Appendix "A"

No. 21-5263

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIMITAR PETLECHKOV,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Dimitar Petlechkov, a pro se federal prisoner, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. Petlechkov has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also filed a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5), and a motion to expedite merits briefing and submission, and he asks this court to take judicial notice of the financial affidavit and account statements that he has filed in support of his in forma pauperis motion.

FedEx provides shipping discounts to high-volume customers. To obtain such a discount, Petlechkov lied to FedEx by claiming that he was a vendor for a high-volume shipper, General Dynamics Corporation ("General Dynamics"). He then used those discounted rates to offer shipping services to third parties, pocketing the profit margin between what he charged the third parties and what he paid FedEx. Petlechkov shipped nearly 30,000 packages in this manner over the course of several years before FedEx finally caught him. As a result of his actions, a federal jury convicted Petlechkov of twenty counts of mail fraud, in violation of 18 U.S.C. § 1341. The district court sentenced Petlechkov to 37 months' imprisonment on each count, to be served concurrently, and ordered him to pay approximately $800,000 in restitution.

On direct appeal, Petlechkov challenged the sufficiency of the evidence underlying his convictions and argued that that the government had failed to prove that venue was proper in the Western District of Tennessee. We concluded that, although the government had satisfied its burden of production with respect to elements of the statute of conviction, "no rational juror could have found that the government proved venue for Counts 1-5, 7-12, 14-18, and 20." *United States v. Petlechkov*, 922 F.3d 762, 766-67, 769–71 (6th Cir. 2019). We therefore affirmed Petlechkov's convictions on Counts 6, 13, and 19, dismissed all remaining counts without prejudice, and remanded the case for resentencing. *Id.* at 771. Upon remand, the district court resentenced Petlechkov to the same terms of imprisonment and restitution as originally imposed but added a two-year term of supervised release.

Meanwhile, Petlechkov filed a § 2255 motion, in which he argued that his trial counsel had rendered ineffective assistance by inadequately cross-examining and impeaching the government's key witness with alleged prior inconsistent statements and "exculpatory documentary evidence." The district court denied Petlechkov's ineffective-assistance-of-counsel claim on the merits, dismissed his § 2255 motion with prejudice, and declined to issue a COA. This appeal followed.

Petlechkov now seeks a COA from this court as to his ineffective-assistance-of-counsel claim. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude [that] the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

To prove ineffective assistance of trial counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We determine whether counsel's performance was deficient by reference to an objective standard of reasonableness, based on prevailing professional norms. *Rickman v.*

Bell, 131 F.3d 1150, 1154 (6th Cir. 1997) (citing *Strickland*, 466 U.S. at 687–88). Counsel's performance must be assessed according to the time of representation, rather than viewed with the benefit of hindsight. *See Strickland*, 466 U.S. at 689. Because of the inherent difficulties in making this determination, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The burden rests on the defendant to overcome the presumption that the challenged conduct "might be considered sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). With respect to proving prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Petlechkov argued that trial counsel was ineffective for inadequately cross-examining a FedEx account manager named Andrew Newbon, whose allegedly perjurious testimony was crucial to proving that his misrepresentation—that he was a General Dynamics vendor entitled to discounted shipping rates—was material.[1] To that end, Petlechkov argued that counsel's failure to impeach Newbon's credibility with allegedly inconsistent statements that he had made in a related civil lawsuit and other "available exculpatory documentary evidence" allowed Newbon's damaging testimony to go unchallenged and gave the jury "a false impression of the case."

In response, Petlechkov's trial counsel provided an affidavit outlining his strategy. Noting that Petlechkov admitted before trial that he had lied to FedEx about being a General Dynamics vendor to receive shipping discounts that he knew he was not entitled to receive, counsel averred that "the defense was focused on challenging the materiality element and, once the proof closed, venue." Counsel then explained that his goal during Newbon's cross-examination was to undermine the government's claim that Petlechkov's misrepresentation was material, specifically

[1] To convict a defendant of mail fraud, the government must prove that he devised a scheme to defraud, used the mails in furtherance of that scheme, and intended to deprive the victim of money or property. 18 U.S.C. § 1341; *United States v. Warshak*, 631 F.3d 266, 310 (6th Cir. 2010). A fraudulent scheme must include a *material* misrepresentation, which is a misrepresentation that could influence the decision of a "person[] of ordinary prudence and comprehension." *United States v. Jamieson*, 427 F.3d 394, 415–16 (6th Cir. 2005) (quoting *Berent v. Kemper Corp.*, 973 F.3d 1291, 1294 (6th Cir. 1992)).

by showing that FedEx's pricing agreements with General Dynamics—which controlled application of the discounts—did not authorize General Dynamics's vendors to receive the discount. Counsel stated that his cross-examination of Newbon "was fairly short" because, although Newbon testified that Petlechkov had received shipping discounts because of his misrepresentation, he readily conceded that the pricing agreements did not provide for vendors to receive shipping discounts. Counsel further elaborated that

> [a]s a matter of trial strategy, I was satisfied with the testimony elicited from Mr. Newbon on cross exam and determined that not only was it unnecessary to . . . cross examine him further regarding any prior statements at that time, but that it would have been unwise because it would have allowed Mr. Newbon to explain his testimony and to equivocate . . . . Frankly, Mr. Newbon had testified to the information I sought to elicit as I began his cross examination. Prior to closing my cross examination I consulted with Mr. Petlechkov and we jointly decided no further questions were necessary or appropriate.

The record thus reflects that trial counsel made a deliberate decision to limit the scope and duration of Newbon's cross-examination. Because "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690; *see also Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002), no reasonable jurist could debate the district court's denial of Petlechkov's ineffective-assistance-of-counsel claim.

Accordingly, Petlechkov's motion to take judicial notice is **GRANTED**, his COA application is **DENIED**, and his motions for pauper status and to expedite merits briefing and submission are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DIMITAR PETLECHKOV,

Movant,

v.

Cv. No. 2:19-cv-02467-JPM-tmp
Cr. No. 2:17-cr-20344-JPM-01

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING & DISMISSING MOTION PURSUANT TO 28 U.S.C. § 2255
ORDER DENYING MOTION TO EXPEDITE AS MOOT
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the motion pursuant to 28 U.S.C. § 2255 (§ 2255 motion") filed by Movant Dimitar Petlechkov (ECF No. 1), the response of the United States (ECF No. 14), the affidavit of Defense Attorney Michael Stengel (ECF No. 16), and Petlechkov's reply (ECF No. 15). For the reasons stated below, the Court **DENIES** the § 2255 motion. Because this order resolves the case, Movant's motion to expedite the decision (ECF No. 17) is **DENIED as MOOT**.

I. PROCEDURAL HISTORY

A. Criminal Case No. 2:17-20344-JPM-01

On January 25, 2018, a federal grand jury in the Western District of Tennessee returned a superseding indictment against Petlechkov charging him with twenty counts of wire fraud in violation of 18 U.S.C. § 1341. (Criminal ("Cr.") ECF No. 23.) From April 2, through April 4,

2018, this Court presided over Defendant's jury trial. (Cr. ECF Nos. 53, 60, 62.) At the end of the trial, the jury returned a verdict of guilty on all counts. (Cr. ECF No. 64.) The Court conducted sentencing hearings on July 24, 2018, August 9, 2018, and August 31, 2018, and sentenced Petlechkov to thirty-seven months in prison on each count of wire fraud, to be served concurrently. (Cr. ECF Nos. 113, 121, 130.) Petlechkov filed a notice of appeal. (Cr. ECF No. 136.) On appeal, Petlechkov contended that the evidence was insufficient to support the jury's guilty verdicts and that the United States failed to prove venue was proper in the Western District of Tennessee. *United States v. Petlechkov*, 922 F.3d 762, 766-67 (6th Cir. 2019). The United States Court of Appeals for the Sixth Circuit affirmed Petlechkov's convictions on Counts Six, Thirteen, and Nineteen and dismissed the remaining counts without prejudice, holding that the United States failed to prove venue as to the dismissed counts. *Id.* at 766-71. (Cr. ECF No. 162.)

The facts underlying Petlechkov's convictions were summarized by the Sixth Circuit on direct appeal:

> FedEx provides shipping discounts to high-volume customers. In order to obtain such a discount, Dimitar Petlechkov lied to FedEx and claimed he was a vendor for a high-volume shipper. He used those discounted rates to offer shipping services to third parties, pocketing the profit margin between what he charged the third parties and what he paid FedEx. He shipped nearly 30,000 packages this way until FedEx finally caught him.

United States v. Petlechkov, 922 F.3d at 766.

B. Civil Case Number 19-2467-JPM-tmp

On July 22, 2019, Movant filed this § 2255 motion alleging that:

1. Trial counsel performed deficiently by failing to cross examine and impeach the key government witness, Andrew Newbon, with inconsistent statements and exculpatory documentary evidence.

(ECF No. 1 at 4.) The United States responds that movant's allegations are without merit (ECF No. 14 at 1) and relies on the affidavit of trial and appellate counsel Michael Stengel. (ECF No. 16.)

II. LEGAL STANDARDS

28 U.S.C. § 2255(a) provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (citation and internal quotation marks omitted).

A § 2255 motion is not a substitute for a direct appeal. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). "[N]onconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976). "Defendants must assert their claims in the ordinary course of trial and direct appeal." *Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996). This rule is not absolute:

> If claims have been forfeited by virtue of ineffective assistance of counsel, then relief under § 2255 would be available subject to the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In those rare instances where the defaulted claim is of an error not ordinarily cognizable or constitutional error, but the error is committed in a context that is so positively outrageous as to indicate a "complete miscarriage of justice," it seems to us that what is really being asserted is a violation of due process.

Grant, 72 F.3d at 506.

Even constitutional claims that could have been raised on direct appeal, but were not, will be barred by procedural default unless the defendant demonstrates cause and prejudice sufficient to excuse his failure to raise these issues previously. *El-Nobani v. United States*, 287 F.3d 417, 420 (6th Cir. 2002) (withdrawal of guilty plea); *Peveler v. United States*, 269 F.3d 693, 698-99 (6th Cir. 2001) (new Supreme Court decision issued during pendency of direct appeal); *Phillip v. United States*, 229 F.3d 550, 552 (6th Cir. 2000) (trial errors). Alternatively, a defendant may obtain review of a procedurally defaulted claim by demonstrating his "actual innocence." *Bousley*, 523 U.S. at 622.

After a § 2255 motion is filed, it is reviewed by the Court and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion . . . ." Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts ("Section 2255 Rules"). "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." *Id.* The movant is entitled to reply to the Government's response. Rule 5(d), Section 2255 Rules. The Court may also direct the parties to provide additional information relating to the motion. Rule 7, Section 2255 Rules.

"In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007) (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). "'[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Id.* (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir.

1999)). Where the judge considering the § 2255 motion also presided over the criminal case, the judge may rely on his or her recollection of the prior case. *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996); *see also Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977) ("[A] motion under § 2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion . . . ."). Defendant has the burden of proving that he is entitled to relief by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

> A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. [*Strickland*, 466 U.S.] at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Harrington v. Richter, 562 U.S. 86, 104 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

> It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." [*Strickland*, 466 U.S.] at 693, 104 S. Ct. 2052.

> Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S. Ct. 2052.

Richter, 562 U.S. at 104; *see also id.* at 111-12 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable." (citations omitted)); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." (citing *Strickland*, 466 U.S. at 694)).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, 562 U.S. at 105.

III. ANALYSIS

A. Ineffective Assistance of Counsel

1. Trial counsel did not perform deficiently by failing to cross examine and impeach a key government witness, Andrew Newbon, with inconsistent statements and exculpatory documentary evidence.

Petlechkov contends that trial counsel performed deficiently by failing to cross examine and impeach prosecution witness Andrew Newbon with inconsistent statements and exculpatory documents. (ECF No. 1 at 4, ECF No. 1-1 at 1-25.) The United States has responded that Petlechkov's allegation is without merit and has provided the affidavit of trial and appellate counsel, Michael Stengel, who addresses the issue. (ECF No. 14, ECF No. 16.)

After being duly sworn, Attorney Stengel states:

> I have read the allegation that I was ineffective in cross examining Andrew Newbon . . . and in failing to introduce evidence that would allegedly discredit Mr. Newbon's direct trial testimony.
>
> Importantly, the government introduced Mr. Petlechkov's sworn admissions that he was untruthful when he told a FedEx account manager that he was a vendor for NASSCO and that he made the statement to receive shipping discounts which he knew that he was not entitled to receive. (Cr. ECF No. 75, Trial Transcript ("Tr.") at PageID 493-97, Cr. ECF No.102-4, Petlechkov Civil Deposition Tr. at PageID 1038-44 in *Federal Express Corp. v. Petlechkov*, No. 15-2565, N.D. Ga.). It is true that whether a General Dynamics vendor was entitled to shipping discounts was critical due to the allegation that Mr. Petlechkov falsely represented that he was a General Dynamics vendor. (Cr. ECF No 24, First Superseding Indictment, ¶ 7.A). On direct exam Mr. Newbon had testified that, in addition to subsidiaries or affiliates which were at least 51% owned by General Dynamics, FedEx had a vendor program and authorized vendors of General Dynamics were entitled to the discounts. (Cr. ECF No. 75, Trial Tr. at Page ID 372.) Through Mr. Newbon the government introduced the pricing agreements with General Dynamics as Exs. 1, 2, 3. The pricing agreements controlled the discounts. (Cr. ECF 75, Trial Tr. at PageID 377-78.)
>
> I cross examined Mr. Newbon with the goal of establishing that the pricing agreements, which controlled application of the discount, authorized discounts for subsidiaries, defined as at least 51% owned by General Dynamics,

but did NOT mention or authorize the discount be applied to a General Dynamics vendor. This would tend to support the defense that the misrepresentation was not material. A fraudulent scheme must include a *material* misrepresentation, which is a misrepresentation that could influence the decision of a "person [ ] of ordinary prudence and comprehension." *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005).

The cross exam was fairly short. Mr. Newbon affirmed that the discount was applied because of Mr. Petlechkov's statement that he was a General Dynamics vendor; the discounts were controlled by the General Dynamics pricing agreements introduced as Exs. 1, 2, 3; the pricing agreements provided that a subsidiary (defined as at least 51% owned by General Dynamics) was entitled to the discount; but did NOT mention vendors or provide that they were entitled to the discount. (Cr. ECF 75, Trial Tr. at PageID 392-97.)

I was aware of the civil deposition and the General Dynamics National Account Master Report and had both in my trial notebook prepared to use, if necessary. As a matter of trial strategy, I was satisfied with the testimony elicited from Mr. Newbon on cross exam and determined that not only was it unnecessary to seek to cross examine him further regarding any prior statements at that time, but that it would have been unwise because it would have allowed Mr. Newbon to explain his testimony and to equivocate, as he had done in the civil deposition. Frankly, Mr. Newbon had testified to the information I sought to elicit as I began his cross examination. Prior to closing my cross examination I consulted with Mr. Petlechkov and we jointly decided no further questions were necessary or appropriate. (Cr. ECF No. 75, Trial Tr. at PageID 397.)

Further, Mr. Petlechkov alleges that the failure to introduce the following documents demonstrates ineffective counsel as the evidence would have demonstrated how the fraud was "discovered":

> An email produced by FedEx which discusses how FedEx discovered Mr. Petlechkov's fraudulent scheme. The email was allegedly inconsistent with a verified interrogatory response filed by FedEx in the civil litigation.
>
> A telephone call log produced by FedEx in the civil litigation that demonstrates the date of the discovery of Mr. Petlechkov's fraud. This call log allegedly demonstrates inconsistent testimony by Mr. Newbon.

Mr. Petlechkov also stated that the failure to impeach Mr. Newbon regarding a "Statement of Loss Report", a document that demonstrates that Mr. Petlechkov received discounts one month after Mr. Newbon was aware of the fraud, demonstrates ineffective counsel.

> All of the aforementioned documents were irrelevant in the guilt phase of Mr. Petlechkov's criminal trial. As I had discussed with Mr. Petlechkov repeatedly before the trial commenced, the defense was focused on challenging the materiality element and, once the proof closed, venue. To convict Mr. Petlechkov of mail fraud, the government had to prove that he (A) knowingly devised a scheme to defraud in order to obtain money or property; (B) the scheme included a material misrepresentation or concealment of a material fact; (C) that he had the intent to defraud; and (D) that he used or caused another to use a private or commercial carrier in furtherance of the scheme. Sixth Circuit Pattern Instructions, 10.01. A fraudulent scheme must include a material misrepresentation, which is a misrepresentation that could influence the decision of a "person [ ] of ordinary prudence and comprehension." *United States v. Jamieson*, *supra*, at 415-16. How or why FedEx discovered the fraud had no impact on either materiality or the ultimate challenge to venue. Mr. Newbon was cross examined on the essential element – whether claiming to be a NASSCO vendor, which the government said was the lie, entitled him to the discount. After testifying that the contracts introduced into evidence controlled the vendor discount, Mr. Newbon then conceded that the contracts did not provide that a vendor was entitled to the discount. The additional evidence that Mr. Petlechkov suggested should be introduced may have been relevant to his prior civil proceeding, but weren't relevant in the criminal proceeding.

(ECF No. 16 at 2-6 (emphasis in original) (record citations modified to conform with citations in this order).)

Relying on counsel's affidavit, the United States responds that, because of Petlechkov's inculpatory admission, trial counsel challenged the materiality of Petlechkov's lie during cross examination and was quickly able to obtain an admission from Newbon that the vendor discount program was not contained in the written pricing agreements governing the shipping accounts, an effective trial strategy. (ECF No. 14 at 5-6.) The United States contends that counsel's decision whether and to what extent to conduct cross examination are necessarily strategic and thus "effectively insulated" from ineffectiveness review. (*Id.* at 6 (citing *Hurley v. United States*, 10 F. App'x 257, 260 (6th Cir. 2001)).)

Counsel's recollection and affidavit are fully supported by evidence in the record. The record establishes that counsel's trial strategy was reasonable, and that counsel consulted with

Petlechkov about his cross examination of Newborn during the trial. Trial counsel's cross examination of Newbon was succinct and accomplished counsel's strategic goal. Petchlekov's speculation that further cross-examination could have assisted his defense does not outweigh counsel's reasonable strategic decision to limit questions to prevent giving Newbon an opportunity to equivocate. Petlechkov cannot establish that the strategic decision by his experienced, capable counsel was deficient. Counsel did not perform deficiently by failing to attempt to introduce evidence that was irrelevant in his criminal prosecution. Issue One is without merit and is **DENIED**.

IV. CONCLUSION

The motion, together with the files and record in this case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Movant's conviction and sentence are valid and, therefore, his motion is **DENIED**. Judgment shall be entered for the United States.

V. APPELLATE ISSUES

Pursuant to 28 U.S.C. § 2253(c)(1), the district court is required to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate. The COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. § 2253(c)(2), (3). A "substantial showing" is made when the movant demonstrates 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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation and internal quotation marks omitted); *see also Henley v. Bell*, 308 F.

App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Miller-El*, 537 U.S. at 337). In this case, for the reasons previously stated, Movant's claim lacks substantive merit and, therefore, he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore **DENIES** a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2255 motions. *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Fed. R. App. P. 24(a). *Kincade*, 117 F.3d at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**. If Movant files a notice of appeal, he must also pay the full $505 appellate filing fee (*see* 28 U.S.C. §§ 1913, 1917) or file a motion to

proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days (*see* Fed. R. App. P. 24(a) (4)-(5)).

SO ORDERED, this 23rd day of February, 2021.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Appendix "C"

No. 21-5263

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIMITAR PETLECHKOV,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MOORE, WHITE, and THAPAR, Circuit Judges.

Dimitar Petlechkov, a federal prisoner proceeding pro se, petitions for panel rehearing of this court's order denying his application for a certificate of appealability ("COA"). Petlechkov's COA application arose from the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255, in which he argued that trial counsel had rendered ineffective assistance by inadequately cross-examining and failing to impeach the government's key witness—a FedEx account manager named Andrew Newbon—with his prior inconsistent statements and "exculpatory documentary evidence." Petlechkov now petitions for rehearing of this court's order, arguing that this court failed to acknowledge either the substance of Newbon's prior inconsistent statements, or the caselaw cited within his COA application. He contends that, had his lawyer impeached Newbon with his prior statements, "it could and likely would have raised serious doubts as to [his] guilt in the eyes of any reasonable juror" given that Newbon's testimony was crucial to proving a material element of his offense.

We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in Petlechkov's COA application. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** the petition for panel rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix "D"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

DEBORAH S. HUNT
CLERK

TELEPHONE
(513) 564-7000

November 5, 2021

Dimitar Petlechkov
2625 Piedmont Road
Atlanta, GA 30324

Re: Case No. 21-5263, *Dimitar Petlechkov v U.S.*
Tendered Petition for Rehearing En Banc and Motion for Order to Show Cause

Dear Mr. Petlechkov:

This letter is to advise you that your two tendered documents, a petition for rehearing en banc and a motion for order to show cause, are being returned to you following careful review.

A single-judge panel issued an order on August 23, 2021, denying your application for a certificate of appealability. A three-judge panel then denied your petition for rehearing by order of September 28, 2021. Further review of the court's ruling is not available. Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for filing successive petitions for rehearing. Accordingly, your petition for rehearing en banc and motion for order to show cause are returned unfiled and without further action.

Sincerely,

s/ Julie Cobble
Chief Deputy Clerk

Enclosures

Appendix "E"

MR. MURREY: I think it's World Revenue Operations, WRO.
MR. HOWARD: Where was it at?
MR. MURREY: At the bottom.
THE WITNESS: Oh, so at the top --
MR. HOWARD: WRO, USRO --
THE COURT REPORTER: Wait, wait. I'm sorry.
MR. HOWARD: Excuse me.
THE COURT REPORTER: Now --
MR. HOWARD: WRO would be World Revenue Operations. USRO would be --
THE COURT REPORTER: I'm sorry. WRO?
THE WITNESS: World Revenue Operations.
MR. HOWARD: USRO would be US Revenue Operations. And SOP says Standard Operating Procedure.

BY MR. DAVIS:

Q So back to Drew.

To your knowledge, does Defendant's Exhibit 11 accurately state the standard operating procedure for how Federal Express handles discount requests?

A Yes.

Q Do you know -- well, strike that.

When Mr. Petlechkov set up account number 1589, it was a new account with no pay history, correct?

A I don't know.

Q When Mr. Petlechkov set up his account ending in 1589, the account was new and would have had less than five years with Federal Express, correct?

A A new account that's established, I would say yes, that's correct.

Q Vendors of General Dynamics -- well, strike that.

Companies who provide goods or services to General Dynamics can, in some circumstances, be entitled to receive the discounted pricing that General Dynamics also receives, correct?

A No.

Q No?

A No.

Q Okay. Besides General Dynamics and besides affiliates of General Dynamics, which -- which are companies 51 percent or more owned by General Dynamics, are any other companies entitled to receive General Dynamics' pricing discounts?

A No.

I -- I stand corrected. If there is -- there was a special program set up for people shipping Ground shipments back to General Dynamics, as a rule, even though General Dynamics is paying for the transportation charges, the shipper would still be responsible for the pickup charges.

There was a very limited number of accounts that were set up where the pickup charge was not billed to the shipper.

So, in that case, they would have technically taken advantage of a discounted surcharge.

Q Are you familiar with something called the Vendor Inbound Program?

A That's it.

Q That's what you're talking about?

A Yes.

Q Have you read the deposition testimony of Olivia Waites?

A No.

Q Okay. And do you have personal knowledge of how the Vendor Inbound Program worked prior to your -- prior to your tenure as Worldwide Account Manager of the General Dynamics National Account?

A No.

Q Going back to Exhibit 4 --

A Okay.

Q -- which is the Master Agreement.

A Okay.

Q On Page 21.

A Okay.

Q During the time you've been managing this account, have performance reports been generated on a monthly basis?

A No.

Q What about financial activity reports?

A Not as spelled out in this requirement. There are some reports but not spelled out here.

Q What's the content of the reports you're referring to?

A On a monthly basis they receive a report that they call Net Versus Book, or we call, and it basically provides a summary of all their shipments at the national level, what they would have been billed at had they had zero discounts, and what they were actually billed out, and their savings.

Q And does that report -- you said that report is a summary.

Does the report have line item detail?

A No.