ORIGINAL

No. 19-5255

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

FRANK LOBACZ, M.D., Petitioner

v.

UNITED STATES OF AMERICA, Respondent,

Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Frank Lobacz, M.D.
pro se
352 Wildwood Lane, E.
Deerfield Beach, FL 33442-1406
(917) 586-9141

QUESTIONS PRESENTED

1. Whether it was error by the Court of Appeals for the Second Circuit, to affirm the lower court's denial of Petitioner's Petition pursuant to 28 U.S.C. § 2255 which argued that Petitioner had received ineffective assistance on the part of his trial counsel.

2. Whether the ineffectiveness of trial counsel was so negligent that it amounts to *per se* ineffectiveness.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Rules and Statutes

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit dated March 6, 2019 under Docket No. 18-526-pr is Appendix A to this Petition. The Memorandum Decision and Order of the United States District Court for the Eastern District of New York dated January 18, 2018 under Docket Nos. 16 CV-3386 and 07 CR-744 is Appendix B to this Petition. A copy of the District Court's Certificate of Appealability dated February 16, 2019 is Appendix C.

The decision of the United States Court of Appeals for the Second Circuit dated March 26, 2015 under Docket No. 13-3040-cr, and reported at 603 Fed. App'x 48 (2d Cir. 2015) affirming on direct appeal Petitioner's conviction is Appendix D.

The Judgment in the District Court under Docket No. 07 CR-744 is Appendix E.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

FRANK LOBACZ, M.D., Petitioner

v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank M. Lobacz petitions this Court for a writ of certiorari to review the Order of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of Petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate his conviction.

JURISDICTION

Petitioner Frank Lobacz moved in the District Court pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his conviction and sentence arising from a 2010 conviction. The decision of the District Court denying the motion was affirmed by the Second Circuit Court of Appeals. As such, this Court has jurisdiction of this Petition.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This Petition presents the issue of whether Petitioner was denied his Sixth Amendment right to the effective assistance of counsel due to his trial counsel's failure to move for a severance of counts pursuant to Fed. R. Crim. P. 14(a) and other derelictions and whether Petitioner's conviction should be vacated.

STATEMENT OF THE CASE

A. Procedural History

Frank Lobacz was charged in Indictment S1 07 Cr. 744 in six counts with healthcare fraud (Counts One and Two), with filing a false IRS Form 5500 regarding withdrawals from a pension account (Count Three), and with three counts of income tax evasion for the years 2000, 2001, 2002 in that he failed to report as income profits from the pension withdrawals and from certain options trading (Counts Three, Four and Five).

A jury convicted Lobacz on all counts. On July 29, 2013, Lobacz was sentenced principally to 65 months incarceration and a term of three years supervised release. Additionally, the Court imposed a fine of $17,520 and ordered payment of restitution in the amount of $3,613,935.03.

On March 26, 2015, Dr. Lobacz's conviction was affirmed by the Second Circuit on direct appeal. 603 Fed. App'x 48 (2d Cir. 2015). In that appeal, Dr. Lobacz raised issues including a claim as to the ineffective assistance of his trial counsel. In affirming Dr. Lobacz's convictions, however, the Second Circuit did not address Dr. Lobacz's claims of ineffectiveness. Rather the Court determined that the preferable manner of dealing with an ineffectiveness claim was for the matter first to be litigated in the District Court. For that reason, Dr. Lobacz's claim of ineffectiveness raised on his direct appeal was dismissed "without prejudice" to the filing of a claim for relief under 28 U.S.C. § 2255. No petition for *certiorari* to the Supreme Court was filed.

On June 22, 2016, Dr. Lobacz timely filed a motion under 28 U.S.C. § 2255 based on the ineffective representation of his trial counsel. The District Court denied that motion on January 18, 2018. The Second Circuit affirmed that decision on March 6, 2019.

In his motion to vacate his conviction, Dr. Lobacz pointed primarily to the failure of his trial counsel to move pre-trial for a severance of the health care fraud counts from the charges relating to the pension form and the tax counts, which enabled the Government, unfairly, to pile on unrelated charges. These two groups of charges were wholly independent of each other and evidence of one would not have been admissible at a trial of the other. The joint trial enabled the Government to argue quite effectively a propensity on the part of the defendant to commit financial fraud crimes, which the Government did, and to use the evidence of one group to support the other. In addition, in his motion to vacate, Lobacz also pointed to other derelictions on the part of his trial counsel, which included claims that trial counsel failed properly to investigate the case and to present certain evidence and witnesses which Lobacz had asked trial counsel to present.

The Lower Court's Decision

In an Order and Memorandum dated January 18, 2018, the District Judge denied Lobacz's motion to vacate. Interestingly, while concluding that the failure of trial counsel to seek a severance of the disparate charges did not constitute *per se* ineffectiveness, the District Judge did not place any imprimatur on trial counsel's failure to seek a severance. While not endorsing outright Dr. Lobacz's argument that severance, had it been requested, would likely have been granted, the District Judges observed that

> " . . . it appears that the health fraud counts may not have been properly joined with the tax fraud and Form 5500 counts."

The District Judge, however, bypassed a further determination of whether the failure to move for a severance constituted ineffectiveness and instead skipped to an analysis of whether Lobacz had suffered prejudice from trial counsel's failure. On that issue, the District Judge concluded that there was none because, in the view of the District Judge, the evidence against Dr. Lobacz was overwhelming.

Of course, Lobacz disagreed with the District Judge on this issue. Lobacz clearly was prejudiced by trial counsel's failure to move to sever the healthcare fraud counts from the pension form and tax counts. To the extent the District Judge reached the erroneous conclusion that the evidence was overwhelming, if it was, it was only so because the Government piled on evidence relating to two disparate sets of counts which should not have been tried together, adroitly argued a propensity on the part of the defendant to commit financial crimes and otherwise was the beneficiary of trial counsel's ineffectiveness.

On appeal, the Second Circuit held that trial counsel's trail conduct was not *per se* ineffective, rejected Petitioner's other claims and affirmed the District Court's denial of the motion to vacate.

REASONS FOR GRANTING THE PETITION

LOBACZ WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL

A. The Trial Evidence

1. The Healthcare Fraud (Counts One and Two)

These counts charged Dr. Lobacz with conspiracy to commit healthcare fraud and substantive healthcare fraud. At trial the government called representatives from two healthcare insurers. One witness testified that between years 2000 and 2008 GHI paid 2400 claims for services rendered to Dr. Lobacz, his wife and two daughters. According to her investigation in 2008, these medical services were provided by Dr. Young Shin, an employee of Dr. Lobacz, who according to their records had only one other patient. The most frequent claims were for trigger point injections and inhalation treatments provided to the children, his wife Cecilia and Dr. Lobacz himself. The claims, which stopped in February 2008, totaled $440,466.00 and the checks were sent to and endorsed by Dr. Lobacz or by personnel in his office.

A second investigator for a second insurer testified that over the years 2000-2008 Dr. Lobacz's office submitted claims for approximately 1200 dates of service rendered to patients Sandor and Elaine Shadoff. The insurance claims were for services provided by Dr. Young Shin, a majority of which were for trigger point injections, beginning in 2000 and which became increasingly more frequent over the years until they ceased in March 2008, shortly after the investigation began. Since Dr. Shin was an out of network provider the claim payments were sent directly to the insured Sandor Shadoff, were endorsed by him, given to Dr. Lobacz's staff.

Sandor Shadoff testified that he and his wife, Elaine, were covered by his major medical policy with United Health Care and that he was always treated by Dr. Lobacz not by Dr. Shin or any physician's assistant or nurse practitioner employed by Dr. Lobacz. Shadoff testified that although the frequency of claimed visits seemed accurate for years 2000 and 2001, the frequency of claimed visits for the years 2002, 2003, 2004, 2005, 2006, 2007 and 2008 appeared overstated and included treatment dates when he was out of state or elsewhere. He claimed that he did not look at the medical insurance checks sent to him or the explanation of benefits sent along with the checks; he simply gave the checks to Dr. Lobacz or a member of his staff.

Elaine Shadoff testified that she had been a patient of Dr. Lobacz since the 1990's and had been treated with acupuncture for pain in her knees. Like her husband, she testified that she was only treated by Dr. Lobacz with acupuncture and never was treated by Dr. Shin. She testified that the number of treatment visits reflected by the insurance claims were inflated and inaccurately reflected that she was treated by Dr. Shin.

The Government also called as a witness Dr. Shin. An elderly man, he clearly had memory issues during his testimony. He testified that he could not remember if he ever treated Dr. Lobacz, that he never treated his wife Cecilia Lobacz, or their children, B and S or Elaine Shadoff. He could not remember treating Sandor Shadoff and was not familiar with the name. Dr. Shin testified that he knew what trigger point injections and acupuncture were and that they were different treatments but he had never treated anyone using trigger point injections. Yet, Dr. Shin identified his signature on medical assessment forms reflecting the administration of trigger point injections by him to Shadoff.

2. Filing of the False IRS Form 5500 (Count Three)

This count charged Dr. Lobacz with falsely filing an IRS Form 5500 relating to his Employee Benefit Plan for the year 2002 by knowingly and willfully not stating, as required, whether he had made any nonexempt transactions with respect to the Plan in violation of 26 U.S.C. § 7206 (1). With regard to this count, an IRS Agent identified three checks totaling $645,000 that were drawn from Dr. Lobacz's pension fund account payable to him on May 7, 2002.

Gerald Ottavino, an actuary employed by Schloss & Co., the third party administrator for Dr. Lobacz's pension plan, testified that Dr. Lobacz was the trustee and administrator of the fund. He testified that straight withdrawals from the plan, if not a rollover, became a taxable event and nonexempt transaction, and that Dr. Lobacz was required to submit a Form 5500 yearly to the Department of Labor, which required disclosure of whether nonexempt transactions were engaged in for the reporting year. The Form 5500, however, was completed by his firm. He testified that Schloss & Co. was not made aware of any pension plan distributions or withdrawals and that they were unaware of the $645,000 in withdrawals on May 7, 2002.

Ottavino conceded that neither he nor anyone from his firm had ever met Dr. Lobacz, or explained any of the terms of the plan to him or what constituted a prohibited or nonexempt transaction. He specifically testified that before preparing the Form 5500 for 2000, 2001 and 2002, neither he nor anyone in his firm to his knowledge discussed the contents of the Forms with Dr. Lobacz.

Adley Samson, Dr. Lobacz's accountant, testified that after discovering the 2002 withdrawals, he discussed the tax consequences with Dr. Lobacz and articulated a position that the

distributions were loans and that Lobacz would have to replace the value by year's end. Samson testified that he did not review the Form 5500 signed by Dr. Lobacz for 1999 through 2002.

3. Income Tax Evasion Counts (Counts Four, Five and Six)

These counts charged Dr. Lobacz with knowingly and willingly under-reporting his taxable income for years 2000, 2001, and 2002 by not reporting options trading income and nonexempt pension withdrawals for those years.

Samson testified that he prepared Dr. Lobacz's 2000 tax return in September 2001 from documents, 1099s, and a hand written schedule provided to him by Dr. Lobacz of his stock trading for the year. He testified that he received only three pages of the year-end Prudential Consolidated Statement for Dr. Lobacz's accounts for 2000 and that he received no other information from Dr. Lobacz regarding his options income. Consequently, he did not include, in Dr. Lobacz's 2000 tax return, the options income.

Samson also testified that he prepared Lobacz's 2001 tax return in October 2002, after the staggering losses in Dr. Lobacz's investment accounts in August 2002, and that in preparation for the return he received 10 pages of the 2001 Prudential Consolidated Statement from Lobacz, which originally was 99 pages. The pages of the Consolidated Statement given to him by Dr. Lobacz did not include the options trading or pension fund withdrawals. Although he was aware that Dr. Lobacz was trading in options, he apparently never asked him in preparing the 2001 return whether there had been any options trading gains that needed to be reported.

In addition to cross-examining the Government's witnesses, the defense called five witnesses, including Dr. Lobacz. These witnesses directly contradicted the Government's case. Three office workers, Mrs. Lobacz and Dr. Lobacz himself also testified.

Diane Timmoney, responsible for the insurance claim billing, testified that she observed Dr. Lobacz's wife, Cecilia, and their two daughters at the office where she worked and that they received medical treatments two to three times weekly.

Anne Buckley, Dr. Lobacz's office manager, testified that Sandor Shadoff was treated by service providers, including both Dr. Shin and Dr. Lobacz. According to Buckley, Sandor Shadoff came for treatment three times a week with his wife. She testified about Dr. Lobacz's poor and failing health that resulted in life-saving heart surgery in the fall of 2003. She testified that, after the surgery, Dr. Lobacz went on disability and stopped treating patients for several years. Other staff members performed the medical services and that it was Dr. Shin who treated the Shadoffs.

Buckley also identified medical assessment forms which Buckley had discovered four months prior to trial. The found forms were offered by the defense as proof that Sandor Shadoff was treated with trigger point injections by Dr. Shin from January 2006 to January 2008 and that Elaine Shadoff was so treated from January 2006 to December 2007. The forms were 8 ½ by 9 ¾ inches, leaving the Government to argue that they were "cut off" at the bottom of the page where a revision date might appear.[1] On cross-examination, the Government compared the page size of these medical treatment forms to medical treatment forms for the Shadoffs seized pursuant to a search warrant, which forms measured 8 ½ by 11 inches and had a revised form date printed at the bottom of the page. The Government also cross-examined Buckley regarding medical insurance claims for treatment provided to Dr. Lobacz by Dr. Shin on dates in 2003, 2004, 2005 and 2006

[1] Dr. Lobacz maintains that when these forms were found by Buckley, they were whole sheets of paper and that Dr. Lobacz only learned at trial that they had been "cut."

and on some occasions when Dr. Lobacz was in Cleveland for medical treatment. According to Buckley and Dr. Lobacz these were office errors and not fraudulent claims.

The third office employee called by the defense was Diane Timmoney, Dr. Lobacz's medical biller since 1999. She testified that she saw Sandor and Elaine Shadoff at the Bay Shore office where Dr. Lobacz mainly saw them. At the practice's other offices Dr. Shin and other staff treated the Shadoffs. She also testified that from the year 2000, Cecilia Lobacz and the daughters received treatment from Dr. Shin and other staff. Afterwards she would process the medical forms, which indicated they received trigger point injections.

Catherine Carroll, a receptionist since 1998 at the Massapequa, and later, the Bay Shore offices, testified that she observed the Shadoffs at both offices at least two times a week for treatments by Dr. Lobacz, Dr. Shin, and the physician's assistants. She testified also that Dr. Lobacz's wife and daughters received treatment by Dr. Shin and the physician's assistants.

Cecilia Lobacz testified. She identified their daughters as B, born in 1997, and S, born in 2002, and related how they each suffered from breathing problems and asthma and that B suffered from pains in her legs. She took the children for medical treatments, which included injections, two to three times a week from physician's assistants at the offices. She described her own medical ailments including neck, back and hip pain, for which she also received treatments involving injections two to three times a week from 2000 to 2008.

Dr. Lobacz testified on his own behalf and described his daughters' medical issues and that they were difficult to treat. He described his wife's medical problems and his own medical history. He testified that his medical practice employed Dr. Shin, physician's assistants and other

doctors. He testified that he and other doctors in his practice treated Sandor Shadoff with acupuncture and trigger point injections which he at times personally provided.

Regarding his 2001 federal income tax return, Lobacz testified that he gave Samson his full year-end Prudential Consolidated Statement and that Samson regularly picked up his complete monthly Prudential Statements as part of his normal accounting duties. He testified that the 2001 Prudential Consolidated Statement, consisting of 99 pages, was provided to Samson in January 2002. However, the six pages from that Consolidated Statement that Samson attached to the tax return had no page numbers as in the original document and were not in the same condition as when he gave them to Samson. Moreover, he testified that the half page where the options trading would have been listed was missing from the pages that Samson had attached to his return. Dr. Lobacz denied cutting any pages of the Prudential Consolidated Statements and testified that he did not give cut pages to his accountant.

Dr. Lobacz testified that he reviewed his Form 5500 for the years 2001, 2002 and 2003, which were prepared by Schloss & Co. He testified that he spoke to the actuary employed by Schloss & Co., Gerald Ottavino, approximately three times and spoke to another Schloss & Co. employee on one other occasion. He testified that no one ever reviewed or discussed the terms of the pension plan with him, or explained what constituted a reportable distribution, and that the Forms 5500 for the years 2001, 2002 and 2003 were prepared by Schloss & Co.

Dr. Lobacz testified with respect to the pension plan withdrawals that as early as 1999 Samson advised him that so long as the pension funds were replaced in a timely fashion there would be no tax implications and that other assets could be substituted for withdrawn funds. He claimed that the pension fund was always left whole and that the withdrawals were replaced, and

that he did not know that there were restrictions on pension fund withdrawals. He testified that it was his understanding that if pension fund distributions were replaced with an equal value asset the withdrawal would not be considered a distribution and that it would be an exempt transaction. This advice was told to him over the course of twenty years by several people, including his accountant, Adley Samson.

In addition, Dr. Lobacz testified that one of his Prudential advisors, Donald Reiss, told him that some options trading would be taxable and some not depending on how they were traded. Based on that advice and the advice of Samson he signed and filed his 2000, 2001 and 2002 tax returns as prepared.

Dr. Lobacz also testified to his poor health, his lengthy recuperation and his absence from the day-to-day running of the practice after his surgery at the Cleveland Clinic in 2003.

B. <u>The § 2255 Submissions</u>

1. Dr. Lobacz's Declaration

In support of his motion to vacate, Dr. Lobacz submitted a declaration setting forth additional facts supporting his claims of ineffectiveness on the part of trial counsel. He argued that trial counsel's failure to move to sever the healthcare fraud charges from the tax and pension form charges prejudiced him because it allowed the Government to "pile on" unrelated charges and argue that the evidence regarding the healthcare counts supported the tax and pension counts and vice versa. Dr. Lobacz further pointed out that trial counsel had never even discussed with him the possibility of a severance of counts. Whether to seek severance plainly was a decision for Dr. Lobacz to make. Dr. Lobacz also set forth additional instances in which trial counsel's representation was ineffective, specifically trial counsel's failure to present documentary evidence

and witnesses regarding Dr. Lobacz's own complicated and life-saving surgery in 2003, which left him debilitated for several years, and other witnesses. Dr. Lobacz also set forth facts demonstrating that trial counsel's cross-examination of certain of the Government witnesses also was ineffective.

2. Trial Counsel's Affidavit

In a lengthy affidavit, Dr. Lobacz's trial counsel tried to come up with a rationale for his failure to move for severance. What perhaps was most telling about trial counsel's response was his admission that he had not discussed with Dr. Lobacz even the possibility of severing counts. Instead, counsel tried after-the fact to conjure up reasons why he would have recommended against severance if he had considered the severance option in the first instance. None of the reasons cited in trial counsel's affidavit supported declining to seek severance even had trial counsel considered it and discussed it with Dr. Lobacz. Trial counsel's effort to rebut the other claims of ineffectiveness alleged by Dr. Lobacz having to do with cross-examination of witnesses and failure to produce Dr. Lobacz's medical records and testimony of medical professionals and others are equally unavailing.

3. Dr. Lobacz's Reply Declaration[2]

Dr. Lobacz took issue with trial counsel's speculation and opinions. On the issue of severance, Dr. Lobacz reiterated that trial counsel had never discussed this issue with him and emphasized that the reasons advanced in trial counsel's affidavit for not seeking severance made no sense.

---

[2] Dr. Lobacz's current counsel also submitted a reply affirmation which took issue with several of the statements contained in trial counsel's Affidavit.

C. **The Law Generally Applicable to Ineffectiveness Claims**

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This inquiry should focus "on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. Under *Strickland* and its progeny, the objective reasonableness of counsel's performance is assessed according to "'prevailing professional norms.'" *Rompilla v. Beard*, 545 U.S. 374, 380 (2005)(*quoting Strickland*, 466 U.S. at 688); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Prejudice is shown if, but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Wiggins*, 539 U.S. at 534.

The *Strickland* prejudice analysis is not an outcome-determinative test. *Strickland*, 466 U.S. at 693-94. The question is not whether representation by effective counsel would have actually changed the outcome, nor even whether representation by effective counsel would "more likely than not" have changed the outcome. *Id.* Instead, prejudice is established when confidence in the outcome is undermined because of counsel's deficiencies. *Id.* at 694. "This standard is not a stringent one. It is less demanding than the preponderance standard." *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999); *accord United States v. Day*, 969 F.2d 39, 45 n.8 (3d Cir. 1992) (*Strickland* "does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only 'reasonable probability' that is the case"). It has been held that a defendant seeking *habeas* relief need only set forth a "plausible" claim of ineffective assistance of counsel, "not that he will necessarily

succeed on the claim." *See Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009) (citation omitted).

D. Discussion

1. Dr. Lobacz was Denied his Sixth Amendment Right to Effective Assistance of Counsel Due to Trial Counsel's Failure to Move for a Severance of Counts Pursuant to Fed. R. Crim. P. 14(a)

As noted, the first two counts of the indictment charged conspiracy to commit healthcare fraud. Count Three of the indictment charged the willful failure to report nonexempt transactions on an IRS 5500 Form for the year 2002, relating to Dr. Lobacz's withdrawals from his employee benefit plan. Counts Four through Six of the indictment charged income tax evasion for the years 2000 through 2002 for Dr. Lobacz's alleged willful failure to declare income from stock option trades and the aforesaid pension plan withdrawals.

Rule 8(a) of the Federal Rules of Criminal Procedure permits joinder of offenses if the offenses charged "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Trial counsel's failure to move for relief from this prejudicial joinder was ineffective.

As a plain reading of the indictment and trial record unequivocally demonstrates, Counts One and Two are totally unrelated to the pension form and tax offenses contained in Counts Three through Six. Dr. Lobacz was not charged with failing to report income generated by the fraudulent medical billing alleged in Counts One and Two. At a separate trial, evidence of this healthcare fraud would not have been admissible with respect to the failure to accurately report his income from stock options trades and pension plan withdrawals and vice versa. Moreover, the

time-periods for these offenses also were different. As a result of all counts being tried together the government was able to show a propensity for fraud, in effect bootstrapping arguments with evidence that would have been irrelevant and inadmissible if tried separately.

The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness." The prejudice prong of the *Strickland* test then focuses on whether counsel's constitutionally ineffective performance affected the outcome of the trial.

On the facts of this case, where trial counsel failed to move for relief from prejudicial joinder, it is *per se* ineffective requiring vacating the judgment and conviction. While the *per se* concept is limited, it should be extended to what happened here. where the ineffectiveness was so blatant and elemental and, parenthetically, where the prejudice was so great.

In applying the first prong of the *Strickland* analysis, the Court ordinarily "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy." *Strickland*, 466 U.S. at 689.

Here, there was no sound legal strategy in not moving for a severance of these unrelated Counts that unfairly prejudiced Dr. Lobacz when tried together. It is apparent that Dr. Lobacz's alleged healthcare fraud was entirely unrelated to his alleged willful failure to report nonexempt pension fund transactions and his alleged tax evasion. These offenses clearly did not arise from the same act or set of acts, however broadly the term transaction may be interpreted. Joinder for trial was not proper.

Dr. Lobacz suffered great prejudice from the failure to move for severance, which would have been granted. The decisions of the District Judge and the Court of Appeals overlooked the severe disadvantages to the defendant and obvious advantages to the Government: (1) (the defendant) may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Where, as here, misjoinder is present, a reversal is required if the misjoinder result[ed] in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. Here it did. To determine whether there is actual prejudice courts inquire whether 'evidence tending to prove the charge that should have been severed would nevertheless have been admissible . . . and was admitted subject to appropriate limiting instructions.

As the trial record in this case shows, the volume of evidence relating to the healthcare fraud was irrelevant to the tax offenses and vice versa. There was no connection between the healthcare fraud and tax offenses. The misjoinder of these counts unquestionably prejudiced the Dr. Lobacz in a number of ways. First, it is apparent that the jury rejected the testimony of Dr. Lobacz and his witnesses regarding the healthcare fraud offenses and thus his overall credibility with respect to the tax reporting offenses and vice versa. Second, it is inherent in the piling on of charges that the jury looked with disfavor on a defendant charged with six offenses as opposed to

a smaller number, and that the healthcare fraud testimony involving his small children and family undoubtedly created hostility and bias. Similarly, the fact that the jury heard that Dr. Lobacz made almost a million dollars in options trading in one year, lost 5 million dollars in another, and that he accessed his pension fund created hostility and resentment towards him and suggested a propensity and a disposition to commit crimes for his economic benefit.

Moreover, the Government was able to and did suggest such propensity and predisposition at trial and particularly in its summations by suggesting a similarity between the unrelated offenses through the attribution of greed and the use of allegedly "cut" and fabricated documents to further both groups of offenses. Here, the risk of unfair prejudice was excessive because the jury would see it as a propensity to engage in a particular type of criminal activity.

To be clear, on this point, established law makes clear that joinder of all of these offenses for a single trial was improper and there can be no speculation as to any reason for not moving for severance. There simply was no sound reason not to and the failure to do so constituted ineffectiveness, *per se*, which plainly prejudiced Dr. Lobacz. Counsel simply was unaware of controlling Second Circuit law. *See United States v. Halper*, 590 F.2d 422 (2d Cir. 2007); *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007); and *United States v. Litwok*, 678 F.3d 208 (2d. Cir. 2012).

As noted above, the District Judge did not pass judgment on whether trial counsel's failure to move for severance was deficient. Instead, the District Judge concluded that there was no prejudice to the defendant because, in the view of the District Judge, the evidence was overwhelming. The Second Circuit agreed. Lobacz takes issue with that conclusion – issues in the trial were in sharp dispute and the defense witnesses challenged the prosecution's case – and

to the extent the evidence was seen by the lower courts as overwhelming, that was only because the two sets of unrelated charges were tried together and demonstrates the prejudice inherent in trying both sets of charges in a single trial. Trial counsel should have been aware of the relevant legal precedents and moved for a severance in so obvious a situation.

The Government took full advantage of trial counsel's failure to move for severance and exploited it to the fullest. In its arguments to the jury, the Government argued propensity and greed by stressing a similarity between the unrelated offenses and the use of alleged "cut" documents to further both sets of charges and hammered home the point in summation to Dr. Lobacz's detriment and prejudice.

For example, in his initial summation, the Government's counsel argued that:

> "He [Dr. Lobacz] would have you believe that the multitude of these individuals; accountants, lawyers, insurance companies, actuaries, who have no connection to one another, they all somehow got together to frame Frank Lobacz."
>
> * * * *
>
> "As I said in my opening statement, sometimes things aren't complicated. Sometimes they are what they are, simple and straightforward, and that's what this case is about here. It's simple and straightforward.
>
> It's about theft and it's about greed. The defendant committed healthcare fraud by stealing from health insurance companies and he stole from the government when he didn't pay taxes on money that he earned, simple and straightforward."

Later in his initial summation, Government counsel argued as follows:

> "Now, how did we prove that [healthcare billing fraud]? Well, I would like to talk about the defendant's motivation for doing that. Much like his motivation for failing to report options

> income, when he didn't get caught, he decided to do it again. So when he didn't get caught in 2000 on the option income, he did it again in 2001.
>
> And with filing false healthcare claims, he didn't get caught in the beginning so he did it again."

Next, the Government's counsel, still in his main summation, sought to inflame and prejudice the jury by reminding them that Dr. Lobacz "used his own daughter to take money from insurance companies claiming that she was ill." In a trial of just the tax charges, this evidence would not have been admitted and this emotional and inflammatory argument could not have been made.

Government counsel, in his rebuttal summation, once again blended the evidence and encouraged the jury to use the evidence of the healthcare offenses to help prove the tax offenses and vice versa. Government counsel argued:

> "This defendant stole from insurance companies. He's no different than anybody else that steals. He just had another avenue to complete it. It's not fancy, it's simple. It's straightforward. And he stole from the government when he didn't pay his taxes.
>
> Review the evidence, ask to see those exhibits, and ask to see those cut documents. Oh, before I forget, I mean, how unlucky is this defendant, right? On one end of the spectrum, on the tax spectrum, we have cut documents that were done by Adley Samson and on the health care side there are cut documents for Sander and Elaine Shadoff. How unlucky this guy is, right? Two pieces of critical evidence in this case are cut and he wasn't responsible for either of them. And the people he's blaming, they don't even know each other, right?"

Trial counsel made no objection to these arguments and sought no cautionary instruction as to how the jury should handle this evidence, the purpose of it and as to which offenses it was admitted. The blended evidence, the Government's arguments in its summations and trial

counsel's failure to request a cautionary instruction greatly prejudiced Dr. Lobacz. The obvious overwhelming prejudice to Dr. Lobacz in a joint trial of all offenses should have been recognized by trial counsel. Such a failure constituted ineffectiveness *per se*. And if it was not ineffectiveness *per se*, the Court nonetheless should vacate Dr. Lobacz's conviction because the dereliction as to severance was so obvious and the prejudice was so great. Trial counsel might just as well have been asleep. *See Tippins v. Walker*, 77 F.3d 682, 688-89 (2d Cir. 1990).

On this point, it is important to note further that Dr. Lobacz need not demonstrate that, had severance been granted, he would have prevailed, a point which the Government did not dispute in the lower court. The *Strickland* prejudice analysis is not an "outcome determinative" test. *Strickland*, 466 U.S. at 693-694. In affirming the lower court's decision the Circuit Court ignored its own prior holding that a defendant need only set forth a "plausible" [claim] of ineffective assistance and "not that he will necessarily succeed on the claim," *Puglisi*, 586 F.3d at 213, a standard met in this case.

Nor did the after-the-fact reasons for not seeking a severance posited both by the Government and trial counsel have merit. None would have warranted foregoing severance, particularly given trial counsel's own acknowledgment that he had no discussion about the issue of severance with Dr. Lobacz.

Nonetheless, the Government tried to hypothesize what trial counsel "could have" or "may have" pondered. However, there was no evidence that these "may haves" or "could haves" were what motivated trial counsel to fail to seek a severance. Trial counsel in his affidavit submitted in the lower court by the Government does not say that he considered a severance motion but did not make such a motion because he "found it strategically beneficial" to try all of

the charges at one trial. So, too, the Government's hypothesis that counsel "may have been" of the opinion that a single trial, where Dr. Lobacz could explain his version of events once, would be more beneficial than testifying twice presupposes that Dr. Lobacz would have testified at all had there been separate trials, and it is pure surmise on the Government's part. At separate trials, however, there would have been far less need for Dr. Lobacz to testify. In any event, when weighed against the clear prejudicial downsides of a joint trial of all charges, no hypothesis advanced either by the Government or by trial counsel justified failing to move for severance.

Not one of the Government's hypotheses warranted foregoing a severance and its argument is belied by the its skillful use of the disparate offenses to argue propensity and "cut" documents in both matters and to argue that proof of one set of offenses provided proof of the other. None of the reasons belatedly proffered by trial counsel for not moving for severance had any merit. And more importantly, trial counsel admitted that he never even discussed the possibility of severance with Dr. Lobacz.

The point simply is that the reasons for severance were so obvious and the prejudice of not severing was so great that trial counsel had, at the least, the obligation to discuss this issue with his client, which counsel acknowledges he never did. In the context of this case, ineffectiveness cannot be more "*per se*" than what happened here. And if it is not ineffectiveness "*per se*" it should be because the conviction under the circumstances present here should not be permitted to stand.

2. Dr. Lobacz Received Ineffective Assistance of Counsel Because of Trial Counsel's Failure to Investigate and Present Witnesses And Evidence

While what follows does not necessarily fall within the ambit of the District Judge's Order as to appealability, we pointed out these failures by trial counsel because they also demonstrated trial counsel's overall ineffectiveness. Trial counsel's failure to conduct a reasonable pre-trial investigation, call witnesses and present evidence also rendered his representation deficient. Dr. Lobacz's chief complaint in this regard is that his trial counsel failed to interview and call several witnesses the identities of whom Dr. Lobacz had advised his counsel and who would have helped his case.

This Court in *Strickland* specifically addressed the issue of investigation and stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," 466 U.S. at 691 and a "decision not to investigate [a witness] must be directly addressed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." *Id.* The Sixth Amendment guarantee of effective assistance of counsel is satisfied only if counsel's choice of a defense tactic was the result of an informed, professional judgment made after a reasonable investigation into the facts of the case and the relevant law. *See id.* at 688-91. Had trial counsel fully investigated the potential witnesses and documents that Dr. Lobacz identified, counsel could have corroborated Lobacz's testimony and undercut aspects of the Government's case and put on a more ready defense.

a. Dr. Lobacz's Medical Records

Dr. Lobacz asked trial counsel to present testimony and records from the Cleveland Clinic and other medical records reflecting Dr. Lobacz's several hospitalizations before and after

his surgery in 2003 at the Cleveland Clinic. Trial counsel offered no reason as to why he did not contact the Cleveland Clinic where Dr. Lobacz underwent difficult and life-saving heart surgery in October, 2003. He could have and should have spoken to a member of Dr. Lobacz's operating team and obtained Dr. Lobacz's records from that institution. The crux of Dr. Lobacz's defense, insofar as his health issues were concerned, centered on his severely debilitated condition prior to and after his October, 2003 surgery at the Cleveland Clinic. There was no better witness than the people at the Cleveland Clinic, who were most familiar with Dr. Lobacz's circumstances, but whom it appears trial counsel did not contact at all. Nor does it appear that trial counsel had obtained Dr. Lobacz's records from that institution.

Further, while trial counsel referred to a few of Dr. Lobacz's medical records which he did obtain, there were more that he did not obtain, in addition to the records from the Cleveland Clinic regarding his 2003 surgery. Dr. Lobacz returned to the Cleveland Clinic in February 2004 on an emergency basis, again in early 2007, again in 2008 and again in early October, 2010, when he collapsed into atrial fibrillation right before his scheduled trial.

Along the way, Dr. Lobacz also was hospitalized several times in local hospitals. In 2003, he was admitted to the "E.R." at Good Samaritan Hospital. In December, 2003 he was admitted to Southampton Hospital; in January 2004 he was back at Good Samaritan Hospital. In 2006, he collapsed at home and was treated at Southside Hospital. In 2008, he again was admitted to Good Samaritan Hospital. Lobacz was virtually disabled for a substantial period during the time of the alleged conspiracy.

Had trial counsel obtained all of the records from the Cleveland Clinic and these other facilities and subpoenaed appropriate medical personnel it would have presented a powerful

explanation for Dr. Lobacz's absence from the practice for lengthy periods of time and his inattentiveness to his personal tax matters and the practice's billings. Trial counsel's performance in this regard plainly fell short.

b. The Failure to Call Investigator Paladino

Trial counsel's explanation for his failure to call Investigator Paladino also falls short. His response was that he has no recollection that Dr. Lobacz ever asked him to call Paladino. Dr. Lobacz maintains that he had asked trial counsel to call Paladino, that trial counsel said he would but then did not. The point of the matter is that trial counsel himself should have appreciated the significance of Paladino's helpful testimony and called him as a witness. At trial, Elaine Shadoff had testified that she had been treated by Dr. Lobacz and not by Dr. Shin. Yet during a prior investigatory interview by Paladino provided in discovery, she stated that she had been treated by Dr. Shin. This was an important point for the defense in the context of the case as a whole and in the context of the so-called "cut" documents, which bore Dr. Shin's signature, which Dr. Shin acknowledged signing and which reflected Dr. Shin's treatment of Sander and Elaine Shadoff. Even if Dr. Lobacz had not suggested to trial counsel that he call Investigator Paladino as a defense witness to contradict Elaine Shadoff's testimony, calling Paladino was something trial counsel should have undertaken on his own. Trial counsel offered no excuse for not contacting Investigator Paladino or calling him as a witness. The failure to do so was a significant failure.

c. Failure to Call Donald Reiss

Regarding Donald Reiss from Prudential, trial counsel stated that Dr. Lobacz agreed not to call him. Dr. Lobacz has a different view. The District Court was of the view that this was a

decision within the purview of trial counsel and not outside the range of professionally competent assistance. However, Dr. Lobacz's point simply is that Prudential paid Dr. Lobacz a very sizeable sum to settle a civil claim, which Donald Reiss would have had to admit and which would have undercut seriously his trial testimony. Additionally, Donald Reiss was aware that a form which both he and Lobacz had signed indicated that Lobacz had no experience in options trading. Dr. Lobacz maintains further that this form was given to trial counsel, who did not offer it into evidence.

d. Failure to Call Mone and Connolly

Dr. Lobacz also asked trial counsel to present the testimony of Chris Mone, an attorney with Prudential, and Jim Connolly, Dr. Lobacz's broker at Merrill Lynch. Trial counsel says that did not happen. The District Judge concluded these were decisions also not outside the scope of professionally competent representation. Dr. Lobacz has stated that Mr. Mone was aware of a document indicating that Dr. Lobacz had limited experience trading options and not 15 years experience as noted in a form entered into evidence which Dr. Lobacz had never seen before. Further, Mone would have testified that, prior to meeting Donald Reiss, Dr. Lobacz's investments were in U.S. Treasury Bond. Jim Connolly would have supported Dr. Lobacz's understanding that "rolling over" options was an acceptable tax avoidance strategy, an important fact shedding light on Dr. Lobacz's lack of criminal intent. Further, there is no indication that trial counsel, in conducting his own investigation of facts, even reached out to these people.

e. Dr. Shin's Medical Records

The Government's "star witness" was an elderly man, Dr. Young Ho Shin (80's), who appeared cognitively impaired with a diagnosis of dementia. Dr. Lobacz maintained that he had

asked trial counsel to obtain Dr. Shin's medical records to demonstrate that Dr. Shin's testimony was suspect due to his cognitive deficiencies at the time of his testimony. He was unable to recognize patients he treated as indicated in his own medical records, which he himself wrote and signed. He read from his own records but could not recall the patients or the treatment he gave. Putting aside for the moment what was or was not asked of him, trial counsel should have been alert enough to obtain those records on his own, even if not requested by Dr. Lobacz. Trial counsel never obtained these records. Nor for that matter did the Government. Those records would have demonstrated that Dr. Shin had memory deficiencies at the time of his testimony. Indeed, trial counsel himself, as reflected in the trial record, had concerns regarding Dr. Shin's capacity to testify and should have followed that up with a subpoena for Dr. Shin's medical records, on his own, even in the absence of a request by Dr. Lobacz. The District Judge was of the view that it did not matter given the Shadoffs' testimony. But an exploration of Dr. Shin's mental faculties and memory at around the time of his testimony would have been helpful in pointing to Dr. Shin's limited ability to recall accurately much of what he testified about. Further, as a factual matter, Dr. Lobacz was substantially disabled and the treating doctor was Dr. Shine as reflected in Dr. Shin's own records which he had signed.

f. Failure to Call Character Witnesses and Other Witnesses

Trial counsel also stated that Dr. Lobacz did not ask him to call any character witnesses or identify any such witnesses, a position upheld by the District Court. But, Dr. Lobacz maintained that he did provide a list of such witnesses. In a criminal prosecution, character witnesses alone may be sufficient to raise a reasonable doubt and an accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular

offense charged. *Edgington v. United States*, 164 U.S. 361, 363-364 (1896). Here, while trial counsel stated that he only learned of potential character witnesses after the trial, a position contradicted by Dr. Lobacz, that bespeaks trial counsel's own failure to inquire of Dr. Lobacz as to any character witnesses prior to trial. Experienced and effective counsel would have made suitable inquiry and undertaken the lead in pursuing the components of an effective defense, irrespective of whether he had been asked by his client. Trial counsel did not do that.

Additionally, Dr. Lobacz asked trial counsel to call as a witness Jim Graham, an accountant, who would have contradicted Samson's testimony that he had not received the full brokerage statement showing the options income. Trial counsel said he would call Graham but did not.

CONCLUSION

Given the state of the record and all of trial counsel's failures it is not surprising that the District Judge erroneously thought the evidence was overwhelming – a holding affirmed by the Circuit Court – when in reality it was far from it. In any event, the failure to move for a severance, as discussed above, permeated and infected the entire trial. It constituted ineffective assistance *per se* or was so seriously deficient and caused such great prejudice that the conviction should not be permitted to stand. Taken together with trial counsel's other failures and derelictions, this Court should grant the Petition.

Dated: June 3, 2019

Respectfully submitted,

Frank Lobacz, M.D.
Pro Se
352 Wildwood Lane, E.
Deerfield Beach, FL 33442-1406
917-586-9141