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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HARSHAD SHAH, Defendant-Appellant.	No. 21-55443 D.C. Nos. 8:21-cv-00027-CJC 8:10-cr-00070-CJC-1 Central District of California, Santa Ana ORDER (Filed Sep. 16, 2022)

Before: TALLMAN and BRESS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

HARSHAD SHAH, **Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Case No.:** **SACV 21-00027-CJC** **SACR 10-00070-CJC** **ORDER DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE [10] [335]** (Filed Mar. 12, 2021)

I. INTRODUCTION & BACKGROUND

Plaintiff Harshad Shah is serving a 51-month sentence after a jury convicted him of bribing a public official. Dr. Shah now moves for relief from his sentence under 28 U.S.C. § 2255, arguing that he received ineffective assistance of counsel. (Dkt. 10 [hereinafter "Mot."].)[1] Dr. Shah also filed a motion for recusal, which Judge James V. Selna denied. (Dkt. 12.) The government opposes Dr. Shah's motion for relief, (Dkt.

[1] Dr. Shah also filed an application to seal certain exhibits in support of his motion. (Dkt. 4.) Because these exhibits relate to sensitive personal and medical information, this application is **GRANTED**.

14 [hereinafter "Opp."]), and Dr. Shah filed a reply, (Dkt. 15).[2] Dr. Shah's motion is **DENIED**.[3]

II. DISCUSSION

To show ineffective assistance of counsel, Dr. Shah must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Dr. Shah cannot make this showing.

A. Trial Counsel's Performance Was Reasonable

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly differential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). The *Strickland* standard is "highly demanding" and requires a showing that trial counsel acted with "gross incompetence." *Id.* at 382.

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[2] Dr. Shah requests, in his Reply, reconsideration of the recusal motion Judge Selna denied. (Reply at 7.) This request is DENIED because it was not raised in a properly noticed motion, *see* Fed. R. Civ. P. 60, nor was it made within "14 days after entry of the Order" denying recusal, *see* C.D. Cal. L.R. 7-18.

[3] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15.

Dr. Shah argues that relief is justified because his attorney (1) failed to object to testimony by Revenue Agent ("RA") Mytryee Raghaven, (2) failed to object to false or misleading statements the government made at trial, (3) agreed to a defective answer to a jury question, and (4) failed to provide crucial information during the presentence investigation. (Mot. at 4-24.) The Court will address each argument in turn.

1. RA Raghaven's Testimony

Dr. Shah argues that his trial counsel was ineffective for failing to object to RA Raghaven's testimony, which he asserts was inadmissible "racially charged opinion testimony." (Mot. at 4-9.) This, however, misstates Raghaven's testimony and wholly ignores the observations and rulings of this Court and the Ninth Circuit. As this Court has already noted, "RA Raghaven did not say that [Dr. Shah] made a bribe overture simply because he was from India. She simply said that, based on her own experience and knowledge, she interpreted [Dr. Shah's] statements invoking their shared ethnicity to make the audit go away as a bribe overture." (C.R. 299 [Order Denying Plaintiff s Motion for a New Trial, hereinafter "MNT Order"] at 5.)[4] The Ninth Circuit agreed, stating that "[c]ontrary to Dr. Shah's characterization, RA Raghaven's testimony was *not* the sort of racist predisposition testimony that the Supreme Court denounced in *Buck v.*

[4] "C.R." refers to docket entries in the underlying criminal *case, United States v. Shah*, Case No. 8:10- cr-00070-CJC.

Davis. . . . Testimony regarding RA Raghaven's interpretation of Dr. Shah's statements, using his numerous incongruous references to India as context, is *not* in the same category as testimony that a criminal defendant is predisposed to commit violence because of his race." *United States v. Shah*, 768 F. App'x 637,640 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 933 (2020). Because RA Raghaven's testimony was not prohibited racist predisposition testimony, Dr. Shah's trial counsel was not unreasonable, much less grossly incompetent, for failing to object to it.

2. Government's Statements at Trial

Dr. Shah also argues that his trial counsel failed to object to statements the government made during trial and during closing argument which were false and misleading. (Mot. at 10-15.) The Ninth Circuit rejected this exact argument, ruling that "[n]one of the challenged statements rises to the level of being materially false or misleading. And in any case, Dr. Shah has failed to show that he was prejudiced by any of them." *Shah*, 768 F. App'x at 640. Accordingly, the statements cannot serve as the basis for his § 2255 motion. *See United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000) ("When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as [a] basis for a subsequent § 2255 petition.").

3. Jury Question Response

Dr. Shah also argues that his counsel was ineffective because he failed to object to the Court's response to a jury note. (Mot. at 16-18.) Trial courts have "wide discretion" in responding to "a question from the jury." *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003) ("[T]he precise manner by which the court fulfills its obligation to address the jury's difficulties is a manner committed to its discretion."). Generally, the response cannot be "misleading, unresponsive, or legally incorrect." *United States v. Frega*, 179 F.3d 793, 810 (9th Cir. 1999).

During trial, the jury asked whether it was "allowed to consider evidence (tapes, recordings) as an indicator of the predisposition of the defendent's [sic] character before contact by a government official?" (C.R. 236.) The Court responded, "[y]es, if you determine the evidence (tapes, recordings) indicates the defendant's predisposition before being contacted by government agents." (C.R. 237.) This response was not "misleading, unresponsive, or legally incorrect." *See Frega*, 179 F.3d at 810. As the Ninth Circuit affirmed, the law clearly establishes that "evidence obtained after law enforcement involvement can be used to prove that the defendant was predisposed to commit a crime *before* such involvement." *Shah*, 768 F. App'x at 640.

Dr. Shah now argues that his trial counsel should have objected because the Court's response was incomplete for not directing the jurors to Jury Instruction 17, which states "[e]ach of you must decide the case for

yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors." (Mot. at 16.) The fact that the Court did not direct the jury specifically to Jury Instruction 17 in response to the question about predisposition evidence does not make its response misleading or legally incorrect. The jury was instructed at the beginning and the end of the case to evaluate all evidence, (Opp. Ex. 1 at 3-4, 31-32), and a jury is presumed to understand and follow the trial court's instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Accordingly, Dr. Shah's trial counsel did not act unreasonably by agreeing to the Court's response.

4. Sentencing

Finally, Dr. Shah argues that his trial counsel failed to provide "important information" before the presentence investigation report was submitted to the Court, resulting in "exaggerated [sentencing] guidelines." (Mot. at 19.) Dr. Shah, however, fails to identify any specific information that was not provided to the Probation Office. The Court has already found that Dr. Shah was given opportunity to participate in the presentence investigation when he provided the Probation Office with "a brief written biography." (C.R. 298 [Order Denying Plaintiff's Motion to Strike Presentence Report, hereinafter "MTS Order"] at 3.) As this Court has held, and the Ninth Circuit confirmed, "Dr. Shah does not point to anything specific in the PSR that is misleading or one-sided." *Shah*, 768 F. App'x at

642. Dr. Shah's motion appears to relitigate his sentencing and his Motion to Strike the Presentence Report, rather than argue his counsel performed unreasonably.

Dr. Shah argues that the Court failed to consider a downward departure based on sentencing entrapment. (Mot. at 23.) This is false. The Court made an express finding that there was no sentencing entrapment based on the jury's conclusion that Dr. Shah was not entrapped. (MTS Order at 4.) The Ninth Circuit agreed, stating that "the district court did not ignore Dr. Shah's sentencing entrapment argument, nor did it abuse its discretion at sentencing. The district court denied a downward departure based on sentencing entrapment after it concluded there was sufficient evidence to find Dr. Shah was not induced to commit bribery." *Shah*, 768 F. App'x at 642.

Dr. Shah also argues that the Court failed to consider the fact that Dr. Shah sought to gain a lower benefit. (Mot. at 23.) This is also false. The Court rejected this argument, stating that the fact that "[Dr. Shah's] tax liability was later reduced does not change the fact that at the time [Dr. Shah] offered RA Ham the bribe, he did so with the expectation of receiving a $410,000 benefit." (MTS Order at 3-4.) Accordingly, Dr. Shah has not shown that his counsel acted unreasonably during the presentence investigation or sentencing.

B. Dr. Shah Was Not Prejudiced

Even if Dr. Shah could show counsel was deficient, he cannot show any prejudice resulting from counsel's decisions. *Strickland*, 466 U.S. at 687-88. The overwhelming evidence at trial supported the fact that Dr. Shah twice attempted to cash bribe offers to compromise his tax audit. "The recordings of [Dr. Shah's] conversations with RA Ham make plain that [Dr. Shah] offered to bribe RA Ham in order to reduce his tax liability." (MNT Order at 8.) One shows Dr. Shah offering a $15,000 bribe to lower his tax liability to $150,000, (Opp. Ex. 4), and a second shows Dr. Shah offering a $30,000 bribe to erase his entire tax liability, (Opp. Ex. 6).

Further, this Court properly sentenced Dr. Shah. As the Ninth Circuit found on appeal, "the evidence suggests that the district court reasonably calculated the Sentencing Guidelines range, rejected certain enhancements recommended by the Government; properly noted mitigating factors, such as Dr. Shah's community engagement and his lack of a criminal record; and imposed a sentence . . . which was on the low-end of the Guidelines range and less than half of the Government's recommended sentence." *Shah*, 768 F. App'x at 642. Even if Dr. Shah's counsel had provided additional information or make additional arguments and objections, there is no reasonable probability that Dr. Shah would have been acquitted or sentenced differently. *See Strickland*, 466 U.S. at 694. Accordingly, Dr. Shah has not shown that he was prejudiced by any of his counsel's purported errors.

III. CONCLUSION

For the forgoing reasons, Dr. Shah's § 2255 motion to vacate, set aside, or correct his sentence is **DENIED**.

DATED: March 12, 2021

/s/ Cormac J. Carney
HON. CORMAC J. CARNEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HARSHAD SHAH, Defendant-Appellant.	No. 21-55443 D.C. Nos. 8:21-cv-00027-CJC 8:10-cr-00070-CJC-1 Central District of California, Santa Ana ORDER (Filed May 20, 2021)

This case appears to arise under 28 U.S.C. § 2255 and thus is subject to the requirements of 28 U.S.C. § 2253(c). This case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court chooses to issue a certificate of appealability, the court should specify the issues that meet the required showing; if the district court declines to issue a certificate, the court is requested to state its reasons. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270.

The Clerk will send a copy of this order to the district court.

FOR THE COURT:

Lisa B. Fitzgerald
Interim Appellate Commissioner
Ninth Circuit Rule 27-7

LCC/MOATT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HARSHAD SHAH,	)	**Case No.:**
Petitioner,	)	**SACV 21-00027-CJC**
	)	**SACR 10-00070-CJC**
v.	)	**ORDER DENYING**
UNITED STATES OF AMERICA,	)	**CERTIFICATE OF**
	)	**APPEALABILITY**
Respondent.	)	(Filed May 20, 2021)

On May 3, 2021, Petitioner Harshad Shah appealed the Court's denial of his petition for habeas corpus pursuant to 28 U.S.C. § 2255. (*See* Dkt. 17 [Notice of Appeal].) On May 20, 2021, the Ninth Circuit remanded the case for the limited purpose of granting or denying a certificate of appealability." *United States v. Shah*, Case No. 21-55443, Dkt. 2 (9th Cir. May 20, 2021); (*see also* Dkt. 19 [Request for Issuance of Certificate of Appealability]).

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may only issue from a habeas corpus proceeding where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has not made such a showing. As discussed in the Court's order denying his petition for habeas corpus, Petitioner failed to show he was prejudiced by ineffective assistance of counsel. (*See* Dkt. 16.) Indeed, most of his arguments made in support of that motion had already been rejected by

the Ninth Circuit. (*Compare* Dkt. 10 [Petitioner's § 2255 Motion] *with United States v. Shah*, 768 F. App'x 637 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 933 (2020).) Accordingly, Petitioner has failed to make the showing required for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). For the foregoing reasons, Plaintiff's request for the issuance of a certificate of appealability is DENIED.

DATED: May 20, 2021

/s/ Cormac J. Carney
HON. CORMAC J. CARNEY
UNITED STATES
DISTRICT JUDGE

Cc: 9th Circuit, Case No. 21-55443

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HARSHAD SHAH, Defendant-Appellant.	No. 21-55443 D.C. Nos. 8:21-cv-00027-CJC 8:10-cr-00070-CJC-1 Central District of California, Santa Ana ORDER (Filed Nov. 30, 2022)

Before: WATFORD and FRIEDLAND, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 7) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11. No further filings will be entertained in this closed case.

C.A. No. 21-55443
D.C. Nos. 21-cv-00027-CJC; 10-cr-00070-CJC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HARSHAD R. SHAH,
Defendant-Appellant.

Appeal from the United States District Court
Central District of California
The Honorable Cormac J. Carney

APPELLANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY

(Filed Jul. 9, 2021)

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Pursuant to Rule 22 (b)(2), Federal Rules of Appellate Procedure – Habeas Corpus and Section 2255 Proceedings – Appellant-Petitioner Harshad Shah

respectfully asks this Court to issue a certificate of appealability (COA).

I.
Procedural Facts

On Thursday, January 14, 2021, Petitioner-Appellant Harshad Shah (Shah) filed in the district court his Motion to Vacate, Set Aside or Correct his conviction and sentence pursuant to 28 USC § 2255. [Docket 10]. His Motion was supported by a considerable number of exhibits. And, because of the unique background of this case and the district court's unique lengthy relationship with the case and Appellant, Shah also filed on the same day a Motion for Recusal of Judge Cormac J. Carney Pursuant to 28 USC 455(a). [Docket 11].

The following Tuesday, January 19, 2021, District Judge Selna, to whom by Local Rule the recusal motion was assigned, swiftly denied Shah's Motion to Recuse based upon a non-existent, legally erroneous basis. [Docket 12]. *See discussion below.* The same day, the district court (Judge Carney) issued a briefing schedule ordering the government to respond.

The government filed its opposition one month later – February 19, 2021 and supported it with a large volume of exhibits. [Docket 14]. Shah's 2255 Motion and the government's opposition and exhibits now amounted to a total of 32 exhibits with considerable individual BATES pages of record. [Dockets 10-1 and 14-1]. Then, on March 5, 2021, Shah filed his Reply to Government's Opposition. [Docket 15]. By March 5,

2021 Shah's 2255, the Government's Opposition, and the voluminous exhibits combined from the parties amounted to a considerable number of pages.

Despite the large volume of exhibits to review, within five business days after Shah filed his Reply, on March 12, 2021, the district court issued its Order Denying Shah's Motion to Vacate his conviction and sentence. [Docket 16]. Exhibit A. In the Order, at footnote 3, the district court noted: "Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing." The Court cited Fed. R. Civ. P. 78 and Local Rule 7-15. However, the court did not cite 2255's mandate that a hearing is required "***unless*** the motion ***and the files and record*** of the case ***conclusively*** show that the prisoner is entitled to no relief." *28 U.S.C. § 2255*, emphasis added.

The district court denied each of Shah's 2255 issues with but a parsimonious discussion and brief, incomplete analysis. Surprisingly, the district court then failed to either deny or to issue a COA, as mandated by 28 USC Section 2253(c). After waiting for the district court to act on the 2253(c) mandate to deny or issue a COA, but before the 60-day time for appeal the 2255 denial, on May 3, 2021 Shah filed his Notice of Appeal. [Docket 17]. Also on May 20, 2021 Shah filed with the district court his Request for Issuance of Certificate of Appealability. [Docket 19].

On the same day, May 20, 2021, this Court issued an Order remanding the case to the district court for a

limited purpose. The limited purpose was for the district court to comply with 28 USC § 2253(c) by either granting, or denying, a COA because the district court failed to comply with § 2253(c). This Court also asked the district court to act "at the court's earliest convenience." And ordered further that: "If the district court chooses to issue a certificate of appealability, the court *should* specify the issues that meet the required showing; if the district court declines to issue a certificate, the court is *requested* to state its reasons." *See*, Exhibit B, May 20, 2021 Order, emphasis added.

Swiftly, also on the very same day, May 20, 2021, the district court filed its Order Denying a COA and consisting of a quarter-page statement of the reason for the denial. Exhibit C. However, the district court's Order immediately denying the COA did not address many of the issues actually underlying Petitioner's 2255 *habeas* petition. The district court's statement of reason states, among other things, "Indeed, most of [Shah's] arguments made in support of that motion had already been rejected by the Ninth Circuit." Exhibit C at 2. In fact, the IAC and related issues had not been raised by Shah on his direct appeal.

Important to this Motion for a COA now before this Court is the part of the district court's order denying the COA which states:

> Pursuant to 28 U.S.C. 2253, a certificate of appealability may only issue from a habeas corpus proceeding where "the applicant has made a substantial showing of denial of a constitutional right." 28 U.S.C. 2253(c)(2).

> Petitioner has not made such a showing. As discussed in the Court's order denying his petition for habeas corpus, Petitioner failed to show ***he was prejudiced by ineffective assistance of counsel***. (See Dkt. 16.)

Exhibit C, page 2, emphasis added. Said differently, the district court inevitably and functionally made an implied legal finding that Shah established in his 2255 that his trial counsel had indeed been ineffective; but that Shah "failed to show he was prejudiced . . . " by such IAC. Otherwise, the district court's parsimonious order would have held only that Shah had failed to show the first prong of *Strickland*[1] – that he was denied effective assistance in the first place.

Shah's 2255 *habeas* had actually raised different issues than those presented to this Court on Shah's direct appeal. One of the different issues was a new one – a material misleading representation by the Government to the oral argument panel of this Court. This issue, fully developed by Shah in his Motion, was wholly ignored by the district court.

Appellant Shah respectfully asks this Court to issue a COA so that he can develop the actual meritorious multiple issues in his 2255 motion demonstrating how he was subjected to a "denial of [his] constitutional right(s)" and how the district court never substantively addressed several of his issues.

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[1] *Strickland v. Washington*, 466 U.S. 668 (1986).

II.
THE UNIQUE FACTS OF THIS CASE SUPPORT ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Title 28 U.S.C. Section 2253(c)(2) provides that a certificate of appealability may issue under when "(1) the applicant has made a substantial showing of the denial of a constitutional right." Appellant Harshad Shah submits that in his 2255, he has demonstrated that he has met the standard for a COA as interpreted in *Buck v. Davis*, 137 S.Ct. 759, 773 (2017).

In *Buck*, the Court reaffirmed the *relatively low standard* required for issuance of a COA – "the ***only*** question is whether the applicant has shown that 'jurists of reason ***could disagree*** with the district court's resolution of his constitutional claims ***or*** that jurists could conclude ***the issues presented are adequate*** to deserve encouragement to proceed further." Quoting *Miller-El v. Cockrell*, 537 U. S. 322, 336 (2003) (state case involving a *Batson* issue under a stricter 2254 AEDPA standard, but finding that a COA was required), emphasis added.

III.
THE 2255 ISSUES ACTUALLY RAISED BY SHAH

1. Recusal

At page one of its Order, the district court first notes that Shah filed his 2255 seeking post-conviction relief based upon ineffective assistance of counsel

(IAC). And in a passing footnote, footnote 1, the Court then states: "Dr. Shah also filed a motion for recusal, which Judge James V. Selna denied." The Court ends its analysis of the recusal issue with that one sentence, failing to note Shah's Points & Authorities in support of his Reply to Government's Opposition (Reply) directly addressing Judge Selna's incomplete analysis and legally erroneous basis for the denial. [Exhibit D; Docket 15].

In Shah's 26-page Reply, he specifically noted at page 8, *inter alia*, the following about Judge Selna's denial of his recusal motion:

> The denial of the recusal motion never touched on the actual legal basis for recusal; nor upon meaningful consideration of all the facts provided by Shah. The order denying the motion limited its incomplete ruling on a straw man argument:
>
> > There is no basis to recuse the District Judge based on past rulings adverse to Shah. While Petitioner may have a reasoned basis to the [sic] challenge the rulings of the District Judge, that does not suffice. Litkey [sic], 510 U.S. at 555. Opinions which the District Judge forms during a case, including an opinion concerning Shah's veracity, do not constitute an extrajudicial source.
>
> But Shah never relied upon this simplification of the myriad facts nor legal basis upon which he relied. This is a reductionist straw man

> never presented in the recusal motion. The order denying recusal adds:
>
> > He does not allege or cite any basis for personal prejudice or bias from any extrajudicial source. It is black-letter law that bias cannot arise from what a judge learns during the course of a litigation. Liteky, 510 U.S. at 555-56; United States v. Grinnel Corp., 384 U.S. 563, 583 (1966).
>
> Order Denying Motion to Recuse, page 4, January 19, 2021, Docket 12, emphasis added.

Exhibit D.

In his Reply to the court's denial of his recusal motion, Shah objected and asked that his recusal motion "be fairly reviewed." Shah noted that Judge Selna's denial was *incomplete* because it had failed to review the full facts. And because the denial of the recusal motion relied upon non-existent law when Judge Selna erroneously concluded "Opinions which the District Judge forms during a case, including an opinion concerning Shah's veracity, do not constitute an extrajudicial source." Judge Selna's reliance upon *Liteky* was misplaced because *Liteky* simply did not mandate an extra-judicial source for the appearance of bias at all. Nevertheless, the district court never mentioned Shah's Reply and specific legal objection on the recusal issue.

Seemingly ignoring Shah's specific legal objection to Judge Selna's denial, again in a footnote and not addressing the merits, the district court simply stated:

"Dr. Shah requests, in his Reply, reconsideration of the recusal motion Judge Selna denied. (Reply at 7.) This request is DENIED because it was not raised in a properly noticed motion, ***see Fed. R. Civ. P 60,*** nor was it made within '14 days after entry of the Order' denying recusal, see C.D. Cal. L.R. 7-18." Emphasis added.

But Shah never asked the court for "reconsideration." Therefore, L.R. 7-18 was plainly inapplicable. Shah objected to Judge Selna's *incomplete* review and denial of the recusal *on the wrong legal standard* and reliance on law that simply did not exist. But even if, *arguendo*, Shah had specifically requested "reconsideration", his request, contrary to the district court's plain error, would *still* be timely *and proper.*

The express letter of the very rule invoked by the district court – Rule 60 – to again seemingly reactively rule against him, actually militates *for* Shah. Rule 60 expressly provides: "(c) Timing and Effect of the Motion. (1) *Timing.* A motion under Rule 60(b) must be made ***within a reasonable time*** – and for reasons (1), (2), and (3) ***no more than a year after*** the entry of the judgment or order or the date of the proceeding." Emphasis added. Therefore, Shah was explicitly *not* limited to 14 days at all; nor did he require a notice to bring his "motion." The district court's denial for the expressed reasons was therefore plainly erroneous and facially biased. The district court's denial also bolsters the very reason why Shah requested the court's recusal in the first place.

Moreover, Shah was not required to give notice because 60(a) specifically provides: "The court may correct a clerical mistake ***or a mistake arising from oversight or omission*** whenever one is found in a judgment, order, or other part of the record. The court may do so ***on motion*** or on its own, ***with or without notice***." Emphasis added. Rule 60(b) also allows relief for "(6) ***any other reason*** that justifies relief." Emphasis added.

For purposes of Shah's request for a certificate of appealability, based upon the lenient standard in *Buck* and *Miller-El*, jurists of reason can indeed differ and ask why the very court challenged on a recusal motion was now plainly misapplying Rule 60(b) to again unnecessarily rule against Shah.

2. The Issue Raising Racial testimony – IRS RA Raghaven's Testimony.

Denying this core issue, the district court never stopped to meaningfully address Shah's citation to the comments during oral argument by a member of this Court's argument panel relative to the *presumed* inadmissibility of the racially charged opinion testimony. Indeed, the district court failed to even mention the various evidentiary and procedural bases noted by this Court's Circuit judge, now *within the new context of ineffective assistance of counsel* (IAC). The district court simply concluded: "Because RA Raghaven's testimony was not prohibited racist predisposition testimony, Dr. Shah's trial counsel was not unreasonable, much less

grossly incompetent, for failing to object." Exhibit A, page 3.

The district court's Order also never addressed whether, absent the context of the plain error analysis by this Court on direct appeal, the testimony would be prejudicial in the context of IAC and the readily-available identified motions to exclude. The court's Order also left out of its consideration the critical part of Raghaven's testimony – that corruption was part of the culture in India for the predisposition analysis. It was that core part that injected, by the Government not Shah's trial counsel, the ethnic overtones relative to predisposition that the court's Order failed to analyze beyond quoting this Court's distinguishing, *for plain error analysis*, *Buck v. Davis.* But this Court never considered, beyond calling it out, trial counsel multiple failures to object to the presumptively inadmissible testimony, as one of the oral argument Judges of this Court articulated.

Based squarely upon the *relatively low standard* for issuing a COA as noted in *Buck* and *Miller-El*, if a member of this Court at oral argument can differ about whether the Raghaven testimony "could have been" and should have been excluded on a variety of grounds, so can jurists of reason differ about whether this testimony is indeed like that in *Buck v. Davis within the different context of IAC* and the prejudicial effect it can have when so casually admitted at trial. This prejudice is especially more likely when the Government emphasizes at trial such testimony *at opening and at closing*, as the Government indisputably did here. And as the

district court plainly and mistakenly opined that it was Shah's counsel who had "introduced" the testimony. The record is clear on which party actually first introduced the testimony; it was the Government on opening *and later in its closing.*

Especially missing from the district court's Order, and of further concern to the projection of the court's apparent lack of neutrality, is any mention or analysis at all of the new *undisputed* facts presented by Shah in his Reply at pages 2-5. The critical new facts exposing the Government's surprising misrepresentations to this Court's oral argument panel – that the Government supposedly had *never* even addressed Raghaven's testimony at closing argument. This serious misrepresentation was expressly made in a context and an effort to diffuse the prejudice issue central to the appellate court's plain error analysis. The district court's odd failure to even articulate in passing these new facts leads directly into the next issue – the Government's pattern of misleading statements at trial and at oral argument to this Court.

3. Government's Unending, Misleading Statements at Trial.

The district court's superficial analysis of this issue begins with "The Ninth Circuit rejected this exact argument ruling that `[n]one of the challenged statements rises to the level of being ***materially*** false or misleading.'" And then, the district court quotes the second part of this Court's reasoning for its ruling "And

in any case, Dr. Shah has failed to show ***that he was prejudiced*** by any of them." Exhibit A, page 4, emphasis added.

But in denying this additional issue, the district court failed to even articulate the obvious – that this Court on direct appeal had not ruled on the prejudicial effect of trial counsel's multiple failures to object *under an IAC analysis. The IAC issue was simply not before this Court on direct review.* Therefore, the IAC analysis and prejudicial effect under such different standard were *not* claims raised on direct appeal by Shah nor had they "been given a full and fair opportunity to litigate it on direct appeal. . . ." *See*, *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000), cited by the Government in their Opposition, wholly accepted by the district court.

Related to the prejudice issue under IAC and the misleading statements/failure by trial counsel to object, the district court failed to address at all the Government's inaccurate, twisted *Strickland* standard. Shah analyzed this central procedural issue at pages 16-18 of his Reply. [Exhibit D] There, Shah noted the Government's misrepresenting and twisting out of recognition the *Strickland* standard when it claimed, "It is 'not enough' to show that counsel's errors had some conceivable effect on the outcome; rather counsel's errors 'must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' Id. (quoting Strickland, 466 U.S. at 687). Only when the likelihood of a different outcome is 'substantial, not just conceivable,' has the defendant met Strickland's

demanding standards. Gulbrandson, 738 F.3d at 988 (citations omitted)."

The district court also did not mention the specific additional misrepresentations by the Government included in its Opposition to Shah's 2255. At pages 15-19 of Shah's Reply, he notes several new misrepresentations. One such example can be found at page 15 of Shah's Reply. There, Shah notes one of the Government's new explicit misrepresentations: "Further, the observations of trial counsel and [district court] belie the objectionable nature of [Raghaven's] testimony. ***Five of defendant's lawyers in two trials did not find the testimony objectionable***." This additional misrepresentation was untrue as well and created a credibility issue and materially disputed fact that the district court had to resolve. *See*, Exhibit D at 15-16. But the court never resolved this disputed issue.

The district court also left unresolved factual disputes injected by the Government's Opposition to Shah's 2255. These factual disputes required further action by the district court instead of the denial without a hearing. One such example of this can be found at pages 18-19 of Shah's Reply where he noted of the Government's Opposition, *inter alia*:

> Defendant asserts [to this Court] that trial counsel was ineffective for failing to object to RA Raghaven's testimony. (Mot. at 9.) To support his claim, defendant ***grossly misstates*** RA Raghaven's testimony, wholly ignores the rulings and observations of this Court and the Ninth Circuit, and fails to acknowledge other

> compelling predisposition evidence and the lack of inducement.
>
> Government's Opposition, page 15, emphasis added. The Government adds this separate claim:
>
> Defendant's reliance on a Justice's [sic] statement [member of this Court's] at oral argument, faced with defendant's mischaracterizations and a limited, cold record, that an objection could possibly have been sustained to RA Raghaven's testimony is misplaced. (Mot. at 4.) Despite the comment, the Ninth Circuit affirmed the conviction.

The Government's inaccurate claims – that Shah somehow "grossly misstates" and made "mischaracterizations" of the Raghaven testimony – is a critical issue that relates to the very pattern of mischaracterizations by the Government; one of the very issues in Shah's 2255 left unresolved by the district court.

And just as with the other representations by the Government, all the district court needed to do was to note that Shah had actually provided the transcript of Raghaven's testimony and related trial process. And all the district court needed to do on this issue was to consider the other readily-available fact dispositive nature of the Government's inaccurate claims regarding this Court's "Justice's" comments at oral argument – the link to the very audio transcript of that oral argument that Shah provided to the district court. How Shah in plain sight, as it were, could have mysteriously "grossly misstate[]" the actual transcript and audio of

the hearing, were disputes never discernibly considered nor resolved by the district court.

4. Sentencing.

The district court's Order regarding sentencing entrapment creates obvious circular reasoning when the court, begging the question and ignoring binding precedent, states:

> Dr. Shah argues that the Court failed to consider a downward departure ***based on sentencing entrapment***. (Mot. at 23.) This is false. The Court made an express finding that there was no sentencing entrapment ***based on the jury's conclusion that Dr. Shah was not entrapped***. (MTS Order at 4.) The Ninth Circuit agreed, stating that "the district court did not ignore Dr. Shah's sentencing entrapment argument, nor did it abuse its discretion at sentencing. The district court denied a downward departure based on sentencing entrapment after it concluded there was sufficient evidence to find Dr. Shah ***was not induced to commit bribery***." Shah, 768 F. App'x at 642.

Emphasis added. But the court inappropriately conflated *the defense* of entrapment, rejected by the jury here, with the separate legal issue of consideration by the court of an imperfect defense *for mitigation*. Here, there was no dispute that the IRS Agents deliberately increased Shah's tax liability to get him desperate enough to offer a bribe, thereby increasing the punishment or

Guideline exposure. The district court knew from the trial testimony that a duo of IRS agents were planning how best to get Shah to offer a bribe.

The sentencing entrapment was not dispelled simply by referring to the jury's rejection of the entrapment defense. This is so because, even if Shah had been "predisposed" before he had any contact with the Government, including Raghaven, and the agents engaged in increasing the "temptation" for Shah, such conduct has been fully recognized as *separately relevant* to sentencing as mitigation under USSG Section 5K2.12, 18 USC Section 3553(b), and *United States v. McLelland*, 72 F.3d 717, (9th Cir. 1995) where this Court specifically held of imperfect entrapment:

> A district court could properly determine that a defendant who first proposed an illegal scheme, but who later expressed serious reservations and acted only after strong and repeated inducements by the government is less morally blameworthy and less likely to commit crimes in the future than a defendant who eagerly participated in an illegal scheme with no inducement other than the initial suggestion by a government agent. Thus, if a district court departs downward on the ground of imperfect entrapment in a case in which the defendant first approached the government, ***the departure may still be completely consistent with at least two important factors relevant to sentencing – protection of the public, and characteristics particular to the defendant's culpability***.

Id., emphasis added. *See also*, *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000) and *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994) recognizing that district courts have authority to separately consider a failed defense for purposes of mitigation. Yet, here, the district court's denial of the 2255 and, belatedly, of a COA, fully disregards this precedent and again projects the clear image of bias against Shah.

CONCLUSION

The standard for issuing a Certificate of Appealability is a very low one. *Miller-El, v. Cockrell*, 537 U.S. 322, 338 (2003). In this motion, Petitioner Shah submits that he has made a substantial showing that the issues he raised in his 2255 are definitely debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle, 453* U.S. 880, 893 fn. 4 (1983). Shah respectfully submits that he has also made a facial showing that the district court has acted in a manner that is plainly erroneous revealing at least the appearance and very basis for his motion for recusal in the first place. For these reasons, Shah respectfully requests this Court to issue a Certificate of Appealability.

Dated: July 9, 2021

Respectfully submitted,

/s/ *Ezekiel E. Cortez*
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[Certificate Of Service Omitted]

[Exhibits Omitted]