

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3074

September Term, 2019

1:08-cr-00334-RCL-1

Filed On: January 15, 2020

United States of America,

Appellee

v.

Charles E. Coughlin,

Appellant

BEFORE: Henderson, Srinivasan, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion to dismiss and the opposition thereto, which contains a motion for a certificate of appealability ("COA"), it is

ORDERED that the motion for a COA be denied and the motion to dismiss be granted. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no COA is warranted. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

CHARLES E. COUGHLIN,

Defendant.

Criminal Case No. 08-334 (1)

ORDER

After the Court denied Charles Coughlin's ineffective assistance of counsel claim under 28 U.S.C. § 2255, *see* ECF No. 257, he sought appellate review. *See* ECF No. 258. But because § 2253 requires he first seek a certificate of appealability, the Court of Appeals directed this Court to "determin[e] whether a certificate of appealability is warranted." *See* ECF No. 261 (citing *Mitchell v. Reno*, 216 F.3d 1126 (D.C. Cir. 2000)).

To justify a certificate of appealability, Coughlin "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, 484 (2000). Because he does not, the Court concludes no certificate shall issue.

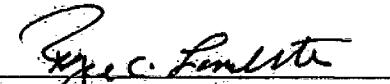
Coughlin—a decorated Naval Officer and Harvard Business School graduate who worked in the Pentagon on September 11th—defrauded the September 11th Victim Compensation by grossly exaggerating his injuries. Though he claimed a severe and permanent disability justifying an award exceeding \$331,000, Coughlin ran the New York marathon a few weeks after the attack and used the money to buy a new house. The grand jury charged him with five counts of mail fraud; one count of filing a false claim; and one count of stealing government property. After a trial in which Coughlin called medical experts to rebut the government's case,

the jury acquitted Coughlin of some counts and hung on others. When the government retried the hung charges, 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," *Jones v. Barnes*, 463 U.S. 754, 751 (1983); their conduct did not "fall below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Moreover, Coughlin identifies no circuit in which his claim would prevail. Given the lack of circuit conflict, no certificate is warranted.

Accordingly, the Court **DENIES** Coughlin's motion [263] for a certificate of appealability. The Court directs the clerk to transmit this Order to the Court of Appeals.

August 28, 2019



Royce C. Lamberth

United States District Judge

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**No. 18-3074****September Term, 2019****1:08-cr-00334-RCL-1****Filed On: April 21, 2020**

United States of America,

Appellee

v.

Charles E. Coughlin,

Appellant

BEFORE: Srinivasan, Chief Judge, and Henderson and Katsas, Circuit Judges**ORDER**

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.**Per Curiam****FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**No. 18-3074****September Term, 2019****1:08-cr-00334-RCL-1****Filed On: April 21, 2020**

United States of America,

Appellee

v.

Charles E. Coughlin,

Appellant

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges**ORDER**

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.**Per Curiam****FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

* Crim. No. 08-CR-334 (RCL)

CHARLES E. COUGHLIN,

Defendant.

* * * * *

DECLARATION OF JOHN A. BOURGEOIS

1. My name is John A. Bourgeois. I am over 18 years of age, have personal knowledge of the contents hereof, and am otherwise competent to testify.
2. I initially declined to discuss with the government's counsel my representation of Charles E. Coughlin in the above-captioned matter in light of Mr. Coughlin's attorney-client privilege, the attorney work-product doctrine, and my obligations under Rule 1.6 of the D.C. Rules of Professional Conduct. I give this declaration under the authority of this Court's Order dated December 14, 2015 (ECF No. 214) which, among other things, waived Mr. Coughlin's attorney-client privilege and authorized my disclosures herein under Rule 1.6(e)(3) of the D.C. Rules of Professional Conduct, and the Court's subsequent



Order dated July 6, 2017 (ECF No. 237) which directed me to make this declaration.

3. I earned my undergraduate degree from the University of Maryland in 1987 and my Juris Doctor degree from Georgetown University in 1993. I was admitted to the practice of law in Maryland in 1993 and the District of Columbia in 2004. I currently am a principal in the firm of Kramon and Graham, P.A., located in Baltimore, Maryland, where my practice is focused on complex civil and criminal litigation. I have been employed by Kramon and Graham, P.A., since 1996. Since my admission to the bar, I have been lead counsel in approximately 75 trials, approximately 20 of which were tried to a jury.

4. Charles E. Coughlin retained the services of Kramon and Graham, P.A. in June 2007 in connection with a then-pending investigation which resulted in his being indicted on charges of mail fraud, false claims, and theft of public funds. I entered my appearance on his behalf on November 6, 2008 and represented Mr. Coughlin throughout his three ensuing jury trials and two appeals.

5. In Mr. Coughlin's first trial, we presented expert medical testimony from Drs. Spiro Antoniades, Akhil Khanna, and Thom Mayer. Drs. Antoniades and Khanna opined that Mr. Coughlin, while serving in the Pentagon on September 11, 2001, incurred a partial permanent disability. Dr. Mayer opined

that, in his experience, athletes have a higher pain threshold and can "play through pain," and that, despite being injured, Mr. Coughlin could still engage in certain athletic activities and other physical pursuits. Ultimately, the jury acquitted Mr. Coughlin of three of the five mail fraud counts. Thereafter, the Court declared a mistrial as to the remaining four counts (two counts of mail fraud, one count of theft of public funds, and one false claim count).

6. In view of the prospect of a retrial on the unresolved counts, my co-counsel, opposing counsel, and I interviewed the jurors from the first trial to gain an understanding of what was effective and what was not in terms of the presentation of evidence. The jurors interviewed were consistent in their criticism of the volume of medical evidence presented, opining that such evidence was distracting and wholly unnecessary because the crux of the case centered on the checks submitted by Mr. Coughlin in support of his claimed economic damages. The jurors expressed that they were not impressed -- or persuaded -- by either side's medical expert testimony.

7. As expected, the government then moved to retry Mr. Coughlin on the unresolved charges. I argued that any retrial would be unconstitutional as a violation of the Constitution's prohibition against Double Jeopardy. Judge Kennedy disagreed. We immediately appealed Judge Kennedy's decision to the D.C. Circuit and moved to stay the case during the pendency of the appeal.

While awaiting the D.C. Circuit's decision, Mr. Coughlin's second trial commenced. The government completed the presentation of its case, and we presented the testimony of Ryan Coughlin before the D.C. Circuit stayed the case pending expedited briefing and argument on the merits of the appeal.

8. On June 29, 2010, the D.C. Circuit issued its opinion, holding that the Double Jeopardy Clause barred retrial on the remaining mail fraud counts but not the false claim and theft counts. As a result of that decision, Judge Kennedy declared a mistrial.

9. The case then proceeded to a third trial before the Honorable Royce C. Lamberth. The jury convicted Mr. Coughlin in this third trial. On December 12, 2011, Judge Lamberth sentenced Mr. Coughlin, among other things, to 44 months' confinement.

10. On December 16, 2014, Mr. Coughlin's post-conviction attorney filed a 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel. Mr. Coughlin then discharged his attorney and filed various *pro se* supplements to this motion. The government advised me of Mr. Coughlin's motion and supplements as well as the subsequent Court orders waiving the attorney-client privilege and limiting my response to the issue of my alleged ineffectiveness for failing to present expert medical testimony at Mr. Coughlin's third trial.

11. By the time of Mr. Coughlin's third trial, the defense team was quite familiar with the testimony of the government's medical experts, having heard and cross-examined them twice. We were concerned that the medical issues were becoming a "side-show" and that we would run the risk of having the jury give unwarranted credence to the medical issues if we were to highlight them by presenting our own expert witnesses. We also were concerned about the inherent contradiction between having doctors testify that Mr. Coughlin's injuries did not impair his ability to engage in athletic pursuits while Mr. Coughlin was, at the same time, contending that he could not perform basic household chores. We discussed these concerns with Mr. Coughlin on multiple occasions.

12. My colleague Amy Askew, who was co-counsel for the trial, was (and is) a very experienced medical malpractice attorney. She and I believed that the better tactical course would be to elicit helpful testimony from the cross-examination of the government's medical expert witnesses, rather than calling our own medical experts. Hence, we advised Mr. Coughlin, both before and during his third trial, that our judgment was not to present expert medical witnesses for the defense. We also advised Mr. Coughlin that we would revisit this issue if, after the government's experts testified and were cross-examined,

our view changed. Indeed, Dr. Mayer was prepared to fly to D.C. from Colorado to testify on August 22 or 24, 2011.

13. 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 did not change. After discussing the matter with Mr. Coughlin over the weekend of August 20 and 21, 2011, Mr. Coughlin agreed with our assessment and we chose not to call Dr. Mayer or any other doctors.

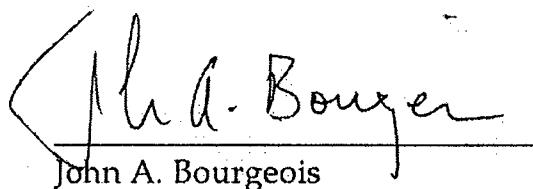
14. Mr. Coughlin's financial state at the time of his third trial did not drive our tactical decision to proceed to trial without the presentation of defense medical experts. Indeed, Mr. Coughlin preferred Dr. Mayer among potential medical experts and Dr. Mayer had agreed to testify without compensation if we decided to call him. Although we were aware that Drs. Antoniades and Khanna would charge for their time if we elected to call them again, and that Mr. Coughlin had very limited funds, we knew that applying for funds through the Criminal Justice Act might be an option. (Indeed, we had sought and obtained appointment under the Criminal Justice Act for Mr. Coughlin's appeals.) We did not explore that option, or ask Mr. Coughlin to secure funding on his own, because our judgment -- which we discussed with Mr. Coughlin -- was that presenting defense medical experts was not in Mr. Coughlin's best interests. In

our view, as noted above and as discussed with Mr. Coughlin, Mr. Coughlin's medical and physical condition had little to do with the core issue in the case -- the checks that Mr. Coughlin submitted to the Victims Compensation Fund in support of his claimed economic loss.

15. Steven Klepper, my colleague who represented Mr. Coughlin for the various appeals, did not represent Mr. Coughlin during the trials and played no role in the advice or the decision not to call expert medical witnesses during Mr. Coughlin's third trial.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 10, 2017.


John A. Bourgeois

APPENDIX F

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA)
v.)
CHARLES E. COUGHLIN,)
Defendant)
Crim. No. 1:08-CR-0034 (RCL)

DECLARATION OF CHARLES E. COUGHLIN

1. My name is Charles E. Coughlin. I am over 18 years of age, have personal knowledge of the contents hereof, and am otherwise competent to testify.
2. I currently reside at 340 Saint Bees Drive, Severna Park, MD 21146.
3. I provide this declaration under the authority of this Court's Order dated December 14, 2015 [214] which granted a limited waiver of Defendant's attorney-client privilege to address Defendant's claims of ineffective assistance of counsel (trial and appellate) in his amended motion under 28 U.S.C. section 2255.
4. The purpose of this declaration is to convey that the decision to not call expert medical witnesses in Trial 3 was neither a strategic nor tactical decision, but rather, ultimately a conflict of schedules and failure to seek CJA funds in response to Defendant's well-known lack of funds.
5. In Trial 1, the defense presented expert medical testimony from Drs. Spiro Antoniades, Akhil Khanna, and Thom Mayer. All three doctors concurred with Dr. Smith's Independent Medical Evaluation (IME) findings, submitted to the VCF, including the Defendant sustaining a permanent cervical injury resulting in increased symptoms and that

"[Coughlin] is a candidate for future surgical [cervical] decompression." They all concurred that treatment options included surgery; were undeterred by Coughlin's having participated in athletic activities given level of play, quality of play, frequency of play, and other factors are most relevant; that comparing Coughlin's performance between the 2000 Boston Marathon and the 2001 NYC Marathon validated their opinion; and agreed that athletes have a high pain tolerance. Drs. Khanna and Mayer discussed the various reasons patients stop seeking physical therapy. Dr. Mayer, a sports medicine doctor, opined further that Coughlin's athletic performance indicated he suffered an injury on 9/11 that directly affected his post-9/11 athletic performance; that Coughlin's medical records were the "standard" type format and not conducive for evaluating changes in an athlete's performance – specifically, the level of play, quality of play, changes in play and ability, etc. – that would better indicate the degree of injury and symptoms experienced by the individual; that Coughlin's marathon and lacrosse performance pre- and post-9/11 clearly indicated a significant event on 9/11; and that Coughlin's hip and shoulder injuries were clearly not a factor in his post-9/11 athletic performance. Ultimately, the jury acquitted Commander Coughlin of three of the five mail fraud charges.

6. In view of the prospect of a retrial on the hung counts, my attorneys and the Government interviewed the jurors from the first trial to gain an understanding of what was effective and what was not in terms of the presentation of evidence. Referring solely to defense medical experts Drs. Khanna and Antoniades, my attorney, John Bourgeois, stated in an email that only several jurors found the two doctors "helpful but not credible." He 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." (Def. Ex. 2) Drs. Antoniades and Khanna were first-time expert witnesses who made critical mistakes 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 \$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. Dr. Mayer's testimony was never referenced by the jurors.

7. As expected, the government retried Coughlin on the unresolved charges. In Trial 2, the Government placed even more emphasis on the medical and athletic activity evidence increasing its case-in-chief testimony in these areas from 44% of its direct testimony in Trial 1 to 57% in Trial 2. The Government increased the number of medical witnesses from 5 to 7, increased the number of expert medical witnesses from 2 to 3 (adding a sports medicine expert witness), and increased the number of its athletic activity witnesses from 3 to 4. Notably, 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. (See Def. Ex. 2 – 7)

8. In preparation for Trial 3, once Judge Lamberth's Memorandum Opinion was published indicating medical and athletic activity evidence would be admitted, the defense initiated an overt Trial 3 strategy to "prepare for trial 1 again." (See Def. Ex. 10) The focus was to use Coughlin's treating physicians and physical therapists from 2006 through 2011; including as experts. (See Def. Ex. 8, 8a, 9, 10, 13)

9. The Government clearly stated on multiple occasions its intentions to use the evidence and the argument it would make in Trial 3 to demonstrate that Coughlin exaggerated the severity of his 9/11 injury; that he would not need to travel to obtain treatment as he claimed; that Coughlin lied when he stated he would ultimately require surgery; that Coughlin lied when he stated his doctors told him he would absolutely require surgery; Coughlin 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 Coughlin didn't disclose other ailments that were more debilitating than his neck injury; and that Coughlin lied about his ability to perform household chores. (2nd Appeal and Addendum, Def. Ex. 11, 21, 26, 27).

10. The defense strategy was to use medical experts and treating physicians to counter the above stated government arguments and to include the limitations of the standard medical record format; focus on specific motions and types of activities that aggravated defendant's symptoms; describe how level of activity and quality of play is indicative of underlying pathology; that performance in athletic activities prior to and after an event is important in identifying the triggering event and degree of symptoms; provide opinions on the relevance of Defendant's various medical record entries, whether future surgery was a potential prognosis, where he would be able to obtain physical therapy, symptomatology, etc. (Def. Ex. 10, 11, 12) Defense counsel notified 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. (Def. Ex. 20, 25, 27)

11. Defense counsel's cross-examination of Government expert medical witnesses

did not entail the depth and breathe of questioning outlined above – or as with defense Trial 1 expert medical witnesses – as the concern was that Government witnesses might not respond as expected; essentially “don’t ask the question if you don’t know for sure what the answer will be.” The intention was to use defense expert medical witnesses to elicit this testimony. Having not elicited this testimony from the Government’s expert medical witnesses, the importance of defense expert medical witnesses was increased.

12. At no time did defense counsel inform Coughlin that their judgment was to not present expert medical witnesses. From the conclusion of Trial 1 to just before the defense rested its case in Trial 3, the expectation – as well as actions taken – was the defense would call expert medical witnesses; multiple experts money allowing. (See Def. Ex. 2-30)

13. There was no plan to reevaluate the strategy for calling defense expert medical witnesses at any time, including after the Government’s last expert testified. The Trial 3 record and contemporaneous emails indicate that despite the Government’s last medical witness testifying on August 15, 2011 and the Government resting its case-in-chief on August 17, 2011, the defense fully expected Dr. Mayer to testify in Trial 3 and actively worked to coordinate scheduling his testimony up to and including August 20, 2011. (See Trial 3, 8/19/11, p. 31-34 Tr.; Def. Ex. 29, 30)

14. On August 21, 2011, defense counsel made the decision to not call Dr. Mayer as an expert witness due solely to schedule conflicts and the fact that the trial was coming to a close. Defendant grudgingly accepted the outcome as there was nothing the defense could do at this point and Defendant’s finances could not support procuring a paid defense expert medical witness.

15. Defense counsel was well-informed of Defendant's depleted finances. Besides having been declared in forma pauperis status for his previous appeal with trial counsel as co-chair, Defendant hadn't made a payment to Kramon & Graham PC in almost two years and owed hundreds of thousands of dollars in back payments. Prior to Trial 3, Defendant's financial condition initiated discussions about using treating physicians as they would most likely be less expensive. (Def. Ex. 11, 14) Defense counsel had an explicit conversation with Defendant just prior to Trial 3 commencing about his finances and his ability to procure an expert medical witness. In fact, defense counsel was aware that Defendant's father and mother-in-law were assisting with the family finances and inquired about their ability to provide funds for expert witnesses. Defendant informed trial counsel at that point that his personal finances could not support a paid expert witness and that his extended family's funds were strained at that point. With that update, Dr. Mayer was to be the only defense expert medical witness.

16. Given Jeffrey Lewis' (a government witness) testimony 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 – and future earnings and medical economic losses were not based on past earnings and medical expenses, future economic loss was totally divorced from any claimed past economic loss. Expert medical witness testimony was directly linked to future economic loss. 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.

17. It is unlikely the jurors would have discounted medical and athletic activity evidence in Trial 1, and prior to a potential Trial 2, given this evidence was clearly relevant

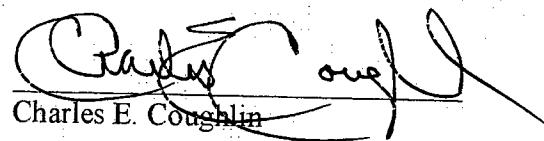
to Defendant's noneconomic claim as well as future economic claims; and the remaining hung counts at a follow-on trial would entail the same economic and noneconomic claims.

18. Defense counsel never discussed Criminal Justice Act (CJA) funds for obtaining the services of expert witnesses with Defendant at any time during this entire, lengthy legal proceeding. Defendant first became aware that CJA funds were to be made available to indigent defendant's after reading a June 2014 issue of the Bloomberg BNA Criminal Law Reporter ("Public Defender Must Fund Defense Costs Incurred by Indigents Who Self-Represent") (Def. Ex. 54) while incarcerated at FPC Schuylkill.

19. Appellate attorney, Steven Klepper, from the same law firm as Defendant's trial attorney, was intimately aware of the importance of medical and athletic activity evidence and expert witnesses in Trial 3 having wrote both Coughlin I and Coughlin II appeals, the motions in limine leading to Judge Lamberth's Memorandum Opinion, numerous briefs for Defendant's trial attorney in preparation for Trial 3, and copied on multiple emails conveying the importance of expert medical witnesses but failed to even mention as a basis for an appeal the failure to seek CJA funds knowing Defendant's indigent status. Defendant's trial attorney was co-chair during the Coughlin post-trial appeal. (See Def. Ex. 31-53)

20. I state these facts, to the best of my ability, to convey the events that transpired in failing to call defense expert medical witnesses at Trial 3.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my recollection.



Charles E. Coughlin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- XI

3 UNITED STATES OF AMERICA,

4 v. Criminal Case No. 09-334

5 | CHARLES E. COUGHLIN,

6 Defendant

X Washington, D.C.
Friday, August 19, 2011
2:00 P.M.

DAY 10 - P.M. SESSION
TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ROYCE C. LAMBERTH
CHIEF UNITED STATES DISTRICT JUDGE

11 || APPEARANCES:

12 For the Government: Susan Beth Menzer, AUSA
13 U.S. ATTORNEY'S OFFICE
14 Community Prosecution
555 Fourth Street, NW
Washington, DC 20530
(202) 252-7975

16 For the Defendant: John A. Bourgeois, Esquire
17 Amy E. Askew, Esquire
18 KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, MD 21202
(410) 752-6030

21 Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247
22
23

24 Proceedings recorded by mechanical stenography, transcript produced by computer.

1 weekend.

2 (Jury Out)

3 THE COURT: Sorry about that, counsel. But she did
4 not look that great. So I don't think we could continue.

5 You want to raise some other issues before I go?

6 MS. MENZER: Yes, Your Honor. I have not gotten a
7 positive response from Ms. Askew. But I think I have some
8 sort of indication that they--

9 THE COURT: Let me give you a minute, maybe you all
10 can talk and resolve this.

11 (There was a pause in the proceeding.)

12 MS. MENZER: I only have one issue. My first issue
13 is going to be that, if they were calling all those doctors,
14 it is cumulative. We're not arguing causation.

15 THE COURT: Let's do this off the record at the
16 bench first and then we'll put what you need on the record.

17 (A discussion was held off the record.)

18 MS. MENZER: Your Honor, Dr. Mayer's testimony was
19 the subject of pretrial motions before the first trial and
20 the government did object to his testimony. He was offered
21 for a number of reasons. I unfortunately did bring the file
22 back to the office during lunch time. There are motions in
23 the docket that the Court can read. I do believe that Judge
24 Kennedy did limit his testimony. He was offered, one, not as
25 a sport medicine doctor, but I believe as a trauma expert.

1 And he runs, they can correct me if I'm wrong, he runs
2 emergency rooms in the greater area. He also I believe is a
3 doctor for the NFL.

4 His testimony basically consisted of about people
5 who experienced trauma and how they react. Whether or not
6 they go seek medical treatment, that kind of thing. He also
7 talked about athletes such as NFL players who play in pain.
8 I think a lot of what he testified to last time is not beyond
9 the understanding of a juror. And that it is not an expert,
10 per se.

11 The issues are no longer relevant in this case
12 because we're not disputing the fact that he was hurt. We're
13 not disputing the fact that he sought medical care. And he
14 had a condition. And it doesn't seem to me that his
15 testimony is relevant at all anymore to the issues that are
16 left in this case.

17 MS. ASKEW: Your Honor, we're not calling Dr. Mayer
18 on the issue of whether or not Commander Couglan sustained an
19 injury. Dr. Mayer has very similar qualifications as
20 Dr. Zukowski who testified. I think he was the first witness
21 in this trial. As I indicated to Ms. Menzer prior to trial,
22 the government is taking exception to Commander Couglan's
23 ability to continue to play sports but not do certain things
24 around the house.

25 One of the things that a physician is qualified to

1 testify about is what movements may or may not trigger
2 certain radicular symptoms. That is beyond the ken of a
3 layperson. We're not calling any other doctors.

4 Dr. Mayer is familiar with both the sport of
5 lacrosse as well as basketball. And can render opinions
6 regarding the diagnosis and the condition that Commander
7 Couglan has, based on his review of the medical records and
8 the physical movements that are related to each play. And
9 that, I do think is beyond the ken. So, the only person
10 we're going to call. I didn't know this motion was going to
11 be made today. So I have not really looked at it. If the
12 Court is inclined to hear more argument--

13 THE COURT: What limitation did Judge Kennedy place?

14 MS. ASKEW: Judge Kennedy allowed him to testify.
15 Again, I have not looked at this in quite some time. So if
16 I'm getting this wrong, Ms. Menzer may have looked at it. I
17 sent her actually the ruling section, right?

18 MS. MENZER: I think he was not allowed to talk
19 about his own personal play because there was some indication
20 that he and his sons played at Vail. So he was not allowed
21 to talk about that he has physically seen people play at
22 Vail.

23 MS. ASKEW: Right, he wasn't going to be a fact
24 witness as to the Vail lacrosse issue. He also has been
25 physician to teams, much like Dr. Zukowski and Dr. Bojescul.

1 So they have knowledge that is beyond a lay person. He was
2 permitted to testify, not only to the issue of the trauma in
3 the first trial, but also as to the movements of the body and
4 how Commander Couglan's condition may or may not limit him.
5 That's classic physician testimony.

6 MS. MENZER: The second part of it, I don't have a
7 problem with, Your Honor. The only problem I do have,
8 because it wasn't -- we're not going to ask him about this,
9 is the trauma issue is because we have not stated anything
10 about the fact that he waited 10 days. It is no longer an
11 issue so I just want to clarify that we're not going to go
12 back and do the same thing that he did last time.

13 MS. ASKEW: No, no, absolutely not.

14 THE COURT: All right.

15 MR. BOURGEOIS: Your Honor, may I beg the Court's
16 indulgence for a moment.

17 (There was a pause in the proceedings.)

18 MR. BOURGEOIS: Your Honor, I would ask -- I've
19 asked Ms. Menzer and she doesn't appear to be inclined. I
20 would ask that the Court direct the government to provide the
21 defense with a copy of the OIG report and the e-mail that Ms.
22 Menzer -- IG, that Ms. Menzer referenced at the end of
23 yesterday's proceedings which she read to the Court. I've
24 never seen them. I don't know what they say. But as I
25 recall the last--

1 THE COURT: What was it about?

2 MR. BOURGEOIS: About the investigation that

3 Mr. Sayers got going --

4 THE COURT: That's irrelevant, I don't want to get
5 into that.

6 MR. BOURGEOIS: Well Your Honor, first of all, it
7 was an inappropriate question. You did sustain my objection.
8 I think it left a stink in the room. And especially, if I
9 heard Ms. Menzer correctly, the last communication she got
10 was that the investigation was done.

11 THE COURT: That can be in your post trial motion.

12 MR. BOURGEOIS: Thank you, Your Honor.

13 THE COURT: Have a good weekend.

14 (Whereupon, at 3:30 P.M., the trial recessed.)

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C O N T E N T S

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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3 (Defendant)

4 THOMAS MOORE

5 By Mr. Bourgeois 3

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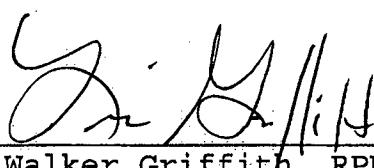
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CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing
is a correct transcript from the record of proceedings in the
above-entitled matter.


Lisa Walker Griffith, RPR

4.30-12
Date

Re: USA v. Coughlin - Various Witnesses

cecoughlin@comcast.net

To Amy E. Askew Copy John A. Bourgeois

8/17/2011 10:58 PM 

Amy,

What is the plan for witnesses on Friday and Monday? I need to have Bill Hook purchase flight tickets and he will be coming from HI. Am I telling Bill Hook to be prepared to testify on Monday or Tuesday?

I see Buddy Garland being locked in for Friday, Dr. Thom Mayer on Monday, and Tom Moore for either Friday or Monday.

We also have Dan Seifert, Jace Stirling (focused solely on character and Memmel - NO sports), and the others I listed below. Dan was pretty flexible when I spoke with him on Monday.

John said that Jon Prusmack was still willing to testify. If he can do Monday or Tuesday I will need to make preps to get him here. I need to know from John what Prusmack's desire was before I can take action.

Please let me know so that we can plan accordingly...as well as them. Tx.

Best Regards,
Chuck

Charles E. Coughlin
(c) 443-370-4307
cecoughlin@comcast.net

From: Amy E. Askew
To: cecoughlin@comcast.net
Sent: Wednesday, August 17, 2011 9:42:29 PM
Subject: Re: USA v. Coughlin - Various Witnesses

Mark Stevens
Walter Iaake
Chuck Sr.
Norwig (if possible)
Ryan
Courtney
Amy E. Askew
Kramon & Graham, P.A.
(410) 752-6030

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Def. Ex. 29

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From: cecoughlin@comcast.net <cecoughlin@comcast.net>
To: Amy E. Askew
Cc: John A. Bourgeois; markdstevens34@gmail.com <markdstevens34@gmail.com>
Sent: Wed Aug 17 20:28:13 2011
Subject: Re: USA v. Coughlin - Various Witnesses

Amy,

So that I have it straight in my mind, please let me know the lineup (including the order) for tomorrow.

Also, you or John should call **Tom Moore** this evening to discuss his testimony and the possible dates he might testify. From my conversation with him this morning he stated this Friday and Monday (8/22) were fine with his schedule. He can also do Tuesday (if God forbid I am not the last one standing at that point) but is not available after that date. Tom indicated that you should call the house phone in the evening as he typically doesn't keep his cell phone handy at that time. Home phone is 703-426-5754. Not a problem calling in the evening since his children are headed to college and he is currently separated (not for general disclosure).

BTW, the other officer that was awarded the PH was in his area/division. Tom saw him with a cut scalp. The guy was struck on the head by a ceiling tile. Tom also notes that the cubicles were higher than 5 feet (I believe he stated around 6 feet) and that it was routine for books and articles to be stored on top of the lockers above the desk area AND that it was common to have the lockers completely open during the day for easy access to the contents.

Shane Coughlin should be on the list. He was a maybe and was specifically to testify to my having attended his games and only missing them for business.

Charles Madison was also supposed to be on the list. He is the African-American that I played basketball at USNA in 1987-1989 and then hooked up with again in 2004 at SPHS. Charles is an engineer and a sharp individual. He saw me in 2004 lay down on the side of the court due to my neck issues. This would have been the Fall 2004 and since the government is already beyond 2004 this should be allowable without opening any doors. I don't believe he noted any hip issues other than being a bit slower (due to age as he thinks we were all slower).

Michael Mathis has been in the N80 spaces over the past year. The interior was just remodeled and a number of the cubicles near Cantwell (in the back with the bullpen) now have 65" to 66" high cubicles while the front part of the office (where I sat) still has the higher cubicle walls. Michael also stated that the front office area has many cubicles with books on top of the shelves along with other articles (including a 22 inch TV). Cantwell herself actually has a radio and 8 figurines on top of her shelf "box." She is a liar!

2 of 4 should be relatively short witnesses.

Best Regards,
Chuck

Charles E. Coughlin
(c) 443-370-4307
cecoughlin@comcast.net

Def. Ex. 29

From: Amy E. Askew
To: markdstevens34@gmail.com
Cc: John A. Bourgeois
Sent: Wednesday, August 17, 2011 6:42:06 AM
Subject: USA v. Coughlin

Mark:

I will contact you this evening and give you the final word on whether or not we need you to testify tomorrow. The government still has not completed its case, so I don't have a good idea as to when we will be able to start our case.

The address to the federal courthouse in D.C. is 333 Constitution Avenue, NW. We are before Chief Judge Lamberth and his courtroom is on the 2nd floor (if you come off the elevators to the hallway, you will turn left).

I will give you a call around 9pm tonight.

Thank you.

Amy E. Askew
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Phone: 410-319-0512
Fax: 410-361-8219
Email: aaskew@kg-law.com

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Def. Ex. 29

Re: Medical Records for Coughlin

cecoughlin@comcast.net**To:** Amy E. Askew **Copy:** John A. Bourgeois

8/20/2011 8:53 AM



Amy,

I think he is an asset and can only help. Although the other doctors really didn't hurt anything (except maybe Bojescul) I think a doctor with advocacy for Coughlin is a good thing. He presents well and will know Menzer's tactics this time around.

Given Menzer hasn't been doing any real lengthy cross the question becomes would Judge Lamberth allow my testimony to be interrupted for Dr. Mayer. The only witnesses that I see Menzer really conducting any cross on Monday is Bill Hook and Courtney since Bill wrote one of the letters for the VCF Hearing and Courtney was somewhat malleable for them the last trial.

Best Regards,
Chuck

Charles E. Coughlin
(c) 443-370-4307
cecoughlin@comcast.net

From: Amy E. Askew
To: John A. Bourgeois, cecoughlin@comcast.net
Sent: Saturday, August 20, 2011 6:45:11 AM
Subject: FW: Medical Records for Coughlin

We need to make a decision about this today.

Amy E. Askew
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Phone: 410-319-0512
Fax: 410-361-8219
Email: aaskew@kg-law.com

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From: Mayer, Thom [mailto:tmayer@best-practices.com]
Sent: Friday, August 19, 2011 5:40 PM
To: Amy E. Askew
Subject: RE: Medical Records for Coughlin

Possibly
Tuesday is much better

Def. Ex. 30

From: Amy E. Askew [mailto:aaskew@kg-law.com]
Sent: Thursday, August 18, 2011 5:54 PM
To: Mayer, Thom
Subject: Re: Medical Records for Coughlin

Let me see what we can work out. We may not go that long. Any way at all that you can go on Monday?

Amy E. Askew
Kramon & Graham, P.A.
(410) 752-6030

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From: Mayer, Thom <tmayer@best-practices.com>
To: Amy E. Askew
Sent: Thu Aug 18 16:50:02 2011
Subject: RE: Medical Records for Coughlin

Amy,

Not sure if you got my email, but the 24th is now best for me

Would that possibly work?

Sorry to be a pain, but my schedule is in flux

Best,

Doc

From: Amy E. Askew [mailto:aaskew@kg-law.com]
Sent: Wednesday, August 17, 2011 11:09 PM
To: Mayer, Thom; Mayer, Thom
Cc: John A. Bourgeois
Subject: RE: Medical Records for Coughlin

Dr. Mayer:

Just want to confirm that you are still able to testify on Monday August 22nd, should we need to call you. If you are still available, I was hoping we could meet or chat on Sunday. Please let me know.

I look forward to hearing from you. Thanks.

Amy E. Askew
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Phone: 410-319-0512

Def. Ex. 30

Fax: 410-361-8219

Email: aaskew@kg-law.com

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From: Amy E. Askew

Sent: Thursday, August 11, 2011 5:38 PM

To: 'Mayer, Thom'

Cc: John A. Bourgeois

Subject: RE: Medical Records for Coughlin

Dr. Mayer:

If you are called to testify, we will not need you until August 22nd. If you have any openings at the end of next week (like the 18th or 19th), let me know.

Also, you only need to review medical records through May 13, 2004. There was a possibility that the government was going to expand their case to present day, but that isn't happening.

Are you around this weekend to chat?

Amy E. Askew
Kramon & Graham, P.A.

One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Phone: 410-319-0512
Fax: 410-361-8219

Email: aaskew@kg-law.com

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From: Mayer, Thom [mailto:tmayer@best-practices.com]

Sent: Tuesday, August 09, 2011 3:58 PM

To: Amy E. Askew

Subject: RE: Medical Records for Coughlin

Amy

Not sure how long the trial is expected to last, but I may be able to do August 22 or 26 instead of the 15th
Doc

From: Amy E. Askew [mailto:aaskew@kg-law.com]

Sent: Saturday, August 06, 2011 12:47 PM

To: Thom Mayer

Cc: John A. Bourgeois

Subject: RE: Medical Records for Coughlin

Def. Ex. 30

Let's shoot for August 15th. Perhaps we can plan to meet or chat on August 13th or 14th to prepare for your testimony? On Monday, August 8th we will overnight the medical records to you to the address in Wyoming. It is Mr. Coughlin's medical file from 1998-2011 and the records are in chronological order. The original VCF hearing was on May 13, 2004, so your initial focus should be on the pre 9/11 medical history and the medical history from 9/11 to the hearing date. The post hearing date records include shoulder and hip surgery, as well as massage, PT, etc. treatment for his neck.

If your schedule opens up more the week of August 15th, please let me know.

Thank you.

Amy E. Askew
 Kramon & Graham, P.A.
 One South Street, Suite 2600
 Baltimore, Maryland 21202-3201
 Phone: 410-319-0512
 Fax: 410-361-8219
 Email: aaskew@kg-law.com

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From: Thom Mayer [mailto:tmayer@best-practices.com]
Sent: Saturday, August 06, 2011 12:31 PM
To: Amy E. Askew
Subject: RE: Medical Records for Coughlin

Amy

My schedule is tight but I can probably do August 11-12 or August 15. Not sure about the next week

If the records haven't already been sent, please send to 2728 Teton Pines Drive, Wilson, Wyoming 83014.

If they have been sent, my office will forward

Best,

Doc

From: Amy E. Askew [mailto:aaskew@kg-law.com]
Sent: Friday, August 05, 2011 2:58 PM
To: Thom Mayer; Thom Mayer
Subject: Medical Records for Coughlin

Dr. Mayer:

I am going to send to your office a binder of Commander Coughlin's medical records from 1998 to 2011. They are in chronological order. Please let me know when you are able to testify during the weeks of August 15th and August 22nd.

I am leaving for D.C. this weekend (trial starts on August 8th). If you need to reach me, please send me an email or call me on my cell phone (410-303-4532).

Def. Ex. 3c

I look forward to hearing from you.

Amy E. Askew
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Phone: 410-319-0512
Fax: 410-361-8219
Email: aaskew@kg-law.com

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Def. Ex. 30

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
v.
CHARLES E. COUGHLIN,
Defendant

Crim. No. CR 08-0034 (RCL)

DECLARATION OF THOM A. MAYER, M.D.

1. My name is Thom A. Mayer. I am over 18 years of age, have personal knowledge of the contents hereof, and am otherwise competent to testify.
2. I currently reside at 2728 Teton Pines Drive, Wilson, Wyoming, 83014.
3. I earned my undergraduate degree from Hanover College in 1973 and my Medical Doctor degree from Duke University School of Medicine in 1977. I am board certified in emergency medicine, pediatric emergency medicine and healthcare leadership, and practice sports medicine as well. I am licensed to practice medicine in multiple states including Maryland and Virginia, and the District of Columbia. I practice medicine at Inova Fairfax Medical Campus of the Inova Health System.
4. Kramon and Graham, P.A. retained my services pro bono in February 2009 to provide expert and fact testimony on behalf of Charles E. Coughlin.
5. At Mr. Coughlin's trial in March 2009 I was designated a medical expert in sports medicine, emergency and trauma medicine, and tactical EMS. I provided testimony based on Mr. Coughlin's medical records and doctors' diagnosis that he incurred a significant injury as a result of the events of 9/11 exacerbating his preexisting cervical medical

condition. I testified that Mr. Coughlin's symptoms were consistent with the medical findings that 9/11 caused left-sided radiculopathy and increased symptoms; concurred that treatment options included surgery based on the severity of symptoms; pain tolerance varies between people and that endurance athletes tend to have a higher pain threshold; athletes can modify activities and how they participate in activities to lessen symptoms; symptoms can vary and present in different ways; Mr. Coughlin's March 2000 motor vehicle accident was minor and not relevant to his current cervical condition; his athletic activities and performance post-9/11 compared to his pre-9/11 performance indicate he sustained a significant injury on 9/11; Mr. Coughlin's participation in athletic activities post-9/11 didn't change my opinion given changes in quality of play, level of play, frequency of play and modifications to play are the relevant factors; athletes go through a transition in understanding and accepting an injury's impact on performance and typically slowly "phase out" athletic participation; analyzing marathon performance prior to and after cervical injuries in 2000 and 9/11 demonstrates the 9/11 event was the most significant injury and was the cause of continuing significant symptoms; Mr. Coughlin's hip and shoulder injuries were "non-factors" and weren't responsible for his decreased athletic performance post-9/11; and that the "standard" medical record format as compared to the sports medicine medical record format is deficient in capturing the information necessary to gage the severity of an injury and its symptoms.

6. In June 2009 I was again retained pro bono by Kramon and Graham, P.A. to provide expert and fact testimony on behalf of Mr. Coughlin in a retrial. My testimony in this trial was to be consistent with my testimony in March 2009. I was informed in July 2009 the trial was stayed and that my services were no longer required.

7. Kramon and Graham, P.A. retained my services pro bono in July 2011 to provide expert and fact testimony on behalf of Mr. Coughlin in a third trial. My testimony in this trial was to be consistent with my testimony in March 2009.

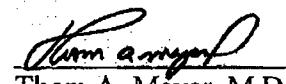
8. Throughout August 2011 Mr. Coughlin's trial attorney and I made multiple attempts to coordinate my appearance at trial with my personal schedule. In mid-August it was decided that I would testify during the week of August 22nd.

9. Due to last-minute changes with my schedule, on Friday, August 19th I asked Mr. Coughlin's trial attorney to reschedule my testimony that was scheduled for Monday, August 22nd to later that week.

10. Ultimately, although scheduled and fully expecting to testify at Mr. Coughlin's trial, I did not provide testimony due to ongoing scheduling conflicts.

11. I state these facts, to the best of my ability, to convey that I anticipated and was fully prepared to testify on behalf of Mr. Coughlin in his third trial and that ultimately, I did not testify due to last-minute conflicts between my personal schedule and the trial calendar.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my recollection.



Thom A. Mayer, M.D.