No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Abraham Moses Fisch, *Petitioner*

v.

United States of America, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Abraham Fisch's case raises a pressing issue for this court's consideration: Has the United States Court of Appeals for the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power when it denied Fisch's Certificate of Appealability (COA) **without discussion or explanation**. Specifically, did the Fifth Circuit depart so far from the accepted and usual course of judicial proceedings when it failed to evaluate the facts and applicable law on his claim that his trial counsel was constitutionally ineffective for failing to raise the affirmative defense of 18 U.S.C. 1515(c) and for knowingly and intentionally failing to investigate and cross-examine a key government witness with available impeachment evidence.

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PETITION FOR A WRIT OF CERTIORARI

Abraham Moses Fisch respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS/ORDERS BELOW

The Order of a single judge of the Fifth Circuit Court of Appeals in *United States of America v. Abraham Moses Fisch*, C.A. No. 21-20301 denying Fisch's motion for certificate of appealability dated April 6, 2022 is reproduced in the Appendix.

The Order of a panel of the Fifth Circuit Court of Appeals denying Fisch's motion for panel reconsideration of the single judge order dated May 9, 2022 is reproduced in the appendix.

The Memorandum Order of the District Court for the Southern District of Texas, Houston Division in *United States of America v. Abraham Moses Fisch*, D.C. No. H-11-CR-722 denying Fisch's §2255 motion and denying a certificate of appealability dated March 12, 2021 is reproduced in the appendix.

JURISDICITON

The Order denying Panel Reconsideration of the single judge order denying Fisch's motion for certificate of appealability was entered on May 9, 2022. The Petition for a Writ of Certiorari is filed within 90 days of the Order of the Fifth Circuit Court of Appeals. Jurisdiction in this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment V

No person shall be... deprived of life, liberty or property without due process of law.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.

18 U.S.C. §1503(a) Influencing or Injuring Officer or Juror Generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due

administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. §1515(c) General Provision

This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

STATEMENT OF THE CASE

1. The United States Attorney's office for the Southern District of Texas, Houston Division initiated a criminal prosecution alleging obstruction of justice, money laundering and failure to file tax returns. (4:11-CR-722) against Fisch, who was a criminal defense attorney. Fisch pled not guilty and proceeded to a jury trial in April 2015. Fisch was represented by volunteer trial counsel Michael McCrum and testified on his own behalf. He was found guilty on some counts, acquitted on one and the government dismissed others.

2. Through different counsel, Fisch filed a motion to determine the effectiveness of his trial counsel on limited grounds under seal in the district court on

the morning of sentencing, October 27, 2015. Without considering all the evidence supporting the motion or holding an evidentiary hearing, the district judge concluded on the record that Fisch's trial attorney McCrum had provided effective assistance and denied the motion. The district court then entered a judgment of conviction and sentenced Fisch to a total of 180 months to run concurrent.

3. Fisch appealed the judgment of conviction to the Fifth Circuit who issued a decision in March 2017 affirming the conviction on all grounds raised. However, the appeals court declined to address the ineffective assistance of counsel (IAC) claims concluding the record was not sufficiently developed and held all IAC claims could be pursued in a collateral §2255 proceeding. *United States v. Fisch*, 851 F.3d 402 (5th Cir. 2017)

4. After his petition for writ of certiorari was denied in this court Fisch timely filed a motion to vacate or set aside his conviction under 28 U.S.C. §2255 in the district court on the basis of ineffective assistance of trial counsel (IAC) supported by uncontroverted sworn declarations and voluminous documentary evidence.

5. In light of the District Court Judge's previous conclusion that attorney McCrum had provided effective assistance of counsel, Fisch filed a Motion to Recuse or Disqualify the District Court Judge from considering his §2255 motion which was denied. The government filed a response without offering a sworn declaration or affidavit explaining trial strategy by McCrum and suggested the court should order him to file one. Fisch replied.

6. The district court then waited almost 3 years to issue a memorandum order in March 2021 denying the motion without authorizing discovery, holding an evidentiary hearing, or requiring attorney McCrum to explain his trial strategy or any of the acts or omissions alleged. The district court denied a certificate of appealability (COA) and in support of its decision misstated the trial record in several respects and disregarded uncontroverted documentary evidence and sworn statements offered in support of the 2255 motion.

7. Fisch then timely filed a motion for certificate of appealability in the Fifth Circuit Court of Appeals and after approximately 9 months in April 2022, a single judge issued an Order denying the motion without discussion of the facts or issues raised and without any application of the facts to applicable law. **Appendix 1-2** In fact, the order merely set out the COA standard in a paragraph and then concludes Fisch hadn't satisfied his burden. Fisch then filed a motion for panel reconsideration and shortly thereafter on May 9, 2022 the panel, which included the single judge who had denied the motion for COA, again denied the motion reiterating that a member of the panel had already done so. **Appendix 3** Fisch has no idea whether or how the COA standard was applied in his case.

8. Fisch asserted several different omissions and other errors by his volunteer trial counsel as a basis of his 2255 motion. The motion itself was 40 pages and was supported by multiple sworn declarations and documentary exhibits which approximated 2500

pages and were wholly uncontroverted. For this court's consideration at this stage, Fisch identifies two of the most egregious errors which clearly satisfy the *Strickland* IAC standard for both unreasonable trial strategy and prejudice.

A. Fisch's trial attorney failed to raise and argue the defense of 18 U.S.C. §1515(c).

9. The factual basis of the government's case asserted Fisch was a licensed attorney who had been retained by criminal defendants with cases pending in federal court and appeared or filed motions to substitute as counsel of record in identified cases. For purposes of the §1515(c) defense, the indictments charged Fisch with conspiracy and obstruction of justice or endeavoring to do so pursuant to 18 U.S.C. §1503. 18 USC §1515(c) provides "this chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." The bona fide legal representation exception was included in section 1515 as a "general provision" for the first time in 1986 *See* Pub. L. 99-646; at that time the section was 18 U.S.C. §1515(b). In 1996, the bona fide legal representation exception was redesignated as §1515(c). *See* Pub. L. 104-292.

10. A few cases have considered the §1515(c) defense either on the merits in the trial court or for the first time on appeal. *See e.g., United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001)(attorney charged with obstruction of justice in connection with his representation of a client in municipal court where he knowingly entered a plea of guilt in

abstentia on behalf of the client under a false name); *United States v. Mintmire*, 507 F.3d 1273, 1293 (11th Cir. 2007)(attorney charged with obstruction of justice by attempting to influence grand jury witnesses from disclosing facts regarding an investigation into the sale of corporate stocks of a company he represented); and *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000)(attorney charged with conspiracy and obstruction of justice in connection with his destruction of documents on behalf of a client in anticipation of an official proceeding). In each of these cases the §1515(c) defense was invoked despite the charged conduct was alleged to be obstruction of justice.

11. In *Kloess*, the 11th circuit held §1515(c) is an affirmative defense by a defendant-attorney because one who provides bona fide legal representation doesn't have an improper purpose; zealous legal representation is fully exempt from prosecution and negates the specific intent element. 251 F.3d at 948. If the government's indictment alleges the necessary facts to invoke applicability of §1515(c) the burden to raise the defense is met by the indictment. *See id* at 948 n.8 citing *Patterson v. New York*, 432 U.S. 197, 231 n. 17 (1977).

12. Yet in denying Fisch's COA the district court concluded McCrum was not ineffective for failing to raise the defense because "the evidence overwhelmingly established that Fisch did not provide lawful, bona fide legal services." **Appendix 10** The district court concluded "he did not prepare, and did not present, any lawful bona fide legal defense for his clients … at a minimum offering to bribe

government officials is not lawful, bona-fide, legal representation." Yet, lawful bona fide legal representation is not limited to preparation and presentation of a defense as the district court suggests. Moreover, there was not a scintilla of evidence that any government official was ever offered a bribe.

13. More importantly, the district court disregarded facts alleged in the indictment, record evidence that Fisch provided lawful, bona fide, legal representation, and the district court's own observations about Fisch's representation during the trial. Specifically, in connection with the government's motion to dismiss counts 4 and 14 related to Fisch's client Joey Herrera, in a colloquy with McCrum about these counts, the court disagreed with his characterization of the government's theory of the case and stated in relevant part:

> " … And I'm not sure, frankly, that I agree with your characterization that the heart of the government's case is that Mr. Fisch did nothing on the cases once he got the money. He did do stuff, the government I understand to allege."

14. "A defendant-lawyer seeking the safe harbor of §1515(c) must affirmatively show he is entitled to its protection." *Kloess*, 251 F.3d at 948 citing *United States v. Jackson*, 57 F.3d 1012, 1016 (11th Cir. 1995) This burden is minimal since "evidence tending to show that the defendant is a licensed attorney who was validly retained to perform the legal

representation which constitutes the charged conduct is sufficient to raise an inference of innocent purpose." *See* 251 F.3d at 948.

15. The indictment alleged and the evidence showed Fisch was a licensed attorney who was validly retained to represent federal criminal clients in federal court which representation constitutes the charged conduct. Aside from the indictment, the court's own conclusion that "he did do stuff," additional evidence not considered by the district court includes the following:

> Government exhibits 103,104,302,303,409 and 410 - Fisch's motion to substitute counsel as attorney of record for federal criminal defendant Portillo, and Order granting same; Fisch's motion to substitute counsel as attorney of record for federal criminal defendant Herrera, and Order granting same; Fisch's motion to substitute counsel as attorney of record for federal criminal defendant Imo and Order granting same.
>
> Government witness Imo testified he retained Fisch to represent him; that he was in court with Fisch in December after paying his fee in November; and wasn't aware of Fisch's preparation and the motions filed on his behalf.
>
> Dismissal of the money laundering count associated with Imo's case - Imo

paid attorney fees to Fisch for bona fide legal representation.

The engagement letters between government witnesses Portillo and Sanchez regarding Fisch's legal representation.

Fisch's testimony regarding his representation of his federal criminal clients.

16. As a licensed attorney Fisch filed motions and appeared in court on behalf of his clients; lawful, bona fide legal representation. Whether Fisch's legal representation as to each count charged was lawful and bona fide was a question for the jury. Having disregarded the government's factual allegations and record facts which demonstrated Fisch was retained to represent federal criminal defendant clients which formed the basis of the charged conduct, the conclusion that Fisch did not was "clearly erroneous." Reasonable jurists would find the district court's assessment that trial counsel was not ineffective for failing to raise a clearly established defense debatable or wrong.

17. *Kloess* reminds us that "any defense which tends to negate an element of the crime charged, sufficiently raised by the defendant, must be disproved by the government." *See Kloess*, 251 F.3d at 948 citing *Patterson*, 432 U.S. at 206-07 *See also United States v. Mintmire*, 507 F.3d 1273 (11th Cir. 2007) When the government is relieved of its burden of proof as to an element of the offense charged, the

defendant's due process rights are violated and reversal in most cases is required. *See In Re Winship*, 397 U.S. 355 (1970)

18. McCrum was deficient for failing to raise a clearly established statutory defense that reasonable investigation would have revealed legal authority which made the §1515(c) defense plausible. His failure to raise the defense relieved the government of the burden to prove an element of its case. A certificate of appealability should have issued by the district court and the fifth circuit since constitutional violations of the 5th and 6th amendment rights to due process and effective assistance of counsel are clearly at issue.

B. Fisch's trial attorney failed to impeach a primary government witness.

19. The crux of the government's proof against Fisch consisted primarily of testimony by defendants convicted in federal drug trafficking and medical fraud cases who were awaiting sentencing in their respective cases. One witness who was not convicted was German Vanegas, Fisch's former Private Investigator (PI) who the government considered above reproach and capitalized on McCrum's ineffective assistance regarding this witness during closing arguments.

German Venagas

Audio Recording/Transcript

20. German Vanegas was Fisch's former PI whom the government exalted as one of its most important

witnesses. During the government's investigation, Vanegas was interviewed on 2 occasions in 2010 as documented by FBI 302s. After one of the interviews Vanegas went to see Fisch, and Fisch recorded the conversation. Given what Vanegas said, Fisch provided the recording to a certified court reporter who transcribed the recording.

21. Fisch provided McCrum with the recording and the transcript which included among other claims, an allegation of an offer of $50,000.00 to Vanegas by the government. Fisch also provided McCrum with text messages between himself and Vanegas which included impeachment evidence never utilized. During cross-examination of Vanegas, McCrum attempted to question Vanegas about his FBI interviews and when he claimed not to recall, McCrum attempted to refresh his memory with the transcript of the recorded conversation; the government objected and the court directed the matter would be addressed later.

22. The following day, the court took up the issue of McCrum's attempted use of the transcript to refresh Vanegas' memory. The court allowed McCrum to use the transcript to question Vanegas outside the presence of the jury about whether he remembered what he'd said during the conversation. Vanegas responded that he didn't recall the conversation. McCrum asked if listening to the recording would help refresh his recollection and Vanegas replied yes, so later in the day outside the presence of the jury, the recording was played for Vanegas, the court, the prosecutors, defense counsel and anyone else present in the courtroom. McCrum then asked whether

Vanegas recalled statements he'd made on the recording and Vanegas agreed he'd made the statements; he heard himself on the recording. In summary Vanegas told Fisch:

> -he'd been offered cash or other benefit to cooperate; -he told the government he could no longer tell them what they wanted to hear; -he wouldn't go on lying for them; -if he were a bad person, he'd want to say yes … "they say, here, cash money. You know, they don't pay with checks;" and "they want you bad. It is politically motivated."

23. On redirect, the government asked whether Vanegas believed there were any differences between the recording and the transcript, and he answered he believed there was. The government argued the court should just disregard the recording and the transcript as a waste of time. Instead, the court directed that any discrepancies between the tape and transcript be specifically identified. Next the court directed counsel:

> "look at the Rule 16(b) issue … the order that I entered … did not specifically identify the interplay between what I was requiring in Rule 16, the question about whether this is in the case-in-chief or whether this is more properly regarded as impeachment."

24. After continued argument by the government that the court should make a ruling on use of the recording and transcript, the court then stated:

> "… for the convenience of the reviewing court and the protection of the record, a clear identification of the extent of the discrepancies and the basis for your arguing that this is not, in fact, impeachment, and it is therefore, simply a circumvention of the requirement of - - if there is one, that it would be a circumvention of otherwise applicable disclosure obligations. So again, we come back to Rule 16(b) and we come back to whether there is any impeachment here or whether this is offered for a different purpose."

After brief additional dialogue, the court convened this discussion and moved on.

25. At the close of the next day's trial proceedings the government requested a hearing about the recording and transcript which the court ordered for 6:00 p.m. The hearing was apparently cancelled as there is no transcript of a hearing nor is there a docket entry indicating any such hearing occurred. Despite the court's directive to counsel, there was no briefing regarding the Rule 16(b) issue nor did the government identify any discrepancy between the recording and the transcript. And then McCrum dropped the ball. He never raised the issue again; the jury heard none of it. Yet this evidence was crucial for the jury to weigh Vanegas' credibility as to whether he was a cooperating witness and had any motive to testify against Fisch.

26. As to this IAC claim, citing to the ROA the district court states in part:

> "According to Fisch … recorded conversations with Vanegas contained statements that he was having financial problems, he pressured Fisch for money and that the government offered him $50,000.00 to testify against Fisch. The record instead shows that counsel for Fisch tried to use a transcript of these conversations to cross-examine Venagas. The government objected, and the court excluded the recording because it was not produced in discovery and the government had no opportunity to determine its reliability." **Appendix 34**

27. Not so – this conclusion directly misstates the ROA as stated above. The district court directed counsel to brief the evidentiary issues but since McCrum never raised the issue again the court had no further occasion to consider or rule on the matter. Nowhere in the ROA does the district court hold the transcript or recording inadmissible. The district court adopted a clearly erroneous factual and legal conclusion.

Text Messages

28. McCrum separately failed to impeach Vanegas with text messages he sent to Fisch which showed Vanegas was in a financial hardship, was pressuring Fisch for money, and suggested he would change his

story if he were approached again. As to this claim citing to the ROA the district court states:

> "The record shows that counsel did cross-examine Vanegas about the texts, and that Vanegas admitted to having financial problems and asking Fisch for work. Fisch makes no showing that introducing the actual text messages would have added to what Vanegas admitted. There is neither deficient performance nor prejudice." **Appendix 34-35**

29. Yet the district court wholly ignored the specific texts which demonstrated Vanegas' animosity and potential motive for cooperating with the government against Fisch. In one of the last text messages Vanegas sent to Fisch he stated:

> "I am in deep shit. I wish I could go back in time and re-do everything! I wouldn't be going through all this mess. If I am approach again, it will not be the same. I have to start thinking for my OWN good. Correction: BECAUSE OF YOU I am in deep shit."

And then a final text:

> "Rolling down with the punches"

30. When considering the importance of Vanegas as a government witness, which the district court itself recognized, there could be no reasonable trial

strategy not to cross-examine Vanegas about these specific text messages which clearly demonstrate potential bias and motive for testifying against Fisch, particularly when combined with the recorded statements about his interview with the FBI made before the text messages.

31. McCrum's failure to pursue the impeachment of Vanegas regarding his recorded statements, to brief the court as ordered regarding the Rule 16(b) issue, and to raise the issue again and again until the court entered an order one way or the other was prejudicial since it precluded the jury from considering whether Vanegas was a cooperating witness or had a bias and motive to testify against Fisch.

Closing Argument

32. The government capitalized on McCrum's ineffective cross-examination and his failure to follow through with impeachment of Vanegas in its closing arguments. Both AUSAs highlighted McCrum's failures in relevant part as follows:

> AUSA Pearson argued Vanegas was "not a cooperating witness." "not someone who has a plea agreement," "not currently incarcerated," and quoted Vanegas' testimony – "Vanegas reaffirmed that he told the agents that and that he understood it to be bribery, and that's what he still understood it to be."

> AUSA Pearson relied on Vanegas as key to the government's case: "Vanegas corroborates Portillo and Sanchez," "With respect to Mr. Vanegas, … he knew right away. Fisch: what the fuck is this?" "I apologize for my harsh language, but I want to put you–all back in that moment … he hears Mr. Fisch talk about paying people off, some kind of special program in Washington D.C. …to me, something like this is not right."

33. AUSA Johnson further magnified McCrum's failure to discuss Vanegas in his closing argument and continued to bolster Vanegas as a key and important government witness as follows:

> " … Mr. McCrum … covered a lot of ground, but there's a few things he did not cover, and there's a reason for that: the witnesses, … Vanegas …"

> " … the reason why the testimony of Mr. Vanegas wasn't addressed is because Mr. Vanegas is not a criminal." "… there are witnesses … who have no criminal background, who are not charged with a crime … Vanegas is one of those people." "That's the reason you didn't hear about Mr. Vanegas during that closing, because he is a key witness. He's not charged with a crime. He doesn't have an axe to grind. In fact, Mr. Fisch has done him favors in the past.

> He's represented his family members for free. He doesn't have anything against Mr. Fisch. In fact he'd probably liked to keep doing work for Mr. Fisch as his investigator."

34. McCrum had damning evidence at his disposal to impeach Vanegas' credibility and motive for testifying against Fisch but never utilized it. McCrum's failure to effectively cross-examine Vanegas allowed AUSA Johnson to argue "he didn't have an axe to grind … and didn't have anything against Fisch." Had the jury been aware of Vanegas' past statements to Fisch regarding his interview with government agents and what he claimed occurred during the interview, including an offer of cash or other benefit, combined with his text messages to Fisch blaming him for his circumstance and implying he would cooperate with the government if approached anew, the government's case would have been seriously undermined.

35. The government's case hinged on Vanegas' testimony in order to validate the criminal defendant witnesses, and to sanitize their case, so to speak as demonstrated by closing arguments. McCrum had damning evidence with which to impeach the government's star witness but never used it. McCrum's ineffective cross-examination of Vanegas amounts to a violation of the confrontation clause that can't be considered harmless. Reasonable jurists would conclude the district court's findings on this issue were clearly erroneous and that a certificate of appealability should have issued in both the district court and at the Fifth Circuit court of appeals.

REASON TO GRANT THE PETITION

36. The petition should be granted because the Fifth Circuit has demonstrated a decided refusal to follow this court's repeated directive to apply the correct standard when considering a motion for certificate of appealabilty. Although supervising the lower courts is not generally necessary since they typically follow this Court's rules and guidance, it seems increased supervision of the Fifth Circuit is necessary because it has "so far departed from the accepted and usual course of judicial proceedings." *See* S.Ct.R. 10(a).

37. Since this Court's decision in *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017) which again set out the applicable COA standard, i.e. a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 483 (2000). When a district court has rejected a claim on its merits, the petitioner can meet this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).* Yet the Fifth Circuit has continued to conduct a merits based analysis or otherwise apply incorrect COA standards when considering COA motions. *See Gonzales v. Davis,* 924 F.3d 236, 239 (5th Cir. 2019)(COA denied despite state appellate court split on constitutional question)*; Halprin v. Davis,* 911 F.3d 247, 254-55 (5th Cir.

2018)(COA denied after merits based analysis); *Hummel v. Davis*, 908 F.3d 987,991 (5th Cir. 2018)(COA denied based on a completely erroneous standard of "reasonable jurists cannot debate the reasonableness of the district court's conclusion"); and *Freeney v. Davis*, 737 F. App'x 198,204-06 (5th Cir. 2018)(COA denied after a merits based type analysis). This Court didn't grant certiorari in any of these cases.

38. In this case, the Fifth Circuit has departed even further from the accepted and usual course of judicial proceedings in considering COA motions. Continuing to ignore this Court's admonishments and directives regarding the correct COA standard, the Fifth Circuit now appears to have decided it will not discuss the case or apply a COA standard at all. **Appendix 1-2** How often the Fifth Circuit has issued such orders without discussion of the case or explanation of the decision is unknown, but Petitioner is aware of at least one other such case. *United States v. Edgar Porfirio Rocha*, No. 18-50415 (5th Cir. 2020)

39. It is critically imperative that this Court address the Fifth Circuit's continued defiance and refusal to apply the correct COA standard. While this is not a capital case, the impact of the Fifth Circuit's refusal to apply the correct COA standard in capital cases is evaluated in A Shortcut to Death – An Analysis of the Fifth Circuit's Refusal to Adopt the Supreme Court's Certificate of Appealability Standard, 48 Am. J. Crim. L. 1, Fall 2020. The data demonstrates the Fifth Circuit routinely denies COA motions in capital cases at a rate substantially higher than any other circuit. The article calls for

this Court's increased supervision of the Fifth Circuit and suggests this Court consider some of the tools available to it to address the Fifth Circuit's open defiance of COA jurisprudence. For example, this Court could flag COA denials from the Fifth Circuit and summarily reverse when it appears the wrong COA standard is applied, or as in this case when it appears no COA standard was applied at all.

40. This Court has reversed the Fifth Circuit 4 times between 2003 and 2017 for failing to apply the correct COA standard, yet it continues to ignore clear directives from this Court about the COA inquiry. Having already intervened without success, it appears likely the Fifth Circuit will continue to deny COA motions applying the wrong COA standard or no COA standard at all. The district court misrepresented the record to justify its decision and deny Fisch's COA despite clear and uncontroverted constitutional violations occasioned by his trial counsel's ineffective assistance at trial. The Fifth Circuit appears to have rubberstamped the district court without discussion or explanation and with no application of the COA standard. This Court should grant the writ and reverse the Fifth Circuit for its refusal to follow the process prescribed in 28 U.S.C. 2253.

CONCLUSION

41. Fisch's §2255 motion was wholly uncontroverted and supported by voluminous exhibits and sworn declarations. Both the district court and the appeals court so far departed from the accepted and usual course of judicial proceedings as to warrant this court's intervention. The district court failed to

require Fisch's trial counsel to explain his trial strategy or hold an evidentiary hearing. After sitting on the motion for nearly 3 years, the court then misrepresented the trial court record to justify the denial of the §2255 motion and certificate of appealability. The Fifth Circuit appears to have simply rubberstamped the district court without requiring the court to hold an evidentiary hearing or addressing the misrepresented record, nor does it appear to have applied a COA standard at all. Under these circumstances, this Court should exercise its supervisory power and reverse the lower courts.

Submitted the 5th day of August, 2022.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20301

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

ABRAHAM MOSES FISCH,
Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the
Southern District of Texas
USDC No. 4:18-CV-1419

ORDER:

Abraham Moses Fisch, federal prisoner #02040-379, seeks a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2255 motion seeking to vacate his conviction and 180-month sentence on counts of obstruction of justice and conspiracy to obstruct justice, money laundering and conspiracy to commit money laundering, and failure to file a tax return. Fisch contends that the district court

erred in denying his claims that counsel was ineffective for failing to raise an affirmative defense under 18 U.S.C. § 1515 that he provide bona fide legal representation, impeach government witnesses, and investigate and call witnesses at trial.

To obtain a COA with respect to the denial of a § *2254* application, a petitioner must make "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000).* Where, as here, a district court has rejected a claim on its merits, the petitioner can meet this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).* Fisch has not made that showing.

The motion for a COA is DENIED.

Don R. Willett

DON R. WILLETT

United States Circuit Judge

United States Court of Appeals
for the Fifth Circuit

No. 21-20301

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

ABRAHAM MOSES FISCH,
Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-1419

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED Appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
v.	§	CRIMINAL NO.
	§	H-11-722-1
	§	
	§	CIVIL NO.
	§	H-18-1419
ABRAHAM MOSES FISCH	§	

MEMORANDUM AND ORDER

After a jury convicted Abraham Moses Fisch on one count of conspiracy to obstruct justice, in violation of 18 U.S.C. § 371; four counts of obstruction of justice, in violation of 18 U.S.C. §§ 1503 and 2; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); seven counts of money laundering, in violation of 18 U.S.C. §§ 1957 and 2; and five counts of failure to file timely tax returns, in violation of 26 U.S.C. § 7203, the court sentenced him to serve 180 months in prison

and five years on supervised release, and ordered him to pay a $1,425.00 special assessment. (Docket Entry No. 482). The court also ordered forfeiture of $1,150,000.00. (Docket Entry No. 470). The Fifth Circuit affirmed Fisch's conviction and sentence, *United States v. Fisch*, 851 F.3d 402 (5th Cir. 2017), and the Supreme Court denied his petition for a writ of *certiorari*, *Fisch v. United States*, 138 S.Ct. 378 (2017). Fisch has now moved to vacate, set aside, or correct his conviction and sentence, claiming multiple instances of ineffective assistance of counsel. (Docket Entry No. 684). Based on Fisch's motion, the government's opposition, Fisch's reply, the record, and the governing law, Fisch's motion is denied, and final judgment is entered in the § 2255 action. The reasons are explained below.

I. The Legal Standards

A. Section 2255

Title 28 U.S.C. § 2255 provides for relief "for errors that occurred at trial or sentencing." *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001). To prevail, Fisch must show that: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence exceeded the maximum allowed by law; or (4) the sentence is otherwise subject to collateral attack. *See United States v. Seyfert*, 67 F.3d 544,546 (5th Cir. 1995).

B. Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, Fisch

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The first prong of the *Strickland* test requires showing that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms and is viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689. In assessing prejudice, the second prong, "*Strickland* asks whether it is reasonably likely the result would have been different," if not for counsel's deficient performance. *Harrington v. Richter*, 562 U.S. 86, 111 (2011)(internal quotation marks omitted).

II. Analysis

A. Background

The Fifth Circuit summarized the background in its decision affirming Fisch's conviction:

> Fisch was a criminal defense attorney. He and former FBI informant Lloyd Williams approached defendants who had criminal charges pending against them. Fisch and Williams told the

> defendants to pay them large sums of money as purported legal fees. They promised to use the money to pay off high-ranking federal government officials in return for the officials' getting the defendants' cases dismissed or resolved on more favorable terms. Fisch and Williams, of course, had no such government contacts that could be paid off to influence pending legal proceedings.
>
> Once their scheme unraveled, Fisch and Williams were indicted for conspiracy, obstruction of justice, money laundering, tax evasion, and impeding administration of the IRS. Malkah Bertman, Fisch's wife, was indicted for conspiracy and obstruction of justice. Williams pleaded guilty but Fisch and Bertman proceeded to trial. The indictment included a notice of criminal forfeiture, which identified "[r]eal property located at 9202 Wickford Dr., Houston, Texas 77024"—Fisch's home—as an asset traceable to criminal proceeds. The government recorded a *lis pendens* (notice of pending legal action) on the home. Fisch challenged the *lis pendens* and sought a hearing on the basis that he needed it lifted so he could use the equity in his home to pay for counsel of choice. The district court denied a hearing due to Fisch's failure to show that he lacked sufficient alternate, available funds to pay for counsel of choice.

> The case proceeded to trial. The jury found Fisch guilty on eighteen counts (three counts had been dismissed) but not guilty on the count for impeding administration of the IRS. The jury acquitted Bertman.
>
> At the government's request, the district court entered a forfeiture order in the amount of $1,150,000. The government then moved to amend the forfeiture order to include Fisch's home as substitute property. The district court granted the motion.
>
> On the day of sentencing, Fisch filed a "motion to determine the effectiveness of trial counsel," arguing that his trial counsel was ineffective in several respects. The district court orally ruled that trial counsel was not ineffective. Fisch was sentenced to 180 months in prison.

United States v. Fisch, 851 F.3d 402, 406 (5th Cir. 2017).

B. The Claims for Relief

Each of Fisch's claims is analyzed below.

1. The Claim That Defense Counsel Failed to Raise an Affirmative Defense

Fisch contends that his counsel was ineffective for failing to raise the defense that he provided lawful, bona-fide legal representation, as provided in 18 U.S.C. § 1515(c), and

for failing to request a jury instruction on this defense. Section 1515(c) states: "[t]his chapter does not prohibit or punish the providing of lawful, bona-fide, legal representation services in connection with or anticipation of an official proceeding."

The evidence overwhelmingly established that Fisch did not provide lawful, bona-fide legal services. The evidence showed that Fisch obtained large sums of money from clients. Fisch persuaded these clients to fire the well-qualified and diligent lawyers they already had, by falsely promising that he could pay government officials to drop or reduce the charges against Fisch's clients. *See, e.g.*, Record on Appeal ("ROA") at 3093-97, 3470-72, 3528-31, 4036-37, 4727-31, 4740, 4859-63, 5150-57, 9084-86, 9095, 9132-46. In the face of this evidence, Fisch's defense counsel had no basis to pursue what would have been a futile defense at trial. Fisch cannot show either that counsel was deficient for failing to raise this defense or a reasonable probability that doing so would have resulted in a better outcome.

The cases Fisch cites do not support a different conclusion. He cites *United States v. Mintmire*, 507 F.3d 1273 (11th Cir. 2007); *United States v. Kloess*, 251 F.3d 941 (11th Cir. 2001); and *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000). These cases hold that §1515(c) is an affirmative defense that shifts the burden to the government to disprove that the defendant provided lawful, bona-fide legal representation. The evidence in this case overwhelmingly proved that Fisch did not provide lawful, bona-fide, legal representation. Instead, he defrauded his clients into paying him millions of dollars with promises to illegally fix cases. He did not prepare, and did not present, any lawful, bona-fide, defense for his clients. The affirmative defense would have failed. At a minimum, offering to bribe government officials is not lawful, bona-fide, legal representation. And the entire scheme was fraudulent because Fisch had no ability to fix his clients' cases as promised. Counsel was not deficient in not raising such an easily

disprovable affirmative defense, and Fisch was not prejudiced because the defense had no reasonable chance of succeeding.

2. Counsel's Failure to Interview or Call Witnesses

The Fifth Circuit has held that "complaints based upon uncalled witnesses [are] not favored because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain, and . . . speculations as to what these witnesses would have testified is too uncertain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983). To show *Strickland* prejudice, the defendant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial." *Id.*

a. Former FBI Agent William Windland

Fisch testified that he met his accomplice, Lloyd Williams, in 2006. One of Fisch's clients was Michael Goodson, Jr., who had been indicted. ROA at 5548-53. Fisch testified that Goodson referred another client, Edilberto

Portillo, to Fisch. According to Fisch, Goodson had convinced Portillo to work with Williams. *Id.* at 5579-85.

When Fisch met Williams, Williams said that he had worked on a number of investigations for the FBI and CIA. *Id.* at 5587-90. Williams told Fisch that a man named Ron McNeil would "handle" Portillo's case at the United States Department of Justice. *Id.* at 5591-93. Williams claimed to have met McNeil years earlier while working undercover in an Internal Revenue Service case that McNeil was prosecuting, and that McNeil had sought some kind of help from Williams and Goodson. Williams claimed that he remained friends with McNeil, who was the head of a DOJ Drug Task Force Unit. Williams gave information about Portillo's criminal activity to McNeil, and, allegedly, McNeil agreed to help Portillo in exchange for the information. *Id.* at 4562.

When FBI agents interviewed Fisch, ROA 4550-54, he gave different answers about how he met Portillo, and he denied soliciting Portillo as a client. Fisch told the FBI agents

that he thought that Williams was passing on Portillo's information to DOJ, and that DOJ would see that the felony indictment against Portillo would be dropped once Portillo assisted in prosecuting Mexican drug cartels. *Id.* at 4557, 4587-88. Fisch asked Williams to set up a phone call with McNeil. Fisch claimed that, during that call, McNeil said that he and Williams were friends who had worked together in the past, and that he would use Portillo's information to infiltrate drug cartels. *Id.* at 5633-34. Fisch testified that McNeil told him that he had helped Williams get federal charges against defendants indicted in Tennessee dismissed. Fisch also claimed that McNeil said that everything Williams was doing to help Portillo was legal. *Id.* at 4555-56.

McNeil testified that he was a former prosecutor in the DOJ Narcotics and Dangerous Drugs Section. He had unsuccessfully prosecuted Williams for money laundering in 1994. *Id.* at 4798-4800. McNeil testified that he did not meet Williams while working on an IRS case, and they were never friends. *Id.* at 4799.

Williams called McNeil several times after 1994 to try to provide tips in investigations and prosecutions. McNeil would refer him to the authorities directly responsible for these matters. On the first of these calls, McNeil specifically told Williams that he had no control over the Houston investigation that Williams called about. *Id.* at 4800-03. McNeil also testified that he never helped Williams get any charges dismissed. *Id.* at 4801. McNeil never heard of Portillo and did not recall ever speaking to Fisch. *Id.* at 4804-05. McNeil described the prospect of either he or his replacement at DOJ getting a judge removed from a case as "totally impossible and . . . totally ridiculous." *Id.* at 4805.

When asked about McNeil's testimony, which thoroughly undermined Fisch's account, Fisch said that he assumed McNeil forgot about their conversation because he did not keep logs of his phone calls. *Id.* at 6067. Fisch now argues that a former FBI agent, William Windland, would have impeached McNeil's testimony and would have

corroborated Fisch's testimony that McNeil told Fisch that he (McNeil) had worked with Williams on resolving an indictment in Memphis. Fisch alleges that his counsel was ineffective for failing to interview Windland or call him as a witness.

Windland submitted a declaration in which he stated that he had worked with Williams on an undercover operation. He stated that McNeil contacted him after Williams called about an indictment pending in Tennessee. Windland stated that he contacted an Assistant United States Attorney in Memphis about the indictment. Williams later told Windland that the indictment was dismissed. Motion to Vacate, (Docket Entry No. 684), Exh. D, (Docket Entry 684-59). McNeil testified that he had never worked with Windland and had never prosecuted a case out of Memphis. *Id.* at 4808-09.

Windland's declaration does not identify any direct interaction between Windland and McNeil. Windland related only Williams's reports of his contacts with McNeil. This

double hearsay would have been inadmissible at Fisch's trial. Fisch identifies no admissible testimony that Windland could have offered to contradict McNeil's testimony.

The remainder of Windland's declaration shows that he had some interactions with Williams that are irrelevant to any element of the crimes charged against Fisch. Fisch fails to demonstrate either deficient performance or prejudice from counsel's failure to call Windland as a witness.

b. Retired FBI Agent John McGauley

Fisch contends that counsel should have called retired FBI Agent John McGauley as a witness to rebut McNeil's testimony and bolster Fisch's claim that Williams had been able to affect the outcome of criminal prosecutions because of the connections to law enforcement he had made through his undercover work. McGauley was Williams's "handler" in the early 1980s. Motion to Vacate, Exh. C-1, (Docket Entry 684-57), at 1.

Williams's connections to the FBI and individuals in the DOJ were over 20 years old when the events at issue

occurred. Testimony about Williams's years-ago undercover investigative work was irrelevant to the efforts Williams and Fisch made to bribe government officials to get them to dismiss or reduce charges against Fisch's clients. Fisch fails to demonstrate that McGauley had any relevant testimony to offer. Counsel was not deficient for not presenting irrelevant testimony, and the absence of McGauley's testimony caused Fisch no prejudice.

c. Lloyd Williams

Fisch argues that, had Williams testified, he could have contradicted McNeil's testimony and rebutted the government's theory. During Fisch's trial, Fisch's counsel informed the court that Williams was not available because he would invoke his Fifth Amendment rights if called to testify. ROA at 5440. A claim of ineffective assistance of counsel based on the failure to call a witness requires a showing that the witness would have been available to testify and would have provided helpful testimony.

In his reply, Fisch argues that Williams was available to testify. Fisch relies on a declaration Williams executed after Fisch's trial, in which Williams lays out what he claims he would have testified to if called. But Williams does not dispute the statement by Fisch's counsel on the record that Williams's attorney told Fisch's counsel that Williams would invoke his Fifth Amendment rights if Fisch called him to testify at trial. That Fisch's counsel believed that this was true is bolstered by Williams's description of a meeting with Fisch's counsel, in which Williams was "asked only general questions" and not "anything specific about my proposed testimony." Williams Declaration, Exhibit E to Motion to Vacate, (Docket Entry No. 684-62), at 3.

Williams also asserts his innocence, but he pleaded guilty in open court. Fisch argues that the factual basis of Williams's plea is "riddled" with falsehoods, but Williams swore it was true, under oath and with counsel present. Williams acknowledges that the courts have rejected his attempt to withdraw his plea, and that, at the time he executed

the declaration, he was pursuing a claim of ineffective assistance of counsel to try to get his guilty plea set aside. *Id.*

The court finds Williams's self-serving *post hoc* assertions unconvincing. At the time of Fisch's trial, Williams's legal proceedings were still ongoing. He had every reason to decline to answer any questions that might have exposed him to increased criminal liability, or that might have undermined his belated claims that he is not guilty and pleaded guilty only due to ineffective assistance of his own counsel. The record provides no support for an inference that Williams would have testified for Fisch if called to do so. At a minimum, it was reasonable for Fisch's counsel to rely on the statement by Williams's counsel that Williams would invoke his Fifth Amendment rights if Fisch called him to testify.

d. Former DEA Agents Zorn Yankovich and Jacqueline Gordon

Fisch argues that his counsel should have called former DEA Special Agent-in-Charge Zorn Yankovich and

former DEA Agent Jacqueline Gordon to confirm Williams's contacts with the DEA about the Portillo case. Fisch also argues that his counsel could have subpoenaed the DEA file on the Portillo investigation. Fisch cites an FBI report in which Williams made statements about the Portillo case.

The government cites Agent Yankovich's report, in which he states that he has no recollection of any dealings with McNeil, Williams, or Portillo. DE 684, Exh. A-35, (Docket Entry 684-35). Agent Gordon's report states that she was sent to interview someone, whose name she did not recall, at a car dealership, about some drug information. She spoke to the person, but she did not take further action because she found that what he said was not credible. DE 684, Exh. A-36, (Docket Entry 684-36). Fisch makes no showing that the testimony or files of these agents would have supported his claims that Williams had government contacts who could intervene in pending criminal cases, or that Williams had valuable information that could help Fisch's clients.

e. Richard Powers

Fisch argues that a letter from FBI Special Agent-in-Charge Richard Powers would have established Williams's background as an FBI informant and his government connections. Fisch contends that his counsel was deficient for failing to call Powers as a trial witness and for failing to offer the letter into evidence. Substantial other evidence, however, established that Williams had been an FBI informant many years earlier. *See* ROA 4559, 4573-74, 4838, 5770-71, 5782, 5786-87, 5820-21, 5868-69. Powers "would have presented testimony already provided by other witnesses. Counsel's decision not to present cumulative testimony does not constitute ineffective assistance." *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007)(footnote omitted).

f. Michael Goodson, Sr.

Michael Goodson, Jr. testified that Fisch paid him ten percent of the fee Portillo paid Fisch for referring Portillo to Fisch. Fisch argues that counsel should have called

Goodson's father, Michael Goodson, Sr., to testify: that Fisch had paid Goodson, Jr. a referral fee less than the amount Goodson, Jr. testified to; Fisch did not solicit Portillo as a client, but instead Goodson, Jr. referred Portillo to Fisch; Portillo was unhappy with his previous attorney; and Goodson, Jr.'s pastor had referred Goodson, Jr. to Williams for help in connection with a previous criminal charge. Fisch also argues that his counsel should have introduced an audio recording of conversations between Fisch and Goodson, Sr. because it contradicted statements attributed to Goodson, Jr. in an FBI report.

In these conversations, Goodson, Sr. said that Fisch met with Portillo and told him to fire his attorney; that Fisch and Williams told Portillo that they could fix his case with a bribe to high-level law-enforcement officials; and that they needed $1 million from Portillo for the bribe. Fisch later told Goodson, Sr. that FBI agents questioned him about the Portillo case, and that Fisch tried to get Goodson, Sr. to sign an affidavit supporting Fisch. Motion to Vacate, Exh. A-4,

(Docket Entry 684-4), at 5, 11-12. Goodson, Jr. stated that he had a similar deal to Portillo's except that he paid Fisch with client referrals rather than cash. *Id.* at 12-13.

Goodson, Sr.'s statements to the FBI would not have helped Fisch. Instead, they corroborated the testimony of Portillo and Elida Sanchez. DE 684, Exh. A-4, (Docket Entry 684-4).

Based on these statements, it was reasonable trial strategy to for Fisch's trial counsel to conclude that any testimony Goodson, Sr. could have given favorable to Fisch was far outweighed by his potentially damaging testimony, and that any favorable testimony would have been easily impeached. Fisch's counsel was not ineffective by failing to call Goodson, Sr., and no prejudice resulted.

g. Clifford Ubani

Fisch argues that Clifford Ubani made statements to FBI agents that would have been helpful to Fisch, and that his counsel was deficient for failing to call Ubani as a trial

witness. Fisch does not identify any such statements. His conclusory allegations present no basis for relief.

h. Jose Leal

Jose Leal was the attorney for one of Fisch's clients, Hugo Barrera. Barrera and his ex-wife, Claudia Rodriguez, testified at trial that Fisch talked to them about giving money to his contacts in the government to get the charges against Barrera dismissed. DE 684 at 21-22, Exh. A21-A24, (Docket Entries 684-21, 22, 23, and 24). Fisch contends that his counsel should have subpoenaed Leal to rebut this testimony.

Leal is an attorney who lives and works in Mexico. He is beyond the subpoena power of the court. Fisch makes no showing that Leal would have come to Houston to testify on Fisch's behalf. Fisch also fails to show that any testimony Leal might have provided would have been helpful to Fisch. In the absence of any showing that Leal was willing and would provide favorable testimony, Fisch cannot demonstrate deficient performance in failing to call him, or *Strickland*

prejudice. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985).

i. Prince Uchech Nwakanma

Prince Uchech Nwakanma is an immigration attorney. Umawa Imo hired Nwakanma to help him find a criminal attorney to represent him in a Medicare-fraud prosecution. ROA 9126-32. Fisch now argues that, if Nwakanma had been called as a witness, he could have rebutted the government's argument that Fisch solicited Imo as a client by testifying that Nwakanma introduced Imo to Fisch and told Imo that Fisch could get Imo's case dismissed. Fisch also argues that Nwakanma could have testified about emails between himself and Williams that made no mention of bribing law-enforcement officials.

Fisch fails to demonstrate that Nwakanma was available to testify, or that he would have provided testimony helpful to Fisch. Nwakanma was an unindicted coconspirator in Fisch's scheme. ROA at 4660, 9132-37, 9141. Evidence showed that Nwakanma persuaded Imo to

hire Fisch as his criminal attorney for $3 million, telling him that Fisch and Williams would get his case dismissed. ROA at 9132-35. Nwakanma told Imo that the large fee was required because Williams would use some of the money to pay off government officials. ROA at 4702-03, 9134-35. Imo testified that, when he asked Nwakanma what he had to gain from this relationship, Nwakanma admitted that Fisch and Williams promised him a $150,000 fee from the $3 million Imo paid them. ROA at 4660. Imo eventually filed a grievance against Nwakanma. ROA at 4684. Testifying would have exposed Nwakanma to questions about his own potentially criminal activity, and Fisch makes no showing that Nwakanma would have been willing to testify or that he would not have invoked the Fifth Amendment. No relief is available for counsel's failure to call this witness.

3. Failure to Introduce Engagement Letters

Fisch argues that counsel should have introduced engagement letters signed by two of his clients, Portillo and Sanchez, to impeach testimony that Portillo's previous

lawyers had visited him regularly, that Fisch induced Portillo to fire his attorneys, and that Fisch guaranteed the outcome of Portillo's and Sanchez's cases. Portillo signed a letter stating that his former attorneys, Dick DeGuerin and Stanley Schneider, both well-known and highly regarded, had not visited him over a five-month period and that Fisch made no promises to induce him to fire DeGuerin and Schneider. Docket Entry No. 684, Exh. A-11, (Docket Entry 684-11), at 1. A second letter stated that Portillo and Sanchez authorized Fisch to use Lloyd Williams as a private investigator in Portillo's criminal case and "to pay out any and all sums of monies that are necessary to facilitate the handling of [Portillo's] criminal action." *Id.* at 2. The letter stated that Fisch made no guarantees. Both Portillo and Sanchez were shown the letters to refresh their recollection during trial. Portillo testified that he signed the letter at Fisch's instruction to say that he was unhappy with his previous attorneys so that Fisch could take over. Portillo testified that Fisch promised he would get Portillo out of jail. ROA 3385-88.

Fisch argues that the letters contradict Portillo's testimony that his previous attorneys were visiting him regularly. In fact, Portillo testified that DeGuerin visited him only twice between July and November 2006. But on other occasions, DeGuerin sent a Spanish-speaking attorney in his place to review discovery with Portillo. ROA 3143-44. There was, at most, a minor inconsistency between Portillo's testimony and the letters, and that inconsistency is explained by Portillo's testimony that Fisch instructed him to write that he was unhappy with his prior attorneys. The letter would therefore have had little or no impeachment value. Fisch fails to demonstrate that counsel was deficient for failing to introduce evidence that had little value to his case, or that he suffered any prejudice as a result of counsel's decision.

4. Cross-Examination of Portillo and Sanchez

Fisch argues that his counsel was ineffective by failing to cross-examine Portillo and Sanchez about their motive to testify against him in exchange for a reduced sentence. Both, however, testified that they hoped to receive

reduced sentences in exchange for their testimony against Fisch. ROA At 3124-25, 3345, 3384, 3883. On cross-examination, Portillo acknowledged that he hoped to reduce his possible life sentence. *Id.* at 3345, 3384-85. Sanchez also testified that she hoped to receive a beneficial deal in exchange for her testimony. *Id.* at 3780-81. Counsel was not ineffective for failing to elicit would have been cumulative testimony on cross-examination.

Fisch also argues that his counsel should have cross-examined Portillo on inconsistent statements about promises of a reduced sentence in exchange for Portillo's cooperation. Review of the record shows that the statements were not inconsistent, but misunderstood. Portillo does not speak English. The record shows that Portillo misunderstood questions about such promises, thinking that he was being asked about Fisch's promises to Portillo. *See, e.g.*, ROA 3081. Fisch identifies no inconsistent statement regarding promises by the government.

Fisch also argues that his counsel should have cross-examined Sanchez about recordings of conversations with Williams in which Sanchez never mentions payoffs to government officials. The recordings were made as part of Sanchez's cooperation with the government. They include Sanchez talking about paying Fisch and Williams $1.1 million to get Portillo's case dismissed, and Williams claiming to work with his contacts in Washington to get the case dismissed. ROA 3582-84, 3597-98. Williams stated that his contacts were trying to get the judge removed from Portillo's case, and that Fisch had "allocated the [$1.1 million] in the right places." *Id.* at 3599. In light of the highly incriminating nature of the recordings to Fisch, his counsel made a reasonable strategic decision not to further highlight the recordings by asking Sanchez about them. Fisch fails to show that his counsel was deficient or that any prejudice resulted.

5. Failure to Impeach Imo

Fisch next argues that his counsel failed to impeach Imo with prior statements indicating that it was Nwakanma, not Fisch, who told Imo that the charges against him would be dismissed. Fisch also argues that his counsel failed to impeach Imo by showing that Imo did not claim that Fisch said anything about paying off government officials until the FBI communicated a proffer agreement to Imo. But the record shows that Fisch's trial counsel used two affidavits submitted by Imo, and an FBI report, to impeach Imo. *See* ROA 4620, 4641-43, 4660, 4683-86. This claim is without merit.

6. Failure to Impeach Ezinne Ubani, Caroline Njoku, and Princewell Njoku

Clifford Ubani hired Fisch to represent him in a healthcare-fraud prosecution. Ubani understood that Fisch and Williams would get the case against him and against his codefendant, Princewell Njoku, dismissed. ROA 4958, 5146-51, 5155-61. Ubani testified that Fisch could not represent both defendants due to conflict of interest, so he moved to substitute in as Ubani's counsel, but reached an agreement

under which both Ubani and Njoku would pay his fee. *Id.* at 4964-65, 5156-61. The trial court denied Fisch's motion to become Ubani's counsel, but Fisch nonetheless instructed Ubani and Njoku to reject plea offers under which the government would not prosecute their wives. *Id.* at 4968, 5168-69. Fisch assured Ubani that he and Williams would be able to resolve their cases. Based on Fisch's and Williams's promises to get their case dismissed, and Fisch's instruction, Ubani and Njoku rejected the plea offer. *Id.* at 4868-69, 4968-70, 5166-69. Ubani, Njoku, and their wives were subsequently charged with conspiracy to commit healthcare-fraud in a new indictment. *Id.* at 4869-70, 4972-73. The men pleaded guilty in both cases, and the women were convicted after a trial. *Id.* at 4870, 4973-74. All four received substantial prison sentences. *Id.* at 4872, 5115-16, 5176. Fisch now argues that his trial counsel was ineffective for failing to impeach Ezinne Ubani and the Njokus with the prior bad acts underlying their convictions.

The record shows that Fisch's counsel cross-examined these witnesses about their crimes. *Id.* at 4808-09, 4913-15, 5114-15, 5118-19, 5180-87, 5240-41. Counsel also cross-examined the witnesses about their motives for testifying for the government, and their prior inconsistent statements, and used cross-examination to try to show that the witnesses interacted with Williams, not Fisch. *Id.* at 4915-24, 5116-23, 5131-32, 5137-40, 5187-95, 5219-24, 5232-38, 5242-43. The record makes clear that Fisch's trial counsel extensively cross-examined these witnesses about a number of subjects, including their convictions, to impeach them and expose potential bias and motive. Fisch's claim is without merit.

7. Cross-Examination of German Vanegas

German Vanegas had previously worked as an investigator for Fisch. Fisch argues that his trial counsel was deficient for failing to cross-examine Vanegas about recordings of his conversations with Fisch. According to Fisch, the recordings contain statements that Venegas was having financial problems, that he pressured Fisch for money,

and that the government offered him $50,000 to testify against Fisch. The record instead shows that counsel for Fisch tried to use a transcript of these conversations to cross-examine Venegas. The government objected, and the court excluded the recording because it was not produced in discovery and the government had no opportunity to determine its reliability. ROA 3439-40, 3510-17.

Fisch also argues that counsel should have used text messages indicating that Vanegas was having financial problems. The record shows that counsel did cross-examine Vanegas about the texts, and that Vanegas admitted to having financial problems and asking Fisch for work. ROA 3441-43. Fisch makes no showing that introducing the actual text messages would have added to what Vanegas admitted. There is neither deficient performance nor prejudice.

8. Failure to Object to McNeil Testimony

Fisch argues that his trial counsel was ineffective for failing to object to McNeil's testimony that Williams was a defendant in a case that McNeil prosecuted, and that McNeil

believed Williams was guilty even though he was acquitted. This testimony rebutted Williams's claims that he met McNeil while working as a government informant, that he and McNeil were friends, and that McNeil confirmed to Williams that the plan to pay law-enforcement officials to get Portillo's case dismissed was legal. The testimony was plainly relevant to show that Fisch and Williams lied to their clients about their government contacts and their ability to influence the disposition of their cases. Any objection would have been futile. Fisch's counsel was not ineffective for failing to raise a futile objection. *See, e.g.*, *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point"); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections.").

Failure to Impeach Richard Miller

Fisch contends that his trial counsel failed to impeach Richard Miller with purported inconsistencies between

statements in an FBI report and a recording of an interview in the same report. Miller is a retired FBI agent and was, at one time, Williams's "handler." Fisch argues that the report attributes statements to Miller not contained in the recording but he does not identify which parts of the report are inaccurate.

In any event, the government objected at trial to the admission of the recording and transcript as hearsay. The court limited counsel's questioning of Miller to his interactions with Fisch and Williams, and to the acts directly related to this case. ROA at 5067-82, 5437-42, 5492-94, 5502, 5761. This ruling prevented counsel from doing what Fisch claims he should have done. Counsel was not ineffective for heeding the court's ruling on this evidentiary issue.

9. The Title III Recording

Fisch next argues that his trial counsel should have had an expert analyze the recording of a wiretapped conversation between Williams and Windland. Fisch argues

that the part of the recording about the Ricardo Lodondo investigation sounded as though it was spliced or otherwise altered. The government points out that the Lodondo investigation was in 1991 and irrelevant to this case. Fisch fails to show deficient performance or prejudice.

Fisch also argues that his trial counsel was deficient for failing to question Agent Young about the affidavit he submitted in support of the wiretap application. Young stated in the affidavit that the government could not prove its case using only the victims' testimony, and that other consensually recorded conversations did not contain sufficiently incriminating statements by Fisch or Williams. The record shows that defense counsel did question Young about his affidavit. Young acknowledged that the investigation leading up to the wiretap did not produce sufficient evidence and more was needed for trial. ROA at 5856-58. The record shows that defense counsel asked the questions that Fisch claims he should have. Fisch fails to show deficient performance by counsel, or prejudice.

10. Evidence of Autism Spectrum Disorder

Dr. Debra Stokan diagnosed Fisch with Autism Spectrum Disorder after the indictment was filed in this case. Docket Entry No. 684 at 36-37, Exh. A-51, (Docket Entry 684-53). Defense counsel included Dr. Stokan on Fisch's witness list, intending to elicit testimony that individuals on the spectrum are "naïve and gullible in social and professional situations" and are "easily scammed and/or taken advantage of for their lack of insight." *Id.*

During a pretrial conference, counsel stated that he intended to call two witnesses to testify that Fisch suffered from mental disabilities. ROA at 2806-07. The court questioned the relevance of the testimony and later precluded it. ROA at 1201-02. Fisch now argues that defense counsel was ineffective for failing to persuade the court that this testimony was relevant and admissible.

Both a federal statute and the Federal Rules of Evidence make clear that this evidence was not admissible to prove Fisch's intent. *See* 18 U.S.C. § 17 ("mental disease or

defect does not . . . constitute a defense" except as an affirmative defense of insanity); Fed. R. Evid. 704(b) ("an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged . . ."). Fisch's law degree and bar license make inadmissibility even more clear. Because the testimony that Fisch claims counsel should have admitted is inadmissible, he fails to show either deficient performance or prejudice in not seeking its admission.

11. Failure to Object to Recordings of Co-Conspirators

Fisch contends that his defense counsel was ineffective for failing to demand evidence of a conspiracy as a predicate to admitting the consensual recordings of conversations between Williams and Sanchez. A party must show a conspiracy when offering the statement of a coconspirator under Rule 801(d)(2)(E) of the Federal Rules of Evidence. *See, e.g., United States v. Fragoso*, 978 F.2d 896, 900 (5th Cir. 1992). This court found that the predicate showing and the conditions for admitting the recordings were

met. ROA at 2878. Fisch fails to demonstrate that counsel's performance was deficient or caused prejudice.

12. The Jury Charge and Closing Argument

Fisch next argues that his defense counsel did not adequately object to the jury charge or to the government's closing argument. Defense counsel raised numerous objections and concerns about the jury charge. *See*, *e.g.*, ROA at 6115-21. Defense counsel also used closing argument to highlight inconsistencies and weaknesses in the government's case, evidence supporting Fisch's theory of the case, the government witnesses' potential biases and motives to testify against Fisch, and the lack of evidence, *id.* at 6398-36. Fisch fails to point to specific objections during the government's argument that defense counsel should have made but did not. Fisch fails to demonstrate deficient performance or prejudice as to either the jury charge or closing argument.

13. Defense Counsel's Health

Finally, Fisch argues that defense counsel's health issues caused him to provide constitutionally deficient representation. The court granted a one-week continuance during trial so that counsel could obtain treatment for a temporary medical issue. Trial resumed after the continuance and proceeded to its conclusion without further medical issues. Fisch provides no specifics in support of this claim. Fisch's claim that counsel was hindered in his representation is contrary to the court's direct observation of counsel's performance, which was robust, well-presented, and thoughtful. Fisch's argument is without merit.

III. Conclusion and Denial of Certificate Of Appealability

Fisch has not requested a certificate of appealability, but the court may determine whether he is entitled to this relief. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district courts to deny COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be

taken without a certificate of appealability having been issued."). A movant may obtain a certificate either from the district court or an appellate court, but an appellate court will not consider a request until the district court has denied it. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does.").

A certificate of appealability may issue only if the movant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A movant "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000).

This court has carefully reviewed the record and found that Fisch has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Fisch is not entitled to a certificate of appealability. Final judgment in the civil case, 4:18-cv-1419, is entered by separate order.

Abraham Fisch's motion to vacate, set aside, or correct sentence, (Docket Entry No. 684), is denied; and no certificate of appealability is issued.

SIGNED on March 12, 2021, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge