not have overridden that decision. *Cf. Johnson v. Cain*, 712 F.3d 227, 232 n.2 (5th Cir. 2013) ("It is deficient performance as a matter of law for defense counsel to override the ultimate decision of a defendant to testify contrary to his advice.") (citation and internal quotation marks omitted). Petitioner therefore cannot now claim ineffective assistance of counsel because they did not call him as a witness. *See McElvain v. Lewis*, 283 F. Supp. 2d 1104, 1118 (C.D. Cal. 2003). Accordingly, Ground One B does not warrant relief.

Petitioner's motion to vacate (cv Dkt. 1) is therefore **DENIED**. The **Clerk** shall close this

case.

Certificate of Appealability

To appeal this decision *in forma pauperis*, Petitioner must apply for and obtain a Certificate of Appealability. He "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Drake*, 542 U .S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

DONE AND ORDERED on March 6th, 2018.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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February 26, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 13-11284-BB
Case Style: USA v. Emmanuel Mekowulu
District Court Docket No: 8:12-cr-00170-JDW-MAP-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, BB at (404) 335-6179.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

Exhibit C

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District	
Name *(under which you were convicted)*: EMMANUEL I. MEKOWULU		Docket or Case No.: 8:12-cr-00170-JDW-MAP
Place of Confinement: ESTILL, SOUTH CAROLINA	Prisoner No.: 56686-018	
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)* EMMANUEL I. MEKOWULU	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

(b) Criminal docket or case number (if you know): 8:12-cr-00170-JDW-MAP

2. (a) Date of the judgment of conviction (if you know): 3/11/2013

(b) Date of sentencing: 3/11/2013

3. Length of sentence: 120 Months, Forfeiture of Professional Licenses and $97,290.00

4. Nature of crime (all counts):
One Count of knowingly and willfully conspiring with other persons both known and unknown to the grand jury to knowinginly and intentionally distribute and dispense, and cause the distribution and dispensing of controlled substances, primarily Oxycodone, a Schedule II controlled substance, not for a legitimate medical purpose and not in the usual course of professional practice, contrary to Title 21, United States Code, Section 841(a)(1).

5. (a) What was your plea? (Check one)
(1) Not guilty ☑ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals of the United States for the Eleventh Circuit

(b) Docket or case number (if you know): 13-11284

(c) Result: Affirmed

(d) Date of result (if you know): 2/26/2014

(e) Citation to the case (if you know): United States v. Mekowulu, 556 Fed. Appx. 865, 868 (11th Cir., 2014)

(f) Grounds raised:

(1) District Court erred in denying motion for judgment of acquittal
(2)District Court erred in giving a deliberate ignorance instruction
(3) District Court erred in calculating advisory guideline sentence

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☑

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Additional grounds are set forth in the attached as follows;
(5) Issue 5: Whether Professor Doering's Testimony and the Deliberate Ignorance Instruction Unconstitutionally Shifted the Burden of Proof to the Defendant. This issue was not raised on direct appeal due to need for evidentiary hearing is required to supplement record with facts, novelty of issues, or ineffective assistance of appellate counsel, please see the attached.

None of the grounds in this motion have been presented in some federal court.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:
Frank Louderback, Esq., 450 Carillon Parkway Suite 120, St. Petersburg, FL 33716

(c) At the trial:
Frank Louderback, Esq., and Dale Sisco, Esq., 1110 N Florida Avenue, Tampa, FL 33602

(d) At sentencing:
Frank Louderback, Esq and Dale Sisco, Esq.

(e) On appeal:
David T. Weisbrod, Esq., 412 East Madison Street Suite 1111, Tampa, FL 33602

(f) In any post-conviction proceeding:
Defenant is represented in this proceeding by Donald J. Schutz, Esq., 535 Central Ave, St Petersburg, FL 33701

(g) On appeal from any ruling against you in a post-conviction proceeding:
Not Applicable

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is filed within one year and 90 days of the date of judgment from the United States Court of Appeals for the Eleventh Circuit, and is timely

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

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

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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

Therefore, movant asks that the Court grant the following relief:

Based on the foregoing and attachments, Defendant requests release from custody, vacate and set aside judgment, discharge the Defendant or grant new trial as may appear appropriate, or such other relief as the Court deems proper.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

5/12/2015

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ (month, date, year)

Executed (signed) on May 12, 2015 (date)

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. 8:12-CR-170-T-27MAP
11 DECEMBER 2012
TAMPA, FLORIDA
PAGES 1 - 5

EMMANUEL I. MEKOWULU,

Defendant.

_____/

TRANSCRIPT OF SIDEBAR PROCEEDINGS
BEFORE THE HONORABLE JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: **Kathy Peluso**
United States Attorney's Office
Middle District of Florida
400 N. Tampa Street
Suite 3200
Tampa, Florida 33602

For the Defendant: **Dale R. Sisco**
Patrick Maloney
Sisco-Law
1110 N Florida Avenue
Tampa, Florida 33602

Franklyn Louderback
Law Office of Franklyn Louderback
Suite 120
450 Carillon Parkway
St Petersburg, Florida 33716

Proceedings recorded and transcribed by computer-aided stenography.

Court Reporter: Linda Starr, RPR
Official Court Reporter
801 N. Florida Avenue
Suite 13B
Tampa, Florida 33602

THE COURT: All right. I think under the circumstances, I should conduct a brief colloquy at sidebar with counsel and their client.

(At which time the following sidebar discussion was held:)

THE COURT: Good morning, sir.

THE DEFENDANT: Good morning.

THE COURT: This discussion will be sealed, in other words, it would not be accessible to anyone without an order from me.

THE DEFENDANT: Okay.

THE COURT: What I want to make sure of is that you understand you have the right to testify and you also have the right not to testify.

THE DEFENDANT: Yes.

THE COURT: And that this decision is yours and yours alone to make, after conferring with your lawyers.

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights?

THE DEFENDANT: No.

THE COURT: Is it your decision to testify or not to testify?

THE DEFENDANT: Not to testify.

THE COURT: All right. And that is your

decision?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you.

THE DEFENDANT: Yes, Your Honor.

(At which time the sidebar discussion was concluded and the proceedings resumed as follows:)

THE COURT: And as I shared with the defendant, that brief sidebar is under seal. It shall not be transcribed or disseminated without an order of the Court.

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

I, Linda Starr, RPR, Official Court Reporter for the United States District Court, Middle District, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in machine shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages, numbered 1 through 5, inclusive, constitute a true and correct transcription of my machine shorthand report of the sidebar discussion.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, this 8th day of January 2015.

/s/ Linda Starr
Linda Starr, RPR, Official Court Reporter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
v. Case No. 8:12-cr-00170-JDW-MAP
EMMANUEL I. MEKOWULU
_____/

DEFENDANT'S ATTACHMENT TO MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE, SET ASIDE, AND CORRECT THE JUDGMENT OF CONVICTION AND SENTENCE
WITH INCORPORATED MEMORANDUM OF LAW

The Defendant, Emmanuel I. Mekowulu ("Mr. Mekowulu") moves this Court pursuant to 28 U.S.C. § 2255 to vacate, set aside, and correct the judgment of conviction and sentence herein (the "Motion"). Mr. Mekowulu asserts that he is actually innocent of the charge and he was convicted due to ineffective assistance of counsel. It is more likely than not that no reasonable juror would have convicted him had he received effective assistance of counsel. Mr. Mekowulu also challenges the constitutionality of his conviction on the grounds that his conviction on the factual testimony of a pharmacy expert rendered the criminal standards unconstitutionally vague, unconstitutionally shifted the burden of proof, violated the *ex post facto* clause and his constitutional right to a jury trial, and violated his right to be convicted only on the charge in the indictment. Mr. Mekowulu requests that he be granted an evidentiary hearing on this motion, authorized to take discovery before the hearing, released from custody, the judgment of conviction vacated, and granted a new trial. Mr. Mekowulu states as follows:

1. Mr. Mekowulu, a pharmacist, was convicted of conspiracy to illegally distribute Oxycodone. Due to the constitutionally ineffective assistance of Mr. Mekowulu's counsel, the Government's pharmacy expert, Professor Paul Doering ("Professor Doering"), testified to opinions that could be reasonably be construed to be a comment on the ultimate guilt of Mr.

Mekowulu, "stating the bottom-line inference, and leaving it to the jury merely to murmur, "Amen."" *United States v. DiDomenico*, 985 F.2d 1159, 1165 (2d Cir., 1993). Professor Doering was allowed not only to opine as to "red flags" that should factually put a pharmacist on notice of diversion of Oxycodone, but was also allowed to actually state the inference that Mr. Mekowulu was guilty, claiming that certain indicators were "deal-breakers," and wrongly claiming that prescriptions were "illegal until they're proven legal," Tr. IV, P. 91.[1] He also testified about an inapplicable DEA Form 222 that applies to transfers of controlled substances between registrants and other inapplicable transfers, and not to the question of whether Mr. Mekowulu could receive and deliver prescriptions for patients through a third-party. Professor Doering usurped the jury's decision making, denying Mr. Mekowulu his right to trial by jury. Through the ineffective assistance of counsel during the Government's case in chief, the burden of proof was unconstitutionally shifted to Mr. Mekowulu, resulting in a requirement that he testify to avoid conviction, yet his attorneys made the unreasonable decision to rest without putting him on the stand. Indeed, in affirming the conviction, after discussing the Government's evidence of Professor Doering's "red flags," the Eleventh Circuit stated, "Mr. Mekowulu did not convince the jury that he and his coconspirators were merely in a seller-buyer relationship rather than coconspirators engaged in an illegal scheme," *United States v. Mekowulu*, 556 Fed. Appx. 865, 868 (11th Cir., 2014). It was not Mr. Mekowulu's burden to convince the jury of anything, but Professor Doering's testimony, elicited by Mr. Mekowulu's ineffective attorneys, shifted the burden to Mr. Mekowulu to convince the jury. Mr. Mekowulu's failure to convince the jury was due to constitutionally ineffective assistance of counsel. After Mr. Mekowulu's attorneys wrongly established through cross-examination of Professor Doering that prescriptions are illegal until proven legal and that an explanation from Mr. Mekowulu was required, shifting the burden

[1] Citations to the trial transcript are by Volume and Page Number.

to Mr. Mekowulu to provide that explanation, Mr. Mekowulu's attorneys rested without putting on Mr. Mekowulu or any other evidence and thereby rested without offering the explanation from Mr. Mekowulu that they wrongly established was necessary. In recommending to Mr. Mekowulu that he not testify, his attorneys failed to advise him of the implications of the deliberate ignorance jury instruction and failed to explain to Mr. Mekowulu that he could be convicted if the jury decided that he deliberately closed his eyes to criminal activity of others. In light of Professor Doering's testimony and the deliberate ignorance instruction, without Mr. Mekowulu testifying that he actually did not believe that any criminal activity was taking place, and without the testimony of a rebuttal expert to contradict Professor Doering's factual findings of guilt, as stated by the Court at sentencing, the evidence was compelling if not overwhelming. Professor Doering made all of the factual determinations to convict Mr. Mekowulu and the jury had nothing to decide, denying Mr. Mekowulu a right to trial by jury. Mr. Mekowulu was convicted by the Government's expert, and the jury simply agreed. His attorneys failed to put on any defense and wrongly counselled Mr. Mekowulu not to testify because, "no jury would convict anyone with this kind of evidence[2]." Mr. Mekowulu submits that he is entitled to conduct discovery and receive an evidentiary hearing on this Motion, and that the judgment of conviction should be vacated, he should be released from custody, and granted a new trial.

2. **Statement of the Case.** Mr. Mekowulu is currently in custody under a judgment of this Court, United States District Court, On April 26, 2012, Mr. Mekowulu, a pharmacist, was indicted for one count of conspiring to cause the distribution of Oxycodone (D.E. 1). A jury trial concluded on December 11, 2012, with a jury verdict of guilty (D.E. 65 - D.E. 81). On March 11, 2013, judgment was entered by this Court (D.E. 93). The judgment incorrectly states that he pleaded guilty. The Judgment adjudicated him as guilty and sentenced him to a term of

[2] Affidavit of Odini R. Mekowulu, ¶ 5.

imprisonment of 120 months, together with forfeiture of Mr. Mekowulu's professional health pharmacist licenses and the sum of $97,290.00. He is in federal custody at Estill, South Carolina. On March 22, 2013, Mr. Mekowulu filed a timely Notice of Appeal (D.E. 94). On February 26, 2014, the United States Court of Appeals filed an opinion and entered judgment affirming the conviction and sentence (D.E. 115), *United States v. Mekowulu,* 556 Fed. Appx. 865 (11th Cir., February 26, 2014). The Eleventh Circuit held that the Government presented sufficient evidence of knowledge, both through "numerous "red flag" indicators of illegal drug diversion that Mr. Mekowulu's coconspirators presented to him," *United States v. Mekowulu,* 556 Fed. Appx. at 867 and from:

> Mekowulu's own suspicious conduct, including: accepting only cash payments for the prized-on-the-street "blue" Oxycodone pills (R. 101 at 142, 145); charging $1 to $3 per blue Oxycodone pill when he purchased each pill wholesale for 40 cents to 45 cents per pill (R.102 at 155); and dropping off large quantities of Oxycodone to his coconspirators in various parking lots at various times of day not typically associated with legitimate pharmaceutical transactions. (R.101 at 161-62). *Id.,* at 867.

The Eleventh Circuit also held that the deliberate ignorance instruction was proper, *Id.*, at 868. Pursuant to *Clay v. United States,* 537 U.S. 522 (2003), this Motion is timely as being filed within one year plus 90 days of the entry of judgment by the Court of Appeals affirming the conviction. Pursuant to the Rules Governing Section 2255 Cases in the United States District Courts, Rule (1) (a) (1) and Rule (1) (a) (4), Mr. Mekowulu alleges that he is a person in custody under a judgment of this court and seeks a determination that the judgment violates the Constitution or laws of the United States, and the Judgment or sentence is otherwise subject to collateral review.

3. Grounds Available, Facts Supporting Each Ground, And Relief Requested:

A. Evidence that Mr. Mekowulu Will Present at an Evidentiary Hearing on this Motion. Mr. Mekowulu intends to present the following witnesses and evidence at hearing on this motion:

(1) **Emmanuel Mekowulu, Affidavit Exhibit A.** As stated in the 27 page Affidavit of Emmanuel Mekowulu, before and during the trial Mr. Mekowulu had intended to take the witness stand and testify. After court recess on Thursday, December 6, 2012, he told his attorney Dale Sisco ("Mr. Sisco") that he was going to testify, Mr. Sisco told him to prepare over the weekend, and Mr. Mekowulu went home from court and prepared to testify. On Tuesday, December 11, 2012, Mr. Mekowulu and his Wife, Odini R. Mekowulu, went to Mr. Sisco's office and Mr. Sisco told both of them that he and co-counsel, Frank Louderback, Esq. ("Mr. Louderback") had made the decision that Mr. Mekowulu would not be testifying. Mr. Mekowulu states that he followed the advice of his attorneys because he thought that the case was won because no witness had testified that he had done anything illegal. He states that he was not advised of the "deliberate ignorance" theory and did not understand it until he read the opinion of the Eleventh Circuit affirming his conviction. During trial, his attorneys never asked him what his defenses were to the Government's witnesses, and when he gave up his right to testify he did not know that the jury would be told that he could be convicted for not asking questions or investigating "red flags." Mr. Mekowulu also states that he did not know that the jury would be told that he could not be convicted if he actually believed that the offense did not exist. Mr. Mekowulu states that, had he taken the stand, he would have testified that he actually believed that all prescriptions were legitimate. He states that he always believed that he was filling valid prescriptions and had no knowledge and did not believe that the Government's witnesses were involved in criminal activity. However, he states that he was not aware that the

jury would be told in the deliberate ignorance instruction that he could be convicted for closing his eyes, and his actual belief of innocence was a defense but without his testimony there would be no evidence of what he actually believed. On pages 7 -22 of his affidavit, Mr. Mekowulu details his factual defenses to the Government's evidence. In these pages, he factually explains why his conduct was innocent, and why he was not alarmed by the "red flags." He explains and rebuts all of the Government's evidence. He states that he often delivered prescriptions, and attaches a flyer from the period in question that he handed out, offering free delivery. He states that he had witnesses, Brenda Williams and Juana Mendoza, who he thought were going to testify that he delivered but who did not come to court. He states there was no reference book to learn of Professor Doering's "red flags" or learn that the "red flags" could result in his being convicted of conspiracy. He states that, had he known that he had a responsibility to view Professor Doering's unknown "red flags," which were otherwise legal activity, as suspicious, and that he could be convicted for deliberately closing his eyes, he would not have done it. He states that there was no way at the time for him to learn of the behavior that constitutes the crime for which he was convicted and there was nothing he could have done to avoid conviction other than to refuse to do lawful business because of unknown "red flag" indicators of diversion that were not in applicable laws and that he did not know existed at the time. He asserts that he did not willfully and knowingly give up his right to testify with an understanding of the charges against him and the defenses available to the charges, the primary one being his actual belief that he was not engaged in a conspiracy.

(2) **Odini R. Mekowulu, Affidavit Exhibit B.** Odini R. Mekowulu, Mr. Mekowulu's wife, states that Mr. Mekowulu prepared to testify over the weekend of December 9, 2012, and she accompanied him to Mr. Sisco's office on December 11, 2012, before court.

Mr. Sisco and Mr. Mekowulu went into a private conference room without her, and when they came out, she heard Mr. Mekowulu say to Mr. Sisco that he wanted to testify, and Mr. Sisco told him that he was not going to testify and that no jury would convict because there was nothing that showed Mr. Mekowulu had done anything wrong.

(3) **Dr. Matthew C. Lee, M.D., Affidavit Exhibit C.** Dr. Matthew C. Lee, M.D. ("Dr. Lee") is a retained pharmacy expert. He is a physician and a pharmacist, B.Pharm., M.S. in Pharmacology and Toxicology. He is an M.D. and is licensed to practice pharmacy in Virginia, North Carolina, and Kentucky. In his 18 page affidavit, Dr. Lee states that he reviewed the Affidavit of Mr. Mekowulu, the transcript of the testimony of Professor Doering, the opinion of the Court of Appeals, and Florida Administrative Code 64B 16-27.831, which is attached to his affidavit. Dr. Lee renders the opinion that during the period 2008 – 2009, certain "red flags" as testified to by Professor Doering were not listed as criteria in the Florida Administrative Code as criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose, and opines that Mr. Mekowulu should not be deemed to be on notice of these criteria as requiring Mr. Mekowulu to question the legitimacy of prescriptions. Dr. Lee rejects five of Professor Doering's red flags as indicators that Mr. Mekowulu should have been deemed to be on notice of as indicators of diversion. He also opines that, assuming Professor Doering meant by the term, "deal-breaker," that a pharmacist was prohibited from dispensing controlled substances under the scenarios presented, that Professor Doering was incorrect. He opines that, if Professor Doering meant that it is a crime for a pharmacist to fill a prescription presented by someone other than the patient, he is incorrect, and Professor Doering's contention that a connection of blood or marriage is required to pick up a prescription for another person is incorrect. He states that he was available to act as an expert witness in 2012, that his availability

is generally available through common internet searches, that he was not contacted by Mr. Mekowulu's attorneys, and had he been contacted and retained, he would have testified at Mr. Mekowulu's trial to the opinions set forth in his affidavit.

(4) **Lori D. Palmieri, Esq., Florida Board Certified Attorney in Criminal Trial Law, Affidavit, Exhibit D.** Lori D. Palmieri, Esq. ("Palmieri") is a retained criminal defense expert. In her 10 page affidavit, she renders the opinion that Mr. Mekowulu's attorneys, Mr. Dale Sisco and Mr. Frank Louderback, rendered ineffective assistance of counsel during the testimony of Professor Doering by failing to object to testimony that can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant. At page 3, she states that Professor Doering's testimony that Mr. Mekowulu filled two prescriptions back to back was a "huge indicator of diversion," which was not a red flag that should put a pharmacist on notice of criminal activity of others, but instead, was Professor Doering's testimony of his opinion that something done by Mr. Mekowulu was a huge indicator of diversion and could reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant. In pages 1 – 6, she discusses multiple failures on the part of the Mr. Mekowulu's attorneys, and on page 6 opines that these failures were unreasonable decisions. On page 6, she also opines that, assuming the factual allegations of Mr. Mekowulu in his affidavit are true, without the testimony of Mr. Mekowulu the jury was left with expert testimony that the Defendant had committed actions that were illegal, that were "deal-breakers," and that were violations of the law. At page 8, referring to the deliberate ignorance instruction, she opines that, under the facts of this case regarding conspiracy, without the testimony of Mr. Mekowulu there was insufficient evidence that the "defendant actually believes that it does not exist," or that the defendant, "had not deliberately closed his eyes." She states that, as stated by this Court at sentencing, the evidence

was compelling if not overwhelming. She states that both Mr. Sisco and Mr. Louderback, "provided ineffective assistance of counsel in recommending to Emmanuel Mekowulu that he not testify," Palmieri Affidavit, P.8. Regarding the waiver of the right to testify and Mr. Mekowulu's claim that he was not advised of the implications of the deliberate ignorance instruction, she opines at Page 9, "[a]ccording to the affidavit of Emmanuel Mekowulu, this information was not provided to him, and the failure to provide that information constituted, in my opinion, the ineffective assistance of counsel." At page 10, she opines that Mr. Mekowulu's attorneys, "rendered ineffective assistance of counsel in not retaining an expert like Dr. Lee, particularly due to the importance of Professor Doering's testimony in the prosecution's case," and states that the failure was an unreasonable decision. She states that, in her opinion, the performance of Mr. Mekowulu's attorneys was deficient, and Mr. Mekowulu suffered prejudice.

(5) **Exhibit E:** Transcript of sidebar conference wherein Mr. Mekowulu personally advised the Court that he would not testify.

(6) **Exhibit F:** Affidavit of Emmanuel I. Mekowulu waiving the attorney-client privilege between himself and Mr. Sisco and Mr. Louderback.

4. Grounds Available for Relief:

(1) Issue 1: Emmanuel Mekowulu Received Constitutionally Ineffective Assistance of Counsel.

To establish that counsel's assistance was so ineffective that it deprived the petitioner of his Sixth Amendment rights, the Defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense, *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Mr. Mekowulu challenges four discrete and independent components of the performance of his attorneys, and contends that each one, independently, constitutes ineffective assistance of counsel warranting a new trial: (1) their failure to object during, and the cross-examination of, the testimony of Professor Doering (2) the decision not to call Mr. Mekowulu as a witness (3) the failure to retain and call a pharmacy expert to rebut Professor Doering's testimony and (4) the failure to properly counsel Mr. Mekowulu on the deliberate ignorance instruction when counseling him regarding the waiver of his right to testify.

A. Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel Regarding Professor Doering's Testimony.

The deliberate ignorance instruction allows the jury to conclude beyond a reasonable doubt that a defendant has the requisite knowledge to base a conviction where the jury finds that a defendant is aware of the high probability of the crime and purposely contrives to avoid learning of all of the facts in order to have a defense in the event of a prosecution, *United States v. Puche,* 350 F.3d 1137 (11th Cir. 2003). One typical fact pattern where the instruction is often used is the drug courier who, "has obtained a package under suspicious circumstances, been paid an exorbitant sum to transport it, and then claimed surprise when the luggage was revealed to be a conduit for moving illegal drugs." *United States v. Hristov*, 466 F.3d 949, 953 (11th Cir. 2006). Here, however, the finding that the defendant was aware of the high probability of a crime was not made by the jury, but instead, was made by the expert witness. Professor Doering, not the jury, decided whether Mr. Mekowulu was on notice of the criminality of others. Professor Doering exceeded the permissible boundaries of testimony without an objection or motion for mistrial by Mr. Mekowulu's attorneys.

> An expert may offer opinion testimony on an ultimate issue of fact, Fed. R. Evid. 704, although "[a]n expert may not, however, merely tell the jury what result to reach."

United States v. Caro, 454 Fed. Appx. 817, 843 (11th Cir. 2012) citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

Here, Professor Doering told the jury what result to reach. The affidavit of Lori D. Palmieri, Esq., Board Certified Criminal Trial attorney, Exhibit D, itemizes those specific areas in the transcript where Professor Doering's testimony can reasonably be construed as a comment on the ultimate guilt or innocence of the Defendant. All transcript page citations are to Volume IV:

- Page 8: Professor Doering was cautioned that the Court had disallowed any opinions about the ultimate guilt or innocence of the Defendant, and at page 9, he agreed to stay within those boundaries;
- Page 16; Professor Doering testified in a manner that would indicate that Mr. Mekowulu would have been trained on Professor Doering's opinion;
- Page 39; Professor Doering testified that a person who had a stack of prescriptions in other people's names would be a "deal-breaker," and states, "I can't contemplate any legitimate reason that may be." This can reasonably be construed as a comment on Mr. Mekowulu's guilt or innocence;
- Page 49; Professor Doering directly testified, without objection, that Mr. Mekowulu's filling of two prescriptions back to back was "a huge indicator of diversion." This is not testimony as to a red flag that would put a pharmacist on notice of criminality of others. Instead, this is direct testimony of Professor Doering's opinion that Mr. Mekowulu had personally been involved in diversion. This testimony can reasonably be construed as a comment on the ultimate guilt or innocence of Mr. Mekowulu;

- Page 51- 52, on the topic of back to back prescriptions, Professor Doering was allowed to testify, "In fact, there's probably no explanation that would satisfy my concern." This can reasonably be construed as a comment on the ultimate guilt or innocence of Mr. Mekowulu;

- Page 53; Professor Doering specifically testified that he would not have honored certain prescriptions, stating, "I wouldn't honor that because I can't think of a valid reason for that to happen," which can reasonably be construed as a comment on the ultimate guilt or innocence of Mr. Mekowulu;

- Page 55; Regarding prescriptions for Oxycodone without no corresponding log sign-out sheet, he stated, "Well, that's a violation of the law. And it would be a further indicator to me that something is going on that would aid or abet diversion of these drugs." This testimony constitutes Professor Doering's opinion that actions of Mr. Mekowulu were a violation of the law and an indicator that Mr. Mekowulu was aiding and abetting the diversion of drugs, and can reasonably be construed to be a comment on the ultimate guilt or innocence of Mr. Mekowulu;

- Page 91; During cross-examination, Mr. Mekowulu's attorney Mr. Sisco specifically asked Professor Doering to opine on whether something was illegal. Professor Doering responded that, referring to prescriptions, "they're illegal until they're proven legal," and Mr. Sisco responded, "okay," and then Mr. Sisco asked, "Okay. Well, you'd need an explanation?" and Professor Doering agreed, "Yes, yes, absolutely." In this series of questions and answers, Mr. Sisco asked Professor Doering to comment on whether facts that can be attributed to Mr. Mekowulu were illegal, allowed Professor Doering to testify that the burden of proof was shifted to the Defendant and wrongly inform the jury that the prescriptions were

illegal until proven to be legal, requiring an explanation, and supports the issue that the Defendant has to testify and offer the explanation.

Legal Analysis.

Professor Doering testified in a manner that can reasonably be construed as a comment on Mr. Mekowulu's guilt or innocence, directly violating his boundaries as ordered by this Court. Professor Doering told the jury that what Emmanuel Mekowulu did was a violation of law, that there was no explanation for it, that it was illegal unless proven legal, and that an explanation was required. This squarely violated the Court's directive on the limitations of his testimony, it was, in part, elicited by Mr. Mekowulu's own attorneys, and there was no request for curative instruction, mistrial, or other remedy. Essentially, Mr. Mekowulu's attorney invited the Government's expert to opine on whether or not something Mr. Mekowulu did was illegal, and then agreed with the expert that the prescriptions were illegal until proven legal by responding, "okay," after Professor Doering wrongly made this claim. Mr. Mekowulu's attorneys then emphasized that an explanation was required and rested without offering any explanation or any evidence. This is clearly a deficient performance by Mr. Mekowulu's attorney that prejudiced the Defendant.

The use of experts to aid juries in understanding nuances of the illicit drug trade is permissible, but the experts are not permitted to state the inference that the defendant is guilty.

> "The operations of narcotics dealers are a proper subject for expert testimony under Rule 702," *United States v. Ginsberg*, 758 F.2d 823, 830 (2d Cir. 1985), and we have recognized the "well-established" "rule" that "an experienced narcotics agent" may testify as an expert to help a jury understand "the significance of certain conduct or methods of operation unique to the drug distribution business." *United States v. Butler*, 102 F.3d 1191, 1199 (11th Cir. 1997) (internal quotations omitted). We also have "affirmed the admission under Rule 702 of the expert testimony of a police officer interpreting 'drug codes and jargon.'" *United States v. Novaton*, 271 F.3d 968, 1008 (11th Cir. 2001) (quoting *United States v. Brown*, 872 F.2d 385, 392 (11th Cir. 1989)). *United States v. Garcia*, 447 F.3d 1327, 1335 (11th Cir., 2006).

The distinction here is that Professor Doering testified what the pharmacist should believe or realize and what he should do when presented with certain factual scenarios including the opinion that certain "red flags" were "deal-breakers," Tr. IV, Pgs. 39-40, that can only mean that a pharmacist was prohibited from filling the prescriptions and was taking illegal action in filling a prescription under the scenario presented. By this testimony, Professor Doering opined as to the pharmacist's mental state of knowledge, and opined that Mr. Mekowulu had engaged in diversion. This exceeded the legal boundaries of permitted testimony. This is different than expert testimony assisting jurors with an understanding of facts or interpreting drug jargon. Fed.R.Evid. 704 provides:

> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

The Eleventh Circuit has also stated, "[a]n expert testifies "with respect to" the mental state or condition of a defendant when an inference of the facts testified to is that the defendant had the mental state or condition constituting an element of the crime." *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir1988). The Eleventh Circuit has characterized this as a "fine line,":

> In other words, Agent Velazquez testified as to what an observer perceiving Batiste's outward manifestations would take to be Batiste's intentions—and not what Batiste's actual state of mind was. We acknowledge that this is a very fine line. In light of the specific questions that prompted the challenged testimony, however, we are confident that Agent Velazquez left the ultimate issue of Batiste's state of mind for the jury to decide *United States v. Augustin*, 661 F.3d 1105, 1124 (11th Cir. 2011).

The expert may state facts, but cannot state the inference. "[T]he expert cannot expressly 'state the inference,' but must leave the inference, however obvious, for the jury to draw," *United*

States v. DiDomenico, 985 F.2d 1159, 1165 (2d Cir. Conn. 1993), citing *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir.,1988).

Here the element of the crime about which Professor Doering was testifying was Mr. Mekowulu's imputed knowledge of a criminal conspiracy. Professor Doering testified that what Mr. Mekowulu himself did was a violation of the law, that his action was an indicator of diversion, that Mr. Mekowulu's actions were illegal until proven legal, that there was no explanation, and that an explanation is necessary. Professor Doering testified that certain scenarios where Mr. Mekowulu filled prescriptions were "deal-breakers," meaning that Mr. Mekowulu was prohibited from filling the prescriptions and Mr. Mekowulu's actions were therefore illegal. Professor Doering did "state the inference," *United States v. Alvarez, Id.*, and Mr. Mekowulu received constitutionally ineffective assistance of counsel because his attorneys both allowed this testimony without objection and, in fact, elicited some of this testimony. Professor Doering unconstitutionally found Mr. Mekowulu guilty, "stating the bottom-line inference, and leaving it to the jury merely to murmur, "Amen."" *United States v. DiDomenico*, 985 F.2d 1159, 1165 (2d Cir., 1993). Rule 704(b) prevents experts from stating the final conclusion or inference as to a defendant's actual mental state, *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988) ("It is only as to the last step in the inferential process -- a conclusion as to the defendant's actual mental state -- that Rule 704(b) commands the expert to be silent.")

Professor Doering's testimony unconstitutionally crosses the Eleventh Circuit's "fine line" between discussing facts that raise the inference and actually stating the inference. Here, Professor Doering explicitly stated that Mr. Mekowulu's actions were violations of the law and that there was no satisfactory explanation. This is a conclusion as to Mr. Mekowulu's actual mental state, and by testifying that there was no satisfactory explanation, a finding of guilt. Mr.

Mekowulu's attorneys rendered a deficient performance, and as a result, Mr. Mekowulu was prejudiced.

B. Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel By Resting Without Calling Mr. Mekowulu as a Witness.

After emphasizing to the jury, through the cross-examination of Professor Doering, that the burden had shifted to Mr. Mekowulu and an explanation from Mr. Mekowulu was necessary, Mr. Mekowulu's attorneys put on no evidence and rested. The deliberate ignorance instruction, as given, Tr. VI, p. 80, Line 21, states:

> Knowledge may be established if the defendant is aware of a high probability of its existence unless the defendant actually believes that it does not exist.

Here, as recognized by the Eleventh Circuit in affirming the conviction, "Mr. Mekowulu did not convince the jury that he and his coconspirators were merely in a seller-buyer relationship rather than coconspirators engaged in an illegal scheme," *United States v. Mr. Mekowulu*, 556 Fed. Appx. 865, 868 (11th Cir., 2014). The jury is instructed that knowledge cannot be established if the defendant actually believed that the fact does not exist, but Mr. Mekowulu's attorneys chose not to put on any evidence of Mr. Mekowulu's actual belief. Mr. Mekowulu had no prior convictions and there is no reasonable explanation for the decision of Mr. Mekowulu's attorneys to rest without putting Mr. Mekowulu on the stand to testify that he actually believed the prescriptions were legitimate. In closing argument, Mr. Louderback emphasized that Mr. Ridenhour and Mr. Wubbena were liars, TR VI, 41-42. At Tr. VI, 42, he states that there is no evidence that Wubbena or Ridenour informed Mr. Mekowulu of their conspiracy. On page Tr. VI, 42, he argues that, if Mr. Mekowulu would have learned of the conspiracy, Mr. Mekowulu could have charged more money, stopped the supply chain, or called the police. At page Tr. VI, 44 – 45, Mr. Louderback wrongly states, "We have absolutely zero

testimony or evidence that would indicate that Mr. Mekowulu knew of the unlawful plan," ignoring the testimony of Professor Doering, and then states that the Judge will tell them that a defendant acted knowingly if he deliberately closed his eyes. At Tr. VI, 49, he begins a discussion of Professor Doering's testimony, argues that it is tainted from the knowledge of the conspiracy involving the Government witnesses, and at Page 59 comments on the fact that they chose not to produce their own expert. He argued only reasonable doubt, and does not argue actual innocence which is the primary defense to the deliberate ignorance instruction. Of course, by resting without testimony from Mr. Mekowulu attesting to his own actual innocence, there was no evidence of actual innocence.

The United States Supreme Court has stated:

> To establish actual innocence, petitioner must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (U.S. 1998), citing *Schlup v. Delo*, 513 U.S. 298, 327-328, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995) (citations omitted).

Had the defense put on Mr. Mekowulu to explain his conduct and testify that he actually believed that Wubbena and Ridenhour were not involved in criminality, and had the defense put on a defense expert like Dr. Lee to contradict Professor Doering's "red flags," it is more likely than not that no reasonable juror would have convicted him. However, without that testimony, as this Court observed at sentencing, the evidence that Mr. Mekowulu had knowledge of the conspiracy was compelling, if not overwhelming. Professor Doering convicted Mr. Mekowulu, and the jury's function was reduced "merely to murmur, "Amen,"" *United States v. DiDomenico*, 985 F.2d 1159, 1165 (2d Cir., 1993). The decision to put on no evidence, and to recommend to Mr. Mekowulu that Mr. Mekowulu not take the stand, was not reasonable, and was constitutionally ineffective assistance of counsel.

C. Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Counsel By Failing to Retain and Call a Pharmacist Expert to Rebut the Testimony of Professor Doering.

The defense was aware that the Government was calling Professor Doering as a witness, as the Government had provided a report well before trial. As set forth in Dr. Lee's affidavit he was available to testify that Professor Doering's "red flags" were not listed in the Florida Administrative Code as criteria putting a pharmacist on notice of diversion. Simply stated, there was no reason not to call an expert pharmacy witness for the defense to testify that Mr. Mekowulu should not be deemed to be on notice of at least five of Professor Doering's "red flags." Further, a pharmacy expert should have been called to rebut Professor Doering's incorrect claim that blood or marriage relation is required to pick up a prescription for someone else, that Mr. Mekowulu's actions in relation to a log book were a violation of the law, that DEA Form 222 had anything to do with this case, and to rebut the remainder of Professor Doering's testimony. By proceeding to trial without a pharmacy expert, Professor Doering was free to state any opinions that came into his mind, and the defense had no rebuttal. One example of this is Professor Doering's invalid claim that a relation of blood or marriage is required for one person to pick-up a prescription of another. This is simply preposterous and there is no authority for such a claim. However, this fictitious claim was unrebutted because the defense had no expert witness and did not move to strike the testimony as violating Fed.R.Evid. 702 for lack of sufficient facts or data. Had the attorneys moved to strike, it is likely the motion would have been granted because there are no facts or data to support such a preposterous claim. Another example is the testimony regarding DEA Form 222, which is for transfers between registrants and prescribers and is inapplicable to the issue of whether Mr. Mekowulu could receive and deliver prescriptions for patients through a third party. This testimony, although completely

inapplicable to this case, came in unrebutted and was exploited by the Government in closing argument. The failure to retain and call a pharmacy expert was unreasonable, and constitutes constitutionally ineffective assistance of counsel. There is no reasonable trial strategy to allow only the Government to produce a pharmacy expert and to rest with no evidence rebutting the Government's expert's opinion. There is no reasonable trial strategy to go to trial without a rebuttal expert, knowing that the Government was putting on an expert. Had a defense expert testified and rebutted this testimony, it is more likely than not that a reasonable juror would not have convicted Mr. Mekowulu. "Where counsel fails to make a reasonable investigation that is reasonably necessary to the defense, a court must conclude that the decision not to call an expert cannot have been based on strategic considerations and will thus be subject to review under Strickland's prejudice prong," *Jelinek v. Costello*, 247 F. Supp. 2d 212, 267 (E.D.N.Y. 2003). Here, the records of Mr. Mekowulu's attorneys, which are not yet in evidence in this case but will be admitted in an evidentiary hearing on this Motion, indicate that Mr. Mekowulu's attorneys did take some action to attempt to locate a pharmacy expert, and they made the unreasonable decision to proceed without a pharmacy expert knowing that the Government's case rested largely on Professor Doering's testimony imputing knowledge to Mr. Mekowulu. Mr. Mekowulu's attorneys failed to make a reasonable investigation to locate and present rebuttal expert testimony, and Mr. Mekowulu deserves a new trial.

D. Mr. Mekowulu's Attorneys Provided Constitutionally Ineffective Assistance of Counsel Regarding Mr. Mekowulu's Waiver of the Right to Testify Rendering the Waiver Not Knowing or Voluntary By Failure of Counsel to Advise Mr. Mekowulu on the Deliberate Ignorance Instruction When Advising and Recommending that Mr. Mekowulu Waive the Right to Testify.

> "T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

After starting trial without a defense pharmacy expert, deficiently allowing Professor Doering to offer his opinion on Mr. Mekowulu's guilt, and making the decision to put on no evidence, the next level of ineffective assistance dealt with the failure to properly counsel Mr. Mekowulu on the deliberate ignorance instruction when counseling Mr. Mekowulu on the implications of Mr. Mekowulu's waiver of his right to testify on his own behalf. The morning of trial, according to Mr. Mekowulu's wife, Mr. Sisco stated that no jury would convict. According to Mr. Mekowulu's affidavit, Mr. Mekowulu did not know that he could be convicted for not asking questions based on Professor Doering's "red flags," and did not know that the jury would be told that he could not be convicted for closing his eyes if he actually believed that no conspiracy existed. When he waived his right to testify, he actually thought that, because there was no direct evidence that he did anything illegal, he could not be convicted. Here, there is a significant factual discrepancy between Mr. Mekowulu's affidavit and what his attorneys were telling the Court, and Mr. Mekowulu is entitled to an evidentiary hearing on this Motion. The trial transcript, V. IV, P. 105, shows that Mr. Louderback told the Court on December 6, 2012, that Mr. Mekowulu would not be testifying. On December 6, 2012, the Court specifically took a break and instructed defense counsel to confer with their client and advise the Court for scheduling purposes, and Mr. Louderback stated, Tr. IV, P. 105, "From the defense perspective, we're—we are not going to call him." According to Mr. Mekowulu, that afternoon after the Court recessed, Mr. Mekowulu told Mr. Sisco that he would testify, and Mr. Sisco discussed it with him and told Mr. Mekowulu to go home and think about how he would testify. Again on December 10, 2012, at a hearing that Mr. Mekowulu cannot recall attending (Tr. Dec. 10, Page 5), the Court inquired and Mr. Sisco responded:

The Court: .... You still don't intend to put on a defense, Mr. Sisco?

> Mr. Sisco: At this point we still do not intend to do that. I haven't heard from my client that he's changed his mind.

According to Mr. Mekowulu, Mr. Sisco's statement to the Court was false. Mr. Mekowulu specifically states that on Thursday, December 6, 2012, he told Mr. Sisco that he intended to testify, he was told by Mr. Sisco to go home and prepare, and both Mr. Mekowulu and his wife Odini Mekowulu state that he prepared all weekend and was not told until Tuesday morning, December 11, 2012, that he would not be testifying. Mr. Mekowulu states that Mr. Sisco stated on the morning of December 11, 2012, that the case was "in our favor," and Odini Mekowulu states that Mr. Sisco stated that, "no jury would convict . . ." It is clear that material issues of fact exist on whether Mr. Mekowulu's attorneys were telling the court one thing, and telling him something else. Mr. Mekowulu specifically states at Pages 3-4 of his affidavit that he was not counselled on the deliberate ignorance instruction before he waived the right to testify, and he was not told that the Court had already determined that there was sufficient evidence to give the deliberate ignorance instruction. Mr. Mekowulu states that his attorneys did not ask him what his defenses were to the testimony presented by Mr. Ridenhour, Mr. Wubbena, or Professor Doering, and he states that when he gave up his right to testify, he did not know that he could be convicted for not investigating "red flags" and that, if he did not testify that he actually believed that no criminal conspiracy existed, the jury would have no evidence of his actual belief and he would likely be convicted. In the Eleventh Circuit, "there can be no effective waiver of a fundamental constitutional right unless there is an 'intentional relinquishment or abandonment of a known right or privilege'," *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992), citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). While the district court may assume that, when a defendant chooses not to take the stand on his attorney's recommendation, "that this was

an appropriate strategic decision," *United States v. Richardson*, 195 F.3d 192, 197 (4th Cir., 1999), Mr. Mekowulu's Affidavit places into dispute whether or not he intentionally and knowingly relinquished the right due to the ineffective assistance of his attorneys in analyzing the impact of Professor Doering's testimony and the deliberate ignorance instruction.

Mr. Mekowulu directly waived his right to testify, Transcript, Exhibit E. The issue here is not whether Mr. Mekowulu knew, or did not know, that he had a right to testify. Mr. Mekowulu knew that he had a right to testify, and he wanted to testify. Here, Mr. Mekowulu gave up that right because his attorneys told him that the case was in his favor, that no jury would convict, and his attorneys did not explain the deliberate ignorance theory of the Government's case and the fact that Mr. Mekowulu would be convicted if the jury found that Mr. Mekowulu deliberately closed his eyes. Mr. Mekowulu simply did not understand that evidence against him and the elements that the Government must prove to convict. Mr. Mekowulu did not understand that, without his testimony, he would likely be convicted because the evidence that he deliberately closed his eyes was compelling, if not overwhelming, and he had to testify and tell the jury that he had no actual knowledge or belief of a conspiracy or illegal conduct by the Government witnesses. For this reason, Mr. Mekowulu's waiver was not a knowing and voluntary waiver because it was the result of ineffective assistance of Counsel.

(2) Issue 2: Whether Professor Doering's Standards Are Unconstitutionally Vague Rendering the Conviction Unconstitutional.

Dr. Lee, in his affidavit, states that the standard by which Mr. Mekowulu should have been judged as to indicators of diversion were in the applicable Florida Administrative Code, and identifies five of Professor Doering's "red flags" that should not be deemed to place Mr. Mekowulu on notice of possible diversion. Further, Dr. Lee states that Professor Doering is

wrong on his testimony that a relationship of blood or marriage is required to pick up a prescription, and he is wrong to label certain scenarios as "deal-breakers" because there is not a legal prohibition to delivering prescriptions under these scenarios. Instead, the Florida Administrative Code requires the pharmacist to employ the verification procedures set forth in the code. Both Mr. Mekowulu and Dr. Lee state that Professor Doering's opinion was not published in a form that would allow Mr. Mekowulu to be placed on notice. Dr. Lee states at Page 10 of his affidavit:

> [T]o my knowledge by 2009 Professor Doering had not published his opinions as he testified to them in 2012 in a clear and tangible form that would allow a pharmacist such as Emmanuel Mr. Mekowulu to be placed on notice of Professor Doering's opinion . . .

Legal Analysis

> "A criminal offense statute is unconstitutionally vague "if it defines an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement."" *United States v. Hurley*, 529 Fed. Appx. 569, 572 (6th Cir. Ohio 2013) citing *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001).

Emmanuel Mekowulu was convicted by Professor Doering testifying to an after-the-fact opinion of improper conduct of a pharmacist in light of "red flags" but his opinion was unknown and unpublished at the time of the transactions. No pharmacist could reasonably understand what conduct is prohibited by Professor Doering's opinion because the opinion did not exist until three to four years after the alleged crime when he testified in court. Professor Doering's opinion did not exist in any tangible form in 2009 so it was impossible for Mr. Mekowulu to know in 2008 – 2009 that, if he failed to comply with Professor Doering's opinion of what a pharmacist was required to do, he could be convicted of closing his eyes to a conspiracy. Indeed, the first Mr. Mekowulu learned of what he should have known or done was in trial. Mr. Mekowulu had no idea of what Professor Doering believed was prohibited, nor did anyone else,

because Mr. Mekowulu was not convicted of violating a statute. He was convicted of violating Professor Doering's personal and private opinion of a code of conduct that was unknown to anyone, possibly even unknown to Professor Doering, at the time of the indictment, 2008 – 2009. The first time it was communicated was during Professor Doering's testimony at the 2012 trial. Clearly, it was impossible for Mr. Mekowulu to understand what was prohibited in 2008 – 2009 because it was impossible for Mr. Mekowulu know what Professor Doering would opine in 2012. As stated by Dr. Lee, the Florida Administrative Code, copy attached to his affidavit, states, "[t]he following criteria shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose," and lists five criteria: frequent loss of controlled substance medication, only controlled substances are prescribed for a patient, one person presents controlled substance prescriptions with different names, the same or similar controlled substance is prescribed by two or more prescribers at the same time, and the patient always pays in cash and insists on brand name product. Importantly, if any of these criteria are present, the code does not prohibit delivering the prescription, but instead, requires compliance with a verification procedure. As stated in Dr. Lee's affidavit, Mr. Mekowulu was presented with some of the criteria in the code, but Professor Doering testified to criteria not in the Florida Administrative Code.

The United States Supreme Court stated long ago:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (U.S. 1926)

Here, Mr. Mekowulu was convicted because he failed to meet Professor Doering's personal opinion of professional conduct, unknown and unannounced when the crime purportedly occurred. Far from being "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," the standard upon which Mr. Mekowulu was convicted did not even exist at the time of the purported crime. Without knowledge of a conspiracy, nothing Mr. Mekowulu did, in and of itself, was illegal. Mr. Mekowulu was convicted through an imputation of knowledge because he violated Professor Doering's personal opinion of the proper standard of professional practice, which came into being three to four years after the alleged crime. This is a case where Mr. Mekowulu was convicted by an expert's after-the-fact opinion that what Mr. Mekowulu did was criminal.

A statute is void for vagueness "both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and because it encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (U.S. 1972) (citations omitted). For example, a criminal statute requiring "credible and reliable identification," was declared void for vagueness, *Kolender v. Lawson*, 461 U.S. 352 (1983), where the court emphasized that the important aspect of the vagueness doctrine was not actual notice but, "the requirement that a legislature establish minimal guidelines to govern law enforcement," *Id.*, at 358. In *Skilling v. United States,* 561 U.S. 358 (2010), the court restricted a statute criminalizing fraudulent deprivation of the intangible right of honest services to not extend beyond schemes involving bribes and kickbacks, stating "[c]onstruing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal," *Id.*, at 368.

Convicting Mr. Mekowulu based on the purported closure of his eyes to Professor Doering's "red flags" that were unknown to Mr. Mekowulu at the time of the transactions, and that possibly did not even exist in Professor's Doering's mind, violates all void-for-vagueness elements. In *United States v. Lovern,* 590 F.3d 1095 (10th Cir., 2009), the Court upheld the conviction of an internet pharmacist and reversed the conviction of a computer technician for conspiracy to dispense prescriptions without a legitimate medical purpose or in defiance of profession standards. The pharmacist asserted that *Gonzales v. Oregon,* 546 U.S. 243, 250 (2006) barred prosecution, which the court distinguished, stating:

> Unlike *Gonzales,* we have before us no interpretive rule seeking to define a practice as lacking any legitimate medical purpose, let alone a rule that conflicts with a state's assessment of the legitimacy of that practice. *United States v. Lovern*, 590 F.3d 1095, 1100 (10th Cir. Kan. 2009).

Here, *Gonzales* applies. In *Gonzales,* the Supreme Court struck down an interpretive rule of the U.S. Attorney General, prohibiting the dispensation of controlled substances in physician-assisted suicides. Oregon permitted the practice. The Supreme Court ruled that the interpretive rule exceeded the Attorney General's delegated authority. Here, Florida has adopted an Administrative Code with five specific criteria that shall alert a pharmacist as to whether a prescription was issued for a legitimate medical purpose. The United States, through this prosecution, relied on Professor Doering's opinion that conflicts with state law. Professor Doering's opinion is akin to the Attorney General's interpretive ruling in *Gonzales*, and the United States is not authorized to develop and implement such regulations that conflict with state law. In closing argument, Tr. VI, P. 20, the Government relied not only on Professor Doering's testimony, but also on Exhibits 70 and 71, a manual and a pamphlet, that are characterized by the Government as a guide for the detection of prescription fraud. To the extent that these pamphlets

also conflict with the Florida Administrative Code, convicting Mr. Mekowulu based on criteria in federal pamphlets violates *Gonzales* and violates the void-for-vagueness doctrine. Mr. Mekowulu is charged with knowing the Florida Administrative Code, but the United States is not authorized to convict him on standards that were unknown or that conflict with the applicable state law governing his licensure. Essentially, Mr. Mekowulu was convicted for violating a Professor Doering's code of conduct for physicians, and the conditions of a federal pamphlet and manual.

In addition to the federal pamphlet and manual, the Government presented evidence and argued in closing argument that Mr. Mekowulu violated Florida and federal regulations relating to DEA Form 222. In closing argument, the Government detailed Professor Doering's red flags, and also argued at Tr. VI, Page 34 that Professor Doering and an investigator had testified prescriptions could only be transferred from one registrant to another using official DEA Form 222. In fact, DEA Form 222 is not applicable here. DEA Form 222 does not apply to prescriptions for patients that are being delivered and picked up by a third party. 21 C.F.R. § 1395.03, "Distributions Requiring a Form 222," itemizes 6 instances where the form is required, and none apply here. The form is required where a central fill pharmacy delivers to a retail pharmacy, where controlled substances are delivered to long-term care facilities on behalf of an ultimate user who resides at the facility, and similar instances. There is no statement in 21 C.F.R. § 1395.03 that applies to employees of a clinic dropping off and picking up prescriptions for clinic patients. The Government argued to the jury in closing argument, Tr. VI, 33-34, that if Mr. Mekowulu delivered patient prescriptions to Wubbena to monitor their patients in taking their medication, "It is prohibited by Florida and federal law and regulations. Controlled substances in this closed system can only be transferred from one registrant to another using

official DEA Forms 222 . . ." Tr. VI, 33, Line 25, and "It is prohibited," Tr. VI P. 34, Line 16. DEA Form 222 is not required where the prescription is issued to a patient and the pharmacist allows a third-party to pick-up the prescription for the patient. Importantly, this was not an argument by the Government that Mr. Mekowulu conspired, but instead, was an argument that Mr. Mekowulu directly violated Florida and federal law for which he was not indicted. DEA Form 222 deals with transfers of controlled substances between registrants and other transfers, and the failure to use, or the fraudulent use, of a DEA Form 222 is a criminal offense, *United States v. Stidham*, 938 F.Supp. 808 (S. D. Ala. 1996), *Haley-Muhammad v. Colonial Mgmt. Group, LP*, 2015 U.S. Dist. LEXIS 31746 (NE. D. Ala. 2015), *United States v. Devous*, 764 F.2d 1349 (10th Cir. 1985). He was not indicated for this offense. However, the testimony regarding DEA Form 222 by Professor Doering, and the Government's argument in closing argument that Mr. Mekowulu violated laws relating to DEA Form 222 in transferring controlled substances between registrants, rendered the law under which Mr. Mekowulu was convicted unconstitutionally vague. The Government blended together the "red flags," that are supposed to put a pharmacist on notice of illegitimate prescriptions, with indicators in federal manuals and pamphlets, and then blended in Professor Doering's own opinion that Mr. Mekowulu had taken actions that were "huge indicators" of diversion and evidence of aiding and abetting, and blended in testimony by Professor Doering that Mr. Mekowulu had taken actions in violation of the law, and also blended in claims that DEA Form 222 was required for the delivery of patient prescriptions by Mr. Mekowulu to Mr. Wubbena and the failure to use the form violated Florida and federal law. In the final analysis, Mr. Mekowulu was indicted for conspiracy, but tried and convicted on a hodge-podge of claims of misconduct that rendered the law under which he was tried and convicted unconstitutionally vague.

For the foregoing reasons, Mr. Mekowulu is entitled to the relief requested in this Motion.

(3) Issue 3: The Government's Claim that Mr. Mekowulu Violated Federal Law Regarding DEA Form 222 Violated Mr. Mekowulu's Right to Be Convicted Only Of Crimes Charged in the Indictment.

As stated above, in its case in chief the Government presented the testimony of an investigator and Professor Doering who testified that Mr. Mekowulu violated federal law relating to DEA Form 222, and the Government argued in closing argument that Mr. Mekowulu's transfers of prescriptions for patients to third parties without a DEA Form 222 was prohibited under Florida and federal laws and regulations. An indictment to engage in a conspiracy "does not equate with an indictment charging the underlying crime itself," *United States v. Wilson*, 2010 U.S. Dist. LEXIS 75149, 12 (S.D. Fla. July 27, 2010). Mr. Mekowulu was indicted only for conspiracy, but the Government gained the conviction by presenting evidence during its case in chief that Mr. Mekowulu violated rules relating to the use of DEA Form 222, and argued in closing argument that Mr. Mekowulu's actions were prohibited by Florida and federal laws and regulations. The Government prosecuted and convicted Mr. Mekowulu of violating unidentified Florida and federal laws and regulations not identified in the indictment. "The Fifth Amendment guarantees that a defendant can be convicted only of crimes charged in the indictment," *United States v. Holt,* 777 F.3d 1234, 1261 (11th Cir., 2015). Mr. Mekowulu had no prior notice that he was going to be tried for violating DEA Form 222 regulations, DEA Form 222 regulations are inapplicable, but the Government put on evidence and argued to the jury in closing argument that he violated Florida and federal law relating to DEA Form 222. The introduction of evidence and the argument to the jury that Mr. Mekowulu violated Florida and federal laws and regulations relating to DEA Form 222 violated Mr. Mekowulu's guarantee that he can only be convicted of

crimes charged in the indictment. For this reason, Mr. Mekowulu is entitled to have the conviction vacated and is entitled to a new trial.

(4) Issue 4: Whether Emmanuel Mr. Mekowulu's Conviction Based on Professor Doering's Testimony Is a Violation of the Prohibition of Convictions Based on *Ex Post Facto* laws.

Article 1 § 9 of the United States Constitution states, "no ex post facto law shall be passed." The United States Supreme Court in *Calder v. Bull,* 3 U.S. 386 (1798) defined an *ex post facto* law as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. *Calder v. Bull*, 3 U.S. 386, 390-391 (U.S. 1798).

The *Calder v. Bull* court also stated, "that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit," *Calder v. Bull*, 3 U.S. 386, 388 (U.S. 1798).

Emmanuel Mr. Mekowulu was convicted for not inquiring about Professor Doering's enumerated "red flags," even though Professor Doering's opinion was not available to Mr. Mekowulu at the time of the purported crime. Essentially, Professor Doering was allowed to review factual situations that confronted Emmanuel Mr. Mekowulu in 2008 -2009, and opine in 2012 as to whether or not a pharmacist should have recognized the situation as a "red flag" and either caused a further investigation or declared the situation to be a "deal breaker" and refuse to issue prescriptions. Professor Doering's standards did not exist at the time of the alleged crime, or to the extent that they did exist, they were not communicated to Mr. Mekowulu under state

laws governing his licensure. The standards under which Mr. Mekowulu was convicted did not exist until Professor Doering rendered his opinion at the trial in 2012. In *Marks v. United States*, 430 U.S. 188 (U.S. 1977) the United States Supreme Court reversed obscenity convictions for acts taken through February 1973 because the standards applied to convict were not announced by the Court until June 1973 in *Miller v. California*, 413 U.S. 15 (U.S. 1973). In *Marks,* the Supreme Court specifically applied the *Calder v. Bull* prohibition against *ex post facto* laws, stating:

> The *Ex Post Facto Clause* is a limitation upon the powers of the Legislature, see *Calder v. Bull*, 3 Dall. 386 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank v. Mangum*, 237 U.S. 309, 344 (1915). But the principle on which the Clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. See *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. *Marks v. United States*, 430 U.S. 188, 191-192 (U.S. 1977).

In *Marks*, the Supreme Court emphasized that unforeseeable enlargements of criminal statutes, applied retroactively, operate as *ex post facto* laws, and are barred by due process, *Id.*, at 192.

As applied to the deliberate ignorance instruction, Mr. Mekowulu's conviction for conduct in 2008 – 2009 based on Professor Doering's 2012 opinion constitutes the unconstitutional *ex post facto* enlargement of the criteria that shall cause a pharmacist to question the legitimacy of a prescription, and thereby violates the prohibition of *ex post facto* laws.

> "An instruction on deliberate ignorance is appropriate only if it is shown that the defendant was aware of a high probability of the fact in question and that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003)

Here, Mr. Mekowulu was held to be on notice of the high probability of criminal activity by Brett Ridenour and Troy Wubbena through the application of professional standards of pharmacy practice that did not exist at the time of the alleged crime, and were not incorporated into the Florida Administrative Code. Professor Doering's practice standards, his "red flags," that purportedly show that Mr. Mekowulu was aware of the criminal activity, were unknown to Mr. Mekowulu before Professor Doering rendered his opinion at trial. To convict a professional of conspiracy for violating professional standards, the professional standards had to both exist and legally apply to the professional at the time of the alleged crime. Professor Doering's opinion did not exist at the time of the alleged crime, and the federal manuals and pamphlets were not legal licensure requirements under the Florida Administrative Code. For this reason, the Mr. Mekowulu's conviction is unconstitutional and should be vacated.

(5) Issue 5: Whether Professor Doering's Testimony and the Deliberate Ignorance Instruction Unconstitutionally Shifted the Burden of Proof to the Defendant.

The deliberate ignorance instruction, as given, Volume VI, Page 80, instructed the jury that, "knowledge may be established if the defendant is aware of a high probability of its existence unless the defendant actually believes that it does not exist." In *In Re Winship*, 397 U.S. 358 (1970), the Court held that all elements of any crime must be proven beyond a reasonable doubt, and in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court states, "a jury instruction violates *Winship* when it resolves an element of the crime, alleviating the jury's role as fact-finder and lowering the prosecution's burden of proof." In *Sandstrom*, the Court states that a jury instruction that requires the defendant to introduce evidence to disprove that he acted knowingly is a due process violation.

As stated in the affidavit of Attorney Lori D. Palmieri, Esq., Mr. Sisco provided ineffective assistance of counsel during the cross-examination of the Government's expert,

Professor Doering. Mr. Sisco established, wrongly, that prescriptions are deemed to be illegal until proven to be legal, and established that an explanation is required from the Defendant. This testimony shifted the burden of proof to Mr. Mekowulu to introduce evidence that he did not know of the conspiracy. While the deliberate ignorance instruction, standing alone, does not shift the burden of proof, it did here due to Professor Doering's testimony.

Courts have cautioned that, in some circumstances, the deliberate ignorance instruction can create an unconstitutional shifting of the burden of proof:

> In addition, courts must studiously guard against the danger of shifting the burden to the defendant to prove his or her innocence. See *Murrieta-Bejarano*, 552 F.2d at 1325 ("The effect of a [deliberate ignorance] instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt."); cf. *Sandstrom v. Montana*, 442 U.S. 510, 521, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) (disapproving of jury instructions that contain presumptions which shift the burden of proof of an element of a crime to the defendant). *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991).

In *United States v. Ebert*, 1999 U.S. App. LEXIS 8453, 36-37 (4th Cir. N.C. May 3, 1999), the Court held as to the deliberate ignorance instruction, "[a]nother serious concern is that the instruction might shift the burden to the defendant and force him to prove his innocence."

The Eleventh Circuit has stated:

> Prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992).

Here, the Government's expert, Professor Doering, directly, and wrongly, testified that the burden shifted to Mr. Mekowulu to prove that the prescriptions were legal, and Professor Doering also stated that an explanation was necessary, constituting both a shifting of the burden to Mr. Mekowulu and an implied, if not express, comment on Mr. Mekowulu's later decision to not testify.

5. Request for Hearing

Mr. Mekowulu requests a hearing pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings. A hearing is necessary unless, "the motion, files, and records of the case conclusively show that the movant is not entitled to relief," *Thomas v. United States*, 737 F.3d 1202,1206 (8th Cir., 2013), (citing 28 U.S.C. § 2255(b)), and no hearing is required only where "the petitioner's allegations, accepted as true, would not entitle the petitioner to relief." *Id.* (alterations removed). Here, the affidavit of Emmanuel I. Mekowulu and Odini Mekowulu raise factual issues that, if true, establish that he received constitutionally ineffective assistance of counsel, as confirmed by the affidavits of Lori D. Palmieri, Esq., and Matthew C. Lee, M.D. Further, the legal contentions of this motion raise constitutional violations that warrant a hearing.

6. Any Failure to Raise on Direct Appeal Should Not Preclude Consideration of these Claims.

Mr. Mekowulu submits that he is actually innocent, and in addition, to the extent that this Court is concerned that any of the issues raised herein could have been raised on direct appeal, Mr. Mekowulu contends that the omission on direct appeal of any issues raised herein is the result either of the novelty of the issues or ineffective assistance of appellate counsel, and Mr. Mekowulu remains entitled to relief under § 2255. Mr. Mekowulu has established in this Motion both (1) cause and prejudice or (2) actual innocence, *Bousley v. United States*, 523 U.S. 614, 622 (1998), entitling him to raise these issues in this § 2255 Motion, *Mills v. United States*, 36 F.3d 1052 (11th Cir., 1994). Ineffective assistance of counsel is cause, *McCleskey v. Zant*, 499 U.S. 467, 493-94, (1991), and "[t]o establish prejudice, [the Petitioner] must prove by a reasonable probability that but for his counsel's errors, the outcome of his case would have been different. *Mathis v. United States*, 401 Fed. Appx. 417, 418-419 (11th Cir. 2010). The issues

raised herein are either so novel that they were not reasonably available to trial and appellate counsel, or alternatively, if they are not deemed to be novel then the failure to raise the issues was ineffective assistance of both trial and appellate counsel, *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed.2d 828 (1998). Any failure to raise any of the issues raised in this § 2255 Motion on direct appeal should therefore not preclude the consideration of these issues in this Motion.

7. Request to Conduct Discovery.

Mr. Mekowulu has waived his attorney client privilege with Mr. Sisco and Mr. Louderback, Affidavit Exhibit E, and requests the opportunity to depose Mr. Sisco and Mr. Louderback on the following issues raised in this motion: (1) whether they counselled Mr. Mekowulu on the deliberate ignorance instruction (2) whether they asked Mr. Mekowulu what his testimony would be if he testified (3) why they did not call him as a witness (4) whether he had told them that he was not testifying when Mr. Louderback told the Court on December 6, 2012, that he would not be called (5) even though documents in the attorneys' files indicates that some effort was made to hire a pharmacy expert, why they did not hire a pharmacy expert or have a pharmacy expert available as a rebuttal expert and (6) the remaining factual issues set forth in this Motion. Mr. Mekowulu also requests to depose Professor Doering with regard to DEA Form 222 and establish that it has no applicability to this fact pattern, and inquire as to where and how Professor Doering contends that Mr. Mekowulu was supposed to be on notice of Professor Doering's 2012 opinion in 2008- 2009. In addition, Mr. Mekowulu may seek to depose other witnesses.

8. Request for Certificate of Appealability

To the extent that this Court denies this motion or any relief sought herein, Mr. Mekowulu requests a certificate of appealability pursuant to Rules Governing Section 2255 Proceedings, Rule 11(a). A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner must show that a reasonable jurist would find the district court ruling on the constitutional claims debatable, *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Mr. Mekowulu submits that this Motion crosses the "debateable" threshold and, to the extent relief is denied by this Court, justifies the issuance of a certificate of appealability.

9. Request for Relief. Based on the foregoing, Emmanuel I. Mekowulu requests that this Court release him from custody, vacate and set aside the judgment, discharge the Defendant or grant a new trial as may appear appropriate, or such other relief as the Court may determine appropriate.

10. Signature Under Penalty of Perjury

I declare certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2015

Emmanuel I. Mekowulu

11. **Certificate of Service:** I hereby certify that on May 15, 2015, I electronically filed the foregoing with the Clerk of this Court using the Court's CM/ECF System which will send a notice of electronic filing to all registered parties, including:

Kathy J. M. Peluso, Esq., Assistant United States Attorney
Dale R. Mr. Sisco, Esq., Trial Counsel for Defendant
Frank Mr. Louderback, Esq., Trial Counsel for Defendant.

Donald J. Schutz, Esq.
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Attorney for Emmanuel I. Mekowulu

Exhibit A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

V. Case No. 8:12-cr-00170-JDW-MAP

EMMANUEL I. MEKOWULU

_____/

AFFIDAVIT OF EMMANUEL I. MEKOWULU

I, Emmanuel I. Mekowulu, hereby swear, affirm, acknowledge and state:

1. My name is Emmanuel I. Mekowulu, and I am the Defendant in this case, and I have personal knowledge of all facts set forth herein.

2. I make this Affidavit in support of my Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct a Sentence.

3. I am currently in federal custody at the Federal Correctional Institution at Estill, South Carolina.

4. The jury trial in this case began on December 3, 2012.

5. Before the jury trial had begun, I had intended to take the witness stand and testify.

6. The prosecution put on its case on December 3, 4, 5, and 6, 2012. We did not have court on Friday, December 7, 2012. At the close of court on Thursday, December 6, 2012, in a discussion with my attorney, Dale Sisco in his office, I told Mr. Sisco that I would testify. He asked me if I had ever testified before. I said no. He told me that he would ask me questions, he said he did not know what the prosecutor would ask me. He said he knew what he would ask me, but he did not explain to me exactly what he would be asking me. He told me to go home

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and think about how I would testify. Other than this discussion, I had no further preparation to testify. I had no sample questioning, no explanation as to the points that were necessary for me to discuss, or any other discussion at all about my testimony. I was told by Mr. Sisco to prepare to testify the following week.

7. I do not recall whether or not I went to court on Monday, December 10, 2012. I do not recall going to court on Monday because I believed that there was no formal court session that day to my understanding.

8. On the morning of Tuesday, December 11, 2012, my wife and I went to Mr. Sisco's office before going to court. At that time, he told both me and my wife that both he and my other attorney Mr. Frank Louderback had made the decision that I will not be testifying. At that time, he stated that both he and Mr. Louderback were very comfortable that the case was in our favor.

9. I had given Mr. Sisco the names of four witnesses who would testify that I regularly offered delivery to customers. He had previously told me that he had not been able to reach Anna Ferlita, but I thought that Brenda Williams and Juana Mendoza would be testifying that I delivered to customers including themselves. He had told me that he had contacted them, and he had previously told me that they were going to show up. However, when I went to court on Tuesday I did not see them there. I asked Mr. Sisco on Tuesday in court why the witnesses were not there, and I do not recall his response. I do not remember whether I spoke with Mr. Sisco about the whereabouts of these witnesses before or after I advised the Court that I would not be testifying.

10. I made a decision to follow the advice of my attorneys, Dale Sisco and Frank Louderback, and not testify. I thought that the case was won because no witness had testified that I had done anything illegal.

11. I was not advised by Mr. Sisco or Mr. Louderback before I advised the Court that I would not testify that I could be convicted on what I now understand is the "deliberate ignorance" theory explained in the opinion affirming my conviction issued by the United States Court of Appeals of the Eleventh Circuit.

12. The first time that Mr. Sisco ever told me that there was a possibility that I could be convicted was after the jury had been instructed and while we were waiting for the jury verdict. To that time, I thought that, unless I had taken any illegal action myself, that I could not be convicted of a crime. I did not know that I could be convicted of conspiracy because a pharmacy expert could testify that I should have been aware that something illegal could be occurring even though the individuals I was doing business with were not doing anything illegal in their transactions with me or that I was not doing anything illegal in my transactions with them.

13. I did not know that on Thursday, December 6, 2012, my attorneys were advised by the Court that the deliberate ignorance jury instruction would be given to the jury. I have read the transcript, and based on the transcript of the trial, specifically, at Transcript Volume 4, Page 146 – 149, my attorneys objected to the deliberate ignorance instruction, and my attorneys discussed that the basis of the prosecution's claim was the reference to "red flags." On the transcript, Volume 4, Page 145, my attorney, Frank Louderback, states, "I think what the government would like to – intends to argue is that the defendant, by not asking some of these questions that Professor Doering said should have been asked, that we was not – he was

deliberately not asking those questions because he didn't want to know the answers, I guess." Mr. Louderback and Mr. Sisco did not explain the meaning of this to me at any time before I told the Court that I would not testify on December 11, 2012. The Court states on Page 148 of Volume 4 of the transcript, "Well, I will find that based on the evidence, there is sufficient evidence to support this requested instruction. That is, that the defendant may have acted with deliberate ignorance or such that he could be found to have consciously avoided knowledge consistent with the annotations." When my attorneys told me that I should not testify, my attorneys never told me that the Court had already made a finding that the evidence would be sufficient to allow this instruction to be given, and on that basis, I could be convicted and my attorneys never took the time to ask me what my defenses were to the testimony presented by Mr. Ridenour, Mr. Wubbena, and Professor Doering. I did not know when I gave up my right to testify that the jury would be told that I could be convicted for not asking questions or investigating what the prosecution expert was calling "red flags."

14. Before I gave up my right to testify, I did not know that the jury would be told that I could not be convicted if I actually believed that the offense did not exist. In my case, the only way for the jury to know what I actually believed, and that I actually believed that no crime was being committed by Mr. Ridenhour or Mr. Wubbena, was for me to testify and tell the jury that I actually believed that I was dispensing the controlled substances for legitimate prescriptions and for the legitimate medical purpose of the named patients.

15. Without my testimony, the jury had no evidence of my belief. The only way for the jury to have any evidence of my belief was for me to testify that I actually believed that I was filling legitimate prescriptions for a legitimate medical purpose. If I had taken the stand to testify, I would have testified that I actually believed, for each prescription I filled, that the

prescriptions were legitimate and were being used for a legitimate medical purpose and in the usual course of professional practice. If the jury believed this, I would not have been convicted based on the instructions to the jury. I did not know this when I gave up my right to testify.

16. I always believed that I was filing valid prescriptions for a legitimate medical purpose. I had no knowledge, and I did not believe, that Mr. Wubbena and Mr. Ridenour were involved in criminal activity. If I had testified, I would have told the jury that I actually believed that no criminal activity existed.

17. There was no evidence presented to the jury of my actual belief. My attorneys never told me that, even if I failed to ask questions based on the "red flags" that Professor Doering testified to, that I still would not be convicted if the jury found reasonable doubt on the issue of knowledge, and my actual belief that I was not involved in a criminal conspiracy was a defense.

18. Had I known that I could be convicted of participating in a conspiracy for failing to ask questions and investigate otherwise legal activity, even though everything I did was legal, and everything Mr. Wubbena and Mr. Ridenour were doing that I was aware of was legal, and had I known that, before I gave up my right to testify that the Court had already made a finding that there was sufficient evidence to give the deliberate ignorance instruction to the jury, and had I known that, if the jury found that I had had every reason to know that the prescriptions were not valid but I deliberately closed my eyes the jury could convict me of conspiracy and I would be sentenced to prison, I would not have agreed to give up my right to testify because I actually believed at all times that the prescriptions were valid and were being used for a legitimate medical purpose, and I believed at all times that I was dispensing the prescriptions for a

legitimate medical purpose and within the usual course of professional practice and I would have testified to my actual belief to the jury.

19. I have read page 102 of Transcript Volume 4, on Thursday, December 6, 2012, where the Court specifically asked my attorneys if we were going to put on evidence, and Mr. Louderback stated, "We need to just reconfirm with our client, but at this point I don't believe we're going to put on any evidence." At page 104 on Thursday, December, 6, 2012, the Court specifically stated to my attorney, Frank Louderback, "And that's, of course – I don't want to send them home if there's a chance that your client's going to testify. So why don't you go confer – attend – go confer with your agent, Ms. Peluso, and counsel with your client and then come right back up. And I'll explain to the jury we're discussing our schedule." The transcript shows that a break was held, and at page 105, Mr. Louderback told the Court, "From the defense perspective, we're – we are not going to call him. So we'd be prepared to go with a 29 motion and announce rest on Tuesday, however you want to do it."

This was a false statement by Mr. Louderback. We had no discussions during court as to whether I was going to testify. Mr. Louderback and Mr. Sisco did not take a break and tell me that the Judge was asking whether I was going to testify, and they did not tell me that they were telling the Judge that I would not testify. I thought that I was going to testify on Thursday, December 6, 2012, and I did not know that my attorneys had told the Court that I would not be testifying and the Court let the jury go home because the Court was told by my attorneys that I would not be testifying. I was not told until Tuesday morning, December 11, 2012, that I would not be testifying. I met with my attorney, Dale Sisco, on December 6, 2012, after court, I told him that I wanted to testify. After he hesitated, he said that when he defended Dr. Mubang, he took the stand in his own defense. He told me to prepare to testify. I prepared to testify all

weekend, and prepared on Monday, December 10, 2012. Then, on Tuesday morning, December 11, 2012 my wife and I went to Mr. Sisco's office, and I was told by Mr. Sisco that he and Mr. Louderback made a decision that I would not testify, that the case was in our favor, and there was no need for me to testify and make a mistake.

20. On Monday, December 10, 2012, there was a court session and I do not recall whether or not I was not at that session, but I do not remember being at that session. At that court session, on page 5, the Court stated to my attorney, Dale Sisco, "You still don't intend to put on a defense, Mr. Sisco?" and Mr. Sisco responded, "At this point we still do not intend to do that. I haven't heard from my client that he's changed his mind." This is a blatantly false statement by Mr. Sisco. On the evening of Thursday, December 6, 2012, after Court, Mr. Sisco told me to prepare to testify. I had no discussion with Mr. Sisco before he made the statement in court on Monday December 10, 2012, that I would not be testifying. The discussion was the opposite – at the end of court session on December 6, 2012, I met with Mr. Sisco and told him that I wanted to testify, he hesitated and said to me that when he defended Dr. Mubang he took the witness stand and that worked out right. He told me how to sit at the witness podium. He said he would ask me questions but never provided me with any guideline of questions. I went home and prepared all weekend and Monday to testify on December 11, 2002, based on what I heard from the government witnesses.

21. Had I testified, I would have testified as follows:

a. On the issue of prescriptions from the same doctor for the same controlled substance to Brett Ridenour's wife and daughter and delivery to his house:

I would have testified that Brett Ridenour came to Felky Pharmacy with his wife and daughter, with prescriptions. I asked Mr. Ridenour why there were three prescriptions for the

same type of medication, and he told me that they were in a car accident. I told him that I did not have any Oxycodone 30 mg in stock, but I was expecting a delivery from the wholesaler at 10:30 a.m. They left the prescriptions and told me that they would return. At 11:00 a.m., Brett Ridenour called, and I told him the truck was running behind. At 12:00 noon he came back to the pharmacy, but the delivery had not arrived so he left. At 1:00 p.m., he called me and I told him that the truck was on the way. At this point I told him that we have free delivery and I did not mind delivering to his house if he did not mind me getting to him late. I told him I do all my deliveries after I close at 7:00 p.m. He told me he does not mind. I told him based on his address that he is about 3 miles west of my home, and he would be the last stop, about 8:30 – 9:00 p.m. I arrived at his house, handed him the prescription bags with computer printed receipts, with cash price or insurance and co-pay shown. This is the same price we ring in the cash register if the patient comes to physically pick up the prescription. Mr. Ridenour signed and paid me cash, the total price on the three receipts. I asked him if he had any questions about the medications, he said no, and I left.

I found nothing alarming about Mr. Ridenour filling a prescription for his wife and daughter as I was told that there was a car accident.

b. On the issue of multiple prescriptions from the same doctor all for the same controlled substance:

I would have testified that I made a trip to Dr. Friedlander's office, and confirmed that Dr. Friedlander was a neurologist and a certified pain management doctor and all prescriptions written were signed in his original hand written signature. The prescriptions were not outside of Dr. Friedlander's specialty, and were within the guidelines of recommended treatment. In my experience, the types of medication and dosage amounts were normal for a pain management

neurologist to write. The directions given in each prescription were within recommended daily dosages. Moreover, on two occasions I went to Dr. Friedlander's office on a due diligence trip. I saw many patients waiting. Based on my due diligence trip, I had no reason in my mind to doubt or question the prescriptions he wrote, other than to call Mr. Wubbena to clarify with Dr. Friedlander whenever I had issues with dosage instructions or quantity.

c. On the issue of patients paying in cash:

I would have testified that, from the beginning, Mr. Wubbena represented to me that the only prescriptions that I would be receiving were ones where the patients were paying in cash and that they were the ones having problems with what they were being charged elsewhere. However, there was one patient that I filled for Medicaid, and the following month, the Medicaid did not go through. I called and asked if there was any insurance on file for the patient, and Mr. Wubbena sent me a fax stating that the patient did not have Medicaid anymore and would be paying in cash. The fax Mr. Wubbena sent to me was on my trial file with Mr. Sisco, my attorney. I must also point out that when Mr. Wubbena came to pick up prescriptions, he reminded me that all of the patients they were sending to me were some of their cash patients.

Pharmacies, especially independent pharmacies, have always accepted any and all forms of payments except check payment for those pharmacy that do not have check payment verification system but preferred cash in order to reduce credit payment processing fees. In this case, the only reason why I did not worry about the amount of cash was because I thought and believed that each patient prepaid to the doctor's office before the prescriptions were picked up since I did not think the doctor's office would try to pay from their pocket and then collect from the patient and since I made every effort to ensure that Mr. Wubbena was actually the

physician's assistant to Dr. Friedlander I had no reason to doubt the cash payment or suspect anything.

Every prescription bag had a computer printed receipt attached to the bag to show the patient how much they paid for their prescriptions.

Furthermore, other than what Mr. Wubbena told me the very first time he came to the pharmacy, and the day I was searching for patient Medicaid coverage, we never have any other discussion as to whether their prescription would be cash only.

d. On the issue of patients insisting on name brands because they are more popular with drug abusers;

I would have testified that this statement was misleading. Oxycodone 30 mg is a generic drug, and came in only in blue during this time period in question. So that would not have alerted me to anything, and this is part of what was described as a "red flag."

I would have been alerted if the prescription in question was Lortab 10/500mg. Lortab is a brand name for hydrocodone/Tylenol 10/500 mg also known as Hydrocodone/APAP 10/500 mg – or hydrocodone/acetaminophen 10/500 mg. The brand Lortab comes in blue and the generics of it, hydrocodone/APAP or hydrocodone /acetaminophen 10/500 mg came in blue and white colors. Some patients would try to convince pharmacists that the blue generic color made by Watson is the one that works for them and not the white color. Because I knew that the blue generic color looks exactly like the brand name, I right away would suspect abuse tendency or diversion once the patients insist or become specific they must have blue colored tablets. But this has nothing to do with oxycodone 30 mg. Oxycodone brand name is Roxicodone which I have never carried because it was very expensive. And oxycodone 30 mg again came only in

blue color during this time period and the prescriptions were being dropped off and picked up by the doctor's assistant which I verified. So there was no reason to suspect or anything that appeared strange.

e. On the issue of one person presenting multiple prescriptions in different people's names;

I would have testified that I went to Dr. Friedlander's clinic, I confirmed that Mr. Wubbena worked there, and that he was a physician's assistant, and I did not have any information indicating that there was any criminal activity with either Mr. Wubbena or Mr. Ridenour. I thought and believed that they were simply assisting the clinic's patients in getting their prescriptions. I would have testified that there is nothing at all illegal about giving a prescription to an agent of the patient. There is no such prohibition. There was nothing about my receiving prescriptions from Mr. Wubbena or Mr. Ridenour for clinic patients that was illegal, violated any regulation, or that in any manner alarmed me or made be believe that that the oxycodone was being diverted.

f. On the issue that prescriptions are presented for people who are not regular patrons;

I would have testified that there was nothing unusual about this at all. Pain clinic patients commonly go to pharmacies to fill their pain medication. I did not expect the patients of this pain clinic to bring me all of their other prescriptions. I did not expect that I would know these patients, and there was nothing about the fact that I did not have an historical relationship with these patients that alarmed me, especially since their prescriptions were coming straight from the

doctor's office. And to become regular in any pharmacy or business you have to do business with the pharmacy for the first time and go back only if you have a good experience.

g. On the issue of multiple prescriptions for the same drug presented on the same date or dated the same day by the same patient and filled back to back:

I would have testified that this was caused by a shortage of supplies from manufacturers. On January 9, 2009, Actavis Pharmaceuticals which was the largest manufacturer of oxycodone at the time shut down their plant. As a result of supply shortage the wholesaler that I was using at the time decided to allocate order quantity to their customers. The only oxycodone product they carried at this time period was one manufactured by a company called Mallinckrodt. Because I was no longer sure how much supply I could get and when I could get it, I called Mr. Wubbena and told him to have Dr. Friedlander split each patient prescription they were sending to me. I explained to him that I have a problem with supply. I instructed them to split each patient's prescription they intend to fill with me in such a way that each would not exceed the patient's usual monthly supply, for example, for a patient getting 150 tablets a month, to split it into 100 and 50 or 120 and 30 tablets. I made it clear to him that I would fill the 100 or 120 tablets script first and after I had taken care of other patients, then if I had any supply left, I would fill the balance of the script for 50 or 30 tablets, otherwise they have to take the prescription to somewhere else if I was not able to get supply. And that was the reason why the prescription number for the same patient on the same day or next was so staggered out as it showed. I also made a suggestion to write the prescription as usual and I would partial fill it, then if I was not able to get supply, Dr. Friedlander could then write prescriptions for the balance for them to try another pharmacy. My main focus as it has always been throughout my career which many people that know me including patients has always been for the best interest of the

patients. Now looking back based on this experience, would I have done it? No. I would have let them write the prescriptions as usual and partial fill them or turn it down completely on the ground of not being sure whether I would be able to get supply to complete the partial filled ones. I realize and regret that one may look at the computer record and misinterpret my good intention to mean something else. I was just trying to provide good service to these patients.

h. On the issue of a doctor was prescribing the same substance in the same quantity:

I would have testified that Dr. Friedlander's prescriptions and dosages and quantities indicated were common for a pain management clinic. None of the prescriptions exceeded recommended daily dosages or monthly supply based on daily dosage instructions given which were in line with generally recommended dosage by the manufacturer and also based on clinical literature. Dr. Friedlander also was a neurologist and certified pain management doctor so there was no reason for me to question his judgment especially since I went to the clinic and determined that he actually ran the clinic and Mr. Wubbena was his physician's assistant. In situations where a prescription was improperly written, I called Mr. Wubbena and asked to have Dr. Friedlander re-write the prescription with correct instruction or whatever I determined was wrong with the prescription. It has always been done and faxed to me and original corrected copy or copies delivered to me before or when they pick up prescriptions and the previous dropped off script that had error(s) destroyed. I put in effort to guard against diversion. I found nothing unusual or alarming throughout the time I was dealing with Mr. Wubbena and Mr. Ridenour.

i. On the issue of why I supposedly did not ask about insurance, and why I did not make any calls to the clinic to confirm the prescriptions:

I would have testified that I did. I asked about insurance and I was told that the patients were paying in cash. I mentioned in paragraph 21-c of this affidavit my effort trying to locate Medicaid coverage for a patient that had Medicaid the previous month and I was told they did not have insurance anymore. With my 20 plus years experience with retail chains when people drop off prescription whether for themselves or as an agent to the patient, the first question we asked was "do you have insurance?" Some would say yes, and some would say no and would be paying cash even in a situation where they have insurance. In fact one of the insurance cards shown during my trial was a Medicare Part A and B card which was only meant for hospital and doctor's visit and not for prescriptions. And during that time period, most independent pharmacy did not have capability to search for insurance online as they are able to do today.

As far as confirming prescriptions, I did. Anyone that has worked retail knows that when you call a doctor's office, the nurse or physician assistant is the one that will take your message and discuss with the doctor and get back with you. So, for me having Mr. Wubbena's cell phone that gave me quick access to him to facilitate communication with the doctor since I verified that Mr. Wubbena was Dr. Friedlander's assistant. As a fellow health care professional, I trusted him. I had no reason and nothing alarmed me to doubt any of the information or prescriptions that he and Mr. Ridenour were bringing and pickup up for Dr. Friedlander's patients.

j. Interview with the Agents:

I would have testified that I cooperated fully with the agent because I knew that I had done nothing wrong, I was not aware that I was being investigated. On the first day the agent came to my pharmacy, the agent told me that I was not under investigation. He gave me a list of information, the prescriptions, pickup logs, and prescription record print out that corresponds to all scripts filled for Dr. Friedlander's patients, which I provided. I would have testified that after

the agents came and requested information the first time in 2009, I sorted every record about Dr. Friedlander's patients and put them in a separate folder because we were planning to move to a new location and I wanted to be able to access them in the event that additional requests were made for that information. One of the agents testified that I was apprehensive. I was not. He said to me that I was not under investigation.

k. On the issue of what I did to confirm that the prescriptions were being dispensed for a legitimate medical purpose:

I would have testified that, in the first or second week in June 2008 Troy Wubbena came to the pharmacy sometime about late morning or early afternoon. He introduced himself, and gave me his business card. He told me that he was a physician's assistant for Dr. Friedlander, and his business card matched this introduction. His business card indicated that he was a Ph.D in some other discipline. I asked what I could help him with. He said that his clinic is looking for a pharmacy that will be filling prescriptions for their patients. He stated that they see 250 to 300 patients a month, they are open twice a week. He said that they would drop off all of the prescriptions and pick all of them up for the patients to pick up at the clinic. I asked why the patients could not bring the prescriptions by themselves and pick up by themselves, and he said that the patients keep coming back with the story that they had lost the prescriptions. He said that they had no way to verify the stories. They did not want to keep giving out duplicate prescriptions, so they were more comfortable actually handing the patient the prescription so they knew that the patient had received the prescription. He also said that many of them are complaining about the price pharmacies were charging and sometimes they have difficulty with transportation going back and forth to the pharmacy, so the doctor raised the possibility of the clinic locating a pharmacy and have the prescriptions picked up for the patients and handed to

the patients at the clinic. I told him that I could not fill pain medication for 250 – 300 patients because I would not be able to get enough supply to take care of that many patients plus the patients already coming to me. I told him that in this case, based upon what he said, I cannot accept more than 10% to 20% of his patient's load, if the patients authorized him to pick up the prescriptions for them. He said fine.

Two days later, I decided to make a trip to Dr. Friedlander's office to confirm that Troy Wubbena actually worked there. I arrived at about 8:30 a.m., but I was told by the receptionist that Dr. Troy Wubbena had not come in, so I left. Sometime that day, he either called me with the phone number I left or I called him. He asked me if I could come back that afternoon, and I said no, because I could not leave the pharmacy. But I did make another trip back to the clinic two days later on my way to work, which was about 8:30 a.m. The main reason for my trip back was to verify and be sure that Troy Wubbena actually worked at the clinic as a physician's assistant, which based on my findings, he did. He thanked me for stopping by, showed me around the clinic, took me to the back office or examination room and introduced me to Dr. Friedlander. Dr. Friedlander was trying to mix a medication or was about to draw some medications into a syringe because he had something in his hand I believed was a needle and a syringe and 2 vials of medication in front of him. Dr. Friedlander asked me if I could make a certain form of a steroid, and I told him I could not because I was not set up with a "clean room" to compound any form of injectables.

Later that day or the next day, Troy Wubbena called and said that one of his staff named Brett Ridenour would be the only one other than himself to drop off and pick up prescriptions for any of the Neurology and Pain Clinic Patients. He stated that Brett Ridenour had been to my pharmacy before, and said that I must have met him.

I would have testified to the foregoing. There was nothing about this that alarmed me.

l. On the issue of the price and increase in price:

I would have testified that my prices were always comparable to prices of other pharmacies and sometimes even less. When there was a shortage of oxycodone, prices went up. I was charging the same prices that everyone else (independent pharmacies) were charging and again sometimes less. I told Mr. Sisco before the trial that the prices went up during this period. I even urged him to make his own personal investigation about that.

m. On the issue of exchange cell phone numbers:

I would have testified that the only reason for giving cell phone was because I thought that this would facilitate communications. There was nothing in this that alarmed me.

n. On the issue of helping me unpack Oxycodone:

I would have testified that Mr. Wubbena never helped me unpack oxydocone. This never happened. He had never been been present when my order arrived. I was surprised that my attorney did not press him on this; this was simply not true. It never happened. Mr. Wubbena said that was how he saw my wholesale invoice and saw the cost or what I paid for each bottle. The only remote way Mr. Wubbena may have come up with the cost of oxycodone per bottle would be during his interview with the DEA in which he was given prescription scripts to identify according to what was on the interview report. At the back of each prescription was a sticker showing cost and retail price.

o. On the issue of delivering at parking lots.

I would have testified that this was for convenience on the occasion. I delivered prescriptions, we offered free delivery, and an actual copy of a flyer that I delivered to many

potential customers is attached. We offered free delivery. Some patients I have delivered for two years straight.

p. On Brett Ridenour's testimony:

i. I would have testified that my business was located in an office condominium complex, each was individually occupied, and my pharmacy had 1,500 square feet which exceeded state board requirements. Regarding his ridicule of my sign, the complex had a uniform sign policy in place and I complied with the sign policy. My sign cost over $2,000 to make and install.

ii. On over-the-counter products, I would have testified that there was a sign to ask the pharmacist for over-the-counter products. We were not a very busy pharmacy, and I had no technician or drug clerk, and to minimize the possibility of theft, I had to stock a small line of over-the-counter products inside the pharmacy.

iii. Mr. Ridenour was provided with computer printed receipts at all times and provided with cash register receipts. In every occasion he picked up, he paid exactly what was on the cash register printed receipts. The prices were rounded up and down to avoid having to make change.

iv. I had no idea of anything wrong since the prescriptions met the requirements.

q. On Troy Wubbena's Testimony and Government Positions:

i. I never stated to Mr. Wubbena that prescriptions would be cash only. He told me that the prescriptions would be cash, but I would have accepted insurance.

ii. As to Mr. Wubbena's claim that I only went to the clinic in late afternoon, I would have testified that pharmacy law does not allow me to close the pharmacy outside the operating hours posted, or in the case of serious emergency. Even if I had somebody working for me, which I did not, I still would not have been able to just close the pharmacy and leave the building.

iii. As to Mr. Wubbena's testimony that I had a conversation with him to drop off prescriptions when my staff was not there, I would have testified that it was not true. During the period, I never had anybody working for me except the pharmacist that worked alternate days with me and I had a floating pharmacist to cover when neither of us was available. The volume of prescriptions we were doing were not enough to hire additional help such as technicians or drug clerk. My tax record would also show that up until August 31, 2009, I had another full time job.

r. I would have testified that I took every necessary step to ensure that every prescription dropped off by Troy Wubbena or Brett Ridenour was valid. I evaluated each prescription, I checked for the necessary information, I checked for a valid DEA license number, I confirmed the original signatures, I confirmed that daily dosage requirements on prescriptions were within manufacturer's recommendation and acceptable limits.

s. I would have testified that, had I called the clinic, I would have relied on Troy Wubbena, a physician's assistant. I had no reason to doubt him and on occasion that I called, I called him on his cell phone to facilitate response back from the doctor. For example, there were a few times the dosages written were incorrect, and I called him to have Dr. Friedlander rewrite the prescriptions and fax it back to me and bring me corrected written hard copies when coming to pick up. He had also texted me correction for single prescription and brought the hard copy when picking up.

t. I would have testified that I heard that the prescriptions were pre-signed for the first time in court. I had no idea that Dr. Friedlander was pre-signing prescriptions.

u. I would have testified that when Mr. Wubbena brought me a prescription for oxycontin 80mg for a patient, I asked why Dr. Friedlander was writing oxycontin for this patient as a first line of treatment for headache instead of Fioricet. I asked for the patient's phone number and I wanted to talk with Dr. Friedlander. Mr. Wubbena said that the only reason he was using oxycontin 80mg was that it worked for the patient, but since I raised the concern, he would talk to Dr. Friedlander and address it when the patient came to pick up the medication. I told him that I did not think I had it in stock because it cost about $1,000.00 for 100 tablets, the insurance always pays less than what it costs, and it is too expensive. I told him it would cost $11 - $12 per tablet. He stated that it would be alright, that was cheaper than what he has been paying somewhere else. This was the only person he brought prescriptions for oxycontin and no one else.

v. Regarding delivery, I would have testified that I delivered to Troy Wubbena twice only, and on those two occasions, two children were in his car but did not come out of the car. My first delivery, he called me and said he was on his way. I told him that I was about to close the pharmacy, and asked him where he was. He stated on Hillsborough Avenue, I asked him where, and he told me. I said to him that I could not wait for him because I have another patient waiting for me, and I could bring his bags with me and meet him at the corner of Hillsborough and Memorial Highway and I would call him when I get close since I was going to pass there on my way home. When I got close, I called him, and he told me he was in a Walgreen's parking lot. I met him, I gave him the pick-up slip to sign, and he paid me and I left. The second and last time occurred on a Saturday afternoon. About 10:00 a.m., I believe I called him to remind him to pick up prescriptions before 2:00 p.m. when I was calling other patients, since we close at 2:00 p.m. on Saturdays. Mr. Wubbena told me he could get to the pharmacy by 1:00 p.m. At about 12:45 p.m., he had not come and I called him. He said he was in Lakeland. By 1:30 p.m. he had not come, and I called again. I told him that I work seven days a week and on Saturday, I like to close at exactly 2:00 p.m. I further said to him that I had a commitment in Orlando and I had to leave at 2:00 p.m. He told me that he was on the interstate in Lakeland coming to Tampa so I said to him that I would not wait for him, I would bring his bags and meet him at the Thonotosassa-Sefner exit. We did not meet at a truck stop as Mr. Wubbena claimed, and I did not just leave my pharmacy to meet him. The deliveries I made him were made out of genuine customer service from my heart as I have always

done for other people and this one off Interatetate-4 was because I was heading that way. I never met Mer. Wubbena in any other place not even for breakfast.

w. On the issue of Mr. Wubbena's testimony about how much he paid and receipts: I would have testified that Mr. Wubbena did not pay me anything more than what was on the computer printed receipt attached to each bag of prescriptions he picked up. As a result of occasional change issue, payment would have been rounded up or down. Any money I received from Mr. Wubbena was for the prescriptions he picked up. He never did me any favor either in cash or in kind. Each prescription he picked up had computer printed receipt attached to it that show how much he paid for each prescription which corresponded to what was in the computer. I would also have testified that contrary to Mr. Wubbena's claim that I met him in Lakeland and some other places, that was completely false. I never met with Mr. Wubbena, other than the times he picked up prescriptions in the pharmacy, his initial visit to the pharmacy, my due diligence trip to the clinic and on the two occasions I delivered to him out of convenience and circumstances.

22. At sentencing, the Court stated to me that the evidence of my guilt was overwhelming. This is at the sentencing transcript, page 61. However, my attorneys told me on December 11, 2012, when telling me that I should not testify, that the case was in our favor and there was no evidence against me. As I stated at the sentencing, I am innocent and I should have testified. Had I known that the Court had already stated that there was sufficient evidence to present the case to a jury, and sufficient evidence to give the deliberate ignorance instruction and convict me because I did not ask enough questions, I would not have given up my right to testify.

23. I did not knowingly and willingly give up my right to testify. Instead, I gave up my right to testify without knowing that the jury would have no evidence as to my actual belief that I had done nothing wrong or illegal.

24. My entire life has been ruined by this case. I am an honest man, I worked very hard all of my life, I have served very honorably in various important positions with different organizations. People looked up to me because of my principles and moral ethics. I have a beautiful family, and I was always honest and professional in my business dealings. I was never told by Mr. Ridenour or Mr. Wubbena that they were involved in any illegal activity, as they stated in court, but more importantly, I never had any belief that there was anything suspicious about their activities. At all times, I actually believed that I was filling legitimate prescriptions for a legitimate medical purpose.

25. I do not agree with all of Professor Doering's statements. Those opinions are his, but his opinions are not written down anywhere in a location where I could learn what supposedly was criminal activity versus non-criminal activity. All of the activity that I am accused of doing is totally legal, to my knowledge. There is no law against accepting cash, delivering prescriptions, filling prescriptions as I filled them, delivering the prescriptions to an agent for the patient, or any of the other actions I took. I understand that Professor Doering contends that they were "red flags" and indicators of diversion. There is no reference book or other reference authority, to my knowledge, where I could refer to any documentation to learn that Professor Doering's opinions are supposed "red flags" or that some combination of them could result in my being convicted of criminal conspiracy if it turns out that the other individuals involved are diverting controlled substances. All of the "red flags" identified by Professor Doering are not in any administrative code, statute, or other reference where an attorney could

tell me what is criminal and what is not criminal based on "red flags." I have no way, to my knowledge, of learning the details of practice that Professor Doering itemized that resulted in my conviction. My understanding is that, if I am alerted to criteria that may cause me to question if a prescription was legitimate or for a legitimate purpose, my obligation was to confirm that the prescription was legitimate. I had conducted a due diligence trip to the clinic and I was satisfied that the prescriptions were legitimate. I obtained written authorizations from patients from Mr. Wubbena authorizing me to deliver the prescription to Mr. Wubbena, and I confirmed the prescriptions with Mr. Wubbena, who was the physician's assistant. I did not think that Mr. Wubbena, a physician's assistant, would be involved in criminal activity. Had I known that legal activity should be viewed as suspicious and an indicator of diversion of controlled substances, resulting with me being charged with a criminal offense, I would not have done it. For example, had I known that the legal delivery of oxycodone to Troy Wubbena or Brett Ridenour as an agent for a patient of a clinic, although legal, could be construed as a "red flag" that Troy Wubbena or Brett Ridenour may be involved in illegally diverting the controlled substances, resulting in my being convicted of conspiracy, I would not have done it. Had I known that regularly accepting cash payments from an agent for a patient, although legal, could be construed as a "red flag" that Troy Wubbena or Brett Ridenour may be involved in illegally diverting the controlled substances, resulting in me being convicted of conspiracy, I would not have done it. Had I known that dispensing oxycodone to a patient who did not reside near my pharmacy, or in an quantity that other patients received from the same doctor, or any of the other "red flags" identified by Professor Doering, although legal, could be later identified by an expert witness to be indicators of diversion of controlled substances and could result in my being convicted of conspiracy, I would not have done them. I did not have a way to conform my behavior to the

criminal standards identified by Dr. Doering, because those standards do not exist in any ascertainable form while I was dispensing the prescriptions for which I was ultimately convicted to my knowledge. Dr. Doering's standards are not taught, to my knowledge, in any course, written down by any agency, or otherwise identified anywhere. I was convicted because Professor Doering identified "red flags" that I did not know existed, and could not be expected to know existed, and because Professor Doering's personal standards of practice were different that the law requires. I am required to obtain identification of patients and verify the prescriptions; the law does not require me to stop dispensing prescriptions that I believe are legal and for a legitimate medical purpose out of fear that my actions may be misconstrued and I may be convicted of conspiracy.

26. I do not believe that I should be charged with this crime because there is no way that I can learn of the behavior that constitutes the crime for which I was convicted before I was charged with the crime and the prosecutor finds an expert who reviews what I did and states whether or not, in the expert's opinion, I should have been aware of indicators of diversion. There was nothing that I could have done to avoid this conviction other than refuse to do lawful business because of "red flags," indicators of diversion, that I did not know existed at the time. However, if the charges are not dismissed, I request a new trial to allow me to testify to the jury and explain my position on all of these facts. I did not willfully and knowingly give up my right to testify with the understanding of the charges against me and the defenses to the charges, the primary one being my actual belief that I was not engaged in a conspiracy, and I ask the Court to grant me a new trial to explain to the jury that I did nothing wrong, and that I actually believed that the prescriptions were legitimate and I was dispensing the prescriptions for a legitimate medical purpose.

I, Emmanuel I. Mekowulu, having read and understood the foregoing, declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Emmanuel I. Mekowulu

State of South Carolina

County of (Insert Name of County): Hampton

Before me, the undersigned notary public, did appear this date Emmanuel I. Mekowulu, who did execute this document in my presence. Subscribed, sworn, and acknowledged before me this 13th day of March, 2015.

( ) Personally Known

(X) Identification: Federal ID

Notary Public Talitha N. Bing Talitha N. Bing

Commission Expires: 08/29/2015

(Seal)

FELKY PRESCRIPTIONS
15429 North Florida Ave
Tampa, Florida 33613
Phone (813) 264-0777
Fax (813) 264-0329

NO MORE RUNNING AROUND TOWN LOOKING FOR YOUR MEDICATIONS. COME AND EXPERIENCE OUR QUALITY AND PERSONALIZE SERVICE TAILORED TO YOUR NEEDS. "IF WE DO NOT HAVE WHAT YOU NEED, WHEN WE GET IT THE NEXT DAY WE DELIVER IT TO YOUR HOUSE UNLESS OTHERWISE REQUESTED"

BRING THIS COUPON WITH YOUR PRESCRIPTION(S) AND GET

$20.00 OFF
OR
FREE IF LESS.

OFFER GOOD TILL 6/30/08

2M

Exhibit B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

V. Case No. 8:12-cr-00170-JDW-MAP

EMMANUEL I. MEKOWULU

_____/

AFFIDAVIT OF ODINI R. MEKOWULU

I, Odini R. Mekowulu, hereby swear, affirm, acknowledge and state:

1. My name is Odini R. Mekowulu, and I have personal knowledge of all facts set forth herein. I reside at 12271 Lexington Park Drive, Tampa, FL 33626.

2. The Defendant, Emmanuel I. Mekowulu, is my husband.

3. Emmanuel Mekowulu came home on the afternoon of Thursday, December 6, 2012, and told me that the trial was going to resume the following week, and he would be testifying, and he would prepare that weekend to testify. He said that he was going to tell the jury about what he knew and what happened.

4. On Friday, December 7, 2012, through Monday, December 10, 2012, Emmanuel Mekowulu prepared to testify. I saw him writing and reading, and I asked him what he was going to say, and he told me that he was not supposed to discuss his case with me. On the morning of Tuesday December 11, 2012, as we were preparing to go to Dale Sisco's office before trial, he told me that he was ready to testify.

5. On the morning of Tuesday, December 11, 2012, I accompanied my husband to the office of his attorney, Dale Sisco, Esq. Mr. Sisco took Emmanuel Mekowulu into a separate room while I waited. They came out, and I heard Emmanuel say to Mr. Sisco that he wanted to

testify. Mr. Sisco told him that he was not going to testify. Mr. Sisco stated that no jury would convict anyone with this kind of evidence because there was nothing that showed Emmanuel had done anything wrong.

6. I went to court with Emmanuel Mekowulu and I heard him state to the Judge that he was not going to testify.

7. After he was convicted, Emmanuel Mekowulu told me that he had paid the attorneys and he needed to follow their advice.

I, Odini R. Mekowulu, having read and understood the foregoing, declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Odini R. Mekowulu

State of Florida
County of Pinellas
Before me, the undersigned notary public, did appear this date Odini R. Mekowulu who did execute this document in my presence. Subscribed, sworn, and acknowledged before me this 10 day of May, 2015.
(X) Personally Known
( ) Identification:_____

Notary Public
Commission Expires:
(Seal)

Notary Public State of Florida
Donald J Schutz
My Commission FF 026459
Expires 06/11/2017

Exhibit C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

V. Case No. 8:12-cr-00170-JDW-MAP

EMMANUEL I. MEKOWULU

_____/

AFFIDAVIT OF DR. MATTHEW C. LEE, M.D.

I, Dr. Matthew C. Lee, hereby swear, affirm, acknowledge and state:

1. My name is Dr. Matthew C. Lee, and I have personal knowledge of all facts set forth herein. My Curriculum Vitae is attached hereto.

2. By letter dated March 23, 2015, I was retained by Donald J. Schutz, Esq., counsel for Emmanuel I. Mekowulu, to review matters relating to the conviction of Emmanuel I. Mekowulu. I was provided with the following documents to review:

a. Affidavit of Emmanuel Mekowulu dated March 13, 2015.

b. Volume IV, Pages 1-163, of the transcript of the trial in this case on March 6, 2012, which sets forth the testimony of Professor Paul Louis Doering (hereinafter referred to as "Professor Doering's Testimony").

c. The opinion of the Court of Appeals for the Eleventh Circuit affirming Mr. Mekowulu's conviction.

d. Florida Administrative Code 64B16-27.831 Standards of Practice, copy attached.

3. The scope of my review was to answer the following questions:

a. During the period June 2008 – March 2009, were pharmacists such as Emmanuel I. Mekowulu on notice of the "red flags" as testified by Professor Doering in 2012 as criteria in determining whether a prescription was being distributed not for a legitimate medical purpose and not in the usual course of professional practice?

b. Was my availability as a testifying expert searchable via the internet in 2012, and if asked and retained, would I have been willing to testify at the 2012 trial of Emmanuel Mekowulu to the opinions set forth in this affidavit?

4. My opinions, in answering the questions asked, based on my review of the materials set forth in this affidavit, are as follows:

5. Question Number 1: During the period June 2008 – March 2009, were pharmacists such as Emmanuel I. Mekowulu on notice of the "red flags" as testified by Professor Doering in 2012 as criteria in determining whether a prescription was being distributed not for a legitimate medical purpose and not in the usual course of professional practice?

Answer: Florida Administrative Code 64B16-27.831, "Standards of Practice for the Dispensing of Controlled Substances for Treatment of Pain," in 2008 – 2009, copy attached, listed 5 criteria which, "shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose," which are:

(a) Frequent loss of controlled substance medications,
(b) Only controlled substance medications are prescribed for a patient,
(c) One person presents controlled substance prescriptions with different patient names,
(d) Same or similar controlled substance medication is prescribed by two or more prescribers at same time,
(e) Patient always pays cash and always insists on brand name product.

These criteria are intended to help identify patients that are diverting prescriptions for controlled substances, not practitioners, and cannot be extrapolated or applied to practitioners who may be diverting controlled substances.

This administrative code provision further provides:

> (3) If any of the criteria in (2) is met, the pharmacist shall:
> (a) Require that the person to whom the medication is dispensed provide picture identification and the pharmacist should photocopy such picture identification for the pharmacist's records. If a photocopier is not available, the pharmacist should document on the back of the prescription complete descriptive information from the picture identification. If the person to whom medication is dispensed has no picture identification, the pharmacist should confirm the person's identity and document on the back of the prescription complete information on which the confirmation is based.
> (b) Verify the prescription with the prescriber. A pharmacist who believes a prescription for a controlled substance medication to be valid, but who has not been able to verify it with the prescriber, may determine not to supply the full quantity and may dispense a partial supply, not to exceed a 72 hour supply. After verification by the prescriber, the pharmacist may dispense the balance of the prescription within a 72 hour time period following the initial partial filling, unless otherwise prohibited by law.

Professor Doering was cautioned at Page 8, line 23 – 25, that the court had disallowed opinions about the guilt or innocence of this defendant, but at Page 9 was allowed to testify as to "red flags" that would put a pharmacist on alert that the purported prescriptions may be illegitimate. A "red flag" is a warning that some action or pattern is consistent with suspicious activity and warrants closer attention, or additional verification procedures, to verify the legitimacy of the prescription. A "red flag" is not indicative of medication diversion.

On Pages 34-35, Professor Doering testified to a "red flag" of what he calls "pattern prescribing," for different patients, and he used the example of Oxycodone 30 being prescribed for different patients like a "rubberstamp." During the period 2008 – 2009, the fact that a physician prescribes the same prescription to multiple patients was not a listed criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a

prescription was issued for a legitimate medical purpose. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to question whether a prescription was issued for a legitimate medical purpose.

On Page 36, Professor Doering was presented with the scenario that a pharmacy was presented with nearly 350 prescriptions for Oxycodone 30s during a six or seven month period, and during that same period, other doctors whose prescriptions were being presented were 80, then 50, and all the way down to five, six, or seven. Professor Doering testified that would be strongly suggestive of diversion. During the period 2008 – 2009, the fact that a physician prescribes a higher number of Oxycodone prescriptions than other physicians was not a listed criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to question whether a prescription was issued for a legitimate medical purpose.

On page 37, Professor Doering testified that a red flag is payment in cash, which was a listed criteria in the Florida Administrative Code. As stated by Emmanuel Mekowulu in his affidavit, in my opinion and experience, independent pharmacies often both deliver prescriptions and accept cash payments. Where a patient regularly pays cash for prescriptions of controlled substances, that is listed as a criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose.

On page 38, Professor Doering testified that people presenting prescriptions from sites that are distant from the pharmacy, with the availability of closer pharmacies and the price of

gasoline, is an indicator of diversion. During the period 2008 – 2009, the fact that patients had the availability of closer pharmacies was not a listed criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to question whether a prescription was issued for a legitimate medical purpose.

On page 38 Professor Doering was presented with a hypothetical where one individual brings in multiple prescriptions in other patients names. Professor Doering testified at Page 39 Line 11:

> Well, that not only would be an indicator, that to me would be a deal breaker because that's simply not the way that controlled substance prescriptions are presented and not the way that pharmacists dispense them.

Assuming that Professor Doering meant, by the term "deal-breaker," that the pharmacist was prohibited from dispensing controlled substances to one person who presents controlled substance prescriptions with different names, the Florida Administrative Code does list as a criteria for a pharmacist to question whether a prescription was issued for a legitimate medical purpose: "(c) One person presents controlled substance prescriptions with different patient names." However, as stated earlier, the pharmacist is then required to comply with the verification procedure set forth in the Administrative Code section and the pharmacist is not prohibited from filling the prescription. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to refuse to fill the prescription, assuming that is what Professor Doering meant by the term "deal-

breaker," since the Florida Administrative Code specifically states that the pharmacists requirement is to comply with the verification procedures set forth in the regulation.

At Page 39, Line 16, Professor Doering was presented with the scenario that combined multiple prescriptions for patients with far distance addresses being presented by one person, Professor Doering testified:

> I can't comtemplate any legitimate reason that may be. I mean, that in and of itself would be a deal breaker for me.

I would agree with Professior Doering's testimony if it was the patients themselves presenting the prescriptions, however, this is not the case. It is not uncommon for patients to travel distances to see a doctor, particularly a specialist. As well, "far distance" is referring to the when pharmacy is a "far distance" from the prescribing pratitioners office, and the patients address. Which is not the case here, since the pharmacy is located near the prescribing practitioner.

As stated earlier, during the period 2008 – 2009, the criteria of far distance addresses was not a criteria for a pharmacist to question whether a prescription was issued for a legitimate medical purpose listed in the Florida Administrative Code. The criteria of one person presenting prescriptions for multiple persons (in particular when the "one person" is an agent of the provider) required the pharmacist to comply with the verification procedures set forth in the Administrative Code but did not require the pharmacist to refuse to fill the prescriptions. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to refuse to fill the prescription, assuming that is what Professor Doering meant by the term "deal-breaker."

On page 41-42, Professor Doering testified:

> In fact, on the labels of controlled substances, there's lettering that says it's a crime to transfer the medication from anyone other than to whom it was filled.

Assuming that Professor Doering meant that it is a crime for a pharmacist to fill a prescription presented by someone other than the patient, as stated earlier, the Florida Administrative Code did list this as a criteria for a pharmacist to question whether a prescription was issued for a legitimate medical purpose, but the required conduct of the pharmacist was to comply with the verification procedures set forth in the Administrative Code. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice that, as stated in the Florida Administrative Code, where "One person presents controlled substance prescriptions with different patient names," was a crime, as opined by Professor Doering, assuming that is the conduct that Professor Doering was referring to, because the Florida Administrative Code lists that criteria as a criteria that requires a pharmacist to question whether the prescription was issued for a legitimate medical purpose and requires compliance with the verification procedures set forth in the code section.

At page 48, Professor Doering discusses his Exhibit 69, which is a spreadsheet. I have not reviewed the spreadsheet and I am not commenting on the testimony relating to the spreadsheet at this time.

At page 52, Professor Doering was presented the scenario where a person presenting multiple prescriptions in multiple names from multiple different people and has permission slips from each one of the people. Professor Doering testified:

> Well, frankly, I would be flabbergasted. I've never in 40 years of being a pharmacist experienced anything such as that. I—from a pharmacist's perspective, I wouldn't honor that because I can't think of a valid reason for that to happen.

Professor Doering testified "in 40 years being a pharmacist", not practicing as a pharmacist, because the greater proportion of Professor Doering's experience is in academia, and not clinical practice. Practices taught academically cannot reliably be extrapolated to every situation encountered in clinical practice. During the period 2008 – 2009, the fact that a person presenting prescriptions for other individuals and also provided a written permission slip for the pick-up of the prescription was not a listed criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice of this criteria as a requirement to question whether a prescription was issued for a legitimate medical purpose. In my opinion, the pharmacist's receipt of a permission slip to allow a third-party to pick up a prescription does not require the pharmacist to refuse to honor it as testified by Professor Doering.

On Page 53, Professor Doering, as I understand his testimony, Professor Doering testified that a connection through blood or through marriage is required for a person to pick up a prescription for another person. If that is what he was attempting to claim, in my opinion, that is incorrect.

On Page 54, Professor Doering was presented a scenario where one person signed a signature log for different people, and he testified at line 23, "Well, that's an indicator of diversion." During the period 2008 – 2009, the execution of the signature log by a person picking up the prescription for someone else is not a listed criteria in the Florida Administrative

Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. The criteria of a person presenting prescriptions for other individuals was a listed criteria in the Florida Administrative Code as a criteria that shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose as discussed earlier, requiring the pharmacist to comply with the verification procedures of set forth in the Florida Administrative Code. As well, this would not apply when the individual is an agent of the practitioner. In my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not be deemed to be on notice that a person signing a signature log is a criteria, but was on notice that a person picking up prescriptions for others is a criteria that requires the pharmacist to question whether a prescription was issued for a legitimate medical purpose, but he was required to comply with the verification procedures set forth in the Florida Administrative Code and was not required to refuse to issue the prescription.

On Page 55, Professor Doering was presented the scenario where there are numerous prescriptions for Oxycodone to numerous people and there is no corresponding log sign-out sheet. Professor Doering testified that was a violation of the law, and an indicator that something is going on that would aid or abet a diversion of drugs. A sign-out sheet is maintained by the pharmacist for insurance companies, and the lack of a sign-out sheet could not be a criteria putting the pharmacist on notice of possible diversion, since there is no legal requirement for pharmacist's to maintain a signature log for prescriptions picked up, or for patients to sign for prescriptions.

For the foregoing reasons, in my opinion, Professor Doering was allowed to testify to criteria that were, in his opinion, "red flags" that should place a pharmacist on notice of possible diversion, but in my opinion, during the period 2008 – 2009, Emmanuel I. Mekowulu should not

be deemed to be on notice of all of the criteria opined by Professor Doering as I explain in this affidavit. During the period 2008-2009, Professor Doering's opinion that he testified at trial in 2012 was not incorporated into the Florida Administrative Code, and to my knowledge by 2009 Professor Doering had not published his opinions as he testified to them in 2012 in a clear and tangible form that would allow a pharmacist such as Emmanuel Mekowulu to be placed on notice of Professor Doering's opinion that a pharmacist such as Emmanuel Mekowulu would be expected to conform his behavior and practice to Professor Doering's opinion in order to avoid indictment and conviction of conspiracy to distribute oxycodone not for a legitimate medical purpose and not in the usual course of professional practice.

6. **Question 2: Was your availability as a testifying expert searchable via the internet in 2012, and if asked and retained, would you have been willing to testify at the 2012 trial of Emmanuel Mekowulu to the opinions set forth in this affidavit?**

Answer: Yes, I was available to act as an expert witness in 2012, my availability was generally obtainable through common internet searches, I was not contacted by attorneys representing Emmanuel Mekowulu in 2012, and had I been contacted and retained, I would have testified at the trial of Emmanuel Mekowulu in 2012 to the matters set forth in this affidavit.

7. I have been paid $2,000.00 for the review of materials and the execution of this affidavit. I expended approximately four (4) hours through the execution of this affidavit.

Further, Affiant Sayeth Not.

I, Dr. Matthew C. Lee, having read and understood the foregoing, hereby swear, affirm, and acknowledge that the same is true and correct to the best of my knowledge and belief.

CHARLOTTE S. WILSON
Notary Public
Commonwealth of Virginia
247418
My Commission Expires Aug 31, 2017

Dr. Matthew C. Lee, MD, RPh. MS

State of Virginia

County of Richmond

Before me, the undersigned notary public, did appear this date Dr. Matthew C. Lee, who did execute this document in my presence. Subscribed and Sworn to before me this 3 day of April, 2015.

(✓) Personally Known

(✓) Identification VADC

Notary Public

Commission Expires: August 31, 2017

4/8/2014

CURRICULUM VITAE

MATTHEW C. LEE, MD, RPH, MS

PHYSICIAN,PHARMACIST, PHARMACOLOGIST & TOXICOLOGIST

5700 Old Richmond Avenue
Suite A-5
Richmond, VA 23226
Contact: 804.358.1492 Fax: 804.358.1491
eMail: mlee@eLEEtePhysicians.com

I. EMPLOYMENT

Physician. eLEEte Physicians, LLC, Primary Care Practice. Primary care physician (PCP). Primary Care medical practice, diagnose and treat general medical conditions of adult patients 18 years old and over.

Pharmacist. Parallon Solutions. Provide patient care activities to ensure safe and effective drug therapy. Accurately enter orders in the computer and timely manner. Screen for drug interactions, allergies, or duplications, appropriate diagnosis, renal and liver function prior to order entry. Investigate and report adverse drug events and medication incidents. Review and interpret all physician orders received using patient profiles. Monitor for incompatibilities, concentration and rate of intravenous drugs. Assess orders for age specific appropriateness from neonatal through geriatric. Dissemination of drug information.

Medical Examiner for the Central District of the Office of the Chief Medical Examiner for the jurisdictions of Chesterfield, Hanover and Henrico counties and Richmond city. Appointed by the Chief Medical Examiner for a three year term, until September 30, 2014.

Veterans Evaluation Services Provider. Perform Forensic Legal Examinations of U.S. Military Veterans evaluating and assessing the extent of functional limitations or impairment related to a claimed condition.

Physician. Apple Mobile Medical. Occupational Health Physician at Teva Pharmaceuticals. Perform annual Employee Health Surveillance and pulmonary assessments on employees required to wear respirators. One to two weeks per year.

II. WORK HISTORY:

Physician. United States Department of Defense, Military Entrance Processing Station (MEPS), Fort Lee Virginia. Physician, perform physicals on new military recruits to determine medical qualification as required for entrance into any branch of the U.S. Military as defined by the protocols established the U.S. Department of Defense.

Physician. Apple Mobile Medical Occupational Health. Perform Personal Health Assessments on Pre- and Post- deployment soldiers in the United States National Guard.

Physician. Locum Tenens in Occupational Health and Family Practice for Jackson and Coker.

Zelda West Johnson, MD and Associates Family Practice- Physician in Family Practice.

Pharmacist, Walnut Hill Pharmacy, Petersburg, VA

Pharmacist; Poplar Springs Hospital; Petersburg, VA.

Pharmacist for Wal-Mart pharmacy, as needed throughout Virginia

Pharmacy Manager; Wal-Mart Pharmacy; Tarboro, NC.

Lab Technician; Medical College of Virginia, Department of Pharmacology; Richmond, VA.

Pharmacist; Prince George Pharmacy; Prince George, VA.

III. EDUCATION AND TRAINING

Undergraduate - Barton College (previously Atlantic Christian College). September 1988 – May 1990.

Undergraduate - Virginia Commonwealth University, **Bachelor's of Science in Chemistry**. August 1992.

Professional - Medical College of Virginia, School of Pharmacy, **Bachelor's of Science in Pharmacy (B.Pharm)**. May 1995.

Graduate - Virginia Commonwealth University Department of Pharmacology/Toxicology. **Master's of Science in Pharmacology and Toxicology.** September 1997 – August 1999.
Thesis: The Role of several kinases in mice tolerant to delta-9 Tetrahydrocannabinol.

Doctoral - Virginia Commonwealth University School of Medicine, **Doctor of Medicine (M.D.).** May 2004.

Post-Doctoral - Internship in Internal Medicine, Virginia Commonwealth University Medical Center. July 2004 – June 2005.

IV. CERTIFICATIONS AND LICENSURE

Musculoskeletal Exam and Treatment Techniques, American College of Occupational and Environmental Medicine.

Medical Review Officer, Certified by American College of Occupational and Environmental Medicine.

Commonwealth of Virginia, license to practice medicine and surgery, since 2005

Commonwealth of Virginia, license to practice pharmacy, since 1995

State of North Carolina license to practice pharmacy, since 1999

Commonwealth of Kentucky license to practice pharmacy, since 2013

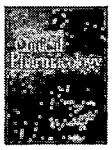
V. APPOINTMENTS

Medical Examiner for the Central District of the Office of the Chief Medical Examiner for the jurisdictions of Chesterfield, Hanover and Henrico counties and Richmond city. Appointed by the Chief Medical Examiner for a three year term, until September 30, 2014.

National Association of Boards of Pharmacy Licensure Exam (NABPLEX) question writer.

National Academy of Sciences, Science & Entertainment Exchange Consultant.

CBS *Criminal Minds.*



Journal of Clinical Pharmacology Peer Review Board.

DynaMed Editorial Team Reviewer. http://www.ebscohost.com/dynamed.

VI. PUBLICATIONS AND RESEARCH PRESENTATIONS

Medical Marijuana in the Workplace. A White Paper Prepared by the ACOEM Pharma and MRO Sections. ACOEM Position Paper on Medical Marijuana. Reviewer/editor.

ACOEM Medical Review Officer Review committee for the proposed rule to establish FMCSA Clearinghouse for drug and alcohol test results.

Two Cases of Alleged Dilaudid® Overdose: Sometimes it is, sometimes it is not. **Matthew C. Lee, MD, RPh, MS.** June 2013. www.HGExperts.com, www.JurisPro.com, www.ExpertPages.com.

DynaMed Editorial Team. **Lee, M** (Reviewer). Neuroleptic Malignant Syndrome. Last updated 2012 05 01. Available from *DynaMed*: http://www.ebscohost.com/dynamed.

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http://www.ebscohost.com/dynamed.

Assessment of Marijuana Intoxication. **Matthew C. Lee, MD, RPh, MS.** October 4th, 2010. www.HGExperts.com, and www.ExpertPages.com.

Quantum Free Will. **Matthew Lee.** *New Scientist.* September 1st-7th, 2007; 195(2619):25. http://www.newscientist.com/article/mg19526195.100-quantum-free-will.html

The Role of Several Kinases in Mice Tolerant to Delta-9 Tetrahydrocannabinol. **M. Lee,** D. Stevens, S. Welch. *Journal of Pharmacology and Experimental Therapeutics.* 2003 May; 305(2):593-9. http://jpet.aspetjournals.org/content/305/2/593.full.pdf+html

The Effects of Blocking Several Kinases in Mice Tolerant to Δ9-THC. **Matthew C. Lee,** David L. Stevens and Sandra P. Welch. Virginia Academy of Sciences May 1999.

Reversing Δ9-THC Antinociceptive Tolerance by Inhibiting the Phosphorylation of the CB1 Receptor. **Matthew C. Lee,** David L. Stevens and Sandra P. Welch. FASEB, 1999.

The Role of Several Kinases in Mice Tolerant to Δ9-THC. **Matthew C. Lee,** David L. Stevens and Sandra P. Welch. International Cannabinoid Research Society, 1999.

VII. HONORS AND AWARDS

Distinguished Service Award. Virginia Commonwealth University.

University Leadership Award. Virginia Commonwealth University.

Local Association **President's Award.** Virginia Pharmacist's Association.

Professionalism Award. American Pharmaceutical Association/McNeil Consumer Products.

Allen and Hanbury's **Pride in Pharmacy Scholarship Award.**

VIII. VOLUNTEER ACTIVITIES

Physician Volunteer, Fan Free Clinic, Richmond, VA.

Foundations of Clinical Medicine Assistant Instructor.

Professionalism Workshop Group Leader.

Virginia Pharmacist's Association Board of Directors.

Speaker's Bureau for the Pitt County (North Carolina) AIDS Service Organization (PICASO).

IX. PROFESSIONAL MEMBERSHIP

American College of Clinical Pharmacology

American College of and Occupational and Environmental Medicine

American College of Forensic Examiners Institute

American Medical Association

American Pharmacists Association

Medical Society of Virginia

American Society of Pharmacy Law

Richmond Academy of Medicine

64B16-27.831 Standards of Practice for the Dispensing of Controlled Substances for Treatment of Pain.

(1) An order purporting to be a prescription that is not issued for a legitimate medical purpose is not a prescription and the pharmacist knowingly filling such a purported prescription shall be subject to penalties for violations of the law.

(2) The following criteria shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose:

(a) Frequent loss of controlled substance medications,

(b) Only controlled substance medications are prescribed for a patient,

(c) One person presents controlled substance prescriptions with different patient names,

(d) Same or similar controlled substance medication is prescribed by two or more prescribers at same time,

(e) Patient always pays cash and always insists on brand name product.

(3) If any of the criteria in (2) is met, the pharmacist shall:

(a) Require that the person to whom the medication is dispensed provide picture identification and the pharmacist should photocopy such picture identification for the pharmacist's records. If a photocopier is not available, the pharmacist should document on the back of the prescription complete descriptive information from the picture identification. If the person to whom medication is dispensed has no picture identification, the pharmacist should confirm the person's identity and document on the back of the prescription complete information on which the confirmation is based.

(b) Verify the prescription with the prescriber. A pharmacist who believes a prescription for a controlled substance medication to be valid, but who has not been able to verify it with the prescriber, may determine not to supply the full quantity and may dispense a partial supply, not to exceed a 72 hour supply. After verification by the prescriber, the pharmacist may dispense the balance of the prescription within a 72 hour time period following the initial partial filling, unless otherwise prohibited by law.

(4) Every pharmacy permit holder shall maintain a computerized record of controlled substance prescriptions dispensed. A hard copy printout summary of such record, covering the previous 60 day period, shall be made available within 72 hours following a request for it by any law enforcement personnel entitled to request such summary under authority of Section 465.017(2), F.S. Such summary shall include information from which it is possible to determine the volume and identity of controlled substance medications being dispensed under the prescription of a specific prescriber, and the volume and identity of controlled substance medications being dispensed to a specific patient.

(5) Any pharmacist who has reason to believe that a prescriber of controlled substances is involved in the diversion of controlled substances shall report such prescriber to the Department of Health.

(6) Any pharmacist that dispenses a controlled substance subject to the requirements of this rule when dispensed by mail shall be exempt from the requirements to obtain suitable identification.

Specific Authority 465.005, 465.0155 FS. Law Implemented 456.072(1)(i), 465.0155, 465.016(1)(i), (o), 465.017(2) FS. History–New 8-29-02, Amended 2-24-03, 11-18-07.

Exhibit D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

V. **Case No. 8:12-cr-00170-JDW-MAP**

EMMANUEL I. MEKOWULU
_____/

AFFIDAVIT OF LORI D. PALMIERI, ATTORNEY AT LAW

I, Lori D. Palmieri, hereby swear, affirm, acknowledge and state:

1. My name is Lori D. Palmieri, and I have personal knowledge of all facts set forth herein. I am an attorney licensed to practice law in the State of Florida since 1990, and I am Board Certified by the Florida Bar in Criminal Trial Law since 2000. I am currently engaged in the private practice of law in the State of Florida as a criminal defense attorney in both federal and state courts, and I previously was a prosecutor with the Hillsborough State Attorney's Office, the Office of Statewide Prosecution, and the Pinellas-Pasco State Attorney's Office. I served on The Florida Bar Criminal Certification Committee from 2005-2011 and as the Chair from 2009 - 2011. I am AV- rated by Martindale-Hubbell.

2. I was retained by Donald J. Schutz, Esq., counsel for Emmanuel I. Mekowulu, to review matters relating to the conviction of Emmanuel I. Mekowulu. I was provided with the following documents to review:

a. Affidavit of Emmanuel Mekowulu dated March 13, 2015.

b. Affidavit of Dr. Matthew Lee dated April 3, 2015.

c. Complete trial transcript of United States v. Emmanuel Mekowulu

d. Copies of case law.

e. The opinion of the Court of Appeals for the Eleventh Circuit affirming Mr. Mekowulu's conviction.

f. Florida Administrative Code 64B16-27.831 Standards of Practice, copy attached.

g. Report of Paul L. Doering, M.S., Consultant Pharmacist, dated April 17, 2012.

3. The scope of my review was render an expert opinion as a board certified criminal trial attorney on whether I believe that Dale Sisco, Esq., and Frank Louderback, Esq., rendered ineffective assistance of counsel in their representation of Emmanual I. Mekowulu in this case on the following issues:

a. Failure to Object to the Testimony of Professor Doering when Professor Doering testified that certain actions were illegal and/or violations of law.

b. Failure to Properly Counsel Emmanuel Mekowulu in Recommending that Emmanuel Mekowulu Should Not Testify at Trial and Failure to Explain the Deliberate Ignorance Instruction To Emmanuel Mekowulu Before Emmanuel Mekowulu Represented to the Court that He Would Not Testify.

c. Failure to retain and introduce the testimony of an expert in pharmacy such as the expert retained for purposes of this motion, Dr. Matthew Lee.

4. My opinion is that Frank Louderback, Esq., and Dale Sisco, Esq., failed to render the effective assistance of counsel to Emmanuel Mekowulu in this case, as follows:

a. **Question Number 1: Did Attorneys for Emmanuel Mekowulu Render Ineffective Assistance of Counsel During the Testimony of Professor Doering?**

Professor Doering testified on December 6, 2012, trial transcript volume IV. At page 8, he was cautioned that the Court had disallowed any opinions about the ultimate guilt or

innocence of the Defendant. At page 9, Professor Doering stated that he would stay within those boundaries. At page 16, he states:

> " . . . pharmacists are trained and, in fact, I lecture to them about things that they should do to make sure that drugs don't get into the hands of people that don't need them or shouldn't be taking them."

This testimony would indicate to a reasonable person that all pharmacists, including Emmanuel Mekowulu, have been trained on Professor Doering's Opinion.

At page 39, he testifies that a person who has a stack of prescriptions in other patients' names would be a "deal breaker," and states at line 23, "I can't contemplate any legitimate reason that may be. I mean, that in and of itself would be a deal breaker for me." By using this language the defense allowed Professor Doering, without objection, to testify in a manner that can reasonably be construed as a comment on the ultimate guilt or innocence of the Defendant.

At page 49, he testified that Emmanuel Mekowulu filled two prescriptions back to back, and at line 12, "that's a huge indicator of diversion." This came in without objection, and was Professor Doering's opinion that Emmanuel Mekowulu, by filling two prescriptions on back to back days, committed a "huge indicator of diversion." This was not a "red flag" that a pharmacist should be on alert for as an indicator of diversion, but instead, was Professor Doering's testimony on his opinion that something done by the Defendant was a huge indicator of diversion, which came in without objection and can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

At page 51, on the topic of back to back prescriptions, he again testified without objection, at Line 13, "In fact, there's probably no explanation that would satisfy my concern." This testimony can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

At page 52, Professor Doering testified without objection:

> I mean, you're being asked to dispense the medicine in two different prescriptions, it makes no sense whatsoever because either you've got it or you don't have it. And I can't think of a valid reason why that would be done.

This testimony constitutes Professor Doering's opinion that he cannot think of a valid reason why an action of Emmanuel Mekowulu in filling prescriptions would be done, and can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

At page 52, regarding permission slips from people for someone else to pick up prescriptions, Professor Doering testified without objection, beginning at Line 23, and continuing to Page 53:

> Well, frankly, I would be flabbergasted. I've never in 40 years of being a pharmacist experienced anything such as that. I--- from a pharmacist's perspective, I wouldn't honor that because I can't think of a valid reason for that to happen.

This testimony constitutes Professor Doering's opinion that he cannot think of a valid reason why an action of Emmanuel Mekowulu in accepting permission slips from patients would be done, and can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

At page 55, Professor Doering, line 3, he was asked about numerous prescriptions for Oxycodone and no corresponding log sign-out sheet, and at Line 7, he responded without objection, "Well, that's a violation of the law. And it would be a further indicator to me that something is going on that would aid or abet diversion of these drugs." This testimony constitutes Professor Doering's opinion that actions of Emmanuel Mekowulu were a violation of the law and an indicator that Emmanuel Mekowulu was aiding and abetting diversion of drugs, and can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

On cross-examination, at page 91, Dale Sisco, Esq., specifically asked Professor Doering's opinion on whether prescriptions were illegal:

Q: Okay. But the fact that that was done in and of itself doesn't make those prescriptions illegal; right?

A: Well, it's kind of opposite of our legal system. To me they're illegal until they're prove legal.

Q: Okay.

A: I'd have to hear a very convincing reason why that was done before I would dispense them.

Q: Okay. Well, you'd need an explanation?

A: Yes, yes, absolutely.

Q. Okay. But as you sit here today, you don't know what was communicated to Mr. Mekowulu about those, right?

A: That is correct.

Here, Emmanuel Mekowulu's attorneys specifically asked Professor Doering to render an opinion as to whether something Emmanuel Mekowulu did was illegal, and Professor Doering's response was that it was illegal unless they're proven legal, and he would need an explanation. This testimony inexplicably asked Professor Doering to comment on whether Emmanuel Mekowulu had done anything that was illegal in contravention of the Court's instructions, allowed Professor Doering to opine that the burden of proof was shifted to the Defendant to prove that what he did was legal, and supports the issues discussed later in this Affidavit that the Defendant has to testify and offer the explanation. This testimony can reasonably be construed to be a comment on the ultimate guilt or innocence of the Defendant.

Based on the foregoing, it is my opinion that the attorneys for Emmanuel Mekowulu allowed Professor Doering to testify, without objection, to testimony that could reasonably be construed to be Professor Doering's comment on the ultimate guilt or innocence of the

Defendant, in violation of the Court's directive, and thereby rendered ineffective assistance of counsel.

In my opinion, the failure to make objections as stated above, the failure to request curative instructions, the failure to move for mistrial, and the decision to specifically ask Professor Doering to opine on the illegality of the Defendant's actions, were unreasonable decisions.

b. Question Number 2: Did the Attorneys for the Defendant Render Ineffective Assistance of Counsel by Failing to Properly Counsel Emmanuel Mekowulu in Recommending that Emmanuel Mekowulu Should Not Testify at Trial and Failing to Explain the Deliberate Ignorance Instruction To Emmanuel Mekowulu Before Emmanuel Mekowulu Represented to the Court that He Would Not Testify?

I have read the affidavit of Emmanuel Mekowulu, and assuming that the factual assertions are true, in my opinion, the attorneys for Emmanuel Mekowulu rendered ineffective assistance of counsel both in recommending to Emmanuel Mekowulu that he should not testify, and in counseling Emmanuel Mekowulu on the law applicable to the charges against him by omitting a clear explanation of the implications of the deliberate ignorance instruction.

As stated above, the attorneys for Emmanuel Mekowulu elicited testimony from Professor Doering to the effect that actions of the Defendant were, "illegal until they're proven legal," and a "very convincing reason" was necessary. The only source for that explanation was the testimony of the Defendant. Without testimony from the Defendant, the jury was left with expert testimony that the Defendant had committed actions that were illegal, that were "deal-

breakers," that were violations of the law, and that Emmanuel Mekowulu's actions indicated that, " something is going on that would aid or abet diversion of these drugs."

At transcript Volume IV, Page 105, Mr. Louderback, one of Emmanuel Mekowulu's attorneys, states at Line 24, "From the defense perspective, we're --- we are not going to call him." Mr. Louderback's announcement was before the jury instructions were discussed in the presence of the defendant. This statement to the court was also before Emmanuel Mekowulu had been counseled on whether or not he should testify, and was also before a decision by Emmanuel Mekowulu that he would not testify.

The government's proposed jury instructions, including the deliberate ignorance instruction, were filed on November 23, 2012. (Doc 56). At transcript Volume IV, Page 148, during the charging conference regarding the deliberate ignorance instruction, the Court said, "Well, I will find that based on the evidence, there is sufficient evidence to support this requested instruction. That is, that the defendant may have acted with deliberate ignorance or such that he could be found to have consciously avoided knowledge . . ."

At transcript Volume V, Page, 5, the Court asked, "You still don't intend to put on a defense, Mr. Sisco? At this point we still do not intend to do that. I haven't heard from my client that he's changed his mind." During the sidebar conference transcript, Page 5, Mr. Mekowulu affirms his decision not to testify. Mr. Mekowulu asserts in his affidavit that he prepared to testify all weekend and it was only at the last moment that he was advised he should not. He followed the advice of his counsel.

Transcript volume VI, Page 80, is the deliberate ignorance instruction as given to the jury:

> When knowledge of the existence of a particular fact is an essential part of an offense, knowledge may be established if the defendant is aware of a high probability of its existence unless the defendant actually believes that it does not exist.
>
> In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt either that the defendant actually knew that the prescriptions were not valid or had every reason to know but deliberately closed his eyes.
>
> I must emphasize, however, that the requisite proof of knowledge on the part of a defendant cannot be established by merely demonstrating that the defendant was negligent, careless, or foolish.

Under the facts of this case, regarding the conspiracy, without the testimony of Emmanuel Mekowulu there was insufficient evidence that "the defendant actually believes that it does not exist," or that the defendant had not, "deliberately closed his eyes." Emmanuel Mekowulu, according to his affidavit, was prepared to testify that he actually believed that a conspiracy did not exist, and that he had not deliberately close his eyes. In his affidavit, he explains his reasoning of the actions he took. As observed by the trial court at sentencing, trial transcript VII, page 61, Line 17, "As I said, the evidence in this case was very compelling if not overwhelming. There was no question in my mind that you were correctly found guilty." According to the affidavit of Emmanuel Mekowulu, he was not asked during the trial as to what testimony he could offer to rebut any witnesses, and according to his affidavit, he did have testimony that he could have offered to both explain his actions, offer reasons, and testify that he did not have actual knowledge of a conspiracy. Effective counsel would have to know that a guilty verdict was essentially a foregone conclusion without the testimony of the Defendant, and in my opinion, Dale Sisco, Esq., and Frank Louderback, Esq., provided ineffective assistance of counsel in recommending to Emmanuel Mekowulu that he not testify.

A related issue is whether Dale Sisco, Esq., and Frank Louderback, Esq., provided ineffective assistance of counsel in advising Emmanuel Mekowulu on the applicable law as a

condition to the Defendant's waiver of his right to testify, by failing to explain the deliberate ignorance instruction, to make Emmanuel Mekowulu's waiver of his right to testify knowing and voluntary. According to Emmanuel Mekowulu's affidavit, the deliberate ignorance instruction was not explained to him, and the Defendant did not know that he could be convicted if he failed to investigate the "red flags" as testified by Professor Doering. He also states in his affidavit that he was not asked during the trial as to what he could testify to rebut the testimony of witnesses. According to his affidavit, he did not know that he could be convicted due to his failure to investigate "red flags," but if he testified that he did not actually believe in a conspiracy and the jury believed that testimony, or if the jury believed that he was simply negligent, careless, or foolish, he would not be convicted. According to the affidavit of Emmanuel Mekowulu, this information was not provided to him, and the failure to provide that information constituted, in my opinion, the ineffective assistance of counsel.

c. Failure to retain and introduce the testimony of an expert in pharmacy such as the expert retained for purposes of this motion, Dr. Matthew Lee.

I have read the affidavit of Dr. Matthew Lee. Dr. Lee states in his affidavit, that he was available to act as an expert witness during this period, that he was advertised on the internet, that he was not contacted by the attorneys for Emmanuel Mekowulu, and that, had he been retained, he would have testified at trial that the "red flags" as testified by Professor Doering were not in the Florida Administrative Code, and were not otherwise commonly known in the pharmacy industry for the time period in question. In my opinion, the attorneys for Emmanuel Mekowulu rendered ineffective assistance of counsel in not retaining an expert like Dr. Lee, particularly due to the importance of Professor Doering's testimony in the prosecution's case.

In my opinion, the failure to retain and call an expert witness like Dr. Lee was an unreasonable decision.

5. Based on the foregoing, in my opinion, counsels' performance was deficient, and Emmanuel Mekowulu suffered prejudice as the result of that deficient performance. Further, Affiant Sayeth Not.

I, Lori D. Palmieri, having read and understood the foregoing, hereby swear, affirm, and acknowledge that the same is true and correct to the best of my knowledge and belief.

Lori D. Palmieri

State of Florida

County of Hillsborough

Before me, the undersigned notary public, did appear this date Lori D. Palmieri, who did execute this document in my presence. Subscribed and Sworn to before me this 30th day of April, 2015.

(-) ~~Personally~~ Known

( ) Identification_____

BONNIE M. OTTERSON
Notary Public - State of Florida
My Comm. Expires Feb 7, 2017
Commission # EE 870945
Bonded Through National Notary Assn.

Bonnie Otterson
Notary Public

Commission Expires: 2.7.17

Exhibit F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

V.

Case No. 8:12-cr-00170-JDW-MAP

EMMANUEL I. MEKOWULU

_____/

AFFIDAVIT OF EMMANUEL I. MEKOWULU REGARDING ISSUE OF WAIVER OF ATTORNEY-CLIENT PRIVILEGE AS TO DALE SISCO, ESQ., FRANK LOUDERBACK, ESQ., AND DAVID T. WEISBROD, ESQ.

I, Emmanuel I. Mekowulu, hereby swear, affirm, acknowledge and state:

1. My name is Emmanuel I. Mekowulu, and I am the Defendant in this case, and I have personal knowledge of all facts set forth herein.

2. I make this Affidavit in support of my Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct a Sentence.

3. I am currently in federal custody at the Federal Correctional Institution at Estill, South Carolina.

4. My defense attorneys at trial and sentencing in this case were Dale Sisco, Esq., and Frank Louderback, Esq. (collectively, my "Trial Attorneys"). My appellate attorney in this case was David T. Weisbrod, Esq. (my "Appellate Attorney").

5. I have separately signed an affidavit in support of my motion under 28 U.S.C. § 2255 that discloses certain communications between myself and my Trial Attorneys.

6. I understand that I have a privilege to prevent the disclosure of confidential communications that I engaged in with my Trial Attorneys and my Appellate Attorney, and by signing an affidavit and testifying in this case in which confidential attorney-client

communications are disclosed and made public, and by making claims of ineffective assistance of counsel. I am waiving the attorney-client privilege in respect to those communications.

7. I do not waive any privilege in excess of the waiver required by the prevailing law, and I invoke all privileges and confidences with the understanding that a Court will have the authority to determine the extent and scope of the waiver of any privileges resulting from the filing of the 28 U.S.C. § 2255 and all related affidavits, testimony, and filings, and the Court may determine that any and all privileges have been waived and as result there will be no restrictions on the testimony or disclosures by my Trial Attorneys or my Appellate Attorney.

I, Emmanuel I. Mekowulu, having read and understood the foregoing, declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Emmanuel I. Mekowulu

State of South Carolina

County of (Insert Name of County): Hampton

Before me, the undersigned notary public, did appear this date Emmanuel I. Mekowulu, who did execute this document in my presence. Subscribed, sworn, and acknowledged before me this 13th day of March, 2015.

( ) Personally Known

(X) Identification: Federal ID

Notary Public Talitha N. Bing Talitha N. Bing

Commission Expires: 08/29/2015

(Seal)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EMMANUEL I. MEKOWULU

Plaintiff,

V. Case No. 8:15-cv-01158-JDW-MAP

UNITED STATES OF AMERICA,

Defendant.

_____/

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF § 2255

The Plaintiff, Emmanuel I. Mekowulu ("Mekowulu") by and through undersigned counsel, files the following Notice of Supplemental Authority:

1. *Elonis v. United States,* ____U.S._____ (Case No. 13-983, June 1, 2015), copy attached, for the proposition that:

> Criminal negligence standards often incorporate "the circumstances known" to a defendant. ALI, Model Penal Code §2.02(2)(d) (1985). See id., Comment 4, at 241; 1 LaFave, Substantive Criminal Law §5.4, at 372–373. Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard. *Id.,* at opinion page 14.

Wherefore; serves the attached supplemental authority.

Certificate of Service: I hereby certify that on June 1, 2015, I electronically filed the foregoing with the Clerk of this Court using the Court's CM/ECF System which will send a notice of electronic filing to all registered parties, including:

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