No. 22-5530

ORIGINAL

SUPREME COURT OF THE UNITED STATES

JOSEPH JORDAN
Petitioner

v.

UNITED STATES
Respondent

PETITION FOR WRIT OF CERTIORARI

(to the Second Circuit Court of Appeals)

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QUESTIONS PRESENTED

Each of the following four pages presents one primary question regarding IAC claims that survived Section 2255(b) screening, but were ultimately rejected by the District Court without hearing, findings, the appointment of counsel, or the granting of a COA.

Primary Question A

Where the defendant (convicted under Section 1512(b) of non-violent witness tampering) made the undisputed claim that (1) trial counsel had neglected to inform him of the affirmative defense (available under Section 1512(e)) before his right to testify was waived, and (2) but for that omission, he would have taken the stand to testify in support of that defense, was the District Court's decision to reject that IAC claim without hearing or findings (after it survived Section 2255(b) screening) wrong or at least debatable - given that counsel had a duty (under Strickland) to advise the accused, and an uninformed waiver is invalid (under Brady).

[Subsidiary Questions]

1. Is the District Court required to make "findings of fact and conclusions of law" regarding each claim that survives Section 2255(b) screening?

2. Does trial counsel's duty to advise a criminal defendant of the right to testify, and the benefits of doing so, include an obligation to apprise him of a viable affirmative defense that his testimony could support?

3. When a criminal defendant is not apprised of an affirmative defense before his right to testify (in support of it) is waived, is that waiver invalid (under Brady), as unintelligently made, or does harmless-error analysis (under Strickland) apply?

Primary Question B

Where trial counsel told the judge (after the close of evidence) that the "written communications" alleged to constitute witness tampering (under section 1512(b)) supported a theory of "truth-seeking" (under section 1512(e)), and invoked that affirmative defense (at sidebar), but then neglected to argue in support of it (in summation), was the District Court's finding (under Section 2255) that the omission was "strategic" (made without a hearing or an assessment of the unused truth-seeking argument submitted by the movant) wrong or at least debatable - given that (1) invoking the affirmative defense (and allowing the jury to be instructed on it) effectively conceded all the government had to prove, (2) failing to explain the "truth-seeking" theory left jurors without the ability to intelligently consider it, and (3) no other real defense (to the witness tampering charges) was argued or advanced?

[Subsidiary Questions]

1. Is whether or not to advance or abandon an affirmative defense a fundamental trial decision that belongs personally to the defendant? And if so, where trial counsel effectively concedes guilt by invoking such a defense (without consulting the defendant) is prejudice presumed?

2. When the District Court's finding that an omission of counsel was "strategic" is not supported by the record, is its decision (denying an IAC claim under Section 2255) at least debatable?

3. Given that a theory of guilt (under 1512(b)) is nullified when the evidence also supports a theory of "truth-seeking" (under Section 1512(e)), is the District Court required (under Section 2255(b)) to make an assessment of, and findings regarding, the evidence supporting both theories?

Primary Question C

Where a prisoner - serving 40 years for non-violent witness tampering - made the claim (under Section 2255) that trial counsel deprived him of acquittals, or of a sentence at least 34 years shorter, by failing to request a lesser-included offense instruction (on "witness harassment" under Section 1512(d)), or otherwise respond, after the prosecutor told the jury that the "written communications," alleged to constitute witness intimidation under Section 1512(b), demonstrated guilt because they were "harass[ment]" (which is not conduct proscribed by that statute), was the District Court's rejection of that IAC claim, and its findings that Section 1512(d) is not a lesser-included offense of Section 1512(b), and that no harm accrued, wrong or at least debatable (and thus should a COA have issued), given that (1) another circuit had held that the former is a lesser-included offense of the latter, (2) the jury was left to believe that it could convict (under Section 1512(b) for "harass[ment]," and (3) the offending speech (at issue) did not include an improper request or demand, or any statement that could invoke fear of bodily harm, or cause a witness to testify inaccurately?

[Subsidiary Questions]

1. When (as here) the District Court concedes that its decision is debatable, is its denial of a COA contrary to the Supreme Court's holding in Slack?

2. Is Section 1512(d) [witness harassment] a lesser-included offense of Section 1512(b) [witness intimidation] where each proscribes an attempt to tamper?

3. Does Section 1512(b) reach conduct intended to embarrass, harass, or annoy?

Primary Question D

Are the rights to the effective assistance of counsel at trial, and access to the courts, adequately protected (or unconstitutionally restricted) when (as here) a poor man is denied post-trial counsel (to prepare, amend, and present a motion to vacate), and a COA (i.e., a first appeal), regarding IAC claims that survived Section 2255(b) screening and could not have been raised on direct appeal?

[Subsidiary Questions]

1. When a post-trial motion (under Section 2255) is the first opportunity to raise an IAC claim (that is neither refuted by the record, nor dismissed as frivolous), is an indigent entitled to the appointment of counsel to litigate that claim?

2. If the District Court rejects an IAC claim (under Section 2255) that could not have been advanced on direct appeal, is the appeal of that decision tantamount to a first appeal (according to Martinez), and if so, is an indigent entitled to the appointment of counsel (according to Douglas) to prosecute that appeal?

3. Is it constitutionally permissible to require a layman (not schooled in the law) to (without counsel) convince the lower courts that he should be allowed a first appeal of the denial of IAC claims that could not have been decided on direct appeal?

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SUPREME COURT OF THE UNITED STATES

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Joseph Jordan,
Petitioner,

v. CASE NO. _____

United States,
Respondent.

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PETITION FOR WRIT OF CERTIORARI

Now comes Mr. Jordan before this Honorable Court to seek review of the decisions, and decisional processes, of the Second Circuit Court of Appeals (case no. 19-2987), and the District Court for the Southern District of New York (case no. 18-cv-3372), denying his motions for the appointment of counsel (under sec. 3006A), his motion to vacate (under sec. 2255), and his applications for a certificate of appealability (under sec. 2253).*

By this petition, Mr. Jordan, serving 40 years in prison after convictions for non-violent witness tampering, asserts that the lower courts' resolutions of three ineffective assistance of counsel (IAC) claims, and refusals to issue a certificate of appealability (COA), (1) are contrary to Supreme Court law, and thus summary reversal is appropriate, and (2) raise procedural questions - regarding habeas claim processing and the COA standard - of national significance that should be answered by this Court.

This Court has jurisdiction under Art. III, Sec. 2, Cl. 2 of the U.S. Constitution, S.Ct. Rules 10(a) and 16.1, and Title 28 USC sec. 2601, because this petition is timely presented.**

Following is a summary of the facts, and issues, and the reasons why certiorari should be granted.

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* The special appendix ("S.A.") with this petition contains the decisions of the lower courts (S.A. 01-25), and copies of the relevant statutes (S.A. 45-56). District Court documents (case no. 18-cv-3372) are in the record appendix ("R.A."), and include: motion to vacate (Dkt. 1); movant's affidavit (Dkt. 8), movant's memorandum (Dkt. 11), and the Opinion & Order (Dkt. 16), which is also in the Special Appendix.

** The timely filed motion to vacate was denied (without hearing) on August 30, 2019 (S.A. 04). A COA was denied (without explanation) on December 15, 2020 (S.A. 03), and a timely motion for reconsideration was denied on August 6, 2021 (S.A. 01). This Court then granted an extension of time to file this petition to January 3, 2022, and on May 6, 2022 this petition was returned for corrections to be made within 60 days (S.A. 02).

I. INTRODUCTION

A. The Import

This petition follows the lower courts' denials of a COA - which this Court has the power to review. Hohn v. United states, 524 U.S. 236, 238-39 (1998). That power should be exercised (here) because this matter regards Section 2255 procedures and the COA standard, and "questions of practice regarding habeas corpus" are important to all of society. Walker v. Johnson, 312 U.S. 275, 278 (1941). Such helps to ensure that the lower courts have the guidance needed to fulfill their constitutional obligations - given that, as Justice Fortas explained in Harris v. Nelson, 394 U.S. 286 (1969), "there is no higher duty of a court than the careful processing of habeas petitions." Id. at 292. Absent that care, the "privilege of the writ of habeas corpus" - guaranteed by Art. I, Sec. 9, Cl. 2 of our constitution - is effectively suspended.*

When, a Section 2255 motion (that survived screening) is denied without a hearing, without proper findings, and without the issuance of a COA, the movant is left without a meaningful avenue to relief. And "a prisoner's inability to present a claim of trial error is of particular concern when (as here) the claim is one of ineffective assistance of counsel." Martinez v. Ryan, 566 U.S. 1, 12 (2012).**

Thus, short of recognizing the right to post-conviction counsel in Section 2255 proceedings that regard claims of ineffective trial counsel that could not have been raised on direct appeal, and thus are being

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* Meaningful access for Section 2255 movants is critical, especially when it comes to IAC claims - because they typically cannot be litigated on direct appeal, Massaro v. United States, 538 U.S. 500, 502-06 (2003), when a prisoner has a right to counsel. Douglas v. California, 372 U.S. 353, 356-58 (1963). But, instead, must be presented - for the first time - in a subsequent collateral proceeding when the right to counsel has not yet been recognized. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). This means that a poor man, unlike a rich man, who was convicted at a trial where he did not receive the effective assistance of counsel to which he was entitled, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), is forced to proceed pro se, with little chance to obtain relief from what may be a wrongful conviction - because, as Justice Kennedy explained in Martinez v. Ryan, 566 U.S. 1 (2012), more often than not, presenting a successful IAC claim requires "investigative work and an understanding of trial strategy." Id. at 11-12.

** The effective assistance of counsel is essential to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85 (1984). Among other things, the right to counsel protects all other trial rights. United States v. Cronic, 466 U.S. 648, 653-54 (1984). And without the right, an innocent person can be convicted. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

raised for the first time,* or of declaring the COA requirement unconstitutional when applied in such circumstances, this Court should exercise its authority to ensure that the procedures proscribed by Section 2255(b), and the COA standard (under sec. 2253(c)), are not misinterpreted, disregarded, or unfairly applied - as this petition shall show they were here.**

B. The Issues

The primary issue (here) is whether a COA (under sec. 2253(c)) should have been granted regarding three IAC claims that survived Section 2255(b) screening, but were subsequently denied without hearing, and one without findings. The claims involved trial counsel's performance with respect to charges of witness tampering (under sec. 1512(b)).

This Court has said that a COA should be issued when "jurists of reason" could debate whether a habeas claim was improperly or prematurely denied. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Here, your petitioner asserts: (1) that a "general assessment" of his claims (in accordance with Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)) will show that the propriety of the decisions denying them, and the decisional process (or lack thereof), is so clearly debatable that the denial of a COA is contrary to Slack, and thus summary reversal is appropriate; and (2) that certiorari should be granted because this case raises issues of national significance regarding the processing of Section 2255 claims, and the COA standard:

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* In Martinez v. Ryan, 566 U.S. 1 (2012), this Court stated that when a collateral proceeding (like one under sec. 2255) is the first opportunity to raise an IAC claim, that proceeding is tantamount to direct appeal with respect to that claim. Id. at 8. And this Court has held that when a right to appeal is afforded (as it is by sec. 2255(d)), an indigent prisoner has a right to the appointment of counsel. Douglas v. California, 372 U.S. 353, 357 (1963). This is required by our constitution's due process and equal protection clauses. Griffin v. Illinois, 351 U.S. 12, 18 (1956)

** Further guidance for the lower courts is needed because it appears that the COA standard is often (as in this case) misinterpreted or disregarded. Compare: Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) (standard for a COA is "low"); and Veal v. Jones, 376 Fed. Appx. 809, 810 (10th Cir. 2010) (standard for a COA is "high"). And, as the Second Circuit has observed, regardless of the interpretation, most courts rarely issue a COA. Murden v. Artuz, 497 F.3d 178, 199 (2d Cir. 2007).

Whether a COA applicant is deprived of a proper Slack analysis by the Court of Appeals, or a remand is required by Section 2255(b), when (as here) the District Court denies a viable IAC claim (that is not refuted by the record) without making any findings, or even mentioning the claim?

Whether Section 2255(b) requires a remand, or a COA should be granted, when (as here) a viable claim that relies on facts outside of the record (and is supported by an affidavit) is denied without a hearing or other record expansion?

Whether Section 2255(b), and Strickland, require a remand, or a COA should issue, when (as here) an IAC claim is denied based a presumption that counsel's omission - underlying the claim - was trial strategy, that presumption has no record support, and a hearing was not held?

Whether Slack, Lozado, and Keeble, require the issuance of a COA when (as here) the District Court acknowledges that its decision on a habeas claim is contrary to decisions of other federal courts?

To be sure, answers to these, and the other subsidiary, questions presented by this petition will aid the lower courts in the processing of habeas claims and in the consideration of COA applications. And for Mr. Jordan, such answers may ultimately result in reversals of wrongful convictions for witness tampering (under sec. 1512(b)) because the facts and law cited herein (infra) support the proposition that he was either convicted of "harassment" under the wrong statute, or that, owing to the affirmative defense (available under sec. 1512(e)), effective trial counsel could have demonstrated that he was actually innocent.*

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* The IAC claims:

A. Trial counsel's failure to inform Mr. Jordan (charged with witness tampering under sec. 1512(b)) of the affirmative defense (available under sec. 1512(e)) of "truth-seeking" before his right to testify was waived (1) invalidates that waiver (as unintelligently made), and (2) unfairly deprived him of the opportunity to testify in support of that viable defense;

B. Trial counsel's failure to argue (to the jury) the affirmative defense of "truth-seeking" (made available under sec. 1512(e)), after invoking it (at sidebar) and telling the judge (correctly) that record evidence supported it, and not arguing any other real defense to the witness tampering charges (under sec. 1512(b)), deprived Mr. Jordan of a different outcome at trial with respect to those charges; and

C. Trial counsel's failure to request a lesser-included offense instruction on "witness harassment" (under sec. 1512(d)), or otherwise respond, after the prosecutor told the jury that it could return guilty verdicts for "witness tampering" (under sec. 1512(b)) based on evidence of "harass[ment]" (which is a proper theory under subsection (d), but not under subsection (b)), deprived Mr. Jordan (charged only under subsection (b)) of, short of acquittals, a sentence of at least 34 years shorter.

II. STATEMENT OF CASE

A. Proceedings

After a jury returned general verdicts of guilt for transmitting threats (counts 1-3) and witness tampering (counts 4-5), and the judgments were affirmed following an appeal (that did not regard ineffective assistance of counsel (IAC) claims), Section 2255 proceedings were initiated (case no. 18-cv-3372), in the Southern District of New York (SDNY), when a timely motion to vacate was filed (Dkt. 1). After screening it (pursuant to sec. 2255(b)), the District Court ordered the government to respond (Dkt. 5). The motion raised only IAC claims, and was supported by movant's affidavit (Dkt. 8), submission of documents (Dkt. 9), and memorandum (Dkt. 11).

On August 30, 2019, the District Court denied the motion to vacate (without hearing) and all subsidiary motions (Dkt. 16). (Its opinion did not address, or include findings regarding, most of movant's claims.) A timely notice of appeal - of the denials of motions (1) for counsel, (2) for a hearing, (3) to vacate, and (4) for a COA - was filed (Dkt. 21), and proceedings in the Second Circuit (case no. 19-2987) began. A timely motion for a COA - regarding six IAC claims - followed (Dkt. 18), and was denied (without explanation) on December 15, 2020 (Dkt. 40). (The "Motion Order" did not address Jordan's appeal of the lower court's denials of his motions for the appointment of counsel.)

B. The Case

An overview of the evidence, including that regarding the charges based on alleged threats (counts 1-3), and other facts, is necessary to the understanding that the conduct alleged to constitute witness tampering (counts 4-5) was truth-seeking:

1. The Relationship

As the trial judge told the jury, this case grew out of the relationship between Jordan (Joe) and a woman he met (we'll call her ST) at a bar in New York City, July '07 (Tr. 341 [R.A. 234]). She had come to America from Trinidad as a teen, was 36, divorced, and staying with her mother (Dodson) in Queens (Tr. 125-26

[R.A. 211]). During the relationship, ST told Joe that she had once been arrested for domestic violence (Tr. 36 [R.A. 202]), and he told her that he had once been arrested for "trying to get his children from his ex-wife" (Tr. 383 [R.A. 236]). The relationship ended (in early December) after her ex-boyfriend (Weller) gave her a bottle of liquor as a "gift" (Aff. 17 [R.A. 86]) knowing, as he later told the FBI, that she was a recovering "alcoholic" (DOC. J2 [R.A. 113]).

ST then traveled to visit her sister (Adams) in Virginia (Tr. 394 [R.A. 236]), and, while there, spoke via telephone with Joe dozens of times (Tr. 513-24 [R.A. 256-61]), and as records (GX A, N) demonstrated, most of the calls were initiated by her (Aff. 19-22 [R.A. 87-88]). At no time during any of those calls did Joe threaten her (Tr. 399-400 [R.A. 237]). But when he rejected her suggestion (by text message) to reunite in New York (Tr. 799-800 [R.A. 284]), she left Virginia (for London) to stay with her aunt (Phillip), then the ambassador from Trinidad & Tobago to the United Kingdom (Tr. 267 [R.A. 220]).

2. The Alleged Threats (counts 1-3)

Around Christmastime, after Joe learned that ST had been sexually assaulted by her uncle (Tr. 406 [R.A. 238]), his call (to the U.K.) was fielded by Phillip who, angered by his insistence to speak with ST, threatened him with voodoo (Tr. 315-18 [R.A. 229-30]). Subsequently, he disclosed ST's allegations about Phillip's husband to embassy staff (Tr. 275-77 [R.A. 221-22]) to prompt someone there to check on her welfare (Aff. 24 [R.A. 89]). And when that disclosure was reported on (by the news media in Trinidad), Phillip's ambassadorship was jeopardized (Tr. 292 [R.A. 225]).

That's when Phillip's campaign to stop (and discredit) Joe began: (a) back in America, her sister (Dodson) and other niece (Adams) complained (about threatening telephone calls) to, respectively, the NYPD (Tr. 74 [R.A. 205]) and FBI (Tr. 164, 168 [R.A. 213-14]), even though neither woman had heard from him in over a month (Tr. 68-69, 176-81 [R.A. 203, 216-18]); and (b) Phillip directed ST to email him to "stop the harassment" (Tr. 330-31 [R.A. 232]), and told her what to write (Tr. 284 [R.A. 223]). The next day, two email responses from him were received in ST's email box: the first, an expression of concern (GX 65), "given what you told me about your aunt's husband" (Tr. 411 [R.A. 239]); the second, a promise to "rescue" ST (GX 63) "unless I hear from you directly that you are safe" (Tr. 413-14 [R.A. 240]).

Several days later, Joe was arrested, and ultimately indicted for "threats" and "harassment" (counts 1-3), including a threat to kidnap ST (based on his promise - in the email - to "rescue" her), even though she had responded that she wanted him to (DOC. A2 [R.A. 108]); and telephone threats to Adams, Dodson, and ST (Tr. 897-98 [R.A. 300] jury charge), even though the latter had made no such accusation (Tr. 399-400 [R.A. 237]).

3. The Truth-Seeking (counts 4-5)

The conduct alleged to constitute witness tampering consisted of (a) letters intended for ST and (b) a press release received by the Trinidadian government and the FBI:

(a) Letters To ST (count 4)

While ST did not testify before the grand jury, the FBI agent who did (Waller), inaccurately related that she had been threatened by Jordan (via telephone) while she was in Virginia (02/14/08 Tr. 7 [R.A. 116]). When Jordan learned of that accusation (charged in count 1 together with other alleged threats to members of her family (Tr. 898-900 [R.A. 300-01] bill of particulars])), he naturally (but erroneously) believed that she had made it (Aff. 27-28 [R.A. 91]). And so he wrote to her.

The letters (to ST) were intercepted (and read) by the FBI (Tr. 750-55 [R.A. 276-78]) without a warrant. Only two of them (GX 400, 401E) mentioned the case against Jordan, and only one of them (the former) contained a request: "write to the judge" and tell "the truth" about the sole alleged spoken threat to harm her because it didn't happen (Tr. 754 [R.A. 278]). And although she never received that request (or any of the letters), when she was asked (on direct) if she recalled any such threat being spoken to her, she testified that she did not (Tr. 399-400 [R.A. 237]).

Trial counsel didn't explain to the jury (1) that ST's testimony - that she was not threatened by Joe (as charged in count 1) - was proof that his pre-trial effort to persuade her to say so was, in fact, truth-seeking; and (2) that the prosecution's theory - that the intent had been to improve her opinion of him before she testified (Tr. 855 [R.A. 295]) - was not inconsistent with that.

(b) The Press Release (count 5)

Before trial (on counts 1-3), the judge ruled that whether or not ST had made (and Jordan was aware of) the sexual misconduct accusation (about Phillip's husband) was relevant to whether the email (GX 63) - with the promise to "rescue" ST (Tr. 413-14 [R.A. 240]) - was a "true threat" to kidnap her (as charged in count 1) or a genuine expression of concern for her safety while staying in Phillip's home. United States v. Doe (Jordan), 2008 U.S. Dist. LEXIS 86534 at 10-13 (SDNY 2008). Jordan believed that that fact (that he had learned about the sexual misconduct in Phillip's home), and the fact that Phillip threatened him (with voodoo) when he had called to check on ST's welfare, would help justify the message about rescuing her (GX 63), and so he sought to bring out those truths by issuing a press release (Aff. 33-34 [R.A. 94]).

The press release (GX 81-82), sent to the FBI and to the Trinidadian government, (1) prompted the latter to confront Phillip with it (Tr. 301-03 [R.A. 225-26]), including Jordan's claim (reported therein) that he had a recording of her threatening him over the phone (GX 81-82 [R.A. 314]), and (2) prompted the former to confront ST with it (R.A. 112 [FBI Report]) because it stated that she had told others (not just Jordan) about the sexual misconduct in Phillip's home, and that they would testify to that (GX 81-82 [R.A. 313]).

Trial counsel didn't explain to the jury that ST's testimony, that she had alleged abuse by her uncle (Tr. 406 [R.A. 238]), and Phillip's testimony, that she did threaten Jordan over the phone (Tr. 315-18 [R.A. 229-30]), not only explained away the "rescue" email, but, also, was the product of very clever truth-seeking: Jordan knew that the press release would accomplish that because Phillip did threaten him (but didn't know he had no recording), and ST had told others about the abuse by Phillip's husband (Tr. 432 [R.A. 242]).

Notably, like the press release (GX 81-82), another written communication (GX 401E), sent to ST, referred to the so-called recording of Phillip threatening Jordan over the phone (APP. 200). It also referred to "romantic text messages" written (by ST) to Jordan that his sister had supposedly seen. Id. One of them (sent after their separation) sought to reunite (Tr. 799-800 [R.A. 284]). Jordan believed that evidence of

those "romantic messages" would refute the prosecution's claim that she didn't want to be with him (Aff. 29 [S.A. 40]). He even wrote to the judge (before trial) seeking a subpoena (Mem. 48 note 81 [Dkt. 11]). Unfortunately (for him) T-Mobile had purged the messages from its system before a subpoena was issued, and so he sought to dupe ST into being honest about what she had written (to him) by making her believe that evidence of the messages was obtained (or at least available) by falsely telling her that his sister had seen them, and by using the back of a legitimate copy of the subpoena (GX 400 [R.A. 317]) to write to ST (Aff. 29 [S.A. 40]). (It was very clever "truth-seeking," and, given the affirmative defense (under Sec. 1512(e)), completely lawful. But trial counsel didn't tell him (or the jury) about that defense. And so (without relief under Sec. 2255) he's spending 40 years in prison for speech that should have been protected.)

III. REASONS TO GRANT PETITION

A. The Decision Rejecting The IAC Claim - That Jordan Was Not Made Aware of The Affirmative Defense Before His Right To Testify Was Waived - Was Wrong, or At Least Debatable, And Was Reached Contrary To Section 2255(b) And Supreme Court Law

[Background]

Jordan asserted (without dispute) that he had not been made aware of the affirmative defense (under sec. 1512(e)) until he heard the jury instruction on it at trial, and that had he been made aware of it (earlier) he would not have waived his right to testify - because his conduct (alleged to constitute "witness tampering" (under sec. 1512(b)) was in fact "truth-seeking" (Aff. 5-6 [R.A. 80]). In other words, owing to trial counsel's failure to inform him of the availability of that defense, he was left to believe (erroneously) that his testimony - that his intent was to obtain exculpatory evidence and otherwise bring out the truth (Aff. 27-34 [R.A. 91-94]) - would not be helpful, and so he unintelligently waived the right to present it. Id.

This IAC claim (Mot. 5 [R.A. 44]) implicated the validity of a waiver of a constitutional right, and the deprivation of the opportunity to exercise it (COA 21-26 [R.A. 17-19]). It raises questions of exceptional importance, including whether trial counsel is obligated to inform a defendant of a viable affirmative

defense that his testimony could support; whether a waiver of the right to testify is valid if made without that information; and whether harmless-error analysis applies to such an omission (which is an issue that the lower courts are not in agreement on).

Jordan now asserts that the decision rejecting this claim (after it survived screening) was wrong, or at least debatable (and thus a COA should have been granted), and was reached contrary to Section 2255(b) and Supreme Court law, because the District Court (1) did not make the required "findings of fact and conclusions of law" with respect to it (and thus a proper Slack inquiry by the Court of Appeals could not be conducted), and (2) did not hold a hearing (or otherwise assess the alleged deficient performance or the resulting prejudice) notwithstanding the fact that nothing in the record refuted the claim, and it had previously found (at trial) that the affirmative defense was viable.

This IAC claim (Mot. 5 [R.A. 44]) implicated the validity of the waiver of a constitutional right, and the deprivation of the opportunity to exercise it (COA 21-26 [R.A. 17-19]). A remand - before a decision as to whether a COA should be granted regarding this claim - was necessary because (contrary to sec. 2255(b)) the District Court (1) did not address - or make "findings of fact and conclusions of law" with respect to - it, and (2) improperly rejected it (albeit by neglect) without a hearing as required by Second Circuit law.

1. The Absence of Findings and Conclusions By The District Court Was Contrary to Section 2255(b)

The claim - that trial counsel generally did not prepare with Jordan for his testimony (Mot. 3 [R.A. 43]) - was "addressed" by the District Court that found (somewhat off-point) that Jordan had been made aware (at the time of trial) of "his right to testify" (Opn. 8-9 [S.A. 5-6]). But the separate (and undisputed) claim - that trial counsel failed to inform him of the affirmative defense (available under sec. 1512(e)) before his right to testify was waived (Mot. 5 [R.A. 44]) - was not addressed in the opinion:

> Jordan principally makes two arguments about his counsel's performance in connection with the § 1512(b) charges. He contends that his attorneys should have more actively pursued the affirmative defense that the communications on which his conviction was based, such as the press release sent to Trinidad and Tobago government offices and his post-arrest correspondence with the Victim, were "truth-seeking" communications. On the other hand, he also appears to argue that{**2019 U.S. Dist. LEXIS 14**} his counsel should not have asked for a charge on the affirmative defense of truth seeking unless counsel were going to argue in support of that defense in the defense summation.

The District Court's description of the IAC claims involving the witness tampering charges (under Sec. 1512(b)) evinces that the failure-to-inform claim was not addressed (Opn. 13 [S.A. 16]) (Indeed, that claim was not even mentioned in its opinion.) As such, denial (by the Court of Appeals) of a COA (with respect to that claim) was at least premature - because a remand for "findings of fact and conclusions of law" (as required by Sec. 2255(b)) was necessary. See e.g., Clanton v. United States, 284 F.3d 420, 426 (2d Cir. 2002) (Sec. 2255(b) mandates findings), and Rudenko v. Costello, 286 F.3d 51, 80 (2d Cir. 2002) (a proper Slack inquiry cannot be conducted without findings by the District Court).

As this Court has explained: the Court of Appeals should grant a COA when the District Court's decision is "debatable," Slack v. McDaniel, 529 U.S. 473, 484 (2000), and in order to determine whether or not a decision is debatable, it must have the lower court's decision to review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Here there was nothing to review. What's more, as explained in part 2, infra, with respect to the IAC claims involving the witness tampering charges, the District Court also neglected to analyze the record evidence that supported the affirmative defense (under Sec. 1512(e)) of "truth-seeking," and Jordan's sworn submission of what his testimony (at trial) would have been. And it also misapprehended relevant record evidence. Thus, this Court should decide whether Section 2255(b) requires the District Court to make findings and conclusions regarding claims that survived the screening process, and whether a proper Slack inquiry could be conducted without such.

2. The Absence of A Hearing Was Contrary To Section 2255(b) and Supreme Court Law

A plausible IAC claim (under Sec. 2255) cannot be properly rejected without a hearing, Harris v. Nelson, 394 U.S. 286, 291 (1969), so long as the movant presents "specific and detailed assertions" that are not refuted by the record. Machibroda v. United States, 368 U.S. 487, 495-96 (1962). Here, Jordan asserted (without dispute) that trial counsel had neglected to inform him of the affirmative defense (under Sec. 1512(e)) before his right to testify (in support of it) was waived (Aff. 5-6 [R.A. 80]). And both the Supreme Court and the Second Circuit have indicated that such a claim is a plausible one. See Hill v.

Lockhart, 474 U.S. 52, 62 (1985) (failure to advise a client of the relevant law "clearly satisfies the first prong of the Strickland analysis"), and Mitchell v. Scully, 746 F.2d. 951, 954 (2d Cir. 1984) (failure to inform a criminal defendant of the availability of an affirmative defense is likely not effective assistance).

Here, the additional assertion (also not refuted by the record) that trial counsel's omission kept Jordan off the stand, and prevented him from testifying in support of the affirmative defense (Aff. 5-6 [S.A. 36-37]), increased the need for a hearing (and factual development) before the motion to vacate (much less the motion for a COA) could be properly decided - because it raised questions of exceptional importance, including whether counsel's omission (a) could reasonably be deemed strategic, (b) affected the validity of the waiver of the right to testify, and (c) deprived Jordan of a different outcome of trial.

(a) Counsel's Omission Was Deficient Performance, Not Strategy

Without findings by the District Court, we don't know the basis for the claim's rejection (or, for that matter, if was was even considered). We do know, however, that trial counsel's failure to inform Jordan of the available affirmative defense (under Sec. 1512(e)) to the witness tampering charges (counts 4-5) could not have been reasonably deemed strategic. For starters, the facts belie such a conclusion: Without consulting Jordan, and after his right to testify had been waived, trial counsel invoked the affirmative defense (at sidebar), telling the judge that the evidence of the conduct (alleged to constitute witness tampering) supported a theory of "truth-seeking" (Tr. 837 [R.A. 291]). Moreover, an attorney's choice not to consult with the client on important issues can never be strategic - because counsel has a duty to discuss potential strategies with the defendant, Florida v. Nixon, 543 U.S. 175, 178 (2004), and must ensure that the accused is "well informed" before a constitutional right is waived. See McMann v. Richardson, 397 U.S 759, 769-70 (1970).

Defense counsel's "core purpose" is to assist the accused who is confronted with the "intricacies of the law." United States v. Ash, 413 U.S. 300, 309 (1973). Thus, counsel has a duty "to consult with the defendant on important decisions and to keep [him] informed...." Strickland v. Washington, 466 U.S. 668, 688 (1984). Consequently, failure to do so, as Justice Rehnquist observed in Hill v. Lockhart, 474 U.S. 52, 62 (1985), is deficient performance.

> The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the Strickland analysis adopted by the majority, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. Strickland v Washington, supra, at 690, 80 L Ed 2d 674, 104 S Ct 2052.

What's more, counsel's duty to inform includes the obligation to apprise the defendant of the strategic implications of testifying, Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997), because whether the defendant is to testify is an important tactical decision (that he cannot make) without the information necessary to evaluate the "actual worth" of doing so. See Brooks v. Tennessee, 406 U.S. 605, 612 (1972). Indeed, as Justice Sutherland so eloquently explained, in Powell v. Alabama, 304 U.S. 45, 69 (1932), without the "guiding hand" of counsel, an innocent man can be convicted:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. [304 U.S. at 463, 58 S. Ct. at 1022].

Here, Jordan was left without that "guiding hand" of counsel; without knowledge of the affirmative defense that his testimony could have supported (Aff. 27-34 [S.A. 38-45]). What's more, consultation regarding it was not just necessary; it was mandatory - because (as the Second Circuit has held) whether to invoke it (or not) is a fundamental trial decision that belongs (personally) to the defendant. Petrovich v. Leonardo, 229 F.3d 384, 386-87 (2d Cir. 2000). In other words, trial counsel's omission (here) was deficient performance. As such, the District Court was required (by Strickland) to conduct a prejudice analysis, and (by Sec. 2255(b)) to hold a hearing (and make findings), but didn't do so. Thus, a remand (for those reasons) was necessary before a COA could be denied.

(b) The Waiver of The Right To Testify Is Not Valid

While the lower courts do not agree on whether the deprivation of the right to testify is subject to harmful error analysis, see Frey v. Schuetzle, 151 F.3d 893, 898 n.3 (8th. Cir. 1998) (listing conflicting opinions), the Supreme Court has stated (1) that the deprivation of the assistance of counsel at a stage when certain rights must be asserted or waived is an error that "pervades the entire proceeding," Satterwhite v. Texas, 486 U.S. 249, 256 (1988), and (2) that an error that kept the defendant off of the stand "could never [be deemed] harmless." Luce v. United States, 469 U.S. 38, 42 (1984). As such, this Court should now decide whether an error of trial counsel that prevents the defendant from testifying is structural or subject to harmful-error review, and whether the waiver of the right to testify is valid absent knowledge of a viable affirmative defense.

Here, although Jordan - who didn't testify at trial (Tr. 835-36 [R.A. 290-91]) - was made aware of his right to do so, it was not refuted by the record, or disputed by the government (during the Section 2255 proceeding), that (1) he had not been made aware of the affirmative defense (available under Sec. 1512(e)), and (2) had he been made aware of it he would not have waived his right to testify (Aff. 5-6 [R.A. 80]). In other words, he gave up that constitutional right because he was not (at that time) aware of the benefits of exercising it, or the consequences of not doing so, and that is undisputed. As such, the waiver is invalid - because it involved a fundamental trial right, Rock v. Arkansas, 483 U.S. 44, 52-53 (1987), and thus to be valid it needed to be an intelligent act taken with "sufficient awareness of the relevant circumstances [(such as the availability of the affirmative defense)] and likely consequences [(such as the loss of the opportunity to testify in support of that defense)]." Brady v. United States, 397 U.S. 742, 748 (1970).

A waiver is an "intentional relinquishment of a known right," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and must be "a voluntary and intelligent choice among alternative courses of action." North Carolina v. Alford, 400 U.S. 25, 31 (1970). Yet here, before his right to testify was waived, Jordan was

not made aware that - even if the government had proved its case (under Sec. 1512(b)) - the jury could acquit him (under Sec. 1512(e)) if he convinced them (by his testimony) that his sole intent (in engaging in the conduct alleged to constitute witness tampering) was to bring out certain truths. Id. And so, essentially, he was duped (by counsel's silence) into waiving his right to testify. And, as this Court has held, such a waiver - based on misinformation (or a lack of information) - is not valid. Bousley, v. United States, 523 U.S. 614, 626 (1998)

(c) Jordan's Testimony Would Have Altered The Outcome of Trial

Even assuming - for the sake of argument - that the unintelligently made waiver (of the right to testify) does not require automatic reversals of the convictions (on counts 4-5), it still was the product of trial counsel's omission (the failure to inform Jordan of the affirmative defense), and evinced deficient performance that deprived Jordan of the opportunity to testify in support of that defense. And, as the Supreme Court has explained, "the most important witness for the defense [often] is the defendant himself," Rock v. Arkansas, 483 U.S. 44, 52 (1987), because (usually) no other person (including counsel) can be more persuasive. United States v. Green, 365 U.S. 301, 304 (1961). This is especially so when (as here) the case hinges on what the defendant's intent was. See Morissette v. United States, 342 U.S. 246, 276 (1952).

Here, not only did the case (on counts 4-5) hinge on the element of intent, but, also, Jordan had the burden to prove that his intent was not wrongful - because (as the Second Circuit has observed) the federal witness tampering statute (as written) doesn't necessarily require the government to prove improper purpose (i.e., that the defendant's intent was to produce false or prevent truthful testimony), but, instead, provides the accused with the opportunity to escape conviction by proving that the conduct (alleged to constitute witness tampering) had a proper purpose. Higgins v. Holder, 677 F.3d 97, 105-06 (2005). And while the Supreme Court has held, in Arthur Andersen, LLP, 544 U.S. 696 (2005), that a conviction under the "corruptly persuades" clause (of the statute) requires proof of wrongful intent because of the adverb "corrupt[]," id. at 706, that decision did not address the other conduct clauses - which are not modified by such an adverb.

Thus, the use of false or provocative speech "to influence" a witness in any way (improperly or properly), even if the speech is (by itself) not unlawful, can (as the jury was instructed in this case) violate the "misleading conduct" and "intimidation" clauses (of Sec. 1512(b) [S.A. 46]) unless the trier of fact is convinced (by the defendant invoking Sec. 1512(e) [S.A. 47]) that the conduct was intended (solely) "to [properly] influence" the witness or otherwise bring out the truth (Tr. 909-15 [R.A. 306-09]). In other words, Jordan's testimony (as to his intent) was absolutely important, and (as discussed, infra) likely would have changed the outcome of trial.

While we don't know whether or not the District Court considered Jordan's submission (under Sec. 2255) of what his testimony would have been (because it made no findings regarding this IAC claim), we do know that the record evidence, and the prosecution's theories of guilt (at trial), were not inconsistent with a theory of truth-seeking with respect to ST (count 4) and Phillip (count 5). Indeed, neither the government (in its filings and arguments), nor the District Court (in its opinion), pointed to any statement (in the alleged tampering communications) that was either per se unlawful (such as a threat of bodily harm) or that could demonstrate an intent to prevent truthful or produce false testimony (such as an improper offer, request, or demand). Instead, the prosecutor argued, among other things (at trial), that Jordan's intent was to improve ST's opinion of him before she testified (Tr. 855 [R.A. 295]), and to "cause problems" (before trial) for Phillip by the press release that could embarrass her (Tr. 852 [R.A. 294]).

In other words, even if a conviction could be properly returned (under Sec. 1512(b)) without proof of wrongful intent, nothing in the evidence refuted the affirmative defense (available under Sec. 1512(e)). Indeed, as explained (in detail) with respect to IAC Claim B, infra, and as trial counsel told the judge at sidebar (but didn't tell the jury), the record evidence not only didn't refute theories of "truth-seeking," it supported them (Tr. 837 [R.A. 291]). And as the Second Circuit has explained, sufficient proof supporting a theory of truth-seeking trumps sufficient proof of witness tampering. United States v. Johnson, 968 F.2d 208, 213 (2d Cir. 1992). (But Jordan wasn't made aware of that.)

Unaware of the affirmative defense, Jordan naturally believed (albeit erroneously) that the testimony that he would give - that his intent was to bring out certain true facts that would aid in his defense (Aff. 27-34 [R.A. 91-94]) - would not be useful, and indeed perhaps harmful, because he would be admitting efforts "to influence" the two witnesses (albeit properly), and, as far as he knew (at that time) that would be enough to convict him of witness tampering (Aff. 5 [S.A. 36]). And so he made the (uninformed) decision not to take the stand. Id. Consequently, not only was he deprived of a viable defense (on counts 4-5), but, also, of the opportunity to testify in support of it, and thereby prove his innocence.

To be sure, as this Court has explained, the right to testify protects the innocent. Ferguson v. Georgia, 365 U.S. 570, 582 (1961). And Jordan's submission (to the District Court) of what his testimony would have been (Aff. 27-34 [R.A. 91-94]) demonstrates, as this Court can now see, that had he taken the stand, not only would the outcome of trial have been different (on counts 4-5), but, also, that he was, in fact, innocent. It also demonstrates that, with respect to IAC Claim A, a hearing should have been held, findings should have been made, and relief (under Sec. 2255), or at least a COA (under Sec. 2253), should have been granted. *

(A copy of the portion of Jordan's affidavit (as filed in the District Court) - that puts forth what his testimony would have been - is also in the Special Appendix (to this petition) beginning at S.A. 34.)

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* Given that failure to inform a defendant of a viable defense is deficient performance, and credible proof of "truth-seeking" (through Jordan's testimony) would have nullified even sufficient proof of witness tampering, that the District Court did not hold a hearing on this claim, address the issue of the validity of the waiver of the right to testify, assess the evidence that Jordan could have presented had he testified, or make any other findings (as required by sec. 2255(b)), are judicial omissions that would undoubtedly convince other reasonable jurists that the propriety of the decision denying this claim (assuming it wasn't overlooked) was debatable, if not wrong, and at least premature, and thus a COA should have issued.

B. The Decision Rejecting The IAC Claim - That Convictions Are The Consequence of The Absence of A Closing Argument On Truth-Seeking - Was Wrong, or At Least Debatable, And Reached Contrary To Section 2255(b) And Supreme Court Law

[Background]

Just before closing arguments were to begin, trial counsel (at sidebar) invoked the affirmative defense (under Sec. 1512(e)) of "truth-seeking," telling the judge (correctly) that record evidence supported it (Tr. 837 [R.A. 291]). But then - in summation - trial counsel neither identified that evidence for the jury, nor argued in support of that (or any other real) defense to the witness tampering charges (Tr. 878-79 [R.A. 298]). In other words, without consulting Jordan (at any point), trial counsel requested (and got) the instruction (under Sec. 1512(e)) that the defense had the burden to prove that the conduct alleged to constitute witness tampering (i.e., that intended "to influence" the witnesses) was, in fact, intended "to [properly] influence" them (Tr. 914 [R.A. 308]), but then trial counsel made no effort to do that. Indeed, as the District Court acknowledged, the affirmative defense was not even mentioned during closing arguments (Opn. 14 [S.A. 17]). And so jurors were not only left without an explanation as to why they should find that the evidence supported truth-seeking, and thus no reason to do so, but, also, with the erroneous impression that the lack of an argument in support of that defense indicated that it was not viable.

This IAC claim (Mot. 5 [R.A. 44]), which was supported by a written presentation (with citations to the record) of the closing arguments (on counts 4 and 5) that could have been made (Mem. 54-58 [S.A. 26]), implicated a fundamental trial decision, to wit, whether or not to advance (or abandon) an affirmative defense, and the deprivation of the opportunity to exercise it (COA 29-34 [R.A. 21-23]). It raises questions of exceptional importance, including whether decisions about the affirmative defense (under Sec. 1512(e)) are, in fact, fundamental, whether allowing the jury to be instructed on the affirmative defense (after not arguing in support of it) without consulting the defendant is a presumptively prejudicial error (because it effectively conceded guilt), and whether Strickland requires a "habeas" court to assess the record evidence supporting that defense (given that sufficient proof of it trumps sufficient proof of witness tampering).

Jordan now asserts that the decision rejecting this claim (without a hearing or complete findings) was wrong, or at least debatable (and thus a COA should have been granted), and was reached contrary to Section 2255(b) and Supreme Court law, because the District Court's conclusions - that trial counsel's omission was "strategic" (and thus presumptively sound), and that no effort was made (in the Sec. 2255 motion) to overcome that presumption (Opn. 14-15 [S.A. 17-18]) - are not supported by the record facts, and evince, among other things, that a proper prejudice inquiry (under Strickland) was not conducted. What's more, no findings were made regarding so much of the claim as asserted that trial counsel allowing the jury to be instructed on the affirmative defense (after not having argued in support of it in summation, and without consulting Jordan) was a presumptively prejudicial error - because it effectively conceded all that the government had to prove to convict: conduct intended "to influence" a witness.

1. The District Court Disregarded Relevant Facts and Law

The District Court's conclusion - that the absence of a closing argument in support of the affirmative defense was the product of a strategic decision, and thus presumptively sound (id.) - (a) is not supported by the record facts, and (b) conflicts with Second Circuit and Supreme Court law.

(a) Trial Counsel's Omission Was Deficient Performance, Not Sound Strategy

Just after jurors were informed (by the judge) of the import of closing arguments (the opportunity for the lawyers to make their cases and explain how the evidence supports them), trial counsel (at sidebar) invoked the affirmative defense (under Sec. 1512(e)), stating that the record evidence supported it (Tr. 836-37 [R.A. 291]). But then trial counsel did not identify that evidence (for the jury) or otherwise argue in support of that defense in summation). Instead, it was merely argued that the "written communications" (alleged to constitute witness tampering) were "[in]coherent" and would not have been "tak[en] seriously" (Tr. 878-79 [R.A. 298), which is not a defense because it conceded the conduct (intended "to influence" the witnesses) without legally excusing it. And, as Justice Marshall stated, in Mitchell v. Kemp, 97 L Ed 2d 774 (1987), an attorney's decision to advance a defense that is wholly unfounded in law [when another valid defense is available] cannot be characterized as sound trial strategy." Id. at 778.

Here, just moments after telling the judge (correctly) that record evidence supported theories of "truth-seeking," trial counsel said nothing about that theory to the jury:

> Count Four and Count Five. You heard testimony from Dr. Mayer, and Mr. Master would just have you look at him and say, you know, you should stick to leukemia patients. He's a well-educated man. He's certainly a qualified, mature man. He gets these letters, he reads some of the letters. He finds something. He talks to the man about the letters being sent. They have an actual conversation. Mr. Mayer says, well, you know, it reads kind of funny, could be perceived as blackmail. There's a response back: I don't mean it as blackmail. I want them to know what my defense is, I want to put it out there. And what does this very well-educated oncologist, government's witness, who government says might be better left to treating cancer patients, do? He sends out the letters. There's no testimony here that Mr. Mayer thought anything other than the one phrase that he told Mr. Jordan of. There's no testimony here that Mr. Mayer looked at these letters, read these letters and said, oh, my horror, I don't want to have anything more to do with you, I give up.
>
> Examine the letters. See if they make sense. Before even getting to whether or not they could be construed as tampering with a witness, just see if they make sense. Are they even coherent? Do they even rise to the level of somebody reading them and taking them seriously? If you got a letter saying, Write to Judge Cote and do X, Y and Z, would you not test the letter? Is it the government's position that a highly educated ambassador of a foreign country who's been a representative of Trinidad & Tobago to the United Kingdom, Her Excellency, who's now in the United States, is going to get this letter and have it perceived as witness tampering? Read the letter. The proof is in the letter.

Given that neither the affirmative defense, nor any real defense (to the witness tampering charges), was advanced during summation, it is clear that the District Court's opinion (under Sec. 2255) - that trial counsel represented Jordan "vigorously," and chose to make an argument (in summation) that might have more impact on the jury (Opn. 14 [S.A. 17]) - was based on an incomplete review (or misapprehension) of the record. Indeed, as discussed, infra (with respect to the prejudice prong of Strickland), the District Court acknowledged that an analysis of the evidence supporting theories of "truth-seeking," and of the closing arguments that could have been made (Mem. 55-58 [S.A. 26]), was not conducted. Id. As such, its rejection of the claim is contrary to Strickland and Section 2255(b) because whether or not Jordan overcame the presumption of sound strategy was not actually decided.

Moreover, even if the failure to identify and explain the truth-seeking evidence (in summation), after invoking that defense, could reasonably be deemed sound in some situations, here the record reveals a sequence of events that demonstrate that the omission was a product of neglect, not strategy: (1) Just before closing arguments were to begin, trial counsel told the judge (at sidebar) that record evidence supported theories of "truth-seeking," and invoked that affirmative defense (Tr. 837 [R.A. 291]); and (2) After making no mention of that defense during closing argument (Tr. 878-79 [R.A. 298]), trial counsel allowed the jury to be instructed on it (Tr. 914 [R.A. 308]).

Jurors were told (by the judge) that Jordan (who did not testify) had invoked the affirmative defense (under Sec. 1512(e)), and should be acquitted (on counts 4 and 5) if they were convinced by him (or his counsel) that the "written communications" (alleged to constitute witness tampering under Sec. 1512(b)) were not only intended "to influence" a witness (which is all the prosecution had to prove), but, in fact, were intended to do so properly, i.e., to produce truthful or prevent false testimony (Tr. 914 [R.A. 308]). In other words, if they were not convinced that he was "truth-seeking," he was guilty - because conduct intended "to influence" a witness was not disputed. That trial counsel didn't attempt to advance the affirmative defense (in summation), and then allowed such an instruction to be given to the jury, was obviously an oversight. And, as the Second Circuit has explained, an oversight cannot be characterized as

sound strategy. Eze v. Senkowski, 321 F.3d 110, 135-36 (2d Cir. 2003). See also Cox v. Donnelly, 387 F.3d 193, 201 (2d Cir. 2004) (a presumption of reasonable strategy does not apply when counsel's omissions are due to "ignorance, inattention, or ineptitude").

Indeed, with respect to that particular affirmative defense (then available under Sec. 1512(d)), the Second Circuit (before Jordan's trial) had cautioned that the instruction on it - placing the burden (to prove proper purpose) on the accused - can be more harmful than helpful in most cases, United States v. Johnson, 968 F.2d 208, 214-15 (2d Cir. 1992), because requesting it effectively concedes all that the prosecution has to prove (id. at 213), and thus the jury is likely to believe that a defendant's failure to prove innocent intent, or (as here) the absence of an effort to do so, demonstrates guilt. Sandstrom v Montana, 442 U.S. 510, 517 (1979).

Moreover, a decision not to argue in support of the affirmative defense could not have been "reasonable" - because, but for its "corruptly persuades" clause, the federal witness tampering statute (Sec. 1512(b)), as written, does not require the prosecution to prove improper purpose, or to disprove proper purpose, of the conduct alleged to constitute the crime. See, e.g., Jeffress, 22 Am. Crim. L. rev. 1, 16-17 (1984) In other words, as the jury instructions allowed here, proof of speech that is false or could invoke fear of embarrassment is enough to convict - even if it is otherwise lawful, and even when its purpose was "to [properly] influence" a witness (Tr. 909-14 [R.A. 306-08]) - unless the affirmative defense (under Sec. 1512(e)) is invoked and the jury is convinced to accept it.

And so, that trial counsel's performance was deficient (under Strickland) is evinced not only by the absence of a closing argument in support of the affirmative defense (which rendered it useless), but, also, by the absence of a withdrawal of the request for an instruction on that defense (which informed jurors that Jordan had the burden to prove that his speech was lawful). Moreover, regardless of the issue of soundness of the decisions, as discussed, infra, trial counsel had no authority to make them.

(b) Counsel Was Without Authority To Advance or Abandon The Affirmative Defense

As this Court has stated, trial counsel has a duty to consult with the defendant on important decisions. Strickland v. Washington, 466 U.S. 668, 688 (1984); see also Godinez v. Moran, 509 U.S. 389, 398 (1993) (consultation is necessary regarding affirmative defenses). Indeed, the Second Circuit held (before Jordan's trial) that whether or not to advance an affirmative defense is a fundamental trial decision that belongs (personally) to the defendant. Petrovich v. Leonardo, 229 F.3d 384, 386-87 (2d Cir. 2000). And here, Jordan's assertion (under Sec. 2255) - that trial counsel did not consult with him before invoking the affirmative defense (at sidebar), before not arguing in support of it (in summation), or before allowing the jury to be instructed on it (Aff. 5-6 [R.A. 36-37]) - was neither disputed by the government, nor refuted by the record. And thus a presumption of sound strategy is contrary to Supreme Court and Second Circuit law.

What's more, by allowing the jury to be instructed that Jordan was asserting the affirmative defense (i.e., that his efforts "to influence" the witnesses were intended to bring out the truth) after not making a closing argument in support of "truth-seeking," trial counsel effectively conceded guilt - because the first two elements of the affirmative defense (conduct intended to influence) were all the government had to prove to convict. And only the defendant can make the decision to concede guilt. Jones v. Barnes, 463 U.S. 745, 751 (1983). As such, not only was trial counsel's performance not sound, it was presumptively prejudicial. Florida v. Nixon, 543 U.S. 175, 187-99 (2004).

In Nixon, this Court held that trial counsel's concession of guilt was not presumptively prejudicial only because Nixon had been consulted, and did not protest the decision. Id. Thus, this Court should (now) decide whether or not harmful-error analysis applies when (as here) the defendant was not consulted, and therefore had no opportunity to protest. And, of course, even assuming that harmful-error analysis does apply, here denial of relief (under Sec. 2255) and a COA (under Sec. 2253) was error because, as discussed, infra, a proper prejudice inquiry was not conducted.

2. A Proper Prejudice Inquiry Was Not Conducted By The District Court

Given that the presumption of sound strategy (Opn. 14-15 [S.A. 17-18]) is not supported by the relevant facts or law (part 1, supra), and assuming that the deficient performance of trial counsel (with respect to the affirmative defense) was not presumptively prejudicial, the District Court was bound (by Strickland) to conduct a prejudice inquiry (466 U.S. 668, 687-88), and (by Sec. 2255(b)) to make findings and conclusions regarding it. But a proper prejudice inquiry was not conducted, because, as evinced by the opinion, (a) an evaluation of the evidence supporting truth-seeking (which would trump sufficient evidence of witness tampering) did not occur, (b) relevant other record evidence was misapprehended, and (c) Jordan's written presentation of what trial counsel's closing arguments (on counts 4 and 5) could (and should) have been (S.A. 26) was overlooked. (Otherwise, as this Court will (now) see, relief (under Sec. 2255), or at least a COA (under Sec. 2253), would have been granted.)

(a) Evidence That Supported Truth-Seeking Was Improperly Disregarded

The absence of an evaluation (by the District Court) of the record evidence that supported the neglected affirmative defense was a material omission (that prevented that court from properly determining whether the omission of trial counsel, if "strategic," was sound, and whether a COA should be granted) - because (1) sufficient proof supporting a theory of "truth-seeking" trumps sufficient proof of witness tampering, (2) convictions on the "threat" charges (counts 1-3) did not refute theories of truth-seeking (on counts 4 and 5), (3) the government's theories of guilt were consistent with theories of truth-seeking and (4) the District Court's opinion describes evidence that was not inconsistent with theories of truth-seeking.

(1) Truth-Seeking v. Tampering

As the Second Circuit explained in United States v. Johnson, 968 F.2d 208 (2d Cir. 1992), sufficient proof of truth-seeking (by a preponderance of the evidence) trumps sufficient proof of witness tampering. Id. at 213:

> Once the government met its burden, however, Johnson still could have satisfied the intent prong of his affirmative defense by proving, by a preponderance of the evidence, that the evidence he wanted Maydwell and Smith to withhold was false testimony and that his conduct was therefore undertaken with the sole intent to cause them to testify truthfully or not at all.

In other words, after the government has proved its case (under sec. 1512(b)), to wit, conduct intended to influence a potential witness (id.), the affirmative defense (under sec. 1512(e)) provides the accused with the opportunity to persuade the jury that the conduct was, in fact, intended to properly influence that person, and thereby produce truthful or prevent false testimony. Id. Thus, it comes down to whether or not the jury can be convinced that the record supported a proper purpose of the accused. And here, we know - even absent an evaluation - that record evidence did support truth-seeking because the jury was instructed on that theory (Tr. 914-15 [R.A. 308-09]). And such an instruction is typically not given when the record doesn't support it. Mathews v. United States, 485 U.S. 58, 63 (1988).

Of course the judge's instruction did nothing to identify the particular evidence that supported truth-seeking. Doing so was trial counsel's job during summation. But it wasn't done. Consequently, jurors were left without the guidance needed to properly consider the affirmative defense. And, as the Supreme Court explained in Herring v. New York, 422 U.S. 853 (1975), the absence of that guidance can result in an innocent person being convicted. Id. at 858-59:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

To be sure, the import of closing argument is heightened when it comes to the federal witness tampering statute (sec. 1512(b)) because, with the exception of its "corruptly persuade[s]" clause, it does not require the government to prove improper purpose. See Higgins v. Holder, 677 F.3d 97, 106 (2d Cir. 2012) (The burden is on the defendant to prove proper purpose). And so, if the affirmative defense (under sec. 1512(e)) is not advanced, a guilty verdict can be based on proof of conduct that was, in fact, intended to bring out the truth. And, absent an evaluation of the disregarded evidence, it cannot be said that that's not what happened here.

To convict, the jury only had to find that Jordan used deceptive or intimidating - but not necessarily per se

unlawful - conduct to influence ST (count 4) and Phillip (count 5). Without an explanation (from trial counsel) of how that conduct was intended to prevent false (or produce truthful) testimony, and how the evidence supported such, jurors were given no choice but to find otherwise

(2) The Threat Charges

The District Court's decision - with respect to the prejudice prong of Strickland - addressed only the evidence regarding the charges based on the alleged transmission of a threat (counts 1-3), and then did so only generally (Opn. 8 [R.A. 5]), and with error. It did not address the conduct ("written communications") alleged to constitute witness tampering:

> Jordan has failed to show that**{2019 U.S. Dist. LEXIS 8}** any of the alleged deficiencies in his attorneys' performance at trial prejudiced him. The Government's evidence that Jordan committed the crimes with which he was charged was substantial.
>
> As the summary order affirming the conviction observed, the Government's evidence included Jordan's transmission of seven specific threats, such as the threat that he would take the Victim "off the planet." The Court of Appeals observed that the evidence that Jordan "knew that his communications would be interpreted as threats was overwhelming and essentially uncontroverted." Because Jordan has not shown that the jury verdict would have been any different if his counsel had performed differently at trial, this petition can be denied on that ground alone. In any event, as described below, Jordan has also failed to show that his counsel's performance was constitutionally deficient.

To the extent that such silence implies that the convictions on the threat charges (counts 1-3) refute any theory that the conduct alleged to constitute witness tampering (in counts 4-5) was truth-seeking, that implication is not supported by the record. For starters, counts one and two were duplicitous, United States v. Jordan, 2009 U.S. Dist. LEXIS 85994 at 16 (SDNY 2009), alleging different transmissions of a threat to different recipients (Tr. 898-900 [R.A. 300-01]), and the jury was instructed that it could convict if it found that any one of the alleged threats was made and true (Tr. 897, 903 [R.A. 300,303]):

> The most persuasive and relevant case is *United States v. Jordan*, 591 F. Supp. 2d 686 (S.D.N.Y. 2008). In that case, the defendant was charged under § 875(c), a statute which requires "any threat to kidnap any person or any threat**{2020 U.S. Dist. LEXIS 24}** to injure the person of another." *Id.* at 687. At trial, the government presented evidence that Jordan made seven discrete threats against four people via phone, fax, text message, and email. *Id.* at 699-700. Because the existence of a threat was an element of the offense, the jury was instructed that to convict the defendant, the jury "must unanimously agree on at least one threat identified by the Government for Count One that satisfies each of the elements of Count One." *Id.* at 705.

But the alleged witness tampering conduct - toward ST (count 4) and the Trinidadian government (count 5) - neither involved the other alleged victims (in counts 1 and 2), nor most of the alleged threatening communications. (In fact, the only request in any of the communications regarded a single allegation that, as discussed, infra, was not proved at trial.) In other words, convictions on the threat charges (counts 1-2) could be based on an alleged act that was not the focus of the truth-seeking. Moreover, truth-seeking conduct can prevent false testimony without preventing a conviction, and, as explained, infra, that's what happened here. Indeed, the record evidence (when not misapprehended) is not only consistent with truth-seeking, but, also, it shows that the truth-seeking was successful.

Moreover, truth-seeking conduct can successfully prevent false testimony without preventing a conviction, and, as explained herein (IIB3(a)-(b), supra), that's what happened here. Indeed, the record (when not misapprehended) is not only consistent with truth-seeking, but, also, it demonstrates that the truth-seeking was successful. Id.

Incidentally, convictions on the witness tampering charges (counts 4-5) do not mean that the jury found that Jordan intended to wrongfully influence a witness. While the Supreme Court has held that the "corruptly persuade[s]" clause of the federal witness tampering statute (sec. 1512(b)) requires proof of an improper (or wrongful) purpose, Arthur Andersen v. United States, 544 U.S. 696, 706 (2005), that decision did not address the other clauses, to wit, "misleading conduct" and "intimidation" that were implicated in this case. And the statute (as written) does not require proof of an evil purpose with respect to those clauses. (If it did, there'd be no reason for the affirmative defense.)

(3) Government's Theories

Even assuming that the government proved an intent "to influence" ST (count 4) and Phillip (count 5), the record does not belie that the intent was "to influence" them properly. Indeed, the prosecutor's primary arguments (based on the evidence) were that (a) deceptive communication with ST was intended to improve her opinion of Jordan before she testified at trial (Tr. 855 [R.A. 295]), and (b) the press release

(received by the Trinidadian government) was a means to "cause problems" for Phillip by its "embarrass[ing]" content (Tr. 852 [R.A. 294]). There was no argument that the intent was to produce false or prevent truthful testimony, and no evidence disproving (or refuting) theories of truth-seeking.

And of course: (a) deceptive speech is not unprotected, United States v. Alvarez, 567 U.S. 709, 727 (2012); (b) improving ST's opinion of Jordan (before trial) would make it less likely that she would testify falsely against him; (c) as discussed, infra, the only request in any communication (to her) was to tell the truth about the allegation (in count 1 [Tr. 898 [R.A. 300]) that he had threatened her by phone (GX 400 [R.A. 317]) - which was not proven at trial (Tr. 400 [R.A. 237]); and (d) embarrassing content (in the press release) does not evince wrongful intent because (1) even "outrageous speech" about a foreign official is protected, Boos v. Barry, 485 U.S. 312, 322 (1988), and (2) as the judge observed before trial, it was the government that brought the allegations of abuse (by ST's uncle) into the case by charging Jordan with crimes based on communications that mentioned it. United States v. Doe (Jordan), 2008 U.S. Dist. LEXIS 86534 at 11-12 (S.D.N.Y. 2008).

Specifically, the District Court (before trial) explained why the allegations by ST of sexual abuse by her uncle (that were subject of the press release [GX 81-82]) were relevant to Jordan's defense:

> The defendant may also be arguing that the evidence that the **{2008 U.S. Dist. LEXIS 11}**Victim had told the defendant of her history of sexual abuse is relevant for a second purpose. He may be arguing that, in context, the Victim would have understood the threat, while real and immediate, to be a threat to rescue as opposed to a threat to kidnap or physically injure her. In this context, he may be arguing that it is highly probative that the Victim had told the defendant of the abuse. To kidnap requires a person to be "taken, held and transported against . . . her will." *United States v. Macklin*, 671 F.2d 60, 64 (2d Cir. 1982).
>
> The evidence that the Victim had told the defendant of prior abuse does make it somewhat more likely than it would be without the evidence that she would interpret the threat as an offer of an opportunity of escape rather than a threat of abduction.

Thus, while the federal witness tampering statute (Sec. 1512(b)) does not necessarily require proof of intent to wrongfully influence a witness, Higgins v. Holder, 677 F.3d 97, 105-06 (2d Cir. 2012), still, absent that proof (as here), it cannot be said that theories of truth-seeking are without merit. Indeed, had trial counsel argued in support of the affirmative defense (under Sec. 1512(e)), based on the

record evidence, it is likely that the jury would have accepted the theories of truth-seeking. Likewise, as this Court can see (now) had the lower courts not overlooked Jordan's written presentation of what those arguments could (and should) have been (S.A. 26), relief (under Sec. 2255), or at least a COA (under Sec. 2253), would have been granted.

(4) The Opinion

Of course, an experienced jurist - supporting his or her decision in favor of the government - points to the strongest record evidence of the crime(s) charged. Yet here, the District Court (in its opinion) pointed to just two communications alleged to constitute witness tampering: (1) a statement (GX 403E [count 4]) that Jordan's ex-wife "would testify [in an unrelated and ultimately dismissed state case in Connecticut] to his good character"; and (2) a press release (GX 81-82 [count 5]), from "Jordan Family Relations," received by government authorities, that reported his claims of innocence, but had content that could embarrass Phillip (Opn. 3-4 [S.A. 6-7]). That's it. They don't appear to be witness tampering at all, but are certainly not inconsistent with a theory of truth-seeking. In fact, this Court can (now) see what the lower courts overlooked: The closing arguments (with citations to the record) that could (and should) have been made by trial counsel - which demonstrate that in fact Jordan was truth-seeking (S.A. 26).

(b) Misapprehended Relevant Evidence

Based solely on what we now know to be erroneous grand jury testimony (of an FBI agent) regarding accusations of threats (02/14/08 Tr. 7 [R.A. 116]), Jordan was charged (in count 1) with, among other offending communications to other alleged victims, a single spoken threat to ST (Tr. 898 [R.A. 300]). And so her testimony (at trial) - that she did not recall him making such a threat (Tr. 400 [R.A. 237]) - was evidence that was relevant (to the prejudice inquiry) because the only request related by any of the letters (intended for her) that were alleged to constitute witness tampering (in count 4) was for her to "write to the judge" and tell "the truth" about that particular allegation (Tr. 754 [R.A. 278]). In other words, her testimony was evidence that supported truth-seeking. But that testimony (favorable to Jordan) has been disregarded and misapprehended by the courts:

8a81jor5 Thenault - direct

BY MR. MASTER:

Q. Was that the only type of conversation you had with him?

A. I don't recall all the others.

Q. Were there conversations where his tone was different?

A. Yes. He would first be nice, or try to be, and then he would be very angry.

Q. And how did he express his anger?

A. By yelling on the phone, and I would -- I have hung up a few times, and then he would send me -- he sent me quite a few -- he had sent some texts.

Q. And --

A. Just -- I'm sorry.

Q. Do you recall specifically whether he threatened you at all over the telephone while you were in Virginia?

A. I don't recall specifically.

Q. Did there come a time when you called him or were there occasions when you called him when you were in Virginia?

A. I did, in order to calm him down, to have him stop calling my sister.

Q. And how often did you call him?

A. I called a few times. I don't recall how many. And then I decided to turn the phone off and not call again.

In its discussion of the prejudice prong of Strickland (with respect to counts 1-3), the District Court, referring to the decision on direct appeal, stated: "the government's evidence included Jordan's transmission of seven specific threats, such as the threat to [harm ST]" (Opn. 8 [S.A. 5]):

> Jordan has failed to show that{**2019 U.S. Dist. LEXIS 8**} any of the alleged deficiencies in his attorneys' performance at trial prejudiced him. The Government's evidence that Jordan committed the crimes with which he was charged was substantial.
>
> As the summary order affirming the conviction observed, the Government's evidence included Jordan's transmission of seven specific threats, such as the threat that he would take the Victim "off the planet." The Court of Appeals observed that the evidence that Jordan "knew that his communications would be interpreted as threats was overwhelming and essentially uncontroverted." Because Jordan has not shown that the jury verdict would have been any different if his counsel had performed differently at trial, this petition can be denied on that ground alone. In any event, as described below, Jordan has also failed to show that his counsel's performance was constitutionally deficient.

That finding is clearly erroneous for several reasons:

For starters, count one was duplicitous, charging various threats to various people (Tr. 898-900 [R.A. 300-01]), the jury was instructed that it had only to find that one threat was made in order to convict (Tr. 897 [R.A. 300]), and a general verdict returned (Tr. 959 [R.A. 309]), which concealed the specific alleged act upon which it relied to do so. United States v. Margiotta, 646 F.2d 729, 733 (2d Cir. 1981).

What's more, the statement - in the direct appeal decision - that the evidence (on count 1) included "proof" of seven threats, U.S. v. Jordan, 639 Fed. Appx. 768, 770 (2d Cir. 2016), is not only contrary to the trial record (given that there was no evidence of the charged spoken threat to ST), but, also, was followed by a citation to the transcript ("Tr. 898-900") which demonstrates that the statement is unsupported - because that portion of the transcript reflects the judge's reading of the bill of particulars (enumerating the alleged threats) to the jury. Id. And, of course, a bill of particulars is not evidence. United States v. Murray, 297 F.2d 812, 819 (2d Cir. 1962).

That the Court of Appeals (or author of its decision) confused a reading of the Bill of Particulars with the actual evidence is understandable. After all, the prosecution has repeatedly misstated it. That the District Court did so, having heard the testimony, and after numerous submissions (from movant) that accurately reflected the trial evidence (and included specific citations to the record), is alarming (at best), and indicates not only that its recollection of trial is not dependable, but, also, that a remand (by the Court of Appeals) was necessary (before a COA could be properly denied) because a lower court abuses its discretion when it relies on a "clearly erroneous finding of fact." United States v. Gonzalez, 647 F.3d 41, 57 (2d Cir. 2011).

(c) Overlooked Truth-Seeking Arguments

As the Supreme court has explained, in Herring v. New York, 422 U.S. 853 (1975), closing argument can make the difference between conviction and acquittal. Id. at 862:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See In re Winship, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068.

Here, Jordan's claim - that trial counsel deprived him of acquittals (on counts 4 and 5) by neglecting to argue (to the jury) in support of the affirmative defense (Mot. 5-6 [R.A. 44]) - was supported by a written presentation of what the closing arguments (on truth-seeking) could (and should) have been (Mem. 55-58 [S.A. 26]). But that presentation was not considered. We know this because the District Court stated: "Jordan does not explain how [trial counsel] could have [argued] this defense" (Opn. 15 [S.A. 18]). As such, proper consideration of whether relief (under Sec. 2255) or a COA (under Sec. 2253) should be granted could not have occurred. *

This Court can (now) see what the lower courts had (but overlooked), and it clearly demonstrates that Jordan (serving 40 years in prison for non-violent witness tampering) was deprived of a different outcome at trial. SEE "UNUSED TRUTH-SEEKING ARGUMENTS" in SPECIAL APPENDIX at page 26.

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* Given the facts - that trial counsel told the judge (at sidebar) that record evidence supported the affirmative defense, and then didn't identify that evidence for the jury, knowing it would be instructed that Jordan (who did not testify) had the burden of proof, and didn't argue any other real defense to the charges of witness tampering - and Jordan's submission to the District Court (under sec. 2255) that did identify the exculpatory record evidence (with citations to the trial transcript), and outlined precisely what trial counsel could have argued, absent a hearing (under sec. 2255(b)) or other record facts supporting a presumption of sound trial strategy, reasonable jurists - like Justices Marshall, Brennan, and Blackmun, could easily conclude that trial counsel's performance was "incompetent," Mitchell v. Kemp, 97 LED 2d 774, 778 (1987), and thus that a COA should have issued because the decision denying the IAC claim, was at least debatable, if not wrong.

C. The Decision Rejecting The IAC Claim - That The Absence of An Instruction On Witness Harassment Deprived Jordan of Acquittals or A Lesser Sentence - Was Wrong, or At Least Debatable, And Was Contrary To Section 2255(b), Record Facts, And Supreme Court Law

[Background]

In summation (to the jury) the prosecutor argued that the letters to ST (count 4) were "efforts to harass" her, and that the press release (count 5) was intended to, and did, "cause problems" for Phillip (Tr. 852-53 [R.A. 294]). Subsequently, trial counsel neither responded that "harassment" is not proscribed by the statute (Sec. 1512(b)) under which Jordan was charged (GX 15 [R.A. 121-22]), nor requested (as a fallback) a lesser-included offense instruction on "witness harassment" (under Sec. 1512(d)). Consequently, as the record evidence demonstrates, he was deprived of, short of acquittals (for witness intimidation), a sentence of at least 34 years shorter (for witness harassment).

This IAC claim (Mot. 9 [R.A. 46], Mot. 14 [R.A. 48]) implicated the prosecution's burden to prove each element of the offense charged, and raised questions of exceptional importance (including whether witness harassment is a lesser-included offense of an attempt to intimidate a witness), and regarded both counts. Id. But, contrary to Section 2255(b), the District Court decided it only with respect count five, ruling that witness harassment is not a lesser-included offense of witness intimidation (which conflicts with rulings of other courts), and, contrary to record facts, that Jordan was not harmed by the absence of an LIO jury instruction (Opn. 15-19 [S.A. 18-22]). And although the court effectively acknowledged that the decision was debatable, a COA was not granted (which was contrary to Supreme Court law).

Jordan now asserts: (1) that the District Court's ruling - that "witness harassment" (under Sec. 1512(d)) is not a lesser-included offense (LIO) of "witness intimidation" (under Sec. 1512(b)) - was wrong (because it is contrary to Schmuck), and was at least debatable (given Lozada), and thus a COA should have been granted (because it conflicted with decisions of other courts); and (2) that the District Court's ruling (with respect to count 5 only) - that an LIO instruction was not justified by the evidence, and that its absence

caused no harm because the jury was properly instructed on, and convicted Jordan of, the charged offense - disregarded this Court's reasoning (in Beck and Keeble), and was not supported by the record. (Indeed, Jordan further asserts that (owing to the record evidence) he was (and remains) entitled to a ruling (under Sec. 2106 [S.A. 64]) changing his convictions (on counts 4 and 5) to acquittals, or, alternatively, to judgments of conviction under the lesser offense of "witness harassment.")

1. Section 1512(d) Is A Lesser-Included Offense of Section 1512(b)

In ruling that Section 1512(d) (proscribing witness harassment) is not a lesser-included offense of Section 1512(b) (proscribing witness intimidation), the district court (a) misconstrued the elements of the two offenses, (b) did not properly apply the so-called "elements test," and (c) acknowledged that its decision was debatable --

(a) The Elements

Neither Section 1512(b) (under which Jordan was charged), nor Section 1512(d) (on which he asserted that trial counsel should have had the jury instructed), define the conduct (to wit, "intimidation" and "harassment") that is proscribed by it. And neither term is defined in Section 1515 (where other definitions are provided). However, Section 1514 (which provides the District Court with the authority to issue a restraining order to prevent the conduct proscribed within Section 1512) separately defines both terms. The first and last element of each is identical: "[A] serious act or course of conduct [that] serves no legitimate purpose" (S.A. 49). The only difference (between the two definitions) is (1) "harassment" must cause (or be intended to cause) "substantial emotional distress"; and (2) "intimidation" must cause (or be intended to cause) "fear." Id. And "fear," of course, is a type of emotional distress. See, e.g., Doe v. Chao, 540 U.S. 614, 634 (2004) (Ginsburg, j. dissenting). See also Velez v. Levy, 401 F.3d 75, 83 (2d Cir. 2005) ("embarrassment, humiliation, and fear" are forms of emotional distress).

As such, it would be impossible to "intimidate" (i.e., frighten) a witness (under Sec. 1512(b)) without also causing "substantial emotional distress" (and thus also violating Section 1512(d)). Yet, one could embarrass

or humiliate or frustrate a witness (i.e., harass) without necessarily causing fear (i.e., intimidation). Thus, Section 1512(d) is a lesser-included offense of Section 1512(b) because the elements of the former are a "subset of the elements" of the latter. Schmuck v. United States, 489 U.S. 705, 715-21 (1989).

(b) The Error

In reaching its conclusion (that Section 1512(d) is not a lesser-included offense of Section 1512(b)), the District Court disregarded the actual elements of each offense (and the "attempt" offense charged), and, instead, simply explained that the former statute requires "proof of intentional harassment," and the latter does not (Opn. 16 [S.A. 19]). This was error - because, while it is true that Section 1512(d) proscribes "intentional harassment" (which, as discussed, supra, means an intent to distress), Section 1512(b) proscribes the "knowing use of intimidation" - which necessarily requires an intent to instill fear (which is a form of distress). Thus, it is clear that Section 1512(d) does not actually require proof of an element that is not required by Section 1512(b).

Moreover, both statutes proscribe an "attempt" to commit the offense. And, as this Court has observed, an "attempt" to commit a crime requires an intent to do so. Braxton v. United States, 500 U.S. 344, 350-51 n.* (1991). Indeed, here Jordan was charged with attempted witness intimidation (under Sec. 1512(b)), and the jury was instructed: "A defendant attempts to intimidate [when] he acts with the intent to do so" (Tr. 912 [R.A. 307]). And even "misleading conduct" (i.e., a false statement) used to intimidate, as the prosecution asserted in this case (Tr. 852-53 [R.A. 294]), requires proof of intent to emotionally distress. In other words, an attempt to intimidate (as was charged) by any kind of conduct is an attempt to emotionally distress. And if the intent to intimidate is not intended to do so by fear of harm, then it is (instead) harassment - which is therefore a lesser-included offense.

(c) Debatable Decision

In addition to asserting (under Sec. 2255) that he was entitled to relief (because, as discussed, infra, the evidence [at trial] justified an LIO instruction, and trial counsel's failure to request it was prejudicial),

Jordan asserted (in the Court of Appeals) that a COA (under Sec. 2253) should be granted because the decision denying this IAC claim was wrong, or at least debatable (COA 36-37 [R.A. 24-25]). And as is now clear from the record facts, the denial of a COA was contrary to Supreme Court law - because: (1) A COA must be granted (on an issue) when the decision (under Sec. 2255) is "debatable," Slack v. McDaniel, 529 U.S. 473, 484 (2000); (2) Such a decision is "debatable" when it conflicts with decisions of other courts, Lozado v. Deeds, 498 U.S. 430, 432 (1991); and (3) As the District Court acknowledged (here), its conclusion - that Section 1512(d) is not a lesser-included offense of Section 1512(b) (Opn. 16-18 [S.A. 19-21]) - conflicted with decisions of other courts, including two panels of the Ninth Circuit Court of Appeals. United States v. Chaggar, 197 Fed. Appx. 704, 707 (9th Cir. 2006), and the Second Circuit Court of Appeals:

> It is true that the Second Circuit has, in dicta, observed that the same conduct may be punishable under more than one subsection of § 1512. See United States v. Veliz, 800 F.3d 63, 71 (2d Cir. 2015) (holding that solicitation of a person to murder a witness is punishable under § 1512(b)). The Second Circuit suggested that "a defendant who follows a witness's every move might be guilty of 'intimidation' under subsection (b) or 'harassment' under subsection (d)." Id. at 72. In doing so, the Second Circuit cited a Ninth Circuit case that held that § 1512(d) was a lesser-included offense of § 1512(b). Id. (citing United States v. Chaggar, 197 Fed. Appx. 704, 707 (9th Cir. 2006))). But, applying the elements-based approach called for by the Supreme Court, it does not follow that § 1512(d) constitutes a**{2019 U.S. Dist. LEXIS 18}** subset of § 1512(b). As the Second Circuit has not more directly addressed the question of whether § 1512(d) is a lesser-included offense of § 1512(b), and the Ninth Circuit authority is not binding, it is here concluded that Jordan would not have been entitled to a lesser-offense instruction. Further, because the Second Circuit case that Jordan cites here had not been decided at the time of his trial, his counsel could not have relied upon it. See Weingarten, 865 F.3d at 53 ("A reviewing court must . . . evaluate an attorney's performance in light of the state of the law at the time of the attorney's conduct."); Sellan v. Kuhlman, 261 F.3d 303, 315-17 (2d Cir. 2001).

Given this ruling (reflecting contrary rulings), it cannot be said that the issue - whether Section 1512(d) is a lesser-included offense of Section 1512(b) - is not at least debatable, and thus, as stated, the denial of a COA (on that issue) was contrary to Supreme Court law. And while the District Court also found that the absence of an LIO jury instruction was "in any event" harmless (Opn. 18-19 [S.A. 21-22]), this Court shall see (infra) that that ruling as well was wrong, or at least debatable, and disregarded Supreme Court law.

2. A LIO Instruction Was Justified, and Its Absence Was Prejudicial

While the IAC claim - failure to request a LIO instruction (Mot. 9 [R.A. 46], Mot. 14 [R.A. 48]) - regarded the witness tampering convictions involving ST (count 4) and Phillip (count 5), the District Court made no findings with respect to count 4 (which is contrary to Sec. 2255(b)). And, with respect to count five, its decision - that trial counsel's omission was neither deficient performance, nor prejudicial (Opn. 18-19 [S.A 21-22]) - conflicts with record evidence, Rule 31(c), and Supreme Court law (cited infra). Indeed, as this Court will (now) see, the claim was substantial and meritorious because (a) relevant law authorized a LIO instruction, (b) record evidence justified it, and (c) its absence was harmful to Jordan.

(a) Relevant Law

Although the District court acknowledged that its conclusion - that Section 1512(d) is not a lesser-included offense of Section 1512(b) - was contrary to decisions of other courts (and thus debatable), it further opined that Jordan's counsel could not be faulted "because the Second Circuit case," United States v. Veliz, 800 F.3d 63 (2d Cir. 2015), "had not been decided at the time of his trial," and "the Ninth Circuit authority," United States v. Chaggar, 197 Fed. Appx. 704 (9th Cir. 2006), "is not binding" (Opn. 17-18 [S.A. 20-21]). Of course, this reasoning was flawed - because (1) even non-binding case law serves to alert counsel of a lesser-included offense, (2) counsel had a duty to research the relevant facts and law (in order to make informed decisions), Strickland v. Washington, 466 U.S. 668, 690-91 (1984), and (3) Rule 31(c) of the Federal Rules of Criminal Procedure did exist (at the time of trial), and it authorized a LIO instruction when the elements of the lesser offense are a subset of the elements of the greater offense. United States v. Snype, 441 F.3d 119, 141 (2d Cir. 2005).

What's more, seven years before Jordan's trial, in the same court, a defendant charged with "witness intimidation" (under Sec. 1512(b)), was found guilty of the "lesser-included" offense of "witness harassment" (then under Sec. 1512(c)), United States v. Kelly, 169 F. Supp. 2d 171, 173 (S.D.N.Y. 2001), and the court explained:

In this case, Kelly attempted to plead guilty to misdemeanor witness harassment pursuant to 18 U.S.C. § 1512(c) prior to trial on felony charge of intimidating a witness, pursuant to 18 U.S.C. § 1512(b) (1). However, the U.S. Attorney's Misdemeanor Committee refused the plea offer and prosecuted Kelly at trial. At the request of the defense, the jury was instructed on the lesser included § 1512(c) charge, and Kelly was ultimately convicted of misdemeanor harassment rather than felony intimidation.

(b) Record Evidence

As this Court has explained, a lesser-included offense instruction is justified (under F.R.Cr.P. 31(c)) when the evidence (at trial) could permit a conviction for it, and an acquittal on the charged conduct. Keeble v. United States, 412 U.S. 205, 208 (1973). Here, while the District Court (under Sec. 2255) did not address the failure-to-request-a-LIO-instruction claim with respect to ST (count 4), it did do so with respect to Phillip (count 5), observing that she had "testified to the emotional distress and professional humiliation that [the press release] caused" (Opn. 4 [S.A. 7]). In other words, her testimony appeared to support a theory of harassment (i.e., conduct intended to cause substantial emotional distress [S.A. 60]), and not intimidation (i.e., conduct intended to instill fear of future harm [S.A. 60]).

Indeed, when asked (on direct) about the effect that the press release had on her (before trial), she testified that "[i]t seemed to be bringing back the same problems I had in London" (Tr. 306 [R.A. 228]) which she had characterized as "harassment" (Tr. 325, 331 [R.A. 231-32]). And, as this Court has observed, testimony of the effect (of the conduct) is often the best evidence of the intent. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, j. concurring). Thus, given that the press release was the only alleged tampering conduct with respect to Phillip (count 5), and but for its "embarrassing" content - which was true (Tr. 406 [R.A. 238]) - it was otherwise harmless (S.A. 47-48), her - testimony that it amounted to harassment - justified a LIO instruction.

(c) The Harm

Given that trial counsel did not object (or otherwise respond) to the prosecutor's arguments (in summation) imploring the jury to convict Jordan (under Sec. 1512(b)) for conduct not proscribed by that

statute, to wit, "written communications" intended to (1) "harass" ST (count 4), and (2) "cause problems" for Phillip (count 5), before trial on the other counts (Tr. 852-53 [R.A. 294]), it is likely that the jury did so - because, as this Court explained in Keeble v. United States, 412 U.S. 205 (1973), absent a LIO instruction, jurors are likely to convict even when an element of the charged offense (such as intent to instill fear) is in doubt. Id. at 212-13:

> If the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

To be sure, such doubt (as to an element of Sec. 1512(b)) existed here - because, as the record reveals, there is no evidence that either ST (count 4) or Phillip (count 5) was frightened, misled, or improperly influenced by, respectively, the letters and the press release. And neither the government (in its arguments and filings), nor the District Court (in its opinion), have pointed to any statement (in the "written communications") that could constitute the conduct alleged to constitute witness tampering (under Sec. 1512(b)), to wit, "corrupt persua[sion]" (i.e., an improper offer, request, or demand), "threats" and "intimidation" (that could instill fear of bodily harm), or "misleading conduct" (that could mislead a witness to testify inaccurately).

And while the District Court opined (without any real explanation) that the press release "sent to government offices" (not to Phillip) could constitute "misleading conduct" because it purported to have been issued by "Jordan Family Media Relations" (Opn. 3 [S.A. 6]) or "intimidation" because it reported that "defamatory allegations" about Phillip's husband "would be explored at trial" (Opn. 18-19 [S.A. 21-22]), Jordan, of course, had the right to issue a press release in any name, McIntyre v. Ohio Elections Commission, 514 U.S. 334, 341-43 (1994), and especially his own, and speech about a criminal trial is protected by the First Amendment, Bridges v. California, 314 U.S. 252, 263-64 (1941), even when it involves embarrassing or harsh statements. New York Times v. Sullivan, 376 U.S. 254, 270-71 (1964).

What's more, the so-called "defamatory allegations," to wit, the sexual abuse of ST by Phillip's husband, were indeed explored at trial (see, e.g., Tr. 406 [R.A. 238]) because the very same court that denied the failure-to-request-a-LIO-instruction claim (under Sec. 1512(d)) ruled, before trial, that those allegations were relevant to Jordan's defense to charges in count one, United States v. Doe (Jordan), 2008 U.S. Dist. LEXIS 86534 at 11-12 (S.D.N.Y. 2008), just as the press release later reported. And, just as the prosecutor subsequently argued (at trial), deception (if that's what the press release was) and embarrassing speech, can be used to harass (Tr. 852 [R.A. 294]). And thus it is clear that not only was Jordan entitled to a LIO instruction (on "witness harassment") but, also, that its absence was prejudicial.

The District Court's apparent (but not specifically stated) opinion - that the press release amounted to a threat of harm because it reported that Jordan's trial might be an "embarrassment for the government of Trinidad and Tobago" (Opn. 18 [S.A. 21]) - not only disregards the First Amendment right to criticize the government's case, see, e.g., Gentile v. State Bar of Nevada, 501 U.S. 1030, 1034 (1981), but, also, it requires an unconstitutionally broad reading of the statute (Sec. 1512(b)) that some say is already overly-broad. See Jeffress, W., The Federal Witness tampering Statute, 22 Am. Crim. L. Rev. 1 (1984). Moreover, even assuming that speech about a criminal case made to a government can be a proscribable threat, other courts have found such conduct to constitute witness harassment (not intimidation). See, e.g., United States v. Brown, 217 F.3d 247, 257 (5th. Cir. 2000) ("veiled threats" constitute witness harassment).

What's more, while the conduct here included two copies of the same press release sent to "government offices" (Opn. 18 [S.A. 21]), and its embarrassing content was, as discussed supra, relevant to Jordan's defense to the charges in count one, in a prior case in the same court, United States v. Kelly, 169 F. Supp. 2d 171 (S.D.N.Y. 2001), the defendant, charged (as Jordan was) with witness intimidation (under Sec. 1512(b)), was found guilty of the "lesser-included offense" of witness harassment (then under Sec 1512(c)) based on conduct (false and humiliating speech) that was neither relevant to the case, or true, and was certainly not less offensive that that at issue here. Id. at 172-73:

> In early April of 1998, Kelly, with the assistance of several coworkers,**{2001 U.S. Dist. LEXIS 3}** targeted each of the four complaining ex-employees with unsigned, individualized flyers purporting to have been issued by "neighborhood watch" groups. The flyers included the photographs and home addresses of the women, which were taken from confidential employee files at Le Bar Bat, and accused the women of prostitution, child molestation, and/or drug dealing. The flyers were distributed widely around the neighborhoods where these women lived, mailed to their apartment buildings in at least two cases, and to one woman's out-of-state parents. Each of the four victims, **{169 F. Supp. 2d 173}** who are also involved in a pending civil rights action against Kelly, has submitted an impact statement that has been considered in assessing the appropriate penalty for this offense.

To be sure, had a LIO instruction been given at Jordan's trial, he would not have been convicted of witness tampering under Section 1512(b), as charged, and, if convicted at all, it would have been of the lesser-offense under Section 1512(d). As such, contrary to the District Court's opinion, that disregarded facts and law (and overlooked the claim with respect to count 4), trial counsel's performance was deficient and prejudicial. And relief (under sec. 2255), or at least a COA (under Sec. 2253) should have been granted.

IV. CONCLUSION

Jordan is serving 40 years in prison (20 years for each count of witness tampering under sec. 1512(b)) for non-violent speech that should have been protected. This only because trial counsel: (A) Neglected to inform him of the affirmative defense (available under sec. 1512(e)) before his right to testify in support of it was waived; (B) Neglected to argue in support of the affirmative defense after invoking it (at sidebar), and telling the judge (correctly) that record evidence supported it; and (C) Neglected to request (as a fallback) a lesser-included offense instruction on witness harassment (under Sec. 1512(d)), or to otherwise respond, after the prosecutor argued that theory (invalid under sec. 1512(b)) to the jury.

He now prays that the lower court's denial of a COA - regarding the above IAC claims - will be summarily reversed, or that certiorari will be granted, and the questions presented by this petition addressed.

Respectfully submitted,

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