No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES E. COUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the court of appeals erred in denying petitioner's claim of ineffective assistance of counsel holding "appellant has not made a substantial showing of the denial of a constitutional right" despite evidence indicating medical expert witnesses were the lynchpin of counsel's defense strategy.
2. Whether the district court made an unreasonable determination of fact within the meaning of 28 U.S.C. § 2255 Rules 4 and 7 resolving disputed issues of fact based solely on the government's affidavit without an evidentiary hearing.
3. Whether the district court abused its discretion condoning as a strategic decision trial counsel not calling medical expert witnesses when it appears on the face of the record and multiple documents "outside the files and records of the case," that counsel made no strategic decision at all.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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

The opinion of the United States Court of Appeals for the District of Columbia at Appendix A to this petition and is unpublished.

The opinion of the United States District Court for the District of Columbia at Appendix B to this petition and is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 15, 2020. A timely petition for panel rehearing and rehearing en banc was denied on April 21, 2020, and a copy of the orders denying rehearing appear at Appendices C and D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

None.

STATEMENT OF THE CASE

A. Legal Framework

Under 28 U.S.C. 2253, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this court established § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983) that, under *Barefoot*, includes "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were `adequate to deserve encouragement to proceed further.' *Barefoot*, 463 U.S. at 893 and n. 4 ("sum[ming] up" the "substantial showing" standard. Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 483-84.

The starting point for analysis of a petitioner's constitutional claim of ineffective assistance of counsel is whether the facts set forth in petitioner's pleadings, accepted as true, establish the right to the relief sought which, in this case, is a new trial. *Machibroda*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), *United States v. Amlani*, 111 F3d 705, 710 (9th Cir. 1997) [Amlani's allegations presumed true because the district court did not hold an evidentiary hearing], *Anderson*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ["Credibility determinations are not the function of the judge; rather, the evidence of the non-movant is to be believed, and all justifiable inferences drawn in his favor." *Anderson*, 477 U.S. at 255].

In assessing whether a federal habeas petition was properly dismissed without an evidentiary hearing or discovery, the reviewing court must evaluate the petition under the standards governing motion to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Walker v. True*, 399 F.3d 315, 319 note 1 (4th Cir. 2005). Accordingly, the court is required to accept a petitioner's well pleaded allegations as true and draw all reasonable inferences therefrom in the petitioner's favor. *Conaway*, 453 F.3d 567, 582 (4th Cir. 2006).

An evidentiary hearing on a Section 2255 motion is required when the motion "raise[s] detailed and specific factual allegations whose resolution requires information outside the record or the judge's personal knowledge or recollection.'" *U.S. v. Orleans-Lindsay*, 572 F. Supp. 2d 144 (D.D.C. 2008) (quoting *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C.Cir.1992) (quoting *Machibroda*, 368 U.S. at 495). Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda*, 368 at 494, 495; *United States v. Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero v. United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott v. United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut v. United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano v. United States*, 362 F.2d 931, 932, 933 (3d Cir. 1966). If the parties submit contradictory affidavits or other evidence, and the court must determine the credibility of the

proffered evidence, an evidentiary hearing is generally required. *See* Advisory Committee Note to Rule 7, Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7, Rules Governing Section 2254 Cases, which states that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive").

This court has held that a federal court must grant an evidentiary hearing to a habeas petitioner when the facts in dispute were not resolved at an earlier hearing, the factual determination is not fairly supported by the record as a whole or when the fact-finding procedure employed was not adequate to afford a full and fair determination of the facts. *Townsend v. Sain*, 372 U.S. 293, 313 (1963). The court went further to state that "Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. "Although either party may choose to rely solely upon the evidence contained in that record [] petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues." *Townsend v. Sain*, 372 U.S. at 322 322. When it comes to a claim of ineffective assistance of counsel related to sentencing, failure to investigate or trial strategy, rarely can a habeas court resolve disputed issues of fact based solely on affidavits.

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This is "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970) *(emphasis added)*. The Supreme Court has explained that in giving meaning to this requirement courts must be guided by its purpose--"to ensure a fair trial"--and that therefore the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different," *Id.* at 694. See also *Wiggins v. Smith*, 539 U.S. 510,156 L. Ed. 2d 471,123 S. Ct. 2527, 2535, 2542 (2003); *United States v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. Although review of a defense attorney's performance must be "highly deferential," *Strickland*, 466 U.S. at 689, *Strickland* does not require the Court to "condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F. 3d 586, 604 (5th Cir. 1999). While counsel is to be afforded "wide latitude...in making tactical decisions," *Strickland*, 466 U.S. at 689, and judges should "defer to true tactical choices," the Sixth Amendment does not permit courts simply to "baptize" unreasonable or unexplainable decisions "with the rejuvenating labels of 'tactical' or 'strategic' choices." Proffitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987). When we assess the reasonableness of counsel's actions, we owe deference to counsel's informed strategic choices.

With respect to ineffective assistance of counsel claims, *Strickland* states that a claim of ineffective assistance of counsel requires the reviewing court to consider the "totality of the evidence" before the judge or the jury. "Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inference to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

Under Rule 7, virtually any materials relating to the motion can be added to the record in order "to clarify the relevant facts." *Vasquez v. Hillery*, 474 U.S. 254, 258,106 S. Ct. 617, 620, 88 L.Ed.2d 598 (1986); See, e.g. Id, 474 U.S. at 258, 106 S. Ct. at 620 (statistical analysis); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1160 (9th Cir. 2000) (affidavits); *United States v. Nieuwsma*, 779 F.2d 1359, 1360 n.3 (8th Cir. 1985) (presentence investigation report). Moreover, the materials submitted need not relate only to the merits of the claims in the motion; the record may also be expanded with materials that relate to other issues involving the motion. [emphasis added] See Advisory Committee Notes to Rule 7,

Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7 of Rules Governing Section 2254 Cases).

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right. 28 U.S. Code §2253(c)(2). *Buck v. Davis*, 580 U.S. __, 137 S.Ct. 759,197 L.Ed.2d 1 (2017) states that the questions to be resolved by the reviewing court are as follows: whether the applicant has made a substantial showing of the denial of a constitutional right. The applicant does not have to show he will prevail. He has to show that jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further. The question has to be decided without full consideration of the factual or legal bases adduced in support of the claims.

B. Importance of Medical Expert Witnesses

Trial 1

At Petitioner's first trial, United States v. Coughlin (hereinafter Trial 1), the government called five doctors, two designated as expert witnesses, to attack Petitioner's representations to the 9/11 Victims Compensation Fund (VCF) regarding his neck injury and disability resulting from the 9/11 attacks (Trial 1, Tr. March 18, 2009 (Bowen); March 12, 2009 (AM)(Murphy); March 19, 2009 (Rosenbaum); March 24, 2009 (Smith); and March 23, 2009 (Morgan)). The government entered into evidence petitioner's medical records from 1978-2007 (Pl.'s Ex. Medical Records 1), multiple demonstrative aids, an expanded medical chart timeline documenting visually petitioner's medical visits and complaints from 1998-2005 (Pl.'s Ex. Medical Records 6A, 6B, 6C, 6D), as well as two demonstrative videos of surgical procedures (Pl.'s Ex. Murphy 1) narrated by a physician to assist the fact finders in understanding the highly technical and complex medical testimony. The government also introduced extensive evidence of petitioner's athletic activities – basketball, running, and lacrosse – through multiple witnesses (Trial Tr. March 19, 2009) (Avveduti); Trial Tr. March 23, 2009 (Schraf); and Trial Tr. March 24, 2009 and March 25, 2009 (Broome)).

Through these witnesses the government introduced testimony and evidence to demonstrate petitioner exaggerated the severity of his 9/11 injury; that he would not need to travel to obtain treatment

as he claimed; that petitioner lied when he stated he would ultimately require surgery; that petitioner lied when he stated his doctors told him he would absolutely require surgery; petitioner misrepresented his 1998 symptoms having gone away entirely and he had additional flare- ups prior to 9/11, including a motor vehicle accident in 2000,that he never disclosed to the VCF; that he exaggerated his symptoms; that petitioner didn't disclose other ailments that were more debilitating than his neck injury; and that petitioner lied about his ability to perform household chores.[1] The government emphasized to the Court in its opening statement and closing and rebuttal arguments that their medical experts and athletic activity witnesses established that petitioner:

a. Exaggerated the severity of his 9/11 injury ("The doctors will also tell you that the description that the defendant provided for the way he was injured, what he was able to do after he was injured, and how the medical professionals, who [Coughlin] finally saw on September 21st, how they treated him...are inconsistent with someone who suffered a traumatic injury as defendant Charles Coughlin claimed he had" (Trial Tr. 16:17 – 23, March 10, 2009); "So when we talk about Charles Coughlin...we are talking about lies, half-truths, and...omissions of material facts...that he used to try to fool the VCF...that he was more injured than he really was" (Trial Tr. 10:21 – 11:1, March 7, 2009); "[Dr. Bowen] says in the letter that his condition seems to have been exacerbated by 9/11...[T]he problem with Dr. Bowen's letter is that it tells the truth...that 9/11 was, at most, a small part of the overall neck condition...[and] he was either going to get nothing, or substantially less than he wanted [from the VCF]" (Trial Tr. 24:20 – 25:5, April 7, 2009); "The Fund was designed to compensate people who really were hurt in 9/11...And there was no need to worry about people who, you know, got a scratch" (Trial Tr. 51:22 -52:4), April 7, 2009; "[The Government] never started this case, and we're not trying to tell you now that [Coughlin] wasn't

[1] It is critical to note that the government's medical arguments remained exactly the same throughout all three trials. The government and district court have consistently, but wrongly, claimed in their briefs and opinions that the only medical issues contested in Trial 1 was whether petitioner was injured and whether he incurred a disability. Instead of reviewing and citing to Trial 1 transcripts and exhibits, they cite to several erroneous entries in the appellate court's decision following Trial 2, *United States v. Coughlin,* 610 F. 3d 89 (D.C. Cir. 2010).

hurt. What we've proven to you with evidence is that he lied to the VCF" (Trial Tr. 44:11 – 13, April 8, 2009); "[T]he defendant claimed he had a permanent disability...[Dr. Smith] said if you can run a marathon, you are not disabled" (Trial Tr. 32:2 – 6, April 7, 2009); "So what [Coughlin] did was he tried to minimize what happened before [9/11]. He tried to exaggerate what happened after [9/11]. And you see what the result was in terms of what he convinced the VCF" (Trial Tr. 45:17 – 19, April 8, 2009)).

b. Exaggerated his cervical symptoms ("In fact, when [Coughlin] leaves Dr. Friedman, Dr. Friedman's disposition that he writes on the form is, go to pain management...and come back if you need to. And, you know from all the medical records that he didn't go back. Don't you think that's because he didn't need to?" (Trial Tr. 21:14 – 18, April 7, 2009); "It's also the case, and the evidence proves this, that he grossly exaggerated his symptoms when he talked to the VCF ... constant pain ... couldn't turn his head more than 30 degrees" (Trial Tr. 35:17 – 36:6, April 7, 2009); "When he goes to the doctor in 2003 for his hip surgery...he describes his neck condition as a slight pinched nerve with a slight weakness in his tricep. Where is the constant pain? Where is the 30-degree limitation in range of motion? Where is all the debilitating symptoms that he wants the VCF to believe? So when he is talking to the VCF and there is money riding on this, his symptoms go through the roof...He says the same thing to the anesthesiologist at Walter Reed...slight pinched nerve without pain" (Trial Tr. 36:15 – 37:8, April 7, 2009); "He ran [he 2001 New York Marathon], without stopping, for three hours and 43 minutes...[T]hat's not a disabled person. That's not someone who is suffering from a debilitating symptoms" (Trial Tr. 40:11 – 21, April 7, 2009); "And [the letter] said he was suffering from these debilitating symptoms, which I think it's pretty clear by now there weren't any debilitating symptoms" (Trial Tr. 53:10 – 12, April 7, 2009); "[Coughlin] wrote...say[ing] he requires ongoing therapy. Well, we know that's not true. This was written in 2004, he hadn't had ongoing therapy for - - two years at that point. [Coughlin] writes the symptoms decreased in severity with chiropractic and massage treatment. Again, another falsity" (Trial Tr. 53:18 – 23, April 7, 2009); "And we know now that Charles Coughlin didn't need

any medical services. And the inference there, isn't it, that he wasn't very hurt. He didn't want to go to the doctor...[or] to the chiropractor...[I]t's just more evidence that he actually wasn't very hurt, isn't it" (Trial Tr. 52:1 – 8, April 8, 2009)).

c. Misrepresented the impact of the 9/11 events on his athletic activities and, in turn, he was perfectly capable of performing household chores ("Now what did [Coughlin] do to try to bolster his claim that [his prior 1998 neck injury] had healed...[H]e said...I began running marathons. And gave to the VCF three certifications of completion of three marathons he ran in 1999 and 2000. But...[Coughlin] didn't submit a certificate from...the [2001] New York City Marathon. This was less than two months after he claimed he was permanently disabled...[He] did not tell the VCF that he continued to live an active lifestyle...[H]e lied when he said he stopped playing lacrosse...He didn't just show up, he played and he completed" (Trial Tr. 17:1 – 19:9, March 10, 2009); "Charles Coughlin continued to play his favorite sport, basketball. And you are going to see in the medical records that he not only played, he injured himself by playing several times" (Trial Tr. 19:11 – 14, March 10, 2009); "Dr. Smith will also tell you that defendant Charles Coughlin led him to believe that he was in constant pain; that [Coughlin] couldn't do those regular daily activities that most people can; that he wasn't playing sports anymore" (Trial Tr. 25:23 – 26:1, March 10, 2009); "[T]his case is about lies about his medical history; it's about omissions and half-truths about his physical activities; it's about false and dishonest statements about a number of things" (Trial Tr. 13:11 – 14, April 7, 2009); "Charles Coughlin's application...was riddled with lies, half-truths and glaring omissions...From his medical condition, to his physical limitations, to the sports he played...in a completely dishonest way" (Trial Tr. 15:22 – 16:7, April 7, 2009); "And so the defendant is saying that running a marathon means that you are relatively healthy...The defendant's testimony and his information he provided about the marathon running was completely dishonest and deceptive...he in fact did run a marathon after 9/11. And here is an exhibit that he put into evidence that proves he ran a marathon" (Trial Tr. 38:14 – 39:20, April 7, 2009); "[F]irst of all, let me just say, I don't have a photograph to show you with him painting his daughter's room. Like

we did with the marathons and lacrosse, there is no "gotcha" photograph...[He] ran the New York City Marathon in a very impressive time back in 2001. Does it ring true to you that same man couldn't do household chores; he couldn't hang a picture up; he can't spread mulch out in his yard; he can't paint" (Trial Tr. 46:1 – 10, April 7, 2009); "Coughlin's explanation about running and playing lacrosse, those are just because he was so determined, that he had the force of will...[Coughlin] ran the [NYC 2001] marathon and finished it because he wanted to prove something to the terrorist. Well, why couldn't he muster that same force of will...when it came to paint his daughter's room? Why couldn't he show that same determination when it came time to hang a mirror?" (Trial Tr. 46:20 – 47:4, April 7, 2009); "It's impossible for him to do things around the home like installing a curtain rod...[C]an you honestly believe that...he can't hang a picture...This is the same time [Coughlin] is running [the NYC 2001] marathon" (Trial Tr. 57:25 – 58:6, April 7, 2009); "This case is about whether [Coughlin] lied to the VCF about the nature and extent of his injuries, his physical limitations" (Trial Tr. 43:4 – 6, April 8, 2009); "[Dr. Mayer] wants you to believe that running a marathon in three hours and 43 minutes is evidence that [Coughlin] was terribly injured on 9/11. Do you believe that? That's their case now...that Charles Coughlin was really very badly hurt" (Trial Tr. 47:20 – 48:2, April 8, 2009)).

d. That there were many non-surgical options available and therefore would not ultimately require surgery ("And the neurologist saw the defendant and said surgery is not required. Pain management and other conservative methods was what the doctors had recommended in April of 2003" (Trial Tr. 23:11 – 14, March 10, 2009); "[Coughlin] tells Dr. Smith that the military doctors have told him that he is going to have surgery, that he needs it. That's not documented anywhere in the medical records...Dr. Rosenbaum told [Coughlin] that even in 2007 he still didn't need surgery" (Trial Tr. 30:10 – 16, April 7, 2009); "Now, Dr. Friedman's medical record, obviously, doesn't in any way support what [Coughlin] wants you to believe...[T]he medical records just plain didn't support that [Coughlin] needed surgery or that [Coughlin] would need surgery" (Trial Tr. 54:12 – 17, April 8, 2009).

The defense brought three medical experts, Drs. Spiro Antoniades, Jay Khanna and Thom Mayer, to counter the government's extensive and intensive medical arguments. Collectively they testified:

1. Pain tolerance varies between people and that athletes push through pain and have higher thresholds for pain;
2. Daily activities can affect symptoms and that athletes can modify activities to lessen symptoms;
3. Symptoms can vary and present in different ways; patients can experience periodic flareups;
4. Physical therapy (PT) for patients will vary based on many factors;
5. 9/11 incident exacerbated petitioner's neck injury/condition;
6. Petitioner's pre-1998 medical history and motor vehicle accident in March 2000 (MVA 2000) and other flareups weren't relevant to petitioner's 9/11 injury and post-9/11 symptoms;
7. Concurring with Dr. Smith's IME findings that 9/11 caused left-sided radiculopathy and increased symptoms, that CEC was a surgical candidate, and the permanency and treatment was related to 9/11 injury resulting in a partial disability;
8. Petitioner's 9/11 injury resulted in a new injury to C4-C5;
9. Petitioner's narrowed spinal canal increased his susceptibility to injury;
10. Petitioner's athletic activities and performance after each injury (initial onset in 1998, MVA 2000, 9/11) didn't change their opinion;
11. Petitioner's cervical condition was worsened by 9/11 and his still having symptoms in 2007 was significant;
12. Surgery is an option;
13. The 2000 motor vehicle accident was not the cause of petitioner's post-9/11 symptoms;
14. The important information about athletic activities in gauging the severity of a person's injury includes comparing changes in quality of play, level of play, frequency of play, modifications to play, etc. pre- and post-injury incurring event;
15. Athletes go through a "transition" in understanding and accepting an injury's impact on athletic performance and typically slowly "phase out" athletic participation;

16. In-depth on the deficiencies of the "standard" medical record format as compared to a sports medicine medical record format in gauging severity of injury and symptoms;
17. In-depth analyzing petitioner's marathon performance following each "event" (1998, MVA 2000, 9/11) to explain each "event's" significance and impact on the cervical injury incurred indicated 9/11 event was the most significant injury and was the cause of continuing significant symptoms, and
18. Petitioner's other injuries (e.g. hip, shoulder) couldn't account for, and weren't responsible for, his decreased athletic performance post-9/11.

(Trial 1, Tr. March 18, 2009 (Antoniades); March 30, 2009 (Khanna); March 30, 2009 and March 31, 2009 (AM) (Mayer))

The case was submitted to the jury and after deliberations the jury acquitted petitioner of three counts of mail fraud (Counts 2, 3, and 5), but was unable to reach a verdict as to the other mail fraud counts (Counts 1 and 4), filing a false, fictitious and fraudulent claim count (Count 6) and theft of government property count (Count 7). The government told the Court during a pre-trial motions in limine conference that the jury was persuaded by petitioner's expert witnesses. ("[The juror] couldn't find [petitioner] guilty because [the juror had] been judged disabled, but [he] can still run." Mot. in Limine Tr. 20:12 – 21:3, June 30, 2011). Dr. Mayer's testimony strongly influenced the first jury as reflected by two jurors, Brian Muldoon and jury foreman Dave Geckle, telling a reporter they thought petitioner was the kind of man who wouldn't let the pain stop him from exercising. "I broke my hip but I still run," Muldoon told the reporter. (The Washington Post, April 12, 2009).

Medical and athletic activity evidence and testimony constituted 44% of the government's case-in-chief and 70% of the defense's case.

Trial 2

On June 10, 2009, the jury was sworn and the government began presenting evidence. In United States v. Coughlin (hereinafter Trial 2), the defense counsel was ready and able to counter the government's expert witnesses just as it had in Trial 1 having the same three expert medical witnesses prepared to testify

again (ECF No. 247 Ex. 2 – 7). In its opening statement, the government made the exact same medical arguments as it did in Trial 1. (Trial Tr. June 10, 2009). This time the government called seven medical practitioners, three designated as expert medical witnesses. This was a significant increase over the first trial; two additional doctors with one physician designated as an additional expert witness (two total) in the field of neurosurgery (Trial Tr. 106:4 – 12, June 16, 2009) and the other new physician as an expert with a certification in primary care sports medicine to counter the defense's expert medical witness in sports medicine, Dr. Thom Mayer. (Trial Tr. 108:19 – 21, June 11, 2009 (PM)).

While petitioner's first witness was testifying, the trial was stayed, because on June 18, 2009, the Supreme Court issued its decision in Yeager v. United States, 129 S. Ct. 2360 (2009) that reversed D.C. Circuit law with respect to the double-jeopardy analysis to be applied when a jury acquits on some counts and fails to reach verdicts on others. The expert testimony to refute the Government's case-in-chief was never brought into evidence in Trial 2 although petitioner was well prepared to offer multiple expert witnesses in his defense. (ECF No. 247 Ex. 2 – 7). It is noteworthy that the additional government expert medical and athletic activity witnesses increased the government's medical and athletic activity-elicited testimony on direct from 44% of the total direct testimony in Trial 1 to 57% in Trial 2.

Trial 3

On June 29, 2010, the D.C. Circuit issued its opinion (United States v. Coughlin, 610 F. 3d 89 (D.C. Cir. 2010)) directing the trial court to dismiss Counts One and Four of the original indictment and remanded for further proceedings Counts Six (false claim) and Seven (theft of public money).

In preparation for trial, the government argued before Judge Kennedy that Defendant's "post 9/11 **medical records and athletic activity evidence**...are **intrinsic to the remaining counts** of the indictment." (Gov't's 404(b) Notice – Intent to Introduce Evidence 15, December 12, 2010, ECF No. 122) [emphasis added]. The government stated that "the discrepancies between the medical evidence and petitioner's representations to the VCF...**go to the very heart of the government's case**...[t]herefore, this evidence is **relevant and should be admitted**." Id. at 17 [emphasis added]. Without this evidence and testimony in Trial 3 the amount of money the government could argue petitioner defrauded the VCF would

be significantly reduced; $10,826 ($3,795 in past replacement services and $7,031 in past loss of earnings) of the $151,034 total award.

Expert medical witness testimony was directly linked to future economic loss. Jeffrey Lewis, a government witness, testified consistently in Trials 1 and 3 that future replacement services economic loss was based on what the individual could do in the past but no longer able to do in the future; not what was paid for those past services. Future earnings and medical economic losses were also not based on past earnings and medical expenses. (Trial Tr. 32 – 33, August 10, 2011 (AM); Trial Tr. 173, 182 – 183, March 11, 2009 (AM)). **To summarize, future economic loss was totally divorced from any claimed past economic loss.** Petitioner's January 22, 2004 VCF submissions and his May 13, 2004 VCF Hearing testimony and submissions, including estimates for future economic claims demonstrate petitioner never based his future economic loss on his past economic loss. (Trial 3 Ex. VCF6 – 42-70).

On January 27, 2011, Judge Kennedy orally issued his ruling from the bench. He precluded the government from using medical records and athletic activity evidence to prove defendant's statements regarding "his description of ... his cervical injuries, severity, and debilitating effects" to the VCF were fraudulently made. He also precluded the government from presenting any evidence or making any argument challenging defendant's proclaimed need for replacement services because he was physically capable of performing the services himself. Emphasizing medical evidence and expert medical testimony was central to their case, the government told the court it was "an undoable decision...because **[the government] can't try the case based upon the facts of this case and the Court's ruling.**" Pre-trial Conference Tr. 27, January 27, 2011 [emphasis added].

On February 1, 2011, the government filed a motion restating its position with respect to Judge Kennedy's evidentiary rulings and requesting him to reconsider. Gov't Mot. For Recons. Ct.'s Evidentiary Rulings, February 1, 2011, ECF No. 128. The following day, the case was reassigned to Chief Judge Royce

C. Lamberth by consent and he requested resubmittal of motions.[2] Again the government stressed the importance of the medical and athletic activity evidence to their case stating it was critical Rule 401 evidence. Gov't's Supplemental Mot. Seeking Evidentiary Rulings, February 28, 2011, ECF No. 132

Judge Lamberth agreed, reversed Judge Kennedy's ruling and stated in his opinion the medical and athletic activity evidence "is central to th[e] determination" as to whether Coughlin exaggerated the extent of his 9/11 injuries in order to decide whether "[petitioner] made false economic damages claims or stole public money." He said "[T]he evidence is also relevant to show that despite sustaining an injury on 9/11 [petitioner] could have performed the household chores he [claimed] he was physically incapable of doing. His inability to perform these physical activities form a key portion of his claim for economic damages." **Judge Lamberth said expert medical testimony was "critical," "intrinsically intertwined," and "Rule 401 evidence used to make other evidence more likely than not."** Mem. Op., ECF No. 141. [emphasis added]. Since there was no evidence of petitioner performing the chores he listed in his VCF submission post-9/11, the medical record entries and athletic activity issues were de facto representations of his ability to perform household chores.

Chief Judge Lamberth's ruling disseminated a month before trial reversed Judge Kennedy's ruling and resulted in Trial 3 becoming "Trial 1 all over again" as discussed between trial counsel and petitioner. Defense counsel immediately began reaching out to petitioner's three Trial 1 expert medical witnesses as well as multiple current tending physicians and physical therapists to inquire about their testifying. Ultimately, due to petitioner's financial situation and limitations put in place by the district court to allow only medical testimony up to May 2004, the date of the VCF Hearing, the defense's only expert medical witness scheduled to testify pro bono was Dr. Thom Mayer. Pet'r's Reply Brief, December 15, 2017, ECF No. 247.

Since there was no evidence of petitioner having performed the specific chores he listed in his VCF

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[2] Judge Kennedy had the benefit of seeing both parties evidence, arguments and demeanor during Trials 1 and 2; an observation Judge Lamberth didn't have when forming his memorandum opinions during petitioner's U.S.C. 2255 post-trial motions.

submission post-9/11, the medical record entries and athletic activity issues were highlighted as a de facto representation of petitioner's ability to perform household chores. ("[L]et me just say, [The government] do[es]n't have a photograph to show you with [petitioner] painting his daughter's room. Like we did with marathons and lacrosse, there is no "gotcha" photograph. But...does what he was claiming make sense? I mean...here is a man who...ran the New York City Marathon in a very impressive time back in 2001. Does it ring true to you that that same man couldn't do household chores...Does that make any sense to you." (Trial Tr. Gov't Closing Remarks 46, April 7, 2009 (PM)). As a result, medical expert testimony and athletic activity evidence went directly to future economic loss constituting $140,000 (93%) of the $151,034 of the economic award.

Despite the government's and defense trial attorney's current representations, both parties *increased* the number of medical witnesses, experts and athletic activity witnesses from Trial 1 through Trial 3:

	Trial 1	**Trial 2** [3]	**Trial 3**
Medical Witnesses			
Government:	5	7	5 (1)[4]
Defense:	3	*	0
Athletic Activity			
Government:	3	4	4
Defense:	6	*	9

In its case-in-chief, the government's medical and athletic activity-elicited testimony increased from 44% of the total direct testimony in Trial 1, to 57% in Trial 2, to 77% in Trial 3.

The government's treating and expert medical witnesses had no independent recollection of their past interactions with petitioner and relied solely on the medical records for their opinions and testimony thereby placing them on a par with any defense expert medical witness testifying from the same medical

[3] The D.C. Circuit stayed the case pending petitioner's appeal during testimony of the defense's first witness. The Defense was prepared to offer testimony from the same three Trial 1 expert medical witnesses in Trial 2 as well as multiple athletic activity witnesses. Pet'r's Reply Br. Ex. 247-7, December 15, 2017, ECF No. 247.

[4] Despite extraordinary efforts, the government was unsuccessful in having Dr. Rosenbaum, a military neurosurgeon and designated Trial 1 expert medical witness, recalled from Kandahar, Afghanistan to testify as a 4th expert medical witness and 6th medical practitioner in Trial 3. (Trial Tr. 180:1 – 181:1, August 8, 2011)).

records. (Trial Tr. 40 – 41, August 9, 2011; Trial Tr. 3, August 10, 2011; Trial Tr. 7 – 8, August 11, 2011 (PM); Trial Tr. 116 – 117, 175 – 176, August 15, 2011)

Petitioner's medical issues in Trial 3 were not a "sideshow" (Gov't's Final Opp'n. 15) but rather the focal point of all three trials, particularly Trial 3. Both parties' actions post-Trial 1 through Trial 3 illustrate the importance both parties placed on expert medical witness testimony.

C. Defense Expert Medical Witness Was Scheduled To Testify

On December 15, 2017, petitioner submitted his Reply Brief (ECF No. 247) in response to the government's Final Opposition To Defendant's Amended Motion Under 28 U.S.C. Section 2255 To Vacate, Set Aside, or Correct Sentence (ECF No. 241). This government filing contained trial counsel's declaration (App E) alleging the decision to not call defense expert medical witnesses was a strategic decision and that he informed petitioner of this strategy before and during Trial 3. *Neither the government nor counsel provided any evidence to support the representations within counsel's declaration.* Petitioner's reply brief countered, explaining in detail through petitioner's declaration (App F) that the defense strategy always incorporated defense-called expert medical witnesses and that they were the lynchpin of the defense trial strategy as they were in both previous trials. Pet'r's Reply Br. Ex. 1, December 15, 2017, ECF No. 247. His reply contained representative emails (Pet'r's Reply Br. Ex. 1 – 30) of contemporaneous communications between petitioner and his attorneys and the government and his attorneys post-Trial 1, Trial 2, and prior to and during Trial 3. Trial counsel's strategy for Trial 3, as conveyed through petitioner's declaration with email evidence to support, centered on calling athletic activity witnesses to testify about petitioner's significant decrease in participation in athletic activities and his diminished performance in those activities that he participated, then using expert medical witnesses to explain petitioner's ability to continue to play sports but not do certain household chores, what movements may or may not trigger or aggravate certain radicular symptoms, the movements of the body and how petitioner's condition may or may not limit him, provide opinions on the relevance of petitioner's various medical record entries, whether future surgery was a potential prognosis, where he would be able to obtain physical therapy, symptomology,

etc. These emails were all "outside the files and the record of the trial." The major points contradicting trial counsel's allegations include:

1. Petitioner's trial attorney's actions directly contradict the government's and trial attorney's current representations about Trial 1 jurors' perception of medical experts. In preparation for Trial 2, a May 18, 2009 email from defense trial attorney to petitioner, discussed making arrangements for medical experts to testify in the upcoming trial. Referring solely to defense medical experts Drs. Khanna and Antoniades, it stated that in Trial 1, only several jurors found the two doctors "helpful but not credible." Trial counsel then speculated that in his opinion those jurors found "the doctors' testimony to be helpful in their understanding of the mechanics of the spine and neck and the injuries thereto, but that they discounted Antoniades' and Khanna's opinions being bought and paid for."[5] Dr. Mayer's testimony was never referenced as he was a superb, "on point" witness. (Pet'r's Reply Br. Ex. 1) Notably, contrary to defense trial attorney's current representations, the defense was prepared to have all three expert medical witnesses testify again in Trial 2 commencing three weeks later after discussing their Trial 1 miscues.(Pet'r's Reply Br. Ex. 2 – 7)
2. Immediately upon Judge Lamberth publishing his Memorandum Opinion [141], the defense initiated an overt Trial 3 strategy to "prepare for trial 1 again." (Pet'r's Reply Br. Ex. 10).
3. The focus of that strategy was to use petitioner's treating physicians and physical therapists from 2006 through 2011; including as experts. (Pet'r's Reply Br. Ex. 8, 8a, 9, 10, 13).
4. The strategy was to use medical experts and treating physicians to counter the government's arguments as to petitioner's abilities based on its use of athletic activities and medical record

[5] Drs. Antoniades and Khanna were first-time expert witnesses who made critical mistakes creating this perception. On cross-examination, both doctors admitted their notes and timelines contained errors and omitted several pertinent medical reports that would have factored into their opinions. Dr. Khanna admitted that on the original day he was to testify (and didn't due to a change in trial schedule) – an additional day that Defendant still paid him an additional $5000 – he spent that time conducting academic work such as responding to emails, working on his book and other personal activities instead of reviewing Coughlin's medical records and preparing for trial. (3/18/09, p. 201 – 202; 3/30/09, p. 55 – 56, 57 – 58, 64 – 65, 78).

evidence, focus on specific motions and types of activities that aggravated defendant's symptoms, provide opinions on the relevance of petitioner's various medical record entries, whether future surgery was a potential prognosis, where he would be able to obtain physical therapy, symptomology, etc. (Pet'r's Reply Br. Ex. 10, 11, 12).

5. Defense counsel held a strategy session on July 18, 2011 to discuss petitioner's July 14, 2011 medical appointment with Dr. Severson, a neurosurgeon, to review a recent MRI; using Drs. Severson and Tomlin (another treating neurosurgeon), and Patty Smith, PA as defense treating and expert medical witnesses; using specific physical therapists as medical treating and expert witnesses; the follow-on actions needed for defense counsel to engage them in discussing petitioner's legal situation and medical issues; and using Drs. Mayer, Khana and Antoniades again as expert medical witnesses. (Pet'r's Reply Br. Ex. 10, 13).
6. Following the strategy session, defense counsel made concerted efforts to contact petitioner's treating medical physicians and physical therapists. (Pet'r's Reply Br. Ex. 14, 15, 16, 18).
7. Defense counsel discussed hiring medical experts, the anticipated cost of an expert to testify ($10k-$20k), whether Dr. Mayer would testify again as an expert for free (including stating they would review his Trial 1 testimony to ascertain value in having him testify in Trial 3), the benefit of having treating physicians testify as experts is that they are less expensive, and their reasoning for preferring to talk with Dr. Severson before Dr. Tomlin. Petitioner expressed his opinion and that money was a big issue. (Pet'r's Reply Br. Ex. 11, 14).
8. Petitioner provided an initial proposed defense witness list, with multiple experts, based on recent discussions with defense counsel and trial strategy. (Pet'r's Reply Br. Ex. 17, 17a).
9. Defense counsel, based on their review of Dr. Mayer's Trial 1 testimony and its value, confirmed arrangements for having Dr. Mayer testify in Trial 3. (Pet'r's Reply Br. Ex. 19, 25).
10. The government notified defense counsel of its expert medical witnesses – including significant efforts to recall Dr. Rosenbaum, a neurosurgeon currently deployed in Southern Afghanistan, to testify – and the scope of their Trial 3 testimony. (Pet'r's Reply Br. Ex. 11, 21, 27).

11. Defense counsel solidified arrangements with Dr. Mayer to testify as a pro bono defense expert medical witness. Defense counsel notified the government that Drs. Mayer, Khana and Antoniades would be offered as defense expert medical witnesses and the scope of their Trial 3 testimony to refute the government's arguments would be consistent with their Trial 1 testimony and counsel's previous representations. (Pet'r's Reply Br. Ex. 20, 25, 27).
12. The government objected to defense medical experts and post-indictment medical records. Defense counsel refuted government's basis for objecting to post-indictment medical records, noted that "medical issues remain in play," and that "[The Government] intend[s] to call medical experts in [their] case...[therefore **the defense] is entitled to have medical experts rebut [their] experts' testimony,**" questioning the relevance of several Government expert medical witnesses. [emphasis added] (Pet'r's Reply Br. Ex. 21, 26).
13. Based on the government's objection to defense medical experts, petitioner reiterated to defense counsel the importance of defense medical experts, particularly Dr. Mayer as a sports medicine expert, considering the government's medical and athletic activity arguments. Petitioner noted "what Coughlin can or can't do, should be able to do or not do, might be able to do or not do are the relevant points" and that the experts' testimony will explain the apparent dichotomy of still playing sports (e.g. at a lower performance level, far less frequently, altered play, etc.) while not being able to perform certain household chores and petitioner's claim for possible future surgery. (Pet'r's Reply Br. Ex. 22).
14. Defense counsel provided updated defense and government witness lists based on recent stipulations that medical records and testimony will not go beyond the May 13, 2004 VCF Hearing date. In response to the stipulation, petitioner's treating physicians and physical therapists from 2006 through 2011 are removed from the witness list resulting in 5 medical practitioners (including the 3 experts from Trial 1) and 24 athletic activity witnesses remaining for the defense in Trial 3 while the government has 7 medical practitioners (4 as experts) and 7 athletic activity witnesses on their list. (Pet'r's Reply Br. Ex. 23, 23a, 23b, 26, 28).

15. The government again explained the scope of their expert medical witness testimony, informed the defense that they will call Dr. Smith to explain his IME that notified the VCF of petitioner's potential need for surgery, and its continued objection to calling Dr. Mayer as a defense expert medical witness. (Pet'r's Reply Br. Ex. 26).
16. Defense held a Trial 3 general prep meeting just prior to trial to discuss rebutting the arguments to be made through the government's medical expert and athletic activity witnesses and reaffirmed use of defense medical expert and athletic activity witnesses. Petitioner reaffirmed to defense counsel that he was unable to pay for medical experts leaving Dr. Mayer as the only defense expert medical witness. (Pet'r's Reply Br. Ex. 24, 26).
17. Throughout Trial 3, defense counsel maintained ongoing communication with Dr. Mayer to deconflict his personal schedule with his testifying at trial. (Pet'r's Reply Br. Ex. 25, 29, 30).
18. Government's last medical witnesses testified on August 15, the date trial counsel alleged in his declaration was the point defense counsel would assess the need to call defense expert medical witnesses. (Trial Tr. Friedman and Smith, August 15, 2011).
19. Government rested its case-in-chief on August 17. (Trial Tr. 97, August 17, 2011).
20. Late Thursday evening (August 17), petitioner asks trial counsel the anticipated lineup for defense witnesses. Petitioner states he sees Dr. Mayer "locked in" for Monday, August 22. Trial counsel immediately follows up with Dr. Mayer to confirm he is ready to testify on Monday, August 22, and whether they could possibly meet over the weekend to discuss his testimony. Dr. Mayer was now living in Wyoming. (Pet'r's Reply Br. Ex. 29, 30).
21. On Friday, August 19, at the conclusion of that day's testimony and prior to recessing for the weekend, in response to an ongoing government objection of the defense's expert medical witnesses, defense counsel informed the court given the "government is taking exception to Commander Coughlin's ability to continue to play sports but not do certain things around the house... [Dr. Mayer] is qualified to testify about what movements may or may not trigger certain radicular symptoms" and other testimony to rebut the government's expert medical

witnesses' testimony. Defense counsel informed the Court that Dr. Mayer will be the defense's sole medical expert and will testify that Monday, August 22; the last day the defense would call new witnesses for the defense. (Trial Tr. 31 – 34, August 19, 2011).

22. Trial counsel received an email from Dr. Mayer stating his schedule continues to be in flux and that August 24th is now a better date for him to testify. Trial counsel pleads with Dr. Mayer that the trial may not go that long and whether there is "[a]ny way at all that you can go on Monday[, August 22?"

23. Defense counsel continued communication with Dr. Mayer to coordinate schedules, including beyond trial counsel's alleged date for making a final decision whether to call experts, until it appeared he may not be able to testify prior to the defense resting. Defense trial counsel informed petitioner of the issue on August 20, to which petitioner responded, "I think he is an asset and can only help" while questioning whether the Court will allow petitioner's testimony to be interrupted for Dr. Mayer. On August 21, the day before Dr. Mayer was to testify, petitioner is informed that Dr. Mayer will not testify. (Pet'r's Reply Br. Ex. 30; App H). Dr. Mayer submitted a declaration (late) supporting his scheduled testimony. (App. I)

24. On or about July 21, 2017 – six years later – the government and defense trial counsel inform the court that it was a tactical and/or strategic decision not to call defense medical experts. (Gov't's Final Opp'n 13-17 and Gov't Ex. 1).

REASONS FOR GRANTING THE WRIT

The Court should grant review in this case as the appellate court has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure from the district court, as to call for an exercise of this Court's supervisory power.

The District Court Made An Unreasonable Determination Of Fact

The district court denied petitioner's application for a COA because petitioner failed to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims

debatable or wrong." (Order, August 28, 2019, ECF No. 267). In reaching that decision, the court stated it's reasoning:

> When the government retried the hung charges [from Trial 1], Coughlin's legal team decided not to recall the medical experts, since jurors from the prior trial found their testimony excessive and distracting. Ultimately, that gamble failed: the new jury convicted Coughlin of filing a false claim and stealing government property. And now, Coughlin claims his counsel's strategic misjudgment amounted to constitutionally deficient representation. But in forgoing the medical experts' testimony, Coughlin's lawyers reasonably (if wrongly) trusted their professional judgment.

The court depended solely on trial counsel's declaration (ECF No. 241 Ex. 1) without a hearing. The declaration made numerous assertions that petitioner demonstrated with evidence were false. Trial counsel's misrepresentations were designed to minimize the importance of defense expert medical witness testimony and bolster trial attorney's claim that it was a strategic decision not to use defense experts. The falsehoods in trial attorney's declaration include:

1. Grossly understate/misrepresent the Government's medical case against petitioner in Trial 1 to a single contested issue - whether Coughlin lied about being injured on 9/11 - to minimize the need for expert medical witness testimony since the government claimed whether petitioner was injured or not was no longer an issue. (ECF No. 241 Ex. 1 at 2 – 3). Actually, the government introduced testimony and evidence in Trial 1 to demonstrate petitioner exaggerated the severity of his 9/11 injury; that he would not need to travel to obtain treatment as he claimed; that petitioner lied when he stated he would ultimately require surgery; that petitioner lied when he stated his doctors told him he would absolutely require surgery; petitioner misrepresented his 1998 symptoms having gone away entirely and he had additional flare- ups prior to 9/11, including a motor vehicle accident in 2000,that he never disclosed to the VCF; that he exaggerated his symptoms; that petitioner didn't disclose other ailments that were more debilitating than his neck injury; and that petitioner lied about his ability to perform household chores.[6] (See Trial Tr. Gov't Opening Statement, March 10,

[6] It is noteworthy the government's medical arguments remained exactly the same throughout all three trials. The government and district court have consistently, but wrongly, claimed in their briefs and opinions that the only medical issues contested in Trial 1 was whether petitioner was injured and whether he incurred a disability. Instead of reviewing and citing to Trial 1 transcripts and exhibits, they cite to several

2009; Gov't Closing Remarks, April 7, 2009; Gov't Rebuttal Remarks, April 8, 2009). "[The Government] never started this case, and we're not trying to tell you now that [Coughlin] wasn't hurt. What we've proven to you with evidence is that he lied to the VCF" (Trial Tr. 44:11 – 13, April 8, 2009); "[T]he defendant claimed he had a permanent disability...[Dr. Smith] said if you can run a marathon, you are not disabled" (Trial Tr. 32:2 – 6, April 7, 2009); "So what [Coughlin] did was he tried to minimize what happened before [9/11]. He tried to exaggerate what happened after [9/11]. And you see what the result was in terms of what he convinced the VCF" (Trial Tr. 45:17 – 19, April 8, 2009)). "He ran [he 2001 New York Marathon], without stopping, for three hours and 43 minutes...[T]hat's not a disabled person. That's not someone who is suffering from a debilitating symptoms" (Trial Tr. 40:11 – 21, April 7, 2009);); "And we know now that Charles Coughlin didn't need any medical services. And the inference there, isn't it, that he wasn't very hurt. He didn't want to go to the doctor...[or] to the chiropractor...[I]t's just more evidence that he actually wasn't very hurt, isn't it" (Trial Tr. 52:1 – 8, April 8, 2009)). "[F]irst of all, let me just say, I don't have a photograph to show you with him painting his daughter's room. Like we did with the marathons and lacrosse, there is no "gotcha" photograph...[He] ran the New York City Marathon in a very impressive time back in 2001. Does it ring true to you that same man couldn't do household chores; he couldn't hang a picture up; he can't spread mulch out in his yard; he can't paint" (Trial Tr. 46:1 – 10, April 7, 2009);

2. Grossly understate/misrepresent the testimony of Defense medical experts in Trial 1 to the same single issue to minimize the value of defense expert medical witness testimony: whether Coughlin incurred a partial permanent disability as a result of 9/11. (ECF No. 241 Ex. 1 at 2 – 3). Actually, the three defense expert medical witnesses testified countering the government's experts' testimony as already explained. (See Trial, Tr. March 18, 2009 (Antoniades); March 30, 2009 (Khanna); March 30, 2009 and March 31, 2009 (AM) (Mayer)).

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erroneous entries in the appellate court's decision following Trial 2, *United States v. Coughlin,* 610 F. 3d 89 (D.C. Cir. 2010).

3. Misrepresents the jurors' post-Trial 1 interviews regarding the importance of medical evidence and experts in Trial 1. (ECF No. 241 Ex. 1 at 3). Actually, in preparation for Trial 2, a May 18, 2009 email from defense trial attorney to petitioner, discussed making arrangements for medical experts to testify in the upcoming trial. Referring solely to defense medical experts Drs. Khanna and Antoniades, it stated that in Trial 1, only several jurors found the two doctors "helpful but not credible." Trial counsel then speculated that in his opinion those jurors found "the doctors' testimony to be helpful in their understanding of the mechanics of the spine and neck and the injuries thereto, but that they discounted Antoniades' and Khanna's opinions being bought and paid for."[7] There was no mention of medical testimony being "distracting" or "wholly unnecessary" as trial counsel claimed. Of note is Dr. Mayer's testimony was never referenced as he was a superb, "on point" pro bono witness. (See Pet'r's Reply Br. Ex. 1). Notably, contrary to defense trial attorney's current representations and alleged "reasoning" not to call experts, the defense was prepared to have the same three expert medical witnesses who were allegedly "distracting and wholly unnecessary" to testify again in Trial 2 commencing four weeks later after discussing their Trial 1 jury's feedback. The government, who also interviewed the Trial 1 jury and heard the same feedback, took actions exactly opposite those trial attorney is claiming were appropriate by significantly increasing their medical expert and athletic activity witnesses. (Pet'r's Reply Br. Ex. 2 – 7).

   Both parties *increased* the number of medical witnesses, experts and athletic activity witnesses from Trial 1 through Trial 3:

[7] Drs. Antoniades and Khanna were first-time expert witnesses who made critical mistakes creating this perception. On cross-examination, both doctors admitted their notes and timelines contained errors and omitted several pertinent medical reports that would have factored into their opinions. Dr. Khanna admitted that on the original day he was to testify (and didn't due to a change in trial schedule) – an additional day that Defendant still paid him an additional $5000 – he spent that time conducting academic work such as responding to emails, working on his book and other personal activities instead of reviewing Coughlin's medical records and preparing for trial. (3/18/09, p. 201 – 202; 3/30/09, p. 55 – 56, 57 – 58, 64 – 65, 78)

	Trial 1	Trial 2 [8]	Trial 3
Medical Witnesses			
Government:	5	7	5 (1)[9]
Defense:	3	*	0
Athletic Activity			
Government:	3	4	4
Defense:	6	*	9

In its case-in-chief, the government's medical and athletic activity-elicited testimony increased from 44% of the total direct testimony in Trial 1, to 57% in Trial 2, to 77% in Trial 3. The defense did the same.

4. Misrepresents the importance of medical and athletic activity evidence, and therefore, the need for medical experts in all three trials. (ECF No. 241 Ex. 1 at 5). In reality, both the government and the district court characterized expert medical testimony in their legal filings and opinions as "critical," "intrinsic to the remaining counts," "the very heart of the government's case," and "directly relevant F.R.E. 401 evidence" (ECF No. 122). The government told the court *"it can't try the case based upon the facts of this case and the Court's ruling."* (Pre-trial Conference Tr. 27, January 27, 2011). [emphasis added]. Judge Lamberth ruled in his opinion the medical and athletic activity evidence "is central to th[e] determination" as to whether Coughlin exaggerated the extent of his 9/11 injuries in order to decide whether "[petitioner] made false economic damages claims or stole public money." He said "[T]he evidence is also relevant to show that despite sustaining an injury on 9/11 [petitioner] could have performed the household chores he [claimed] he was physically incapable of doing. His inability to perform these physical activities form a key portion of his claim for economic damages." *Judge Lamberth said expert medical testimony was "critical," "intrinsically intertwined," and "Rule 401 evidence used to make other evidence more likely than*

[8] The D.C. Circuit stayed the case pending petitioner's appeal during testimony of the defense's first witness. The Defense was prepared to offer testimony from the same three Trial 1 expert medical witnesses in Trial 2 as well as multiple athletic activity witnesses. Pet'r's Reply Br. Ex. 247-7, December 15, 2017, ECF No. 247.

[9] Despite extraordinary efforts, the government was unsuccessful in having Dr. Rosenbaum, a military neurosurgeon and designated Trial 1 expert medical witness, recalled from Kandahar, Afghanistan to testify as a 4th expert medical witness and 6th medical practitioner in Trial 3. (Trial Tr. 180:1 – 181:1, August 8, 2011)).

not." (Mem. Op., ECF No. 141). [emphasis added]. Since there was no evidence of petitioner performing the chores he listed in his VCF submission post-9/11, the medical record entries and athletic activity issues were de facto representations of his ability to perform household chores.

5. Claims "the defense team was quite familiar with the testimony of the government's medical experts, having heard and cross-examined them twice." (ECF No. 241 at 5). Trial counsel made this claim to create the impression that the defense already knew the answers the government experts would provide to various questions. But that wasn't true either. By Trial 3, only one government medical witness had testified as an expert previously (Dr. Friedman in Trial 2). Government expert medical witnesses Drs. Bojescul & Zukowski were first-time expert witnesses in Trial 3.

6. Claims the decision to not call defense medical experts was a Trial 3 tactical and/or strategic decision that was discussed with petitioner before and during Trial 3 despite no actual evidence submitted in support of trial counsel's declaration. Trial counsel's declaration also claimed Dr. Mayer was on standby should the defense need him. But contemporaneous email correspondence indicate Dr. Mayer was scheduled to, and the defense expected him to, testify since July 25. (Pet'r's Reply Br. Ex. 2 through 30, December 15, 2017, ECF No. 247). On Friday, August 19, 2011, during an end-of-day bench conference the court reviewed with the parties trial counsel's defense witness list for Monday, August, 22, 2011. Trial counsel told the government and the court that Dr. Mayer was definitely testifying. Ultimately, he didn't testify due to a last-minute scheduling conflict that required him to withdraw as the defense's expert medical witness. That sidebar exchange between the government and trial counsel addressing the court prior to recessing for the weekend follows:

> **Gov't:** [Y]our Honor...I only have one issue. *My first issue is going to be that, if the [defense] were calling all those doctors, it is cumulative.* We're not arguing causation.
>
> **The Court:** Let's do this off the record at the bench first and then we'll put what you need on the record.
>
> (A discussion was held off the record.)
>
> **Gov't:** Your Honor, *Dr. Mayer's testimony* was the subject of pretrial motions before the first trial and the government did object to his testimony. He was offered for a number of

reasons...I think a lot of what he testified to last time is not beyond the understanding of a juror...[I]t doesn't seem to me that his testimony is relevant at all anymore to the issues that are left in this case.

Askew: Your Honor, we're not calling Dr. Mayer on the issue of whether or not Commander Coughlin sustained an injury. Dr. Mayer has very similar qualifications as Dr. Zukowski who testified [as the government's expert witness]...*As I indicated to Ms. Menzer prior to trial, the government is taking exception to Commander Couglin's [sic] ability to continue to play sports but not do certain things around the house. One of the things that a physician is qualified to testify about is what movements may or may not trigger certain radicular symptoms. That is beyond the kin of a layperson. We're not calling any other doctors [other than Dr. Mayer].* Dr. Mayer is familiar with both the sport of lacrosse as well as basketball. And can render opinions regarding the diagnosis and the condition that Commander Couglin [sic] has, based on his review of the medical record and the physical movements that are related to each play. And that, I do think is beyond the kin. *So, [Dr. Mayer is] the only person we're going to call.*

Later in the sidebar discussion:

Askew: [Dr. Mayer isn't] going to be a fact witness to the Veil [sic] lacrosse issue. He also has been physician to teams, much like [the government's expert medical witnesses,] Dr. Zukowski and Dr. Bojescul. *So they have knowledge that is beyond a lay person.* He was permitted to testify, not only to the issue of the trauma in the first trial, but also as to the movements of the body and how Commander Couglin's [sic] condition may or may not limit him. That's classic physician testimony.

Gov't: The second part of it, I don't have a problem with, Your Honor.

(Trial Tr. 31 – 37, August 19, 2011) [emphasis added]; App G

There were other anomalies in trial counsel's declaration (ECF No. 241 Ex. 1) that were never tested. For example, petitioner's attorney claimed Dr. Mayer, residing in Wyoming, was on call should the defense need him to testify. And yet, multiple emails clearly indicate Dr. Mayer and the defense expected him in Washington, DC to testify. (Trial counsel in an August 6, 2011 email tells Dr. Mayer "Let's shoot for August 15th [to testify]. Perhaps *we can plan to meet* or chat on August 13th or 14th." (ECF No. 247 Ex. 30) [emphasis added]. After the trial schedule slipped, petitioner inquired of counsel the jury lineup for Friday and Monday in an August 17th email, an email that petitioner stated "What is the plan for witnesses on Friday and Monday...*I see Dr. Thom Mayer [locked in] on Monday, [August 22nd].*" Trial counsel sent Dr. Mayer an email inquiry 11 minutes later to confirm *he was <u>still</u> able to testify on Monday, August 22nd*. In that same email, trial counsel again states "I was hoping *we could meet* or chat on Sunday. Please let me know." (ECF No. 247 Ex. 30) [emphasis added]. On August 18th, as Dr. Mayer's personal schedule

continues to be in flux he responds to counsel's email saying August 24th is now best for him. Later that same day trial counsel responds pleading "Let me see what we can work out. We may not go that long. *Any way at all that you can go on Monday[, August 22]?*" (ECF No. 247 Ex. 30)) [emphasis added]. The district court made no inquiries on the dichotomy between trial counsel claiming the defense medical expert wasn't expected to testify and how trial counsel would be meeting with him in Washington, DC on two separate occasions on different weekends. There was no curiosity about petitioner describing Dr. Mayer's testimony as "locked in" for Monday, August 22, and trial counsel asking Dr. Mayer 11 minutes later whether he was "still" able to testify on the same Monday. Apparently, petitioner and trial counsel had the same information: Dr. Mayer was scheduled to testify on Monday, August 22.

Another disconnect between trial counsel's declaration and what actually transpired according to contemporaneous documentary evidence was trial counsel's claim that the defense would reevaluate whether to call Dr. Mayer after the government's experts finished testifying. (ECF No. 241 Ex.1 at 5 – 6). Despite the government's last experts testifying on August 15 and the government resting its case on August 17, the email communications previously discussed between trial counsel and Dr. Mayer continued at least through Saturday, August 20, in an attempt to solidify Dr. Mayer's date to testify on August 22. (ECF No. 247 Ex. 29, 30). But yet trial counsel's declaration informed the court that "the examination – both direct and cross – of the government's medical expert witnesses went as expected and provided favorable testimony for the defense. Our recommendation [to not call defense medical expert witnesses] did not change." (ECF 241 Ex. 1 at 6). Again, the district court made no attempt to have trial counsel explain the disconnect. *If favorable testimony was obtained by counsel's self-declared August 15 deadline," why the intensive effort to solidify Dr. Mayer's date to testify for the next five days?*

The starting point for analysis of a petitioner's constitutional claim of ineffective assistance of counsel is whether the facts set forth in petitioner's pleadings, accepted as true, establish the right to the relief sought which, in this case, is a new trial. *Machibroda*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), *United States v. Amlani*, 111 F3d 705, 710 (9th Cir. 1997) [Amlani's allegations presumed true

because the district court did not hold an evidentiary hearing], *Anderson*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ["Credibility determinations are not the function of the judge; rather, the evidence of the non-movant is to be believed, and all justifiable inferences drawn in his favor." *Anderson*, 477 U.S. at 255].

An evidentiary hearing on a Section 2255 motion is required when the motion "raise[s] detailed and specific factual allegations whose resolution requires information outside the record or the judge's personal knowledge or recollection.'" *U.S. v. Orleans-Lindsay*, 572 F. Supp. 2d 144 (D.D.C. 2008) (quoting *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C.Cir.1992) (quoting *Machibroda*, 368 U.S. at 495). Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda*, 368 at 494, 495; *United States v. Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero v. United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott v. United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut v. United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano v. United States*, 362 F.2d 931, 932, 933 (3d Cir. 1966). If the parties submit contradictory affidavits or other evidence, and the court must determine the credibility of the proffered evidence, an evidentiary hearing is generally required. *See* Advisory Committee Note to Rule 7, Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7, Rules Governing Section 2254 Cases, which states that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive").

Under 28 U.S.C. 2253, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this court established § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983) that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Barefoot*, at 893 and n. 4...The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Petitioner claimed ineffective assistance of counsel based on a trial strategy where defense expert medical witnesses were the lynchpin of that strategy and the expert(s) ultimately don't testify. The government claimed otherwise. *Emphasis is on disputed facts!* If there aren't any disputed important facts, the court may resolve the legal issues and decide whether to deny or grant relief to the petitioner. If important factual issues are in dispute, however, the petitioner's entitlement to relief depends on the resolution of those disputed factual issues. This is when the need for an evidentiary hearing comes in. No evidentiary hearing was held. No inquiry was made as to the validity of trial counsel's declaration. No deference was given to petitioner's factual and specific allegations.

The district court made an unreasonable determination of fact when it concluded petitioner's legal team made a conscious decision to not use medical experts as part of an alleged strategy. The court predicated its decision solely on trial counsel's declaration. It failed to identify unresolved factual disputes or to treat petitioner's claims as between the parties despite petitioner submitting contemporaneous documents to support his claim.

Although review of a defense attorney's performance must be "highly deferential," Strickland, 466 U.S. at 689, Strickland does not require the Court to "condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." Moore v. Johnson, 194 F. 3d 586, 604 (5th Cir. 1999). While counsel is to be afforded "wide latitude...in making tactical decisions," Strickland, 466 U.S. at 689, and judges should "defer to true tactical choices," the Sixth Amendment does not permit courts simply to "baptize" unreasonable or unexplainable decisions "with the rejuvenating labels of 'tactical' or 'strategic' choices." Proffitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987).

In this case, the district court condoned an unreasonable decision "parading under the umbrella of strategy" when the contemporaneous documentation within the record and particularly the "files and records outside of the case" demonstrate trial counsel made no strategic decision at all."

The Court of Appeals Decision Is Wrong

The court of appeal's erred in concluding "appellant has not made a substantial showing of the denial of a constitutional right." Given the workload of this Court, the appellate court's decision all but eliminates the ability for a petitioner to address a grievance even when a petitioner's motion "raise[s] detailed and specific factual allegations whose resolution requires information outside the record or the judge's personal knowledge." *Machibroda*, 368 U.S. at 495. The bar, already high for a movant to prevail on a 2255 motion, has been raised astronomically higher given the government's response to petitioner's motion entailed nothing more than trial counsel's declaration; no supporting evidence. Not only do contemporaneous privileged communications between trial counsel and petitioner validate petitioner's claim that defense-called expert medical witnesses were critical to his defense and the lynchpin of his defense strategy, documents outside the "files and records of the case" and the trial record itself supports petitioner's claim that the defense's expert medical witness was scheduled to testify but withdrew at the very last minute due to a scheduling conflict. Additionally, these same contemporaneous documents along with the trial record itself openly and directly contradict counsel's assertions in his declaration.

Under 28 U.S.C. 2253, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this court established § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983) that, under *Barefoot*, includes "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were `adequate to deserve encouragement to proceed further.' *Barefoot*, 463 U.S. at 893 and n. 4 ("sum[ming] up" the "substantial showing" standard. Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 483-84.

In assessing whether a federal habeas petition was properly dismissed without an evidentiary hearing or discovery, the reviewing court must evaluate the petition under the standards governing motion

to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Walker v. True*, 399 F.3d 315, 319 note 1 (4th Cir. 2005). Accordingly, the court is required to accept a petitioner's well pleaded allegations as true and draw all reasonable inferences therefrom in the petitioner's favor. *Conaway*, 453 F.3d 567, 582 (4th Cir. 2006).

In the present case, petitioner claimed ineffective assistance of counsel based on a trial strategy where defense expert medical witnesses were the lynchpin of that strategy and the expert(s) ultimately does not testify. Petitioner claimed ineffective assistance of counsel because trial counsel's trial strategy was narrowly focused on medical and athletic activity evidence and the use of expert medical witnesses to put the evidence in proper context. Trial counsel was intimately familiar with how the government used its medical experts having seen the government's arguments twice previously and how the government's witnesses cast their testimony in the most favorable light for the government. The government and the defense had put each other on notice that they intended to use multiple medical experts and athletic activity witnesses to demonstrate that petitioner was perfectly capable of performing household chores. (Trial Tr. Opening Statement, March 10, 2009; Trial Tr. Closing Argument, April 7, 2009 (PM); Trial Tr. Rebuttal Argument, April 8, 2009). In trial 3 both parties notified the other party of the scope of their experts' testimony (ECF 247 Ex. 1 – 30). During exchanges each party stressed "how the jury will put more weight on evidence offered through a[n expert] witness" thereby increasing the importance of experts. (Pet'r's Reply Br. Ex. 26, ECF No. 247). The defense "pushed back" on the government's attempts to object to the defense using medical experts in its case telling the government that "you have indicated that some medical issues remain in play. Accordingly, you intend to call medical experts in your case. [The defense is] entitled to have medical experts rebut your experts' testimony." (ECF No. 247 Ex. 22). Petitioner discussed with his attorneys how "physicians' opinions as to what Coughlin can or can't do, should be able to do or not do, might be able to do or not do are the relevant points. I think Dr. Mayer's experience in this area is very pertinent...should we designate him as an expert in sports medicine?" (ECF No. 247 Ex. 22). Trial counsel repeated to the court and the government that "[T]he government is taking exception to Commander Couglin's [sic] ability to continue to play sports but not do certain things around the house. One of the

things that a physician is qualified to testify about is what movements may or may not trigger certain radicular symptoms. That is beyond the kin of a layperson." (Trial Tr. Bench Conference, 31 – 37; August 19, 2011). Through multiple emails from July 25 through August 20 the defense scheduled and rescheduled arrangements for Dr. Mayer to testify as a defense expert witness offering to meet with him on at least two occasions prior to his testimony (note that Dr. Mayer would be flying in from Wyoming). (ECF No. 247 Ex. 2 – 30).

Despite the government's and defense trial attorney's current representations, both parties *increased* the number of medical witnesses, experts and athletic activity witnesses from Trial 1 through Trial 3:

	Trial 1	**Trial 2** [10]	**Trial 3**
Medical Witnesses			
Government:	5	7	5 (1)[11]
Defense:	3	*	0
Athletic Activity			
Government:	3	4	4
Defense:	6	*	9

In its case-in-chief, the government's medical and athletic activity-elicited testimony increased from 44% of the total direct testimony in Trial 1, to 57% in Trial 2, to 77% in Trial 3.

Petitioner's claims were "not vague and conclusory but factual and specific." Much of the proffered evidence was "outside the files and the records of the case."

This Court has held that if the record of the case does not "'conclusively show' that under no circumstances could the [movant] establish facts warranting relief under § 2255," the movant must be afforded a hearing in the district court. *Fontaine v. United States*, 411 U.S. 213, 215, 93 S. Ct. 1461, 1463, 36 L.Ed. 2d 169 (1973). A hearing is generally required if the motion presents a colorable claim that arises

[10] The D.C. Circuit stayed the case pending petitioner's appeal during testimony of the defense's first witness. The Defense was prepared to offer testimony from the same three Trial 1 expert medical witnesses in Trial 2 as well as multiple athletic activity witnesses. Pet'r's Reply Br. Ex. 247-7, December 15, 2017, ECF No. 247.

[11] Despite extraordinary efforts, the government was unsuccessful in having Dr. Rosenbaum, a military neurosurgeon and designated Trial 1 expert medical witness, recalled from Kandahar, Afghanistan to testify as a 4th expert medical witness and 6th medical practitioner in Trial 3. (Trial Tr. 180:1 – 181:1, August 8, 2011)).

from matters outside the record. *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989). Multiple cases at this Court's level and throughout the circuits have granted evidentiary hearings to resolve claims where the trial record itself is inconclusive, such as with cases involving a prosecutor's failure to disclose exculpatory evidence or, as here, ineffectiveness of counsel. These claims generally involve factual disputes on matters outside the record.

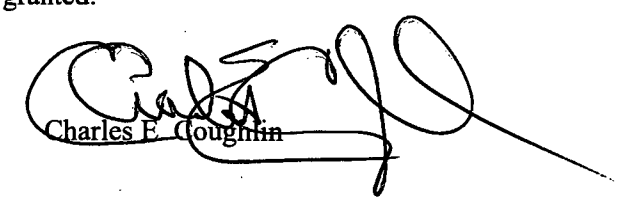
Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda*, 368 at 494, 495; *United States v. Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero v. United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott v. United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut v. United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano v. United States*, 362 F.2d 931, 932, 933 (3d Cir. 1966). If the parties submit contradictory affidavits or other evidence, and the court must determine the credibility of the proffered evidence, an evidentiary hearing is generally required. *See* Advisory Committee Note to Rule 7, Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7, Rules Governing Section 2254 Cases, which states that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive").

Petitioner has demonstrated his Section 2255 motion of ineffective assistance of counsel raises a colorable claim with much of the evidence arising outside the files and records of the case and where jurists of reason could differ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



Charles E. Coughlin