22A226

SUPREME COURT OF THE UNITED STATES

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Joseph Jordan,
movant,

v.

Case No. _____
(case no. 19-2987 2d Cir.)

United States,
respondent.

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The Honorable Sonia Sotomayor, Circuit Justice
For The Second Circuit Court of Appeals

Motion To Hold Petition In Abeyance, and For A COA or Summary Reversal

I. Introduction

A. Motion

By this motion, submitted contemporaneously with a corrected petition for a writ of certiorari, Mr. Jordan, serving 40 years in prison for non-violent witness tampering, requests: (1) that his petition be held in abeyance until a decision on this motion is rendered; and (2) that the Honorable Sonia Sotomayor, in her capacity as "Circuit Justice," issue a Certificate of Appealability (COA), or summarily reverse the lower court's denial of his application for a COA, regarding three ineffective assistance of counsel (IAC) claims that survived Section 2255(b) screening, but were subsequently denied without hearing, and one without findings.

Mr. Jordan respectfully asserts that the record, summarized herein, and set out in detail in his petition, clearly shows that the lower court's denial of a COA - with respect to three IAC claims - is so far outside of the accepted course of judicial proceedings that either summary reversal should be ordered, or a COA now granted.*

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* References to the record shall be:

"Dkt." = docket entries in lower court; "Exh." = document attached hereto; "Opn." = district court's opinion denying Section 2255 relief; "Pet." = petition for a writ of certiorari; and "S.A." = special appendix to petition.

B. Jurisdiction

The Circuit Justice has jurisdiction to either grant a COA, or issue a summary reversal of the denial of a COA. This is because this motion is presented contemporaneously with the corrected, and timely-filed, petition for a writ of certiorari (Exh. A [extensions of time]). And 28 U.S.C. sec. 2253(c)(1) expressly authorizes a "circuit justice" to issue a COA. Alternatively, given that the result would be the same, a circuit justice can issue a summary reversal of the lower court's denial of a COA. This is because the Supreme Court has the power to review such denials, Hohn v. United States, 524 U.S. 236, 238-39 (1998), and can summarily reverse them under S. Ct. Rules 10(a) and 16.1. And when it comes to such decisions, the only issue is whether or not the district court's resolution of the particular habeas claim is debatable, Slack v. McDaniel, 529 U.S. 473, 484 (2000), and it only takes one "jurist of reason" to decide that.

II. Background

A. Procedural History

Following convictions in the Southern District of New York (case no. 08-cr-0124) for non-violent witness tampering (under sec. 1512(b)), Mr. Jordan, proceeding pro se out of financial necessity, sought relief in a Section 2255 proceeding (case no. 18-cv-3372) by presenting claims of ineffective assistance of trial counsel (Dkt. 1).*

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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.

While Mr. Jordan's motion to vacate survived section 2255(b) screening, and the government was ordered to respond to it in its entirety (Dkt. 5), it was subsequently denied (without hearing) in an opinion that addressed some, but not all, of the claims (Dkt. 16). Subsequently, his application for a COA from the Second Circuit (case no. 19-2987), regarding several IAC claims (Dkt. 18), was summarily denied (Dkt. 40).

B. Record Facts

After learning that a woman he cared about (we'll call her "ST") had been sexually assaulted by her uncle while staying with her aunt ("Phillip"), and after being threatened by Phillip (a foreign ambassador) when he called (to the embassy in London) to check on ST's welfare, Mr. Jordan divulged the sexual misconduct to others who could protect her, which jeopardized Phillip's ambassadorship, and he responded to an email from ST by promising to "rescue" her "unless he heard that she was safe" (Pet. 6 [with citations to the trial record]).* Based on that response, and at Phillip's request, he was arrested by the FBI, and charged with threatening to "kidnap" ST and assault Phillip (Pet 6-7).**

Owing to inaccurate grand jury testimony by an FBI agent, Mr. Jordan was also charged with a telephone threat to harm ST, which she ultimately (at trial) testified did not occur (Pet. 7 [citing Tr. 400]). But before trial, he believed (erroneously) that she had made the false accusation to protect her aunt's political career, and so he engaged in a letter writing campaign (from jail), making one request: "[T]ell the truth about the alleged threat [because you know it didn't happen]" (Pet. 7). His letters to her were intercepted by the FBI, and he was charged with attempted witness tampering (Pet. 7).

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* ST's reply to Mr. Jordan's email response was obtained by subpoena from Yahoo!, but, inexplicably, not used at trial. It read: "I love you [and] want to be with you forever" (Pet. 6-7 [the evidence]).

** After the disclosure (of the sexual misconduct by ST's uncle) that jeopardized Phillip's career (Tr. 292 [R.A. 225]), back in America, Phillip's sister (Dodson), and other niece (Adams), made complaints (about threatening calls from Mr. Jordan) to, respectively, the NYPD (Tr. 164, 168 [R.A. 213-14]), and FBI (Tr. 74 [R.A. 205]), even though neither woman had heard from him in over a month (Tr. 68-69, 176-81 [R.A. 203, 216-18]). See also Pet. 6-7 (the evidence).

Mr. Jordan also sought (from jail) to bring out the facts that would help him explain why he wrote the email - promising to "rescue" ST - that got him arrested. He was concerned that the women - Phillip and ST - would not admit what they had said to him beforehand. And so he engaged in some necessary deception: He drafted a press release (about the case) that reported, among other things, that (1) he had a recording of Phillip threatening him (over the phone), and (2) that ST had told others (not just him) about her uncle's misbehavior, and those others could testify to that at trial (Pet. 8).

The press release - sent only to government officials - successfully prompted authorities to confront each of the women with the allegations that it reported, specifically, that Mr. Jordan had a recording of Phillip, and that ST had complained about her uncle to others, and knowing that those allegations were true, the women could not deny them: ST admitted at trial that she had spoken about sexual abuse by her uncle (Pet. 8 [citing Tr. 406]), and Phillip admitted, begrudgingly, that she had threatened Mr. Jordan when he had called to her home to check on ST's welfare (Pet. 8 [citing Tr. 315-18]). In other words, the "truth-seeking" scheme worked!

Nevertheless, Mr. Jordan is serving 40 years in prison for attempting "to influence" two witnesses - because his defense lawyer didn't tell him about the so-called "truth-seeking" affirmative defense before his right to testify (at trial) was waived, and didn't argue or otherwise advance it, or any other real defense to the witness tampering charges (under sec. 1512(b)) to the jury. And when the the prosecution argued (in summation) that the conduct constituted "harass[ment]" (which is proscribed under sec. 1512(d), not 1512(b)), defense counsel neither objected, nor requested a lesser-included offense instruction - that would have prevented a sentence over 6 years!

III. The Issue

The sole issue (here) is whether a COA should be, or should have been, granted regarding three IAC claims that survived Section 2255(b) screening, but were subsequently denied without a hearing. The claims - to

be discussed in Section IV, infra - regarded ineffective assistance of trial counsel with respect to charges of witness tampering (under sec. 1512(b)), the affirmative defense (under sec. 1512(e)), and the lesser-included offense (under sec. 1512(d)). See statutes (S.A. 57-59).

This Court has said that a COA should be granted when jurists could legitimately debate whether a habeas claim was improperly or prematurely denied. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Here, Mr. Jordan submits that a "general assessment" - in accordance with the procedure set out by this Court in Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) - of the three IAC claims rejected by the District Court, and subject of this motion, will show that a COA should be, and should have been, granted.

Each of the three IAC claims involves trial counsel's performance with respect to charges of non-violent witness tampering (under sec. 1512(b)). By its "intimidation" and "misleading conduct" clauses, the federal witness tampering statute allows conviction to be based on conduct that would not otherwise be unlawful, when it is intended "to influence" a potential witness in any way. As written, it does not require the government to prove wrongful intent. Higgins v. Holder, 677 F.3d 97, 106 (2d Cir. 2012).

This means that an accused who used false or embarrassing - but not per se unlawful - speech in an effort to bring out the truth from a potential witness, can be punished for it (under sec. 1512(b)) unless he (or she) invokes, and proves, the affirmative defense (under sec. 1512(e)) of "truth-seeking." In other words, one whose purpose was proper has no choice but to try to convince the jury of that. And if convinced, either by the testimony of the defendant, or the closing argument of defense counsel, the jury must acquit - because proof of "truth-seeking" trumps (or nullifies) sufficient proof of witness tampering. United States v. Johnson, 968 F.2d 208, 213 (2d Cir. 1992).

None of the "written communications" alleged to constitute witness tampering (under sec. 1512(b)) contained an improper request or demand, or content that could invoke fear of bodily harm, or mislead a witness to testify inaccurately (Pet. 7-9 [detailing evidence]). In summation, the prosecutor argued (1)

that "misleading conduct" was demonstrated by Mr. Jordan's attempt to improve ST's opinion of him before she testified at his trial; and (2) that attempted "intimidation" was demonstrated by the pre-trial press release - touting his defense - because it contained content that could, and did, embarrass Phillip (Pet. 7-9 citing Tr. 852, 858-59]). (Even assuming that these theories were proper, they still were not inconsistent with theories of "truth-seeking.")

The prosecutor also implored the jury to convict (under sec. 1512(b)) because the "written communications" were intended to "harass" ST (count 4), and "caused problems" for Phillip (count 5) (Pet. 33 [citing Tr. 852-53]). (These were proper theories under sec. 1512(d), but not under sec. 1512(b)).

With respect to the witness tampering charges (based on the "written communications" that were never received by ST, and not sent to Phillip), no defense was presented (S.A. 52-54 [motion to vacate listing errors of counsel]). Trial counsel did not respond (or object) to any of the prosecution's arguments (or theories of guilt), and did not tell Mr. Jordan about the affirmative defense of "truth-seeking" (under sec. 1512(e)) so that he could testify in support of it (Pet. 9-17 [IAC claim A]).

While trial counsel did invoke the affirmative defense (at sidebar), telling the judge (correctly) that record evidence supported it, that evidence (buried in the "written communications") was not identified for the jury, and neither that defense, nor any other real defense to the witness tampering charges, was argued in summation (Pet. 18-32 [IAC claim B]). And when the prosecutor erroneously told the jury that it could convict (under sec. 1512(b)) based on conduct intended to "harass," trial counsel neither objected to that improper theory, nor requested (as a fallback) a lesser-included offense instruction (under sec. 1512(d)) on "witness harassment" - which has a maximum sentence that is 34 years shorter than that of the statute (sec. 1512(b)) under which Mr. Jordan was charged. (Pet. 33-41 [IAC claim C]).

While Mr. Jordan's post-trial motion for relief - from wrongful convictions - survived Section 2255(b) screening, and the government was ordered to respond to it in its entirety, it was subsequently denied

(by the District Court) without hearing or other record expansion - even though most of the IAC claims (supported by an affidavit) relied on facts outside of the record. See Part IIA, supra (procedural history).

As discussed in more detail in Mr. Jordan's petition (before this Court), but not necessarily relevant to this motion, the District Court's written opinion (S.A. 04-25) addressed some, but not all, of the IAC claims put forth in the motion to vacate, addressed one "claim" that wasn't even made (and had nothing to do with the case), and revealed that certain other claims and record facts were misapprehended, or just misstated. And, as your Honor will now discover from the discussion (of three of those IAC claims) that follows, the propriety of the District Court's decision denying Section 2255 relief, and of its decisional process (or lack thereof), is clearly at least debatable, and thus a COA should have been, and should (now) be, issued.

IV. The IAC Claims

A. A COA Should Be Issued Regarding The Claim That Trial Counsel's Failure To Inform Mr. Jordan of The Affirmative Defense Before His Right To Testify Was Waived, Invalidates The Waiver, and Deprived Him of The Opportunity To Prove That Defense Through His Testimony

Mr. Jordan's sworn assertions that he was not informed of the affirmative defense (available under sec. 1512(e)), and had he been he would have taken the stand to testify in support of it (Aff. 5-6 [S.A. 36-37]), were neither refuted by the record, nor disputed by the government (Pet. 9-17 [IAC claim A]). And so, for the purposes of a Section 2255(b) review, they must be accepted as true. Machibroda v. United States, 368 U.S. 487, 493-94 (1962). And trial counsel told the judge (at sidebar) that the affirmative defense was supported by record evidence, and thus was viable (Tr. 837 [R.A. 291]). As such, the performance prong of the Strickland standard was satisfied because "failure ... to inform a client of the relevant law clearly satisfies the first prong of the Strickland standard." Hill v. Lockhart, 474 U.S. 52, 62 (1985) (White, J., concurring). See also, Strickland v. Washington, 466 U.S. 668, 688 (1984) (counsel is obligated to inform the defendant of facts relevant to his defense), and Powell v. Alabama, 287 U.S. 45, 69 (1932) (absent the aid of counsel, an innocent person can be convicted).

Thus, the only issues (with respect to this claim) were: (1) whether Mr. Jordan's waiver of his right to testify (made without knowledge of the affirmative defense that his testimony would have supported) was valid; and (2) whether his testimony, had it been given, would likely have proved the affirmative defense. (In its decision, the District Court neither made findings on these issues, nor mentioned this particular IAC claim.)

1. The Waiver of The Right To Testify (Pet. 14-15)

To be valid, "waivers of constitutional rights must be knowing intelligent acts done with sufficient awareness of the relevant circumstances, and likely consequences." Brady v. United States, 397 U.S 742, 748 (1970). If Mr. Jordan's waiver of his right to testify was made without knowledge of the affirmative defense that his testimony could have supported (or proved), then that waiver was not intelligently made, and thus is not valid. Id. See also Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) ("[A] waiver must be made with ... knowledge of possible defenses to the charges").

Such care - with respect to waivers - is particularly necessary when it comes to the Fifth Amendment - because the right to testify in one's own defense is the most important right. Rock v. Arkansas, 483 U.S. 44, 52 (1987). And constitutional safeguards are to be jealously preserved when (as here) the "scales of justice are poised between innocence (truth-seeking) and guilt (witness tampering)." Glasser v. United States, 315 U.S. 60, 67 (1942). But here, while this immensely important issue was raised below, it was not addressed by the District Court (Pet. 14-15).

2. The Testimony - of "Truth-Seeking" - That Could Have Been Given (Pet. 15-17)

Even assuming that the unintelligently-made waiver (of the right to testify) is valid, still, denial of this IAC claim (without expansion of the record) was error, because it could not properly be based on the weight of the government's evidence (even assuming it was sufficient) because proof of the affirmative defense (under sec. 1512(e)), i.e., proof that convinces the jury that the purpose of the conduct was proper, trumps (or nullifies) even sufficient evidence of witness tampering (under sec. 1512(b)). United States v. Johnson, 968 F.2d 208, 213 (2d Cir. 1992). Thus, Mr. Jordan's testimony (S.A. 38-45 [see Exh. B

to this motion]), had it been given, could have, without more, changed the outcome of trial with respect to the witness tampering charges.

And, of course, when a Section 2255 movant's allegations - if accepted as true - would entitle him or her to relief, denial of the motion without hearing is error. Machibroda v. United States, 368 U.S. 487, 493-94 (1962). As such, A hearing should have been held below to determine, among other things, whether or not (1) the omission of trial counsel (complained about) kept Mr. Jordan off the stand, and (2) his testimony, had it been given, would have probably changed the outcome of trial. Strickland v. Washington, 466 U.S. 668, 694 (1984). But no hearing was held regarding this claim, and no assessment of the testimony (that he would have given) was conducted.*

And while the District Court did address (in its opinion) a separate IAC claim alleging inadequate preparation (in general) for Mr. Jordan's testimony, it did not address this specific other claim (that he was not made aware of the affirmative defense). Indeed, it did not even mention it (Pet. 15-17). To be sure, given these significant procedural shortcomings, reasonable jurists could debate the propriety of the decision denying this IAC claim, and the absence of a hearing on it, and thus, in light of Slack, a COA should have been, and should (now) be, issued.**

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* That convictions returned on the threat charges (counts 1-3) does not refute theories of "truth-seeking" because: (1) the threat counts were each duplicitous, alleging different threats to different persons, and the jury only had to find that any one threat was made and true to convict (Tr. 898 [R.A. 300]); (2) the "truth-seeking" conduct focused only on the sole alleged telephone threat to ST, that she testified did not occur (Tr. 400 [R.A. 237]), and on the email threat to "rescue" her (both charged in count 1 with other allegations regarding other persons); and (3) even the results of successful truth-seeking, when it only regarded certain matters, do not necessarily provide a complete defense (Pet. 26-27 [counts 1-3]).

** Misled by government misstatements of the evidence, the District Court, in its opinion, erroneously stated that the sole alleged telephone threat to ST was proven at trial (Opn. 8 [S.A. 5]). In fact, as the record shows, ST testified (at trial) that no such threat was made (Tr. 400 [R.A. 237]). See also Exh. D (misapprehended evidence). This factual error is hugely significant because the only request made to ST in any of the intercepted pre-trial letters alleged to constitute witness tampering (count 4) was for her to "tell the truth" about that sole allegation charged in count one (Pet. 29-31). In other words, that record evidence is proof of "truth-seeking."

B. A COA Should Issue Regarding The Claim That Trial Counsel's Failure To Argue In Support of The Affirmative Defense After Invoking It At Sidebar, and Telling The Judge That Record Evidence Supported It, Deprived Mr. Jordan of A Different Outcome of Trial.

Given that the federal witness tampering statute (sec. 1512(b)), as written, can reach (and punish) deceptive or intimidating conduct even when it is intended to bring out the truth or prevent lying (Pet. 15-16), Congress provided an affirmative defense (now under sec. 1512(e)) that trumps (or nullifies) even sufficient evidence of guilt if the accused, after invoking it, proves that the intent behind the conduct alleged to constitute witness tampering was proper, i.e., that the offensive, but otherwise lawful, conduct (in this case: speech) was engaged in for the purpose of preventing false or inducing truthful testimony: "truth-seeking." Id.

Here, while the instruction on the affirmative defense (of "truth-seeking") was requested (at sidebar), and the judge was told (correctly) that record evidence supported it (Tr. 837 [R.A. 291]), trial counsel neither identified that evidence for the jury, nor argued in support of that defense during summation (Tr. 878-79 [R.A. 298]). Notwithstanding the fact that there were strong arguments to make, as Mr. Jordan (in his Section 2255 submissions) outlined for the District Court (S.A. 26-33 [see also Exh. C]).

That trial counsel's omissions were somehow trial strategy, or presumptively sound, as the District Court suggested (in its opinion), but did not actually find (Opn. 14-15 [S.A. 17-18]), has no record support. Indeed, the record refutes such: (1) no other real defense to the witness tampering charges was argued or advanced; (2) after making no arguments in support of it, trial counsel did not withdraw the request for the instruction on the affirmative defense; and (3) that defense, as the jury was instructed, placed a burden on Mr. Jordan to prove it (Pet. 19-22 [deficient performance]).

By requesting that the jury be instructed on the affirmative defense (Tr. 837 [R.A. 291]), trial counsel assumed an obligation to either support it with defense evidence, or, during closing argument, point to record evidence that supported it, and explain to them why it did. But neither was done. And the jury was instructed that Mr. Jordan (who had not testified) should be acquitted only if they were convinced

by him (or his counsel who didn't even mention the affirmative defense in closing) that the conduct intended "to influence" ST (count 4) and Phillip (count 5) was intended "to [properly] influence" them (Tr. 914 [R.A. 308]).

Obviously, the District Court overlooked (or disregarded) the fact that, by invoking the affirmative defense, that included all of the elements of the charged crime (conduct intended "to influence" a potential witness), making no effort to convince the jury that the intent was to bring out the truth, and then allowing them to be instructed that the burden was on the defense to prove that, trial counsel effectively conceded guilt (Pet. 19-22 [deficient performance]). And so, even without more, counsel's performance was deficient.

But there is more - because there was record evidence of "truth-seeking" buried within the "written communications" alleged to constitute witness tampering, and supported by other record evidence, that trial counsel - inexplicably (as this Court will now see) - didn't point out to jurors. While the District Court (in its opinion) remarked that "Jordan (in his Section 2255 submissions) [did] not explain how his attorney could have been more effective" (Opn. 15 [S.A. 18]), in fact, he did do so in his memorandum (Dkt. 11), in which he identified, with citations to the record, the evidence of "truth-seeking," and set out (specifically) what closing arguments could have been made regarding it. Id. at 55-58 (S.A. 26-33). See also Exh. C (unused arguments of "truth-seeking").

That Mr. Jordan's submission - detailing record exculpatory evidence - was overlooked by the District Court (deciding his motion to vacate) makes it less surprising, but no less erroneous, that this IAC claim was rejected. "[L]ess surprising" because, as Your Honor can (now) discover from that same submission (Exh. C), trial counsel's failure to make those (or similar) arguments was not just deficient performance, it deprived Mr. Jordan of acquittals.

Thus, given that closing arguments (alone) can make the difference between a guilty and not guilty

verdict, Herring v. New York, 422 U.S. 853, 858, 862 (1975), especially when (as here) the defense accepted a burden to prove, and given the record facts, jurists of reason could certainly debate the propriety of the District Court's decision denying this IAC claim, its unsupported presumption of unexplained trial strategy, and the absence of an assessment of the record evidence that supported the affirmative defense, and thus, in light of Slack, a COA should have been, and should (now) be, issued.

C. A COA Should Issue Regarding The Claim That Trial Counsel's Failure To Request A Lesser-Included Offense Instruction On Witness Harassment (Under Sec. 1512(d)) Deprived Mr. Jordan (Charged Under Sec. 1512(b)) of A Sentence At Least 34 Years Shorter

In summation, the prosecutor argued that the "written communications" - alleged to constitute witness intimidation (under sec. 1512(b)) - were intended to "harass" ST (count 4) and "cause problems" for Phillip (count 5) (Tr. 852-53 [R.A. 294]). Subsequently, trial counsel neither responded that "harassment" of a witness is not proscribed by the statute (sec. 1512(b)) under which Mr. Jordan was charged, see Indictment (GX 15 [R.A. 121-22]), nor requested (as a fallback) a lesser-included offense instruction on "witness harassment" (under sec. 1512(d)) - which could have reduced the potential sentence by at least 34 years. This resulted in an IAC claim, by Mr. Jordan, under Section 2255 (Pet. 33-41 [IAC claim C]).

On this IAC claim, the District Court ruled (1) that Section 1512(d) is not a lesser-included offense of Section 1512(b), and (2) that Mr. Jordan was not harmed by the absence of an LIO instruction because the jury was properly instructed on, and convicted him of, the charged offense (Opn. 15-19 [S.A. 18-22]). Seeking a COA, Mr. Jordan asserted, and (now) asserts, that (1) whether "witness harassment" is an LIO of "witness intimidation" is at least debatable (because other courts have said that it is); and (2) the finding of no harm - by the absence of an LIO instruction - disregards the Supreme Court's finding in Keeble.

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

The District Court observed (correctly) that Section 1512(d) requires "proof of intentional harassment" (Opn. 16 [S.A. 19]), but disregarded that an attempt to intimidate - as Mr. Jordan's jury was instructed

- requires an intention to do so (Tr. 912 [R.A. 307]). Thus, both offenses required proof of intent to distress a person. Indeed, even "misleading conduct" (e.g., a false statement) used to intimidate - as was alleged in this case (Tr. 852-53 [R.A. 294]) - requires proof of intent to distress a person (Pet. 35).

Section 1514 just so happens to define both witness "intimidation" and "witness harassment" (Exh. E [statutes]). Both proscribe conduct "that serves no legitimate purpose"; the former requires proof of intent to cause "fear"; the latter requires proof of intent to cause "substantial emotional distress." Id. Given that one could not cause "fear" without causing "substantial emotional distress," but one can cause "substantial emotional distress" (frustration, annoyance, or embarrassment) without causing "fear," it is clear that "witness harassment" is a lesser-included offense of "witness intimidation" (Pet. 34-35).

In deciding this IAC claim, the District Court acknowledged that its finding - that Section 1512(d) is not a lesser-included offense of Section 1512(b) - is contrary to findings of other federal courts (Pet. 36), including the Second Circuit. See United States v. Veliz, 800 F.3d 63, 71 (2d Cir. 2015), citing United States v. Chaggar, 197 Fed. Appx. 704, 707 (9th. Cir. 2006) (witness harassment is a lesser-included offense of witness intimidation). Given these other cases, it cannot be said that the issue - whether Section 1512(d) is a lesser-included offense of Section 1512(b) - is not debatable. See Lozado v. Deeds, 498 U.S. 430, 432 (2000) (A decision is debatable when it conflicts with the decision of another court).

2. Whether The Absence of An LIO Instruction Was Harmful Is At Least Debatable

The District Court opined that Mr. Jordan was not harmed - by the absence of an LIO instruction - because the jury was properly instructed on, and convicted him of, the charged offense (Opn. 18-19 [S.A. 212-22]). This reasoning, however, disregards this Court's observation in Keeble v. United States, 412 U.S. 205 (1973), that when deprived of an LIO instruction the jury is likely to convict for the charged offense even if one of its elements is in doubt. Id. at 21-13.

And this observation is spot on (here) where the "written communications" - alleged to constitute witness tampering (under sec. 1512(b)) - did not contain, and neither the government, nor the District Court have pointed to, an improper request or demand, or content that could invoke fear of bodily harm, or mislead a witness to testify inaccurately. See Part III, supra (government's theories). Indeed, that Mr. Jordan was prejudiced by the absence of an LIO instruction is apparent from the proceedings in another case - 7 years before his - in the very same district court.

In United States v. Kelly, 169 F. Supp. 2d 171 (SDNY 2001), the defendant was charged with the same offense, witness intimidation (under sec. 1512(b)), and the conduct was similar (but more provocative). The defense requested a lesser-included offense instruction on "witness harassment" (then under sec. 1512(c), now (d)). The instruction was given, and the jury returned a conviction on the lesser offense. Id. at 173.

Given the record facts (here), and the relevant law, including the Supreme Court's observation in Keeble, and given the District Court's acknowledgment that its decision on the LIO issue was contrary to decisions of other courts, reasonable jurists could certainly debate the propriety of the decision denying this IAC claim. And thus, in light of Slack, a COA should have been, and should (now) be issued.

IV. Conclusion

Mr. Jordan - serving 40 years in prison for non-violent witness tampering - prays that this Court, after review of the record facts recounted herein, and in his petition, will either grant a COA regarding the three IAC claims (subject of this motion, and denied in a Section 2255 proceeding below), or summarily reverse the lower court's denial of a COA.

Date: 7/20/2022

Respectfully submitted,

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