Opinions Below

and

Docketing Statement for 1:20-cv-21212-BB

For § 2255 Filings

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

Appx 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16048

D.C. Docket No. 1:15-cr-20820-BB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KHALED ELBEBLAWY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 7, 2018)

Before WILLIAM PRYOR and MARTIN, Circuit Judges and WOOD,* District Judge.

WILLIAM PRYOR, Circuit Judge:

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* Honorable Lisa Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

This appeal from the convictions and sentence of Khalid Elbeblawy for conspiracy to commit healthcare fraud and wire fraud, 18 U.S.C. § 1349, and conspiracy to defraud the United States and pay healthcare kickbacks, 18 U.S.C. § 371, calls to mind the familiar warning that anything you say to the government can and will be used against you. While he owned or managed three home health entities, Elbeblawy hired patient recruiters and bribed doctors and staffing groups to refer patients with Medicare coverage to his agencies; he falsified medical records; and he billed Medicare for tens of millions of dollars in unnecessary medical services. After he had cooperated with the investigation of these crimes for two years, Elbeblawy and his attorney signed a plea agreement and a statement about its factual basis. The agreement waived two evidentiary rules that would ordinarily bar the admission of statements made during plea discussions. But before Elbeblawy pleaded guilty in open court, he changed his mind and demanded a jury trial. At trial, the district court admitted the factual basis for the plea agreement as well as other evidence that the government obtained as a result of Elbeblawy's cooperation. The jury convicted Elbeblawy, and the district court sentenced him to 240 months of imprisonment and ordered him to forfeit approximately $36 million. We conclude that the district court did not err when it admitted the factual basis for the plea agreement because Elbeblawy knowingly and voluntarily signed a valid waiver. And we reject Elbeblawy's arguments that

the district court committed other errors at his trial when it calculated his Sentencing Guidelines range. But we vacate the forfeiture order and remand for entry of a new order because the district court impermissibly held Elbeblawy jointly and severally liable for the proceeds of the conspiracy. We affirm in part, vacate in part, and remand.

I. BACKGROUND

Khaled Elbeblawy owned or managed three home health agencies that provided in-home medical nursing and other services to homebound patients, and he used each to defraud Medicare of millions of dollars. Elbeblawy began defrauding Medicare when he was working as a billing agent at Willsand Home Health. He and Eulises Escalona, the owner of Willsand and a cooperating witness for the government, were "falsifying . . . medical records, []exaggerating the symptoms [of] . . . patients in order to get paid [by] Medicare," and billing for services that were never provided. Elbeblawy quickly saw the potential to bilk Medicare for still more money. He asked Escalona for a promotion to marketing director and offered to "go out there [in] the community and recruit doctors . . . [who would accept] kickbacks." He told Escalona that if they "pa[id] kickback[s]," and took "doctors to lunch or g[ave] them nice gift[s]," the doctors would refer patients to them. Escalona agreed, and they began to pay doctors between $400 and

$800 per referral. They insisted on paying the doctors only in "[c]ash because cash is the only way that nobody can trace if you pay somebody or not."

Elbeblawy also hired "[b]etween eight [and] ten" "patient recruiters" and purchased referrals from nurses and other home health entities or staffing groups that lacked the authority to bill Medicare. Because the groups required a "large amount of money," it was impractical to pay them in cash. Elbeblawy and Escalona consulted a lawyer who informed them that it was illegal to pay for patient referrals. Undeterred, Elbeblawy and Escalona disguised check payments to the groups by inflating the rate they paid for staffing services. And they described checks to the patient recruiters as payments for consulting and other services. Escalona testified that 90 percent of the patients of Willsand were referred because of a kickback of some kind.

Elbeblawy and Escalona also paid the doctors to approve unnecessary medical services. Elbeblawy would pick the most profitable services, falsify the medical records, and pay the doctors in cash-filled envelopes to sign the appropriate documents. Escalona testified that the majority of the patients of Willsand did not need the services billed to Medicare.

Although Elbeblawy began to hold himself out as the chief executive officer of Willsand, Escalona refused to make him a full partner and instead agreed to become equal partners with him in a new firm, JEM Home Health. Elbeblawy

managed the day-to-day operations of the new agency, which had "the same modus operand[i]" as Willsand and used many of the same sources for patient referrals. Around March 2009, Elbeblawy became the sole owner of JEM.

In November 2009, Medicare suspended payments to JEM in response to "reliable information that [JEM] billed Medicare and received payment for home health services provided to beneficiaries who are not, in fact, homebound and were not homebound during the time the services were rendered." Safeguard Services, a Medicare contractor responsible for investigating healthcare fraud, audited JEM. The audit revealed that almost 74 percent of claims submitted between July 2008 and July 2009, and almost 99 percent of claims submitted between August 2009 and February 2010, should never have been paid.

Elbeblawy then started yet another home health agency, this time in his ex-wife's name, and failed to disclose that he was affiliated with a suspended agency. From the beginning, Elbeblawy ran Healthy Choice Home Health. And in 2013, he bought the company from his ex-wife for ten dollars in accordance with a "stock purchase option agreement" they entered in 2010. All told, Medicare paid $29.1 million for claims from Willsand, $8.7 million for claims from JEM, and $2.5 million for claims from Healthy Choice.

Elbeblawy later decided to "cooperate with the [g]overnment and accept responsibility." For approximately two years, Elbeblawy helped investigators

obtain evidence against his former conspirators. For example, he provided the government with a handwritten list of the doctors, home health groups, and recruiters with whom he used to work. And he recorded more than 30 incriminating conversations about kickbacks with his former conspirators. He offered one physician "the same number [they] used to do." And he told another physician that he "remember[ed] what [he] used to do with [the physician] before," and he told the physician to "[l]et [him] know what [he] ha[d] in mind" for payment.

In June 2015, Elbeblawy and his attorney signed a plea agreement and, 14 days later, a written factual basis for the agreement. The agreement provided that, "[i]n the event of . . . a breach[,] . . . the [d]efendant waives any protection[] afforded by . . . Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence," both of which bar the admission of statements made during plea discussions. The agreement also stated that "the [g]overnment w[ould] be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding[,] any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea." Elbeblawy's attorney testified that he met with Elbeblawy at least twice to discuss the

agreement, that he "literally read" the agreement to him, and that he "walk[ed] [Elbeblawy] through each paragraph separately."

After he signed the agreement, Elbeblawy "changed [his] mind" and refused to plead guilty, so the government prosecuted him for conspiracy to commit healthcare fraud and wire fraud, 18 U.S.C. § 1349, and conspiracy to defraud the United States and pay healthcare kickbacks, 18 U.S.C. § 371. Before the trial, the district court denied Elbeblawy's motion to suppress the signed factual basis for the plea agreement on the ground that Elbeblawy did not knowingly and voluntarily waive the protections of Rule 410 and Rule 11. It held a two-day evidentiary hearing at which Elbeblawy, his attorney, and a government investigator testified. And it explained that Elbeblawy "has a college degree," that "[t]here were several meetings between [Elbeblawy] and [his] attorney," that Elbeblawy was "engaged" and "asked many questions" before he signed the agreement, and that "[h]is questions were answered." Based on this evidence, the district court found that Elbeblawy "made a free and deliberate choice to continue to cooperate" and that he "had full knowledge of [his] actions and [their] consequences."

At trial, the government introduced the factual basis for the plea agreement as well as the evidence Elbeblawy helped the government obtain. And it called Escalona and Kansky Delisma, one of the doctors who accepted kickbacks, to

testify. Elbeblawy testified in his own defense and declared that he was completely "framed" by the government.

At the end of the trial, the district court instructed the jury on both conspiracy counts. It instructed the jury that "[t]o . . . defraud the United States" under section 371 "means to cheat the [g]overnment out of . . . property or money or to interfere with any of its lawful [g]overnment functions by deceit, craft, or trickery." The wording of this instruction varied slightly from the wording in the indictment, which alleged that Elbeblawy conspired "to defraud the United States by impairing, impeding, obstructing, and defeating through deceitful and dishonest means, the lawful government functions of the United States Department of Health and Human Services." The jury found Elbeblawy guilty of each object on both conspiracy counts: conspiracy to commit healthcare fraud and wire fraud, and conspiracy to defraud the United States and pay healthcare kickbacks.

The district court denied Elbeblawy's motion for a new trial based on an alleged violation of his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). Elbeblawy argued that the government unconstitutionally failed to disclose an exculpatory interview report that revealed that Delisma originally denied working with Elbeblawy. The district court reviewed the evidence at trial, which included testimony by Delisma admitting that he knew Elbeblawy as well as a video of Elbeblawy giving him a kickback. And it concluded that the interview

report did not create a "reasonable probability that the outcome of th[e] trial would have been different" had the report been disclosed.

The district court imposed a forfeiture order of $36,400,957. *See* 18 U.S.C. § 982(a)(7). Because Escalona testified that about 90 percent of the patients of Willsand and JEM were referred because of kickbacks, the district court reduced the total amount Medicare paid to the three clinics—$40,445,507—by 10 percent. This number represented "the total amount of the gross proceeds traceable to the commission of the conspiracy, not the amount that was received directly by . . . Elbeblawy." The district court also ruled that "Elbeblawy's convicted co-conspirators [were] jointly and severally liable for th[e] forfeiture money judgment up to the amount of their respective forfeiture money judgments."

At the sentencing hearing, the district court ruled that the 2015 Sentencing Guidelines applied, that Elbeblawy used "sophisticated means" to commit his crimes, and that the loss amount from the conspiracy exceeded $25 million. Elbeblawy argued that an earlier, less-stringent version of the Guidelines applied because his criminal conduct occurred before November 2011. But the district court ruled that the 2015 Guidelines applied because the "continuing criminal conduct . . . began in 2006 and ended in 2013." It also applied a sophisticated-means role enhancement because the conspiracy "was a sophisticated and very extensive and elaborate operation." The district court explained that Elbeblawy

"recruited . . . patient recruiters" and "directly paid the doctors . . . [and] made arrangements for those meetings and those payments." And it stated that Elbeblawy "was involved in the fraudulent contracts that were executed." For the loss amount, the district court used the same $36 million figure it had used for the forfeiture order. It then sentenced Elbeblawy to 240 months of imprisonment.

II. STANDARDS OF REVIEW

Several standards govern this appeal. "In reviewing the district court's suppression rulings, 'we review factual findings for clear error and the court's application of law to those facts *de novo*.'" *United States v. Mathurin*, 868 F.3d 921, 927 (11th Cir. 2017) (quoting *United States v. Goddard*, 312 F.3d 1360, 1362 (11th Cir. 2002)). "We review *de novo* alleged *Brady* . . . violations," and we review "the district court's denial of a motion for [a] new trial for an abuse of discretion." *United States v. Stein*, 846 F.3d 1135, 1145 (11th Cir. 2017). We review a forfeited constructive-amendment argument for plain error. *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013). "We review *de novo* the interpretation of the Guidelines by the district court and the application of the Guidelines to the facts." *United States v. Shabazz*, 887 F.3d 1204, 1222 (11th Cir. 2018). But "[w]e review for clear error the factual findings of the district court, including its . . . loss-amount determinations." *Id.* And "[w]e review *de novo* the district court's legal conclusions regarding forfeiture and the court's findings of

fact for clear error." *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1340 (11th Cir. 2009) (quoting *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003)).

III. DISCUSSION

We divide our discussion in five parts. First, we explain that the district court did not err when it admitted the signed factual basis for Elbeblawy's plea agreement. Second, we explain that the government did not violate Elbeblawy's right to due process under *Brady*. Third, we explain that the district court did not constructively amend the indictment when it instructed the jury. Fourth, we explain that the district court did not clearly err when it calculated Elbeblawy's Sentencing Guidelines range. Fifth, we explain that the district court erred when it imposed a forfeiture order that held Elbeblawy jointly and severally liable for the proceeds of the conspiracy.

A. The District Court Did Not Err when It Admitted the Factual Basis for Elbeblawy's Plea Agreement.

Federal Rule of Evidence 410(a), which is incorporated into Federal Rule of Criminal Procedure 11(f), provides that "a statement made during plea discussions" may not be admitted "[i]n a civil or criminal case . . . against the defendant who made the plea or participated in the plea discussions" if "the discussions did not result in a guilty plea." Fed. R. Evid. 410(a); *see also* Fed. R. Crim. P. 11(f) ("The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."). But "an

agreement to waive" the protections in these rules is "valid and enforceable," the Supreme Court has held, "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

Elbeblawy argues that, although he and his attorney signed a plea agreement that waived the plea-statement rules, the waiver is unenforceable. The relevant provision of that agreement waived the protections of Rule 410 and Rule 11 in broad terms:

> Defendant agrees that if he fails to comply with any of the provisions of this [a]greement, including the failure to tender such [a]greement to the [district] [c]ourt, . . . or attempts to withdraw the plea (prior to or after pleading guilty to the charges identified [in the agreement]), the [g]overnment will have the right to characterize such conduct as a breach of th[e] [a]greement. In the event of such a breach[,] . . . the [d]efendant waives any protections afforded by Section 1B1.8(a) of the Sentencing Guidelines, Rule 11 of the Federal Rules of Criminal Procedure[,] and Rule 410 of the Federal Rules of Evidence, and the [g]overnment will be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to this [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea.

Elbeblawy argues that the waiver is ambiguous and should be construed against the government and, in the alternative, that he did not knowingly and voluntarily sign the plea agreement and that his attorney could not waive the plea-statement rules on his behalf. We disagree.

1. The Waiver Is Unambiguous.

We construe plea agreements "in a manner that is sometimes likened to contractual interpretation." *United States v. Harris*, 376 F.3d 1282, 1287 (11th Cir. 2004) (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)); *see also United States v. Hunter*, 835 F.3d 1320, 1326 (11th Cir. 2016). "This analogy, however, should not be taken too far." *Jefferies*, 908 F.2d at 1523. We have explained that "a plea agreement must be construed in light of the fact that it constitutes a waiver of 'substantial constitutional rights' requiring that the defendant be adequately warned of the consequences of the plea." *United States v. Copeland*, 381 F.3d 1101, 1106 (11th Cir. 2004) (quoting *Jefferies*, 908 F.2d at 1523). So "[w]hen a plea agreement is ambiguous, it 'must be read against the government.'" *Id.* at 1105–06 (quoting *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990)).

Elbeblawy argues that the waiver provision in his plea agreement was ambiguous and must be construed against the government, but the agreement clearly stated that Elbeblawy "waive[d] any protections afforded by . . . Rule 11 . . . and Rule 410." And to avoid any confusion, it elaborated that "the [g]overnment will be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or

otherwise using the attached Agreed Factual Basis." We discern no ambiguity in this text.

Elbeblawy objects that the waiver provision is ambiguous because it defined "breach" to include "attempts to withdraw the plea (prior to or after pleading guilty . . .)" even though "[a] guilty plea that has not yet been entered cannot be withdrawn." Put differently, he contends that the use of the word "withdraw" renders the agreement "ambiguous" about whether a defendant who "attempts to withdraw" "prior to" pleading guilty has breached the agreement. We disagree.

That the term withdraw might have a different meaning in other contexts does not render its meaning in this context any less clear. The text of the agreement makes clear that to withdraw, in this context, includes a decision not to plead guilty at all. Elbeblawy's waiver is unambiguous.

We also reject Elbeblawy's argument that the waiver is ambiguous because it refers to the "attached Agreed Factual Basis" even though the factual basis was not attached when the agreement was signed. The factual basis was identified in the plea agreement and was later signed by both Elbeblawy and his attorney. And the agreement did not condition its enforcement on whether the signed statement was yet attached. Elbeblawy's attorney also testified that when he and Elbeblawy signed the agreement, they "had a . . . [f]actual [b]asis," although he could not

recall "if it was specifically stapled to [the agreement]." Nothing suggests that Elbeblawy was confused about the contents of the factual basis.

2. The District Court Did Not Clearly Err when It Found that Elbeblawy Knowingly and Voluntarily Waived the Plea-Statement Rules.

The Supreme Court has held that a waiver of the plea-statement rules is "valid and enforceable" "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." *Mezzanatto*, 513 U.S. at 210. And this Court has described the conditions necessary for a knowing and voluntary waiver in decisions about the waiver of a defendant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). "[T]he relinquishment of [a] right" is "voluntary" if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Farley*, 607 F.3d 1294, 1326 (11th Cir. 2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). And a decision is made knowingly if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quoting *Moran*, 475 U.S. at 421). We have explained that "the totality of the circumstances . . . must reveal both an uncoerced choice and the requisite level of comprehension." *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1241 (11th Cir. 2015).

Elbeblawy acknowledges that both he and his attorney signed the plea agreement, but he argues that his attorney could not waive the plea-statement rules

on his behalf and that he did not knowingly sign the agreement because he did not understand the waiver provision or the protections he was waiving. He stresses that, although his attorney met with him twice to discuss the agreement and "read the entire plea agreement to him," his attorney did not *explain* the plea-statement rules or the waiver provision. Elbeblawy also argues that his attorney testified that he generally advises his clients that "there would be no agreement" if the client "pulls out of the agreement *after the plea*." According to Elbeblawy, his attorney "did not tell [him] the agreement would be void if he never entered a guilty plea." This argument fails.

We need not decide whether an attorney may waive the plea-statement rules on behalf of his client, because the district court did not clearly err when it ruled that Elbeblawy knowingly and voluntarily waived the rules. As discussed above, the waiver provision is unambiguous. And the testimonies of Elbeblawy, his attorney, and a government investigator over the course of a two-day evidentiary hearing amply support the findings by the district court. Not only could Elbeblawy read the waiver provision for himself, his attorney "literally read" it to him. Indeed, his attorney "walk[ed] through each paragraph separately" with Elbeblawy, and his attorney testified that he was present when Elbeblawy signed the agreement. The district court also explained that Elbeblawy "has a college degree" and "asked many questions" of his attorney, which suggests that he took steps to ensure that he

knew his rights and understood the consequences of signing the agreement. His attorney agreed that, "[o]ther than those questions or concerns that he raised" about unrelated issues, Elbeblawy never "indicate[d] to [him] that there was any portion of the [p]lea [a]greement or [f]actual [b]asis that he didn't understand." We reject Elbeblawy's argument that the district court clearly erred.

B. *The Government Did Not Violate Elbeblawy's Right to Due Process Under* Brady.

To establish a violation of the duty to disclose exculpatory evidence, a defendant must prove "that the government possessed favorable evidence," that the defendant "did not possess the evidence and could not have obtained the evidence with any reasonable diligence, that the government suppressed the favorable evidence, and that the evidence" is material, or "creates a reasonable probability of a different outcome." *United States v. Man*, 891 F.3d 1253, 1276 (11th Cir. 2018) (alterations adopted) (citation and internal quotation marks omitted). "A reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1054 (11th Cir. 2017) (citation and internal quotation marks omitted). "[W]e must consider the totality of the circumstances" and "evaluate the withheld evidence in the context of the entire record" to determine whether the result would have been different. *Id.* (alteration adopted) (citations and internal quotation marks omitted).

Elbeblawy argues that the government violated *Brady* when it failed to disclose an allegedly exculpatory report about an early police interview of Delisma. According to the interview report, Delisma initially denied knowing Elbeblawy and acknowledged only that he "may have seen Elbeblawy . . . approximately 4–5 years [before the date of the interview]" when Elbeblawy was approaching other doctors about working with him. But Delisma almost immediately reversed course. He testified that about two weeks after that initial interview he "f[ound] out that the [g]overnment knew that [he] had referred patients to . . . Elbeblawy in exchange for money" when an investigator "showed [him] a video where [he] was receiving cash money from . . . Elbeblawy in exchange for a referral." At that point, he "admitt[ed] to receiving money for patient referrals." The government played the video for the jury, and Delisma testified that he "told the [g]overnment" about other referrals he made in exchange for kickbacks.

Elbeblawy contends that the report was material because "Delisma [was] the only witness who testified that he received kickbacks from Elbeblawy" and the report "directly exculpate[d] Elbeblawy of any wrongdoing relating to his alleged payment to Delisma of kickbacks." He also maintains that the report was "powerful impeachment evidence" because it showed "Delisma's dishonesty and his willingness to lie to [government investigators]." And he asserts that

impeaching Delisma's credibility would have "undermined . . . Escalona's testimony" because "the government relied on Delisma's testimony to corroborate testimony elicited from [Escalona,] its star witness." We again disagree.

The interview report does not "create[] a reasonable probability of a different outcome." *Man*, 891 F.3d at 1276 (citation and internal quotation marks omitted). The video and Delisma's testimony established that his initial, exculpatory denials were false. And although the interview report may have had some minimal impeachment value, there is no reasonable probability that it would have changed the outcome of the trial. Counsel for Elbeblawy had already called Delisma's credibility into question when he effectively cross-examined him about a separate Medicare fraud scheme. In response to questioning, Delisma admitted that he knew he was violating the law when he referred patients to his brother's home health agency and that he "lie[d]" to federal agents when he said that he stopped referring patients after he learned that it is illegal to pay kickbacks. "[A]ny additional impeachment value that [counsel] might have derived from the [interview report] would have been minimal." *United States v. Jones*, 601 F.3d 1247, 1267 (11th Cir. 2010).

Moreover, the evidence at trial was overwhelming even without Delisma's testimony. *See United States v. Hernandez*, 864 F.3d 1292, 1306 (11th Cir. 2017) (holding that evidence was immaterial, "not just because the alleged unavailable

evidence [was] insufficiently probative or sufficiently substituted, but also because the evidence of guilt [was] overwhelming"). Escalona was the main cooperator, and the government introduced evidence derived from two years of cooperation, including multiple videos of Elbeblawy discussing his kickback arrangements with various doctors, the inculpatory statements Elbeblawy made to federal agents, and Elbeblawy's signed factual basis. Delisma's testimony was not especially important in the light of this record.

C. The District Court Did Not Constructively Amend the Indictment.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. So the government may not try a defendant "on charges that are not made in the indictment against him." *Madden*, 733 F.3d at 1318 (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)). And it follows that a "district court may not constructively amend the indictment" by altering the "essential elements of [an] offense contained in the indictment . . . to broaden the possible bases for conviction beyond what is contained in the indictment." *Id.* (quoting *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990)).

Elbeblawy argues that the district court "constructively amended Count [Two] of the superseding indictment" when it instructed the jury. Count Two

charged Elbeblawy with violating section 371, which prohibits "conspir[ing] . . . to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371. The indictment alleged that Elbeblawy conspired to "defraud the United States by impairing, impeding, obstructing, and defeating through deceitful and dishonest means, the lawful government functions of the . . . Department of Health and Human Services." And the district court instructed the jury that "[t]o . . . defraud the United States means to cheat the [g]overnment out of . . . property or money or to interfere with any of its lawful [g]overnment functions by deceit, craft, or trickery." Elbeblawy argues that the statute "identifies at least two distinct ways in which it can be violated": by depriving the government of property or money and by obstructing or impairing the lawful functions of the government. And he argues that the indictment alleged a violation of the statute by obstructing or impairing the lawful functions of the government, not by depriving the government of property or money. So Elbeblawy contends that the district court constructively amended the indictment when it instructed the jury that it could convict Elbeblawy for conspiring to "cheat the [g]overnment out of . . . property or money." This argument fails.

Our review is governed by the plain-error standard, which applies to challenges that were not raised before the district court. *See Madden*, 733 F.3d at 1319. Elbeblawy argues that he preserved his constructive-amendment argument

because he mentioned it, in passing, in a post-trial reply motion. But Federal Rule of Criminal Procedure 51(b) "tells parties how to preserve claims of error: 'by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting Fed. R. Crim. P. 51(b)). The rule "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Id.* at 134. Ebleblawy's post-trial remark was neither timely nor sufficiently developed.

We conclude that there was no error, let alone plain error, because the slightly different wording of the jury instruction did not amount to a constructive amendment of the indictment. The district court correctly stated the law and its instructions tracked, almost verbatim, our pattern instructions for conspiracy to defraud the United States, 18 U.S.C. § 371. The defraud clause prohibits "conspir[ing] . . . to defraud the United States, or any agency thereof in any manner or for any purpose." *Id.* And the Supreme Court has explained that the statute does not encompass only "conpirac[ies] [that] contemplate a financial loss or that one shall result." *Haas v. Henkel*, 216 U.S. 462, 479 (1910). "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing[,] or defeating the lawful function of any department of [g]overnment."

Id.; *see also Dennis v. United States*, 384 U.S. 855, 861 (1966). Cheating the government out of money or property is a *kind* of deceptive interference with the lawful functions of the government. After all, the lawful functions of the government do not include making unlawful payments to fraudsters.

D. The District Court Did Not Clearly Err when It Calculated Elbeblawy's Sentencing Guidelines Range.

Elbeblawy raises three challenges to the calculation of his Sentencing Guidelines range. First, he argues that the district court violated the Ex Post Facto Clause, U.S. Const. art. 1, § 9, cl. 3, when it sentenced him under the 2015 Guidelines instead of the less severe Guidelines in effect before November 1, 2011. Second, he argues that the district court clearly erred when it found that Elbeblawy used sophisticated means within the meaning of section 2B1.1(b)(10)(C) of the Guidelines. Third, he argues that the district court clearly erred when it calculated the loss amount. None of these arguments is persuasive.

Although a defendant is ordinarily sentenced under the Guidelines in effect at the time of sentencing, *United States v. Aviles*, 518 F.3d 1228, 1230 (11th Cir. 2008), the Ex Post Facto Clause proscribes sentencing an offender under a version of the Guidelines that would provide a higher sentencing range than the version in place at the time of the offense, *Peugh v. United States*, 569 U.S. 530, 533 (2013). Because the Guidelines were amended to provide a four-level increase for certain federal healthcare offenses in November 2011, *see* U.S.S.G. App. C., vol. III, at

388–89 (amend. 749), Elbeblawy could be sentenced under the 2015 Guidelines only if his offense conduct continued after the amendment. *Aviles*, 518 F.3d at 1231.

The district court did not clearly err when it found that Elbeblawy's conduct continued after 2011. Elbeblawy's signed factual basis expressly provided that his "primary role in the scheme . . . was to establish and take control of JEM . . . (from approximately 2006–2011) and Healthy Choice . . . (*from approximately 2009–2013*)." This evidence alone establishes that Elbeblawy's criminal conduct continued after 2011.

Nor did the district court err when it found that Elbeblawy used "sophisticated means" within the meaning of section 2B1.1(b)(10)(C) to defraud the government. The role enhancement for sophisticated means applies to "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense," such as "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." U.S.S.G. § 2B1.1 n.9(B). Elbeblawy and Escalona first agreed to use cash to pay the doctors because "cash is the only way that nobody can trace if you pay somebody or not." They later decided to create sham contracts that allowed them to inflate the rates they paid for staffing services to disguise the kickbacks they paid to the home health entities. Elbeblawy also sent checks to patient

recruiters that used the term "patient care coordinator[]" because, according to Escalona, "if you use the word 'recruiter' . . ., you will be caught very eas[il]y." And he used his ex-wife to open a new home health agency when Medicare suspended payments to JEM. In the light of these efforts at concealment, we are not "left with a definite and firm conviction that a mistake has been committed." *United States v. Robertson*, 493 F.3d 1322, 1332 (11th Cir. 2007); *see also United States v. Feaster*, 798 F.3d 1374, 1381 (11th Cir. 2015) ("[O]ur caselaw demonstrates that we have sustained application of the sophisticated-means enhancement where defendants have engaged in concealment of their crimes in a variety of ways not expressly stated in the Application Note.").

Finally, the district court did not clearly err when it estimated that the loss amount under section 2B1.1(b)(1) was in excess of $25 million. "Although it may not speculate about the existence of facts and must base its estimate on reliable and specific evidence, the district court is required only to make a reasonable estimate of the loss" based on facts that the government must prove by a preponderance of the evidence. *United States v. Ford*, 784 F.3d 1386, 1396 (11th Cir. 2015). "[B]ecause 'district courts are in a unique position to evaluate the evidence relevant to a loss determination,' we must give their determinations 'appropriate deference.'" *United States v. Whitman*, 887 F.3d 1240, 1248 (11th Cir. 2018) (alteration adopted) (quoting *United States v. Moran*, 778 F.3d 942, 973 (11th Cir.

2015)). In his signed factual basis, Elbeblawy admitted that Medicare paid tens of millions of dollars to Willsand, JEM, and Healthy Choice. And evidence at trial established that the three entities collectively reaped $40,445,507 from Medicare, and audit findings revealed that over 73 percent of claims submitted by JEM between 2008 and 2009, and almost 99 percent of claims submitted between 2009 and 2010, should not have been paid. Applying even the lower overpayment rate of 73 percent to $40,445,507 yields $29,525,220.11, which is sufficient for 22-level increase that the district court applied. *See* U.S.S.G. § 2B1.1(b)(1)(L). We "must affirm the finding by the district court if it is 'plausible in light of the record viewed in its entirety.'" *Whitman*, 887 F.3d at 1248 (quoting *United States v. Siegelman*, 786 F.3d 1322, 1333 (11th Cir. 2015)). The record here amply supports the finding by the district court.

E. The District Court Erred when It Entered a Forfeiture Order That Held Elbeblawy Jointly and Severally Liable for the Proceeds of the Conspiracy.

Elbeblawy raises three challenges to the forfeiture order. He argues that the district court erred because "[t]he forfeiture statutes do not authorize personal money judgments as a form of forfeiture," because the Sixth Amendment "require[s] a jury verdict or proof beyond a reasonable doubt to sustain [a] forfeiture order," and because "a forfeiture judgment premised on proceeds received by Escalona" contravenes the holding of the Supreme Court in *Honeycutt*

v. United States, 137 S. Ct. 1626 (2017). Our precedent forecloses the first two arguments, but Elbeblawy is correct that joint and several liability is impermissible under *Honeycutt*.

We have squarely held that "criminal forfeiture acts *in personam* as a punishment against the party who committed the criminal act[]." *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007). The "proceeds of crime constitute a defendant's interest in property" and "can be forfeited in an *in personam* proceeding in a criminal case." *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1211 (11th Cir. 2013) (citation and internal quotation marks omitted). In an attempt to circumvent this precedent, Elbeblawy argues that "*Honeycutt*'s focus on individual receipt of forfeitable assets . . . shows that money judgments derived from conspiratorial criminal responsibility are not authorized." But *Honeycutt* held only that a district court may not hold members of a conspiracy jointly and severally liable for property that a conspirator derived from the crime. 137 S. Ct. at 1630. And far from *sub silentio* abolishing *in personam* judgments against conspirators, the Court presumed the continued existence of *in personam* proceedings when it stated that the statute at issue there "adopt[ed] an *in personam* aspect to criminal forfeiture." *Id.* at 1635.

Elbeblawy's Sixth Amendment argument fares no better. The Supreme Court held in *Libretti v. United States* that "the right to a jury verdict on

forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. 29, 49 (1995). Elbeblawy argues that the Supreme Court abrogated this precedent by implication when it held in *Alleyne v. United States* that "any fact that increases the mandatory minimum [imposed by statute] is an 'element' [of the offense] that must be submitted to the jury." 570 U.S. 99, 103 (2013). He also maintains that "[t]he crucial underpinnings of th[e] holding in *Libretti* . . . have been so thoroughly undermined by subsequent holdings . . . that applying *Libretti* . . . defies recognition of supervening precedent." But *Libretti* controls this appeal, and as a circuit court, we must "follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation and quotation marks omitted).

Finally, we agree with both parties that we must remand for a new forfeiture determination because the district court erred when it ruled that Elbeblawy was jointly and severally liable for the proceeds from the conspiracy. The Supreme Court held in *Honeycutt* that a defendant may not "be held jointly and severally liable for property that his co-conspirator derived from [certain drug] crime[s] but that the defendant himself did not acquire." 137 S. Ct. at 1630. The Court interpreted a different forfeiture statute in *Honeycutt*, *see* 21 U.S.C. § 853(a), but the same reasoning applies to the forfeiture statute for healthcare fraud, *see* 18

U.S.C. § 982(a)(7). As the Fifth Circuit has explained, neither statute provides for joint and several liability, and both statutes reach only property traceable to the commission of an offense. *See United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017). The drug statute at issue in *Honeycutt* requires, among other things, the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation [of a relevant statute]." 21 U.S.C. § 853(a)(1). And the healthcare-fraud statute requires district courts to "order the person [convicted of a healthcare-fraud offense] to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. § 982(a)(7). Finally, "the forfeiture statute for [healthcare-fraud] offenses incorporates many of the drug-law provisions on which *Honeycutt* relied in rejecting joint and several liability." *Sanjar*, 876 F.3d at 749 (citing 21 U.S.C. §§ 853(c), 853(e), and 853(p)). For example, the Supreme Court stated in *Honeycutt* that "[s]ection 853(p)—the sole provision of [section] 853 that permits the [g]overnment to confiscate property untainted by the crime—lays to rest any doubt that the [drug-forfeiture] statute permits joint and several liability." 137 S. Ct. at 1633. And section 982, which includes the healthcare-fraud provision, provides that "[t]he forfeiture of property under this section . . . shall be governed by the provisions of [section 853]." 18

U.S.C. § 982(b)(1); *see also id.* at § 982(b)(2). The healthcare-fraud statute does not permit joint and several liability.

IV. CONCLUSION

We **AFFIRM** Elbeblawy's convictions and sentence, **VACATE** the forfeiture order, and **REMAND** for proceedings consistent with this opinion.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11007

KHALED ELBEBLAWY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-21212-BB

ORDER:

Khaled Elbeblawy appeals the denial of his 28 U.S.C. § 2255 motion to vacate as time-barred. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"). To merit a COA, Elbeblawy must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Elbeblawy has failed to make the requisite showing as to the second prong of *Slack*'s test, his motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED AS MOOT.

Britt C. Grant

UNITED STATES CIRCUIT JUDGE

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11007

KHALED ELBEBLAWY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-21212-BB

Before WILSON and GRANT, Circuit Judges.

BY THE COURT:

Khaled Elbeblawy has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order denying a certificate of appealability and leave to proceed *in forma pauperis* on appeal from the district court's dismissal of his 28 U.S.C. § 2255 motion to vacate as time-barred. Upon review, Elbeblawy's motion for reconsideration is DENIED because he has offered no new evidence or meritorious arguments as to why this Court should reconsider its previous order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21212-BLOOM
(Case No. 15-cr-20820-BLOOM)

KHALED ELBEBLAWY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER OF DISMISSAL ON AMENDED MOTION UNDER 22 U.S.C. § 2255

THIS CAUSE is before the Court on Movant Khaled Elbeblawy's ("Elbeblawy" or "Petitioner") *pro se* Amended Motion Under 28 U.S.C. § 2255, ECF No. [27] ("Amended Motion") raising ineffective assistance of counsel challenges to his underlying criminal conviction in Case No. 15-cr-20820-BLOOM. The Court has carefully considered the Amended Motion and supporting Memorandum of Law, ECF No. [28], the Government's Response, ECF No. [31], Elbeblawy's Reply, ECF No. [32], the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Amended Motion is dismissed as untimely.

I. BACKGROUND

On August 31, 2016, the Court sentenced Elbeblawy in his related criminal case, 15-cr-20820-BLOOM, to 240 months' imprisonment and entered his judgment of conviction for the offenses of conspiracy to commit healthcare and wire fraud and conspiracy to defraud the United States and pay healthcare kickbacks. *See* CR ECF No. [170].[1] On September 5, 2018, the

1 References to docket entries in Petitioner's criminal case, Case No. 15-20820-CR-BLOOM, are denoted with "CR ECF No."

APPX 1
P. 1 of 36

Eleventh Circuit affirmed Elbeblawy's conviction and sentence, but vacated the district court's forfeiture order. *See* CR ECF No. [183]. On March 18, 2019, the U.S. Supreme Court denied Elbeblawy's petition for a writ of certiorari. *See* CR ECF No. [184]. On February 24, 2020, the Court entered an amended forfeiture judgment, *see* CR ECF No. [201], which Petitioner then appealed. *See* CR ECF No. [202]. Petitioner docketed his initial Motion Under 28 U.S.C. § 2255 on March 19, 2020. *See* ECF No. [1].

On April 27, 2020, Petitioner's § 2255 motion was stayed and administratively closed by the Report of Magistrate Judge Lisette M. Reid for the pendency of Petitioner's direct appeal of the amended forfeiture order. *See* ECF No. [5]. Petitioner was ordered "to notify the district court within fourteen (14) days of the Eleventh Circuit's issuance of its mandate in Case No. 20-10769 so that the court may lift the stay and order [Petitioner] to file a legally sufficient and properly verified § 2255 motion." *Id.* at 4. Petitioner was additionally cautioned that his "failure to timely file the notification described in the previous paragraph will result in dismissal of the instant § 2255 motion without prejudice, which in turn will likely result in any further § 2255 motion being dismissed with prejudice as untimely." *Id.* On May 19, 2020, the Court entered an Order Adopting Report of Magistrate Judge. *See* ECF No. [7].

On February 2, 2021, the Eleventh Circuit affirmed the amended forfeiture order, *see* CR ECF No. [227], and on June 7, 2021, the U.S. Supreme Court denied Petitioner's writ of certiorari challenging his amended forfeiture order. *See* CR ECF No. [228]. Accordingly, on October 4, 2021, the Court ordered Petitioner to "file a legally sufficient and properly verified

§ 2255 motion" . . . "**no later than November 4, 2021.**" ECF No. [11] at 2 (emphasis in original).[2]

On October 12, 2021, Petitioner docketed a Motion to Correct Calculation of Time Pursuant to 28 U.S.C. 2255(f)(1). *See* ECF No. [12]. The Court entered an Order denying the Motion on October 14, 2021, noting that "[u]nder the doctrine of equitable tolling, the Court finds that the November 4, 2021, deadline gives Petitioner sufficient extra time to file a legally sufficient and properly verified § 2255 motion." ECF No. [13] at 3. The Court once again ordered Petitioner to "file a legally sufficient and properly verified § 2255 motion" . . . "**no later than November 4, 2021.**" *Id.* (emphasis in original). Petitioner failed to do so. Instead, on October 21, 2021, he filed a Notice of Appeal of the Court's Order denying his Motion to Correct Calculation of Time. *See* ECF No. [14] ("Interlocutory Appeal"). On October 26, 2021, the U.S. Court of Appeals acknowledged receipt of the Interlocutory Appeal. *See* ECF No. [17].

On November 3, 2021, Petitioner filed a Motion for Indicative Ruling stating equitable reasons for additional tolling. *See* ECF No. [18]. On November 8, 2021, the Court entered an Order denying Petitioner's Motion for Indicative Ruling. *See* ECF No. [19]. On March 23, 2022, the Eleventh Circuit entered an Order dismissing the Interlocutory Appeal due to lack of jurisdiction. *See* ECF No. [26].

Petitioner filed the instant Amended Motion on June 8, 2022.[3]

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2 The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

3 "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). In the Amended Motion, the date provided in the prison mailbox stamp is unreadable. *See* ECF No. [27] at 13. However, Petitioner signed the Amended Motion on June 8, 2022. *See id.* at 12; *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) ("Unless there is evidence to the contrary, like prison logs or other

II. DISCUSSION

A. The Amended Motion is Untimely

Under 28 U.S.C. § 2255(f), a movant must file their § 2255 motion within a one-year period that runs "from the latest of" the following dates:

> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Petitioner does not assert that an unconstitutional government-created impediment to filing his Amended Motion existed, that he bases his claims on a right newly recognized by the United States Supreme Court, or that the facts supporting his claims could not have been discovered through the exercise of due diligence. Accordingly, the statute of limitations is measured from the remaining trigger, which is the date Petitioner's judgment of conviction became final.

Because Petitioner appealed his judgment, the judgment of conviction became final on March 18, 2019, when the U.S. Supreme Court denied Petitioner's first writ of certiorari challenging his conviction. *See* CR ECF No. [184]. Petitioner's subsequent appeal and denial of certiorari were regarding his amended forfeiture order and not his judgment of conviction. *See* ECF Nos. [202–03]; *see also Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ

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records, we assume that a prisoner's motion was delivered to prison authorities on the day he signed it.") (citation omitted).

of certiorari, or when the time for filing a certiorari petition expires."). Thus, Petitioner's one-year filing period started on March 18, 2019. Petitioner timely submitted his initial § 2255 motion on March 17, 2020. *See* ECF No. [1]. However, the initial motion was neither legally sufficient nor properly verified. *See* ECF Nos [5], [7], [13].

Although Petitioner's one-year limitations period had elapsed, on October 4, 2021, the Court granted Petitioner an additional month — until November 4, 2021 — to file an amended § 2255 motion. *See* ECF No. [11]; *see also* ECF No. [13] at 2–3 (clarifying that Petitioner was granted additional time under the doctrine of equitable tolling). Petitioner failed to do so. Instead, he opted to file a Motion to Correct Calculation of Time on October 12, 2021, *see* ECF No. [12], as well as the Interlocutory Appeal on October 21, 2021. *See* ECF No. [14]. Then, on November 3, 2021 —the day before the November 4, 2021 deadline — he filed a Motion for Indicative Ruling. *See* ECF No. [18]. Simply put, Petitioner spent the additional month filing other motions and appeals. Petitioner's litigious record shows that he had the ability to file an amended § 2255 motion by November 4, 2021, but he opted not to. Thus, the Amended Motion is untimely.

B. Equitable Tolling is Not Warranted

Petitioner concedes that the Amended Motion is untimely. *See* ECF No. [27] at 11. As justification, he states that "the deadline for filing was equitably tolled during the pendency of interlocutory appellate proceedings in Appeal No. 21-13694-G." *Id.*

"Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). Moreover, "[t]he petitioner has the burden of establishing his entitlement to equitable tolling; his supporting allegations must be specific and not conclusory." *Cole v. Warden, Georgia State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014)

(citation omitted). The Government states that Petitioner fails to "provide specific allegations explaining why the Interlocutory Appeal 'stood in his way' or 'prevented timely filing' of the Amended Motion[,]" and further notes "that there were no court orders from the Interlocutory Appeal staying proceedings in the district court that could have caused Petitioner to confuse or miscalculate the filing deadline." ECF No. [31] at 5. The Court agrees.

As explained, the Court granted Petitioner additional time and ordered him multiple times to "file a legally sufficient and properly verified § 2255 motion" . . . "**no later than November 4, 2021**." ECF No. [11] at 2 (emphasis in original); ECF No. [13] at 3. Instead, he opted to use the additional grant of time to file a series of motions and appeals, none of which included an amended § 2255 motion. Then, on June 8, 2022 — 216 days past the November 4, 2021, deadline — Petitioner filed the Amended Motion. Petitioner has not provided specific allegations supporting equitable tolling. *See Cole*, 768 F.3d at 1158. And, on this record, the Court finds that no "unavoidable" or "extraordinary circumstances" exist to justify it. *See Sandvik*, 177 F.3d at 1271.

C. Certificate of Appealability

A certificate of appealability ("COA") "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). Where, as here, the court denies claims on procedural grounds, a COA should issue if "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Jurists of reason" would not find the Court's procedural ruling "debatable." *Id.* Therefore, a COA is denied.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Movant Khaled Elbeblawy's Amended Motion Under 28 U.S.C. § 2255, **ECF No. [27]**, is **DISMISSED** as time-barred.
2. A certificate of appealability is **DENIED**. Because there are no issues with arguable merit, an appeal would not be taken in good faith, and Elbeblawy is not entitled to appeal *in forma pauperis*.
3. To the extent not otherwise disposed of, any pending motions are **DENIED AS MOOT** and all deadlines are **TERMINATED**.
4. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, on March 10, 2023.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

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EXHIBIT B

MOTION FOR INDICATIVE RULING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21212-CV-BLOOM
(15-20820-CR-BLOOM)
MAGISTRATE JUDGE REID

KHALED ELBEBLAWY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF MAGISTRATE JUDGE

This action was filed under 28 U.S.C § 2255. [Cv-ECF No. 1]. A jury convicted Elbeblawy of conspiracy to commit healthcare and wire fraud and conspiracy to defraud the United States and pay healthcare kickbacks. [*Id.* at 1].

The court sentenced Elbeblawy to 240 months' imprisonment, entering his judgment of conviction on August 31, 2016. [Cr-ECF No. 170 at 1]. On August 7, 2018, the Eleventh Circuit affirmed Elbeblawy's conviction and sentence, but vacated the district court's forfeiture order. [Cr-ECF No. 183 at 4-5, 13, 32]. On March 18, 2019, the U.S. Supreme Court denied Elbeblawy's petition for a writ of certiorari. [Cr-ECF No. 184 at 1].

On February 24, 2020, the district court entered an amended forfeiture judgment. [Cr-ECF No. 201]. Elbeblawy filed a notice of appeal and the appeal is

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pending in the United States Court of Appeals for the Eleventh Circuit. [Cr-ECF Nos. 202-03; Cv-ECF No. 1 at 3].

The instant § 2255 motion was docketed on March 19, 2020. [ECF No. 1 at 1]. In ground one, the motion states "Ineffective Assistance of Counsel" without any supporting facts. [*Id.* at 4]. In ground two, the motion states "Sentence Imposed in Violations of Statutes" without any supporting facts. [*Id.* at 5].

The motion is not signed or dated by Elbeblawy. [*Id.* at 12]. Under the section of the form that says "If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion," the following typewritten language appears: "The Petitioner contracted authorized [sic] the above signed commercial entity[] Research Assistance, Inc[.], to prepare and file a computer expert copy [sic] of this petition." [*Id.*]

The envelope in which the motion was mailed bears Elbeblawy's handwritten return address and a U.S. Postal Service certified mail receipt. [Cv-ECF No. 1 at 19]. A search of the receipt's tracking number on the U.S. Postal Service's website indicates that the motion was submitted to prison authorities for mailing no later than March 17, 2020. *See* https://www.usps.com/manage/ (searching tracking number "7009 2820 0001 7395 3929"); *see also Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009) ("Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing."

(citations omitted)); *Beckley v. City of Atlanta, Ga.*, No. 1:16-CV-1435-MHC, 2017 WL 6460300, at *4 (N.D. Ga. Oct. 18, 2017) ("[A] district court may take judicial notice of public records . . . which are published by federal agencies." (citations omitted)).

"A defendant may not seek collateral relief while his direct appeal is pending." *See United States v. Khoury*, 901 F.2d 975, 976 (11th Cir. 1990). Where the defendant files a § 2255 motion during the pendency of a direct appeal, the district court usually must dismiss the motion without prejudice. *See id.*

Here, the § 2255 motion alleges "Ineffective Assistance of Counsel" and that Elbeblawy's "Sentence [Was] Imposed in Violations of Statutes," either of which ground may implicate issues pertaining to the amended forfeiture money judgment still pending on appeal. Therefore, because Elbeblawy's direct appeal of said judgment is pending, the § 2255 motion is premature.

The undersigned recognizes that "dismissal without prejudice [may have] the effect of a dismissal with prejudice, because of the impact of the § 2255(f)(1) [one-year] time-bar." *Hilel v. United States*, 444 F. App'x 419, 420 (11th Cir. 2011) (per curiam). This is because the record indicates that the motion was filed around March 17, 2020, almost one year to the day after the U.S. Supreme Court denied review of Elbeblawy's judgment of conviction. Therefore, "extraordinary circumstances exist in this case sufficient to warrant an exception to the general rule governing § 2255

motions filed during a pending appeal, and to justify a stay." *Montas v. United States*, No. 14-20433-CR, 2016 WL 269891, at *4 (S.D. Fla. Jan. 22, 2016).

Accordingly, it is recommended:

1. That this case be STAYED and ADMINISTRATIVELY CLOSED.

2. That Elbeblawy be ordered to notify the district court within **fourteen (14) days** of the Eleventh Circuit's issuance of its mandate in Case No. 20-10769 so that the court may lift the stay and order Elbeblawy to file a legally sufficient and properly verified § 2255 motion.[1]

3. That Elbeblawy be cautioned that the failure to timely file the notification described in the previous paragraph will result in dismissal of the instant § 2255 motion without prejudice, which in turn will likely result in any further § 2255 motion being dismissed with prejudice as untimely.

SIGNED this 27th day of April, 2020.

UNITED STATES MAGISTRATE JUDGE

Khaled Elbeblawy

[1] While Elbeblawy may consult with other inmates regarding the preparation of any amended motion, he "cannot be *represented* by a nonlawyer [such as 'Research Assistance, Inc.']" *See Gonzales v. Wyatt*, 157 F.3d 1016, 1021 (5th Cir. 1998) (emphasis added).

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2255,CLOSED,LMR,REF_RR

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:20-cv-21212-BB

Elbeblawy v. United States of America
Assigned to: Judge Beth Bloom
Referred to: Magistrate Judge Lisette M. Reid
Case in other court: USDC Southern FL, 15-CR-20820-BB
USCA, 21-13694-G
USCA, 23-11007-B
Cause: 28:2255 Motion to Vacate Sentence

Date Filed: 03/19/2020
Date Terminated: 05/19/2020
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Plaintiff

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ATTORNEY TO BE NOTICED

V.

Defendant

United States of America

represented by **Noticing 2255 US Attorney**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

APPX 1
P.48

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Date Filed	#	Docket Text
03/19/2020	1	MOTION (Complaint) to Vacate Sentence (2255). NOTE: All further docketing is to be done in the civil case. (Criminal Case # 15-CR-20820-BB), filed by Khaled Elbeblawy. (amb) (Entered: 03/19/2020)
03/19/2020	2	Clerks Notice of Judge Assignment to Judge Beth Bloom and Magistrate Judge Lisette M. Reid. Pursuant to Administrative Order 2019-2, this matter is referred to the Magistrate Judge for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (amb) (Entered: 03/19/2020)
04/01/2020	3	NOTICE of Attorney Appearance by Alexander Thor Pogozelski on behalf of United States of America. Attorney Alexander Thor Pogozelski added to party United States of America(pty:dft). (Pogozelski, Alexander) (Entered: 04/01/2020)
04/24/2020	4	VACATED ORDER TO SHOW CAUSE. The Motion, ECF No. 1 , was filed pursuant to 28 U.S.C. §2255. On or before May 29, 2020, the Respondent, United States of America, shall file a memorandum of fact and law to show cause why the Motion should not be granted. Respondent shall also file all documents and transcripts necessary for the resolution of this motion regardless of whether or not they are in the Court file. Signed by Judge Beth Bloom (BB) Modified on 4/27/2020 per DE 6 Order (kpe). (Entered: 04/24/2020)
04/27/2020	5	REPORT AND RECOMMENDATIONS on 28 USC 2255 case re 1 Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) filed by Khaled Elbeblawy; Recommending: 1) that this case be STAYED and ADMINISTRATIVELY CLOSED. 2) that Elbeblawy be ordered to notify the district court within fourteen (14) days of the Eleventh Circuits issuance of its mandate in Case No. 20-10769 so that the court may lift the stay and order Elbeblawy to file a legally sufficient and properly verified § 2255 motion. 3) That Elbeblawy be cautioned that the failure to timely file the notification described in the previous paragraph will result in dismissal of the instant § 2255 motion without prejudice, which in turn will likely result in any further § 2255 motion being dismissed with prejudice as untimely. Objections to R&R due by 5/11/2020. Signed by

		Magistrate Judge Lisette M. Reid on 4/27/2020. *See attached document for full details.* (br) (Entered: 04/27/2020)
04/27/2020	6	PAPERLESS ORDER VACATING Order to Show Cause, ECF No. 4 , based upon the issuance of Magistrate Judge Reid's Report & Recommendations, ECF No. 5 . Signed by Judge Beth Bloom (BB) (Entered: 04/27/2020)
05/19/2020	7	ORDER ADOPTING 5 REPORT OF MAGISTRATE JUDGE for 1 Motion (Complaint) to Vacate/Set Aside/Correct Sentence. This case is hereby STAYED and ADMINISTRATIVELY CLOSED. Movant is ordered to notify the Court within fourteen (14) days of the issuance of the Eleventh Circuits mandate in Case No. 20-10769. Signed by Judge Beth Bloom on 5/19/2020. *See attached document for full details.* (kpe) (Entered: 05/19/2020)
09/22/2020	8	NOTICE of Change of Address by Khaled Elbeblawy. Address updated. (kpe) (Entered: 09/22/2020)
09/24/2020	9	NOTICE of Change of Address by Khaled Elbeblawy. Address not updated as the address on the docket is current. (kpe) (Entered: 09/24/2020)
01/14/2021	10	Movant's Status Report/Notice of Intent to Seek Certiorari by Khaled Elbeblawy. (kpe) (Entered: 01/14/2021)
10/04/2021	11	ORDER. Petitioner shall file a legally sufficient and properly verified § 2255 motion as indicated in Judge Reids Report, DE# 5 at 2, no later than November 4, 2021. (Amended Complaint due by 11/4/2021) Signed by Judge Beth Bloom on 10/4/2021. *See attached document for full details.* (ebz) (Entered: 10/04/2021)
10/12/2021	12	MOTION To Correct Calculation of Time Pursuant To 28 U.S.C. 2255 (f)(1) re 11 Order, Set/Reset Deadlines, by Khaled Elbeblawy. (ebz) (Entered: 10/13/2021)
10/14/2021	13	ORDER denying 12 Motion to Correct Calculation of Time. Petitioner shall file a legally sufficient and properly verified § 2255 motion as indicated in Judge Reids Report, ECF No. 5 at 2, no later than November 4, 2021. Signed by Judge Beth Bloom on 10/14/2021. *See attached document for full details.* (amb) (Entered: 10/14/2021)
10/21/2021	14	Notice of Appeal by Khaled Elbeblawy as to 13 Order on Motion for Miscellaneous Relief. Filing fee $ 505.00. Receipt#: FEE NOT PAID. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (hh) (Entered: 10/21/2021)
10/21/2021	15	MOTION for Certificate of Appealability by Khaled Elbeblawy. (construed from de# 14 noa) Responses due by 11/4/2021 (hh) (MOTION FILED IN ERROR) Text Modified on 10/25/2021 (hh). (Entered: 10/21/2021)
10/21/2021		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 14 Notice of Appeal. Notice has been electronically mailed. (hh) (Entered: 10/21/2021)
10/21/2021	16	CLERK'S NOTICE of Mailing Pro Se Instructions as to Khaled Elbeblawy re 14 Notice of Appeal (hh) (Entered: 10/21/2021)
10/26/2021	17	Acknowledgment of Receipt of NOA from USCA re 14 Notice of Appeal, filed by Khaled Elbeblawy. Date received by USCA: 10/21/2021. USCA Case Number: 21-13694-G. (apz) (Entered: 10/26/2021)
11/03/2021	18	Plaintiff-Appellant's MOTION for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1 by Khaled Elbeblawy. (apz) (Entered: 11/04/2021)

11/08/2021	19	ORDER denying 18 Motion for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1. Signed by Judge Beth Bloom on 11/8/2021. *See attached document for full details.* (jas) (Entered: 11/08/2021)
12/14/2021	20	MOTION for Leave to Proceed in forma pauperis by Khaled Elbeblawy. (ebz) (Entered: 12/14/2021)
12/14/2021	21	TRANSCRIPT INFORMATION FORM by Khaled Elbeblawy re 14 Notice of Appeal. No Transcript Requested. (apz) (Entered: 12/14/2021)
12/15/2021	22	ORDER granting 20 IFP Status on Appeal Signed by Judge Beth Bloom on 12/15/2021. *See attached document for full details.* (hh) (Entered: 12/16/2021)
12/20/2021	23	COURT REPORTER ACKNOWLEDGMENT re 21 Transcript Information Form, 14 Notice of Appeal,. Court Reporter: Yvette Hernandez, 305-523-5698 / Yvette_Hernandez@flsd.uscourts.gov. Estimated filing date of transcript 12/20/2021. USCA number 21-13694-G. (yhz) (Entered: 12/20/2021)
12/20/2021	24	TRANSCRIPT NOTIFICATION - Transcript(s) ordered on: 12/9/2021 by Khaled Elbeblawy, has/have been filed by Court Reporter: Yvette Hernandez, 305-523-5698 / Yvette_Hernandez@flsd.uscourts.gov re 21 Transcript Information Form, 14 Notice of Appeal, 23 Court Reporter Acknowledgment,. (yhz) (Entered: 12/20/2021)
02/08/2022	25	Acknowledgment of Receipt of NOA from USCA re 14 Notice of Appeal, filed by Khaled Elbeblawy. Date received by USCA: 10/21/21. USCA Case Number: 21-13694-G. (hh) (Entered: 02/09/2022)
03/23/2022	26	ORDER of DISMISSAL from USCA. After reviewing the parties' responses to the jurisdictional question, this appeal is DIMISSED for lack of jurisdiction re 14 Notice of Appeal, filed by Khaled Elbeblawy. USCA #21-13694-G. (apz) (Entered: 03/23/2022)
06/10/2022	27	AMENDED COMPLAINT Under 28 U.S.C. 2255 To Vacate, Set Aside, or Correct Sentence against United States of America, filed by Khaled Elbeblawy.(ebz) (Entered: 06/10/2022)
06/10/2022	28	MEMORANDUM of Law in Support of 27 Amended Complaint/Amended Notice of Removal by Khaled Elbeblawy. (ebz) (Entered: 06/10/2022)
06/14/2022	29	LIMITED ORDER TO SHOW CAUSE. Show Cause Response due by 7/13/2022. Signed by Judge Beth Bloom on 6/13/2022. *See attached document for full details.* (ebz) (Entered: 06/14/2022)
07/13/2022	30	NOTICE of Attorney Appearance by Meredith Hough on behalf of United States of America. Attorney Meredith Hough added to party United States of America(pty:dft). (Hough, Meredith) (Entered: 07/13/2022)
07/13/2022	31	RESPONSE TO ORDER TO SHOW CAUSE by United States of America. (Hough, Meredith) (Entered: 07/13/2022)
07/26/2022	32	PLAINTIFF'S RESPONSE TO LIMITED ORDER TO SHOW CAUSE re 29 Order to Show Cause by Khaled Elbeblawy. (Attachments: # 1 Exhibit)(ebz) (Entered: 07/26/2022)
03/06/2023	33	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Sara E. Kopecki. Filing Fee $ 200.00 Receipt # AFLSDC-16398024 by Khaled Elbeblawy. Responses due by 3/20/2023 (Attachments: # 1 Certification of Attorney Sara E. Kopecki, # 2 Certification of Good Standing for Attorney Sara E. Kopecki, # 3 Text of Proposed Order)(Tibbitt, Daniel) (Entered: 03/06/2023)

03/06/2023	34	PAPERLESS ORDER denying 33 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Attorney Sarah Kopecki. Noncompliance with LR 4(b) of the Rules Governing the Admission, Practice, Peer Review, and Discipline of Attorneys as follows: Local Counsel/Movant, Daniel Tibbitt, failed to associate himself to the case. Signed by Judge Beth Bloom (BB) (Entered: 03/06/2023)
03/10/2023	37	ORDER OF DISMISSAL ON AMENDED MOTION UNDER 22 U.S.C. § 2255: Movant Khaled Elbeblawy's Amended Motion Under 28 U.S.C. § 2255, ECF No. 27 , is DISMISSED as time-barred. A certificate of appealability is DENIED. Because there are no issues with arguable merit, an appeal would not be taken in good faith, and Elbeblawy is not entitled to appeal in forma pauperis.To the extent not otherwise disposed of, any pending motions are DENIED ASMOOT and all deadlines are TERMINATED.The Clerk of Court is directed to CLOSE this case. Signed by Judge Beth Bloom on 3/10/2023. *See attached document for full details.* (nan) (Entered: 03/15/2023)
03/13/2023	35	Amended MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Sara E. Kopecki. Filing Fee $ 200.00 Amended/Corrected Motion to Appear Pro Hac Vice Filed - Filing Fees Previously Paid. See 33 Motion to Appear Pro Hac Vice, by Khaled Elbeblawy. Attorney Daniel James Tibbitt added to party Khaled Elbeblawy(pty:pla). Responses due by 3/27/2023 (Attachments: # 1 Certification of Attorney Sara E. Kopecki, # 2 Certification of Good Standing for Attorney Sara E. Kopecki, # 3 Text of Proposed Order)(Tibbitt, Daniel) (Entered: 03/13/2023)
03/13/2023	36	PAPERLESS ORDER granting ECF No. 35 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Attorney Sara E. Kopecki. Signed by Judge Beth Bloom (sgr) (Entered: 03/13/2023)
03/29/2023	38	Notice of Appeal re 37 Order Dismissing/Closing Case, by Khaled Elbeblawy. FILING FEE: (NOT PAID). Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under All Forms and look for Transcript Order Form www.flsd.uscourts.gov/forms/all-forms. (COA DENIED per DE 37 Order.) (apz) (Entered: 03/31/2023)
03/31/2023		Transmission of Notice of Appeal, Order under appeal, and Docket Sheet to US Court of Appeals re 38 Notice of Appeal, Notice has been electronically mailed. (apz) (Entered: 03/31/2023)
03/31/2023	39	CLERK'S NOTICE of Mailing Pro Se Instructions to Khaled Elbeblawy re 38 Notice of Appeal. (apz) (Entered: 03/31/2023)
04/04/2023	40	Acknowledgment of Receipt of NOA from USCA re 38 Notice of Appeal, filed by Khaled Elbeblawy. Date received by USCA: 3/31/2023. USCA Case Number: 23-11007-B. (apz) (Entered: 04/04/2023)
05/16/2023	41	Clerks Notice of Receipt of Appeal Filing Fee received on 5/16/2023 in the amount of $ 505.00, receipt number FLS269538. (vt) (Entered: 05/16/2023)
09/08/2023	42	ORDER of DISMISSAL from USCA. Elbeblawy's motion for COA is DENIED and his motion for leave to proceed IFP is DENIED AS MOOT re 38 Notice of Appeal, filed by Khaled Elbeblawy. USCA #23-11007-B (jgo) (Entered: 09/11/2023)

PACER Service Center			
Transaction Receipt			
12/06/2023 17:40:40			
PACER Login:	bhtlegal	**Client Code:**	elbeblawy
Description:	Docket Report	**Search Criteria:**	1:20-cv-21212-BB
Billable Pages:	5	**Cost:**	0.50

AO 243 (Rev. 01/15)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Southern of Florida	
Name *(under which you were convicted)*: Khaled Elbeblawy	Miami Division	Docket or Case No.: 1:15-CR-20820-BB
Place of Confinement:	Prisoner No.: 08071-104	
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)* Khaled Elbeblawy	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court for the Southern District of Florida - Miami Division
400 North Miami Ave, Room 10-2 Miami, Florida 33128

cat/div 510/2255/MIA
Case # 15 CR 20820
Judge ____ Mag REID
Motn lfp — Fee pd $ —
Receipt # ____

(b) Criminal docket or case number (if you know): 1:15-CR-20820-BB

2. (a) Date of the judgment of conviction (if you know): 01/21/2016
(b) Date of sentencing: 08/30/2016

3. Length of sentence: 240 Months

4. Nature of crime (all counts): Conspiracy to commit health care and wire fraud. 18 U.S.C. §1349, a class(C) felony. Conspiracy to Defraud the U.S. and Pay Health Care Kickbacks, 18 U.S.C. §371, a class(D) felony.

5. (a) What was your plea? (Check one)
(1) Not guilty [X] (2) Guilty [ ] (3) Nolo contendere (no contest) [ ]

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury [X] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes [X] No [ ]

8. Did you appeal from the judgment of conviction? Yes [X] No [ ]

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9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeal for the Eleventh Circuit

(b) Docket or case number (if you know): 16-16048-C

(c) Result: See Attachment "A"

(d) Date of result (if you know): 08/07/2018

(e) Citation to the case (if you know): USA v. Elbeblawy, 899 F.3d 925

(f) Grounds raised: See the Table Contents

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes [X] No [ ]

If "Yes," answer the following:

(1) Docket or case number (if you know): 18-6667

(2) Result: Denied

(3) Date of result (if you know): Elbeblawy v. USA, 203 LED. 2d.573,-Us-

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes [X] No [ ]

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: USDC-SD Fla

(2) Docket or case number (if you know): 1:15-CR-20820-BB

(3) Date of filing (if you know): See Attachment "A"

(4) Nature of the proceeding: See Attachment "A"

(5) Grounds raised: See Attachment "A"

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes [X] No [ ]

(7) Result: Pending

(8) Date of result (if you know): Pending

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: USDC-S.D.Fla.

(2) Docket of case number (if you know): 1:15-CR-20820-BB

(3) Date of filing (if you know): See Attachment "A"

(4) Nature of the proceeding: See Attachment "A"

(5) Grounds raised: See Attachment "A"

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes [X] No [ ]

(7) Result: Pending

(8) Date of result (if you know): Pending

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes [ ] No [ ] Pending Notice of Appeal

(2) Second petition: Yes [ ] No [ ] Pending Notice of Appeal

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective Assistance of Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [ ] No [X]

(2) If you did not raise this issue in your direct appeal, explain why:

IAC claims precluded pursuant to circuit precedent

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes [ ] No [X]

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes [ ] No [ ]

(4) Did you appeal from the denial of your motion, petition, or application?

Yes [ ] No [ ]

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes [ ] No [ ]

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Sentence Imposed in Violations of Statutes.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [X] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes [X] No [ ]

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: See Attachment "A"

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): 1:15-CR-20820-BB

Date of the court's decision: Pending

Result (attach a copy of the court's opinion or order, if available):

Pending

(3) Did you receive a hearing on your motion, petition, or application?

Yes [X] No [ ]

(4) Did you appeal from the denial of your motion, petition, or application?

Yes [ ] No [ ] Pending Notice of Appeal

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes [ ] No [ ] Pending Notice of Appeal

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

USDC-SDFla

Docket or case number (if you know): 1:15-CR-20820-BB

Date of the court's decision: Pending

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

Michael Matter - See Attachment "A"

(b) At the arraignment and plea:

Francisco Marty, Yan Smith

(c) At the trial:

Michael Matter

(d) At sentencing:

Richard Carroll Klugh, Jr.

(e) On appeal:

Richard Carrol Klugh, Jr.

(f) In any post-conviction proceeding:

Jefrey Weinkle

(g) On appeal from any ruling against you in a post-conviction proceeding:

Pending

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [ ] No [X]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes [X] No [ ]

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is timely where the trial judgment was reversed and remanded by USCA on August 07, 2018. Rehearing by USDC held pending decision on Cert. (Denied) on March 18, 2019.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: That the District Court Vacate the judgment and conviction, and reset the matter for further proceedings.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ (month, date, year)

Executed (signed) on _____ (date)

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

The Petitioner contracted authorized the above signed commercial entity. Research Assistance, Inc, to prepare and file a computer expert copy of the petition.

(e) On appeal:

Richard Carroll Klugh, Jr.
25 SE 2nd Avenue
Suite 1100
Miami, Florida 33131

(f) In any post-conviction proceeding:

Jefrey Weinkle
1481 NW North River Drive
Miami, Florida 33125

(g) On appeal from any ruling against you in a post-conviction proceeding:

Pending

Khaled Elbeblawy Reg. No. 08071-104 Case No. 1:15-CR-20820-BB

Attachment "A"

Question #9 part (c) and (f)

(c) Result: The Appellate Court affirm my conviction and sentences, **Vacate** the forfeiture order, and **Remand** for proceedings consistent with this opion.

(f) Grounds raised:

I.

- Elbeblawy's Convictions must be Reversed Because the District Court Wrongly Allowed the Government to Introduce a Confession and a Plea Agreement That Elbeblawy Signed in the Course of Plea Discussions, Although No Guilty Plea Was Entered.

II.

- Elbeblawy's Convictions must Be Reversed Because the Government Failed to Disclose Powerful Exculpatory Evidence until After Trial, in Violation of Brady v. Maryland.

III.

- The District Court Constructively Amended Count 2 of the Superseding Indictment, in Violation of the Fifth Amendment, by Broadening the Bases upon Which Elbeblawy Could Be Convicted of Conspiring to Defraud the United States.

IV.

- The Cumulative Effect of Multiple Trial Errors Rendered Elbeblawy's Trial Fundamentally Unfair.

V.

- The Sentencing Court Erred in Imposing Enhancements for Intended Loss and Sophisticated means and Violated Ex Post Facto by Using the 2015 Guideline Manual Where No Criminal Conduct after November 2011 Was Proven by the Government at Sentencing.

VI.

- The Forfeiture Money Judgment must Be Reversed Where Neither 18 U.S.C. §982(A)(7) NorFed.R. Crim.P. 32.2 Affords the Government a Jurisdictional Basis for Forfeiture Money Judgment; the Sixth Amendment Bars Imposition of a Forfeiture Judgment Absent a Jury Verdict on Forfeiture Proceeds Based on Proof Beyond a Reasonable Doubt; and the District Court Failed to Limit Forfeiture to Proven Health Care Fraud Proceeds Received by the Defendant.

Question #15 (a thru g)

(a) At the preliminary hearing:

Michael Matter
Adelsin & Matters
2929 SW 3rd Avenue
Suite 410
Miami, Florida 33129

(b) At the arraignment and plea:

Francisco Marty, Yan Smith

(c) At the trial:

Michael Matters
Adelsin & Matters
2929 SW 3rd Avenue
Suite 410
Miami, Florida 33129

(d) At sentencing:

Richard Carroll Klugh, Jr.
25 SE 2nd Avenue
Suite 1100
Miami, Florida 33131

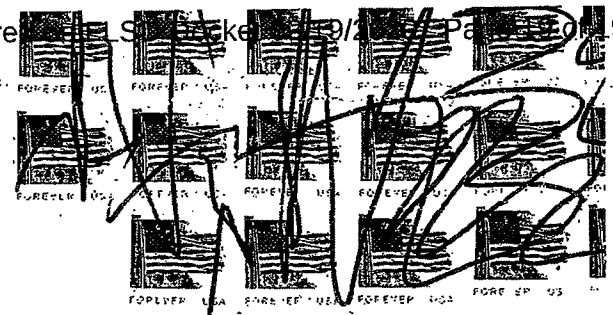
		through PACER. Redaction Request due 4/28/2016. Redacted Transcript Deadline set for 5/9/2016. Release of Transcript Restriction set for 7/8/2016. (yhz) (Entered: 04/04/2016)
04/07/2016	130	MOTION for Forfeiture of Property *Money Judgment* by USA as to Khaled Elbeblawy. Responses due by 4/25/2016 (Attachments: # 1 Exhibit Attachment A (Composite), # 2 Text of Proposed Order)(Sombuntham, Nalina) (Entered: 04/07/2016)
04/07/2016	131	VACATED: ORDER granting 130 Motion for Order of Forfeiture as to Khaled Elbeblawy (1). Signed by Judge Beth Bloom on 4/7/2016. (ar2) Modified text to reflect this order is vacated per court order on 4/15/2016 (tas). (Entered: 04/07/2016)
04/08/2016	132	NOTICE *Regarding Length of Sentencing Hearing and Request for Forfeiture Hearing* by Khaled Elbeblawy (Klugh, Richard) (Entered: 04/08/2016)
04/08/2016	133	PAPERLESS NOTICE OF HEARING as to Khaled Elbeblawy Forfeiture Hearing set for 4/15/2016 10:00 AM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2. (ch1) (Entered: 04/08/2016)
04/12/2016	134	FINAL Addendum 1 Disclosure of REVISED Presentence Investigation Report of Khaled Elbeblawy. This is a limited access document. Report access provided to attorneys Nalina Sombuntham, Vasanth R. Sridharan, Nicholas E. Surmacz, Richard Carroll Klugh, Jr by USPO (Attachments: # 1 Addendum)(acn1) (Entered: 04/12/2016)
04/13/2016	135	NOTICE *of Filing Letters of Support for Sentencing* by Khaled Elbeblawy (Klugh, Richard) (Entered: 04/13/2016)
04/13/2016	136	SENTENCING MEMORANDUM by USA as to Khaled Elbeblawy (Sridharan, Vasanth) (Entered: 04/13/2016)
04/14/2016	137	TRANSCRIPT of Trial Day 1 as to Khaled Elbeblawy held on 01/12/2016 before Judge Beth Bloom, Volume Number 1 of 6, 1 - 269 pages. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/14/2016	138	TRANSCRIPT of Trial Day 2 as to Khaled Elbeblawy held on 1/13/2016 before Judge Beth Bloom, Volume Number 2 of 6, 1 - 263 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/14/2016	139	TRANSCRIPT of Trial Day 3 as to Khaled Elbeblawy held on 1/14/2016 before Judge Beth Bloom, Volume Number 3 of 6, 1 - 244 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/14/2016	140	TRANSCRIPT of Trial Day 4 as to Khaled Elbeblawy held on 1/19/2016 before Judge Beth Bloom, Volume Number 4 of 6, 1 - 316 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/14/2016	141	TRANSCRIPT of Trial Day 5 as to Khaled Elbeblawy held on 1/20/2016 before Judge Beth Bloom, Volume Number 5 of 6, 1 - 265 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/14/2016	142	TRANSCRIPT of Trial Day 6 as to Khaled Elbeblawy held on 1/21/2016 before Judge Beth Bloom, Volume Number 6 of 6, 1 - 359 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 5/9/2016. Redacted Transcript Deadline set for 5/19/2016. Release of Transcript Restriction set for 7/18/2016. (yhz) (Entered: 04/14/2016)
04/15/2016	143	NOTICE *of Filing Letters of Support for Sentencing (Supplemental)* by Khaled Elbeblawy (Klugh, Richard) (Entered: 04/15/2016)
04/15/2016	144	PAPERLESS ORDER denying 106 Motion for Acquittal as to Khaled Elbeblawy (1); denying 106 Motion to Dismiss for Lack of Jurisdiction as to Khaled Elbeblawy (1); denying 106 Motion for New Trial as to Khaled Elbeblawy (1) for reasons stated on the record. Signed by Judge Beth Bloom (BB) (Entered: 04/15/2016)
04/15/2016	145	PAPERLESS Minute Entry for proceedings held before Judge Beth Bloom: Motion Hearing as to Khaled Elbeblawy held on 4/15/2016 re 106 Corrected MOTION for Acquittal MOTION to Dismiss for Lack of Jurisdiction 90 Jury Verdict, 59 Indictment MOTION for New Trial filed by Khaled Elbeblawy. Oral arguments heard. All motions denied for reasons stated on the record. Parties Present: Nicholas E. Surmacz, DOJ; Vasanth R. Sridharan; DOJ; Richard Carroll Klugh, Jr., Esq.; Defendant present (J). Arabic Interpreter present. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. (tas) (Entered: 04/15/2016)
04/15/2016	146	PAPERLESS Minute Entry for proceedings held before Judge Beth Bloom: Forfeiture Hearing as to Khaled Elbeblawy held on 4/15/2016. Oral arguments heard, the Court VACATES ECF No. 131 Order of Forfeiture. Forfeiture Hearing continued and set for Friday, 5/13/2016 01:30 PM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2.Parties Present: Nalina Sombuntham, AUSA; Richard Klugh, Jr.; Esq.; Defendant present (J). Arabic Interpreter present. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. (tas) (Entered: 04/15/2016)
04/15/2016	147	PAPERLESS Order to Vacate re ECF No. 131 Order on Motion for Forfeiture of Property as to Khaled Elbeblawy. Order vacated for reasons stated on the record at the hearing held on Friday, April 15, 2016. Signed by Judge Beth Bloom on 4/15/2016. (tas) (Entered: 04/15/2016)
04/15/2016	148	PAPERLESS Minute Entry for proceedings held before Judge Beth Bloom: Sentencing not held on 4/15/2016 as to Khaled Elbeblawy. Defense ore tenus motion to continue sentencing is granted for reasons stated on the record. (Sentencing CONTINUED to Friday, 5/13/2016 01:30 PM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2.) Parties Present: Nicholas E. Surmacz, DOJ; Vasanth R. Sridharan; DOJ; Richard Carroll Klugh, Jr., Esq.; Defendant present (J). Arabic Interpreter present. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. (tas) (Entered: 04/15/2016)
04/15/2016	149	PAPERLESS NOTICE OF SENTENCING HEARING as to Khaled Elbeblawy. Sentencing set for Friday, 5/13/2016 01:30 PM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2. (tas) (Entered: 04/15/2016)
04/18/2016		SYSTEM ENTRY - Docket Entry 150 restricted/sealed until further notice. (tpl) (Entered: 04/18/2016)
04/18/2016		SYSTEM ENTRY - Docket Entry 151 restricted/sealed until further notice. (tpl) (Entered: 04/18/2016)
04/21/2016	152	CJA 24 as to Khaled Elbeblawy: Authorization to Pay Yvette Hernandez Voucher # FLST 16 095. (amb) (Entered: 04/21/2016)
04/22/2016	153	Unopposed MOTION to Continue *Sentencing and Related Proceedings* re 149 Notice/Order of Change of Plea and/or Sentencing by Khaled Elbeblawy. Responses due by 5/9/2016 (Klugh, Richard) (Entered: 04/22/2016)
04/25/2016	154	PAPERLESS ORDER granting 153 Unopposed Motion for Extended Continuance of Post-Conviction Proceedings and Alternative Request for Relief Due to Appointed Counsel's Medical Emergency as to Khaled Elbeblawy (1). SENTENCING HEARING reset for Friday, 7/29/2016 09:30 AM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2. FORFEITURE Hearing reset for Friday, 7/29/2016 09:30 AM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2. (3 hours set aside for these hearings, please contact Chambers if additonal time is required.)(Arabic Interpreters Required and Ordered) Signed by Judge Beth Bloom on 4/25/16. (tas) (Entered: 04/25/2016)
07/14/2016	155	Unopposed MOTION to Continue Sentencing Hearing *and Forfeiture Hearing* by Khaled Elbeblawy. Responses due by 8/1/2016 (Attachments: # 1 Text of Proposed Order)(Klugh, Richard) (Entered: 07/14/2016)
07/14/2016	156	PAPERLESS ORDER granting 155 Motion to Continue Forfeiture and Sentencing Hearing as to Khaled Elbeblawy (1). Forfeiture Hearing reset for Tuesday, 8/30/2016 09:30 AM in Miami Division before Judge Beth Bloom, 400 North Miami Avenue, Courtroom 10-2. Sentencing set for Tuesday, 8/30/2016 09:30 AM in

		Miami Division before Judge Beth Bloom,400 North Miami Avenue, Courtroom 10-2. Signed by Judge Beth Bloom (tas) (Entered: 07/14/2016)
08/10/2016	157	TRANSCRIPT of Arraignment on Superseding Indictment as to Khaled Elbeblawy held on 01/04/2016 before Judge Beth Bloom, 1 - 36 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/6/2016. Redacted Transcript Deadline set for 9/15/2016. Release of Transcript Restriction set for 11/14/2016. (yhz) (Entered: 08/10/2016)
08/10/2016	158	TRANSCRIPT of Motions & Forfeiture Hearing as to Khaled Elbeblawy held on 04/15/2016 before Judge Beth Bloom, 1 - 102 pages, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/6/2016. Redacted Transcript Deadline set for 9/15/2016. Release of Transcript Restriction set for 11/14/2016. (yhz) (Entered: 08/10/2016)
08/11/2016		SYSTEM ENTRY - Docket Entry 159 restricted/sealed until further notice. (nc) (Entered: 08/11/2016)
08/11/2016		SYSTEM ENTRY - Docket Entry 160 restricted/sealed until further notice. (nc) (Entered: 08/11/2016)
08/11/2016		SYSTEM ENTRY - Docket Entry 161 restricted/sealed until further notice. (nc) (Entered: 08/11/2016)
08/11/2016		SYSTEM ENTRY - Docket Entry 162 restricted/sealed until further notice. (nc) (Entered: 08/11/2016)
08/23/2016	163	RESPONSE in Opposition by Khaled Elbeblawy re 130 MOTION for Forfeiture of Property *Money Judgment* Replies due by 9/2/2016. (Klugh, Richard) (Entered: 08/23/2016)
08/25/2016	164	NOTICE *of Sentencing Witnesses and Hearing Duration* by Khaled Elbeblawy (Klugh, Richard) (Entered: 08/25/2016)
08/25/2016	165	Defendant's MOTION for Downward Departure by Khaled Elbeblawy. Responses due by 9/12/2016 (Klugh, Richard) (Entered: 08/25/2016)
08/29/2016	166	REPLY TO RESPONSE to Motion by USA as to Khaled Elbeblawy re 130 MOTION for Forfeiture of Property *Money Judgment* (Attachments: # 1 Text of Proposed Order) (Sombuntham, Nalina) (Entered: 08/29/2016)
08/30/2016	167	PAPERLESS ORDER denying 118 Motion to Strike as to Khaled Elbeblawy (1) for reasons stated on the record. Signed by Judge Beth Bloom (BB) (Entered: 08/30/2016)
08/30/2016	168	PAPERLESS ORDER denying 165 Motion for Downward Departure as to Khaled Elbeblawy (1) for reasons stated on the record. Signed by Judge Beth Bloom (BB) (Entered: 08/30/2016)
08/30/2016	169	Paperless Minute Entry for proceedings held before Judge Beth Bloom: Forfeiture Hearing as to Khaled Elbeblawy held on 8/30/2016, Sentencing held on 8/30/2016 as to Khaled Elbeblawy. Appearances by Nicholas Surmacz, Nilina Sombuntham and Vasanth Sridharan for the USA and Richard Klugh, Jr. for the defendant. Arabic Interpreter present. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. (ch1) (Entered: 08/30/2016)
08/31/2016	170	JUDGMENT as to Khaled Elbeblawy (1), Count(s) 1, 2. Dismissed; Count(s) 1s, 2s, Imprisonment for a term of 240 months. This term consists of 240 months as to count 1 and 60 months as to count 2, to be served concurrently to count 1; followed by 3 years Supervised Release. This term consists of 3 years as to counts 1 and 2, all such terms to run concurrently. Restitution: $36,400,957.00 Assessment: $200.00 Closing Case for Defendant. Signed by Judge Beth Bloom on 8/31/2016. (ail) **NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69.** (Entered: 09/01/2016)
09/01/2016	171	ORDER OF FORFEITURE as to Khaled Elbeblawy. Signed by Judge Beth Bloom on 8/31/2016. (ail) (Entered: 09/01/2016)
09/12/2016	172	NOTICE OF APPEAL by Khaled Elbeblawy Re: 170 Judgment,,. Filing fee $ 505.00. CJA Appointment with CJA Voucher Number 15 5277. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Klugh, Richard) (Entered: 09/12/2016)
09/13/2016		Transmission of Notice of Appeal, Judgment and Docket Sheet as to Khaled Elbeblawy to US Court of Appeals re 172 Notice of Appeal - Final Judgment, Notice has been electronically mailed. (apz) (Entered: 09/13/2016)
09/26/2016	173	Acknowledgment of Receipt of NOA from USCA as to Khaled Elbeblawy re 172 Notice of Appeal - Final Judgment, date received by USCA: 9/13/2016. USCA Case Number: 16-16048-C. (apz) (Entered: 09/27/2016)
10/11/2016	174	TRANSCRIPT INFORMATION FORM as to Khaled Elbeblawy re 172 Notice of Appeal - Final Judgment, filed by Khaled Elbeblawy. Sentencing, other hearings transcript(s) ordered. Order placed by Richard Klugh. Email sent to Court Reporter Coordinator. (Klugh, Richard) (Entered: 10/11/2016)
10/28/2016	175	COURT REPORTER ACKNOWLEDGMENT as to Khaled Elbeblawy re 174 Transcript Information Form, 172 Notice of Appeal - Final Judgment,. Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. Estimated filing date of transcript 12/12/2016. USCA number 1616048-C. (yhz) (Entered: 10/28/2016)
12/18/2016	176	TRANSCRIPT of Motion to Suppress, Day 1 as to Khaled Elbeblawy held on 11/16/15 before Judge Beth Bloom, 1 - 117 pages, re: 172 Notice of Appeal - Final Judgment, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. USCA Case Number: 16-16048-C. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2017. Redacted Transcript Deadline set for 1/18/2017. Release of Transcript Restriction set for 3/20/2017. (yhz) (Entered: 12/18/2016)
12/18/2016	177	TRANSCRIPT of Motion to Suppress, Day 2 as to Khaled Elbeblawy held on 11/17/2016 before Judge Beth Bloom, 1 - 108 pages, re: 172 Notice of Appeal - Final Judgment, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. USCA Case Number: 16-16048-C. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2017. Redacted Transcript Deadline set for 1/18/2017. Release of Transcript Restriction set for 3/20/2017. (yhz) (Entered: 12/18/2016)
12/18/2016	178	TRANSCRIPT of Pretrial Motion as to Khaled Elbeblawy held on 11/25/15 before Judge Beth Bloom, 1 - 10 pages, re: 172 Notice of Appeal - Final Judgment, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. USCA Case Number: 16-16048-C. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2017. Redacted Transcript Deadline set for 1/18/2017. Release of Transcript Restriction set for 3/20/2017. (yhz) (Entered: 12/18/2016)
12/18/2016	179	TRANSCRIPT of Forfeiture & Sentencing Hearing as to Khaled Elbeblawy held on 8/30/16 before Judge Beth Bloom, 1 - 143 pages, re: 172 Notice of Appeal - Final Judgment, Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov. USCA Case Number: 16-16048-C. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2017. Redacted Transcript Deadline set for 1/18/2017. Release of Transcript Restriction set for 3/20/2017. (yhz) (Entered: 12/18/2016)
12/27/2016	180	TRANSCRIPT NOTIFICATION as to Khaled Elbeblawy - Transcript(s) ordered on: 10/12/2016 by Richard C. Klugh, Esq. has/have been filed on 12/18/16 by Court Reporter: Yvette Hernandez, 954-769-5686 / Yvette_Hernandez@flsd.uscourts.gov re 174 Transcript Information Form, 175 Court Reporter Acknowledgment, 172 Notice of Appeal - Final Judgment,. (yhz) (Entered: 12/27/2016)
08/17/2017	181	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 172 Notice of Appeal - Final Judgment, Appeal No. 16-16048-CC. The entire record on appeal is available electronically. (apz) (Entered: 08/17/2017)
10/18/2017	182	Compliance with Request from USCA dated 10/17/2017. Regarding: Compilation of case documents. Complied with on 10/17/2017. USCA Case Number 16-16048-CC. (apz) (Entered: 10/18/2017)
09/05/2018	183	MANDATE of USCA (certified copy). We AFFIRM Elbeblawy's convictions and sentence, VACATE the forfeiture order, and REMAND for proceedings consistent

		with this opinion as to Khaled Elbeblawy re 172 Notice of Appeal - Final Judgment; Date Issued: 9/5/2018; USCA Case Number: 16-16048-CC. (apz) (Entered: 09/05/2018)
03/18/2019	184	WRIT OF CERTIORARI DENIED by US Supreme Court as to Khaled Elbeblawy re 172 Notice of Appeal - Final Judgment. (apz) (Entered: 03/19/2019)
07/10/2019	185	NOTICE of Reassignment of Assistant US Attorney. Nicole Grosnoff appearing for USA. Nalina Sombuntham terminated. Attorney Nicole Grosnoff added to party USA(pty:pla). (Grosnoff, Nicole) (Entered: 07/10/2019)
09/30/2019	186	PAPERLESS NOTICE OF HEARING as to Khaled Elbeblawy Resentencing re: Forfeiture set for 12/6/2019 at 10:00 AM in Miami Division, 400 North Miami Avenue, Courtroom 10-2 before Judge Beth Bloom. (ego) (Entered: 09/30/2019)
11/01/2019	187	Unopposed MOTION to Withdraw as Attorney by Richard Klugh for / by Khaled Elbeblawy. (Klugh, Richard) (Entered: 11/01/2019)
11/04/2019	188	PAPERLESS ORDER granting 187 Motion to Withdraw as Attorney. Richard Carroll Klugh, Jr withdrawn from case. Added Jeffrey David Weinkle for Khaled Elbeblawy for Remand for Sentencing re: Forfeiture. Date attorney was appointed CJA: 11/4/2019 as to Khaled Elbeblawy (1). Signed by Judge Beth Bloom on 11/4/2019. (ego) (Entered: 11/04/2019)
11/15/2019	189	MOTION to Amend/Correct 171 Order for Forfeiture of Property by USA as to Khaled Elbeblawy. Responses due by 11/29/2019 (Attachments: # 1 Exhibit, # 2 Text of Proposed Order)(Grosnoff, Nicole) (Entered: 11/15/2019)
12/02/2019	190	PAPERLESS ORDER requiring the Defendant's Response by December 5, 2019, to the United States' Motion for Amended Forfeiture Money Judgment, ECF No. 189 , as to Khaled Elbeblawy. Signed by Judge Beth Bloom (BB) (Entered: 12/02/2019)
12/02/2019		Set/Reset Deadlines/Hearings in case as to Khaled Elbeblawy as per DE 190 re 189 MOTION to Amend/Correct 171 Order for Forfeiture of Property. Responses due by 12/5/2019 (lk) (Entered: 12/03/2019)
12/04/2019	191	MOTION to Continue Sentencing Hearing by Khaled Elbeblawy. Responses due by 12/18/2019 (Weinkle, Jeffrey) (Entered: 12/04/2019)
12/04/2019	192	PAPERLESS ORDER granting 191 Motion to Continue Change of Sentencing Hearing as to Khaled Elbeblawy (1). Re: 189 MOTION to Correct 171 Order for Forfeiture of Property . Motion Hearing reset for 2/14/2020 at 09:30 AM in Miami Division, 400 North Miami Avenue, Courtroom 10-2 before Judge Beth Bloom. Signed by Judge Beth Bloom on 12/4/2019. (ego) (Entered: 12/04/2019)
12/04/2019	193	MOTION for Extension of Time file Response re 190 Order by Khaled Elbeblawy. Responses due by 12/18/2019 (Weinkle, Jeffrey) (Entered: 12/04/2019)
12/04/2019	194	PAPERLESS ORDER granting 193 Motion for Extension of Time to File Response by February 7, 2020, as to Khaled Elbeblawy (1). Signed by Judge Beth Bloom (BB) (Entered: 12/04/2019)

PACER Service Center			
Transaction Receipt			
01/29/2020 15:04:22			
PACER Login:	jw271934	Client Code:	ELBEBLAWY
Description:	Docket Report	Search Criteria:	1:15-cr-20820-BB
Billable Pages:	19	Cost:	1.90

Khaled Elbeblawy #08071-104
Federal Detention Center
P.O Box 019120
Miami, FL 33101



CERTIFIED MAIL

7009 2820 0001 7395 3929

LEGAL MAIL

United States District Court
For the Southern District of Florida
United States Federal Courthouse
400 North Miami Avenue, RM: 8N09.
Miami, FL 33128-7716

USMS MAIL ROOM

AO 243 (Rev. 09/17)

AMENDED MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District **SOUTHERN DISTRICT OF FLORIDA, MIAMI**
Name *(under which you were convicted)*: Khaled Elbeblawy	Docket or Case No.: 1:20-CV-21212-BB
Place of Confinement: Federal Correctional Facility, FCI-Miami	Prisoner No.: 08070-104
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)* Khaled Elbeblawy

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

   (b) Criminal docket or case number (if you know): 1:15-CR-20820-BB

2. (a) Date of the judgment of conviction (if you know): 08/31/2016

   (b) Date of sentencing: 08/31/2016

3. Length of sentence: 240 Months

4. Nature of crime (all counts):
   Conspiracy to commit healthcare and wire fraud, 18 U.S.C. § 1349, a class (C) felony, Conspiracy to defraud the United States by paying healthcare kickbacks, 18 U.S.C. § 371, a class (D) felony.

5. (a) What was your plea? (Check one)
   (1) Not guilty [x] (2) Guilty [ ] (3) Nolo contendere (no contest) [ ]

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury [x] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes [x] No [ ]

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8. Did you appeal from the judgment of conviction? Yes [x] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: United States of Appeals for the Eleventh Circuit

(b) Docket or case number (if you know): 16-6048-C

(c) Result: The Appeal Court Affirm my conviction and sentence, vacated the forfeiture order, and remanded

(d) Date of result (if you know):

(e) Citation to the case (if you know): USA v. Elbeblawy, 899 F.3d 925

(f) Grounds raised:

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes [x] No [ ]

If "Yes," answer the following:

(1) Docket or case number (if you know): 18-6667

(2) Result: Denied

(3) Date of result (if you know): 03/18/2019

(4) Citation to the case (if you know): USA v. Elbeblawy, 203 LED.2dd 573.US

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes [x] No [ ]

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: United States District Court - Southern District of Florida

(2) Docket or case number (if you know): 1:15-CR-20820-BB

(3) Date of filing (if you know): 03/08/2016

(4) Nature of the proceeding: Corrected Motion for Acquittal & MOTION for New Trial

(5) Grounds raised:

(1) Impermissible admission of evidence; (2) superseding indictment was efficient; (3) evidence was insufficient to support conviction; (4) Brad/Giglio violation; and (5) juror misconduct.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes [x] No [ ]

(7) Result: Denied

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes [ ] No [ ]

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes [ ] No [ ]

(2) Second petition: Yes [ ] No [ ]

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Trial counsel's performance was deficient where his decision and actions fell below the standards for constitutional performance under the Sixth Amendment.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Specifically, but not limited to, trial counsel: (1) failed to investigate, raise or challenge this Court's jurisdiction based on double jeopardy from the United States' "bad faith" dismissal of a prior matter under F.R. Crim. P. 48(a); (2) failed to inform defendant that he had the option to enter a "conditional plea" dependent on an appeal of the jurisdictional challenge; (3) failed to object to Trial Court's decision/refusal to substitute counsel; and (4) failed to object to being forced to continue as standby counsel after parties informed Trial Court of irreconcilable differences and that attorney client relationship was irretrievably broken.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: IAC claims preculuded pursuant to Circuit precedent.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Appellate counsel's performance was deficient where his decisions and actions fell below the standards of constitutional performance under the Sixth Amendment.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Specifically, but not limited to, Appellate counsel's failure to seek review where the District Court, erred in its denial of the defendant's Sixth Amendment right to representation by professional counsel. The District Court erred: (1) in the denial of the defendant's request for substitute counsel; (2) in proceeding in light of Defendant's statements that he did not "know the law"; (3) in view of this Court's own statements in the records that the defendant was "not familiar with the law... not familiar with court procedures... [and] not familiar with the rules of evidence."; and (4) based on Trial counsel's responses to this Court's inquires that "we [counsel and the defendant] have irreconcilable differences which are going to preclude me [counsel] form continuing to represent him... no, I cannot continue to represent him."

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel's performance was deficient.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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GROUND THREE: The District Court erred by, and through, its denial of the Defendant's Sixth Amendment right to professional counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Specifically, but not limited to, the District Court's repeated denial of: (1) the Defendant's request for substitute counsel; (2) the Defendant's on record statements that he did not "know the law"; (3) the Court's own on record statements that the defendant was not "familiar with the law... not familiar with the court procedure... [and] not familiar with the rules of evidence."; and (4) trial counsel's on record statements that "we have irreconcilable differences which are going to preclude me from continuing to represent him... no, I cannot continue to represent him."

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Deficient performance of Appellate counsel.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

_____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The grounds presented herein were not previously presented to this Court due to the deficient performance of trial and appellate counsel.

_____

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes [ ] No [x]

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

Michael Mater

(b) At the arraignment and plea:

Francisco Marty, Jam Smith

(c) At the trial:

Michael Matters

(d) At sentencing:

Richard Carrol Klugh, Jr.

(e) On appeal:

Richard Carrol Klugh, Jr.

(f) In any post-conviction proceeding:

Jeffrey Weinkle

(g) On appeal from any ruling against you in a post-conviction proceeding:

Sonia Escobia O'Donnell

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes [ ] No [x]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [ ] No [x]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes [ ] No [ ]

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Where the deadline for filing was equitably tolled during the pendency of interlocutory appellate proceedings in Appeal No. 21-13694-G.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

_____

or any other relief to which movant may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____
(month, date, year)

Executed (signed) on June 08, 2022 (date)

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE No. 20-CV-21212-BB

KHALED ELBEBLAWY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.
_____/

MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION TO VACATE
PURSUANT TO 28 U.S.C. § 2255

COMES NOW, Khaled Elbeblawy ("the Plaintiff"), and files this, his Memorandum of Law in support of his Amended Motion to Vacate [ECF No. ____] the Judgement of Conviction [ECF No. 90] pursuant to Title 28 U.S.C. § 2255. The Plaintiff respectfully moves this Court for the entry of an order to VACATE the Judgement of Conviction based on the facts and citations of authority set forth below, or in the alternative, to set an evidentiary hearing in this matter.

I. INFORMATION AND BACKGROUND

1. On October 23, 2015, Mr. Elbeblawy was arrested and detained at his residence, a week after following his return from a trip overseas.

2. On October 22, 2015, the Grand Jury for the Southern District of Florida returned an indictment against the Plaintiff for the *identical set of facts and conduct,* previously alleged and then dismissed in "bad faith" by the United States a scant thirty (30) days prior. See *United States v. Elbeblawy*, SDFL Case No. 1:15-CR-20820-BB, at ECF No. 3.

3. On January 21, 2016, following a one (1) week trial, Mr. Elbeblawy was convicted by a jury of his peers [ECF No. 90].

4. On August 31, 2016, following his adjudication of guilt, this Court sentenced the Plaintiff to 240 months imprisonment for conspiracy to commit Healthcare fraud in violation of 18 U.S.C § 1349 (count 1), and 60 months imprisonment for conspiracy to defraud the United States by paying Healthcare kickbacks in violation of 18 U.S.C. § 371. Further, this Court assessed Mr. Elbeblawy, $36,400,957 in restitution, and $36 million in forfeiture [ECF No.170].

5. On September 12, 2016, the Plaintiff timely filed his Notice of Appeal [ECF No. 172]. On appeal, USCA Appeal No. 16-16048C the Eleventh Circuit affirmed Mr. Elbeblawy's conviction and sentence, but vacated and remanded this Court's forfeiture order, directing it to be amended as instructed. See *United States v. Elbeblawy,* 899 F.3d 925 (11th Cir., 2018).

6. On remand this Court held a hearing to review the forfeiture matter and subsequently issued an amended forfeiture order on February 24, 2020. See ECF No. 201.

7. On February 24, 2020, the Plaintiff filed a timely Notice of Appeal [ECF No. 202] on the amended forfeiture order. On appeal, USCA Appeal No. 20-10767-A, the Eleventh Circuit affirmed the amended forfeiture order by this Court.

8. On or about April 2020, Mr. Elbeblawy filed a Petition for Writ of Certiorari. The petition was denied on June 7, 2021. See *Elbeblawy v. United States,* 141 S. Ct. 2740; 210 L. Ed. 2d 894, 2021 Lexis 2986; 89 U.S.L.W. 3410.

II. STANDARDS OF REVIEW

9. The matter before this Court encompasses two (2) distinct categories of error, each with distinct standards under which claims of that type must be reviewed. "This [type of] case requires an examination of the proper doctrines of structural error and ineffective assistance of counsel. They are

intertwined, because the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective assistance claim...". See *Weaver v. Massachusetts,* 137 S. Ct. 1899, 198 L. Ed. 2d 420, 426.

A. STRUCTURAL ERRORS

10. An error is deemed structural when it "affect[s] the framework within which the trial proceedings." See *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed 302, 309.

11. There are three rationales under which an error may be deemed structural. First, an error is structural when the constitutional protection at issue does not protect the defendant from erroneous conviction but instead protects from some other interest, e.g., the defendant's right to conflict free counsel, or his or her right to self-representation. See Weaver, 198 L. Ed. 2d at 426 (quoting *United States v. Gonzalez – Lopez,* 548 U.S. 140, 149, n. 4). Second, an error is structural, when the error's effects are simply too difficult to measure, e.g., when a defendant is denied the right to select his or her own attorney, making it almost impossible for the government to show that the error was "harmless beyond a reasonable doubt". *Id.* (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705). Third, some errors are always structural because fundamental unfairness cannot be avoided, e.g., when an indigent defendant is denied an attorney. *Id.* citing *Gideon v. Wainwright,* 372 U.S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799.

12. In this case, like *Weaver,* "a critical point is that an error *can* count as structural even if it does not lead to fundamental unfairness in every case." *Id.* at 426. Put differently, the specific contours of the structural error *in this case* may not rise to the threshold of fundamental unfairness in every case.

13. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is

raised in the context of an ineffective assistance claim, however, the defendant must show prejudice in order to obtain a new trial, See Id. at 137 S. Ct. 1913.

B. TRIAL ERROR

14. Trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial.

15. In order to recognize a trial error in the context of a collateral attack as ineffective assistance of counsel, the defendant must demonstrate both prongs under *Strickland v. Washington*, 466 U.S. 668, 687, 104, S. Ct. 2052, 80 L. Ed. 2d. 674.

16. The standard for a finding of deficient performance of counsel first requires showing that counsel made an error so serious that counsel was not functioning as "counsel" of the type contemplated by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the outcome of the proceeding. Stated another way, the defendant must show but for counsel's deficient performance there existed a reasonable probability of a different outcome in his or her case or, that the violation was so serious as to render the trial fundamentally unfair. See *Weaver*, 137 S. Ct. at 1903 – 1904.

17. Moreover, a reviewing court accords trial counsel broad deference that the challenged conduct was the product of a reasoned trial strategy. See *Wilkerson v. Collins*, 950 F. 2d 1054, 1065 (5th Cir, 1992). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel, *unless* it is so ill chosen that it permeates the entire trial with obvious unfairness." See *United States v. Jones*, 287 F. 3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F. 2d 199, 206 (5th Cir, 1983).

C. HARMLESS ERROR

18. A trial error may be deemed "harmless" if the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." See *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

III. ARGUMENTS AND CITATIONS OF AUTHORITY

19. The Plaintiff avers the judgment in this matter must be VACATED based on structural errors that rendered the trial proceedings fundamentally unfair, and trial errors that, but for the deficient performance of counsel, would likely have resulted in a different outcome.

A. STRUCTURAL ERRORS

20. The Supreme Court has made clear that there is no "single, inflexible criterion" that must be met in order for an error to be deemed "structural" and prejudicial per se. "Structural error are errors that affect the 'entire conduct of the [proceeding], from beginning to end.' ... The 'highly exceptional' category of structural errors includes, for example, the denial of counsel of choice." See *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021).

21. An error is structural if the error always results in fundamental unfairness. An example would be when "an indigent defendant is denied an attorney... the resulting trial is always a fundamentally unfair one". *Weaver*, 137 S. Ct., at 1908. Moreover, it would be futile for the government to try to show harmlessness. Id.

22. When a defendant is denied the right to select his or her own attorney, the precise effect of the violation cannot be ascertained. "See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4(2006). The denial of the right to counsel of choice should be deemed "structural" on this reasoning given that" it is impossible to know what different choices the [denied] counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.*

23. As such, harmless error analysis would be nothing more than "a speculation into what might have occurred in an alternate universe." See *Brecht v. Abrahamson,* 507 U.S. 619, 629 (1983*); Gonzalez-Lopez,* 548 U.S. at n.4. Thus, a structural error, i.e., the denial of counsel of choice, necessitates reversal. See *United States v. Davila*, 568 U.S. 597, 611 (2013); *Gonzalez-Lopez,* 548 U.S. at 150, 152.

24. In this case the Defendant repeatedly notified the district court of progressive issues with counsel. The district court encouraged counsel to attempt to talk with the Defendant to work things out. The district court held three separate ex-parte hearings with the Defendant and counsel. At each hearing the district court forced counsel and the Defendant to continue despite clear and compelling testimony from counsel and the Defendant that there was a complete breakdown in communications. Put simply, the district court was on notice the attorney-client relationship was irretrievably broken. See Hearing Tr. *January 4, 2016, pg. 8. L. 10-14; pgs. 13-14; L. 18-25, 1-15.*

> COURT: Mr. Matters, would you care to respond to each of Mr. Elbeblawy's points sir?
> MATTERS: Your Honor, based on the three weeks of discussions with my client we have irreconcilable differences which are going to preclude me from representing him.

25. The conflict between counsel and the Defendant culminated in a mid-trial dissolution of the relationship by the district court.

26. At *NO TIME* did the defendant *request* to represent himself. Instead, the defendant requested *substitute* counsel. Unlike the defendant in *Fischetti v. Johnson,* 384 F. 3d 140, 154 (3rd Cir. 2004) where the defendant had fired *THREE* court appointed attorneys, Mr. Elbeblawy had a single court appointed attorney.

27. Throughout the proceedings the defendant was courteous, respectful, and adhered to proper decorum with the court. CF. *United States v. Thomas*, 357 F. 3d 357, (3rd Cir. 2004) where defendant engaged in misconduct concerning *FOUR* different attorneys, including threats, verbal abuse, tearing up correspondence, etc.

28. Closer to home, *United States v. Melillo,* 2015 U.S. App. Lexis 19796, is instructive on the Sixth Amendment guarantee of counsel and an abusive defendant who attempts to manipulate the judicial process. "[A] defendant has an absolute right to counsel, but it is equally true that a defendant has no right to dictate who that appointed counsel will be." *Id.* at 25-26 (quoting *Thomas v. Wainwright,* 767 F. 2d 738, 742 (11th Cir. 1985)).

29. When an indigent defendant requests that the district court appoint new or substitute counsel, the defendant bears the burden to show "good cause" to support his or her request. Id. at 26 (quoting *United States v. Garey,* 540, F. 3d 1253, 1263 (11th Cir. 2008) (En Banc)).

(1) FUNDAMENTAL CONSTITUTIONAL RIGHT: RIGHT TO COUNSEL

30. Mr. Elbeblawy avers that multiple errors occurred during the pre-trial phase and the trial phase, culminating on January 19, 2016, the fourth day of his trial. First, the district court denied the Defendant's *multiple* requests to substitute counsel based on the wrong criteria. Second, the district court forced the Defendant into a Hobson's Choice of continuing trial with counsel with whom he deemed (and counsel agreed) was conflicted or waive his right to counsel *before* being informed of the potential consequences. Trial Tr., Day 4 (sealed), pg. 17-18, L. 12-25, 1-13. Third, the district court prejudiced the Defendant's decision to seek to retain counsel through the local Suni Muslim community by preemptively stating, "I'm not going to continue the trial... but you understand that you have the right to be represented by an attorney." Trial Tr. Day 4 (sealed) pg. 19, L. 8-20. Fourth, the district court erred in permitting a defendant with no experience, training, or understanding of the legal process or procedure to proceed pro se in the middle of a complex trial.

31. The district court erred in its denial of Mr. Elbeblawy's numerous requests to substitute counsel. The district court conducted a colloquy that exposed a breakdown in communications, a

fundamental loss of trust and confidence, such that despite multiple attempts at reconciliation, the attorney-client relationship was irretrievably broken.

32. The critical error that deprived the defendant of his right to counsel of choice, was *BEFORE* the trial began. In the January 4, 2016, hearing, Matters responded clearly and emphatically to the district court's inquiry, could he [Matters] could not continue to represent Mr. Elbeblawy. Matters testified, "we have irreconcilable differences which are going to preclude me from being able to represent him [Mr. Elbeblawy]." Hearing Tr. January 4, 2016, pg. 8 L. 10-14.

33. Unsatisfied with Mr. Matter's professional and ethical judgment, the district court again pressured counsel asking "should the court deny Mr. Elbeblawy's motion, do you believe that you can continue to represent Mr. Elbeblawy effectively?" Hr. Tr. January 4, 2016, Pg. 13, L. 18-21. Again, Matters was clear and unambiguous in his response to the district court, "No... I cannot have conversations with him any longer, wherein they are helpful to either of us." Hr. Tr., January 4, 2016, pg. 14, L. 11-12.

34. The Defendant not only demonstrated "good cause" (See *Garey*, 540 F. 3d at 1263) but also counsel answered the district court *not once, but twice*, that he could not effectively represent Mr. Elbeblawy because there was a complete breakdown in communication and the attorney-client relationship was irretrievably broken.

35. Bad news does not get better with age, the district court created a structural error – the denial of effective counsel and the denial of counsel of choice – that pervaded the entire trial and resulted in a fundamentally unfair proceeding.

(2) FUNDAMENTAL CONSTITUTIONAL RIGHT: RIGHT TO COUNSEL

36. Second, the district court reinforced the structural error by forcing the defendant into a Hobson's Choice – (a) an attorney who has already told the court he [the attorney] does not believe he can effectively represent him or (b) that he [the Defendant] must endeavor to represent himself. Mr. Elbeblawy never requested to represent himself. Instead, on multiple occasions he asked, as was his legitimate right, for another attorney who *did believe* he could have represented him effectively. The Defendant did not request a specific attorney, merely that he be provided with counsel who would at least start the trial with the professional belief that he could provide the type of professional counsel guaranteed by the Sixth Amendment.

37. The district court abused its discretion by substituting its belief that counsel could be effective in his representation despite counsels' and the defendant's explicit statements to the contrary. When Mr. Matters testified in his professional judgment, grounded in more than thirty-five years of experience, that "we have irreconcilable differences which are going to preclude me from being able to represent him" effectively, "good cause" had been shown. The district court offered no rationale why Mr. Elbeblawy could expect, or would receive, effective counsel from an attorney who had testified that he *could not* represent him effectively.

38. The Hobson's Choice was further solidified by the district court's unprompted admonition, that under no circumstances, "I'm not going to continue the trial." Trial Tr., Day 4 (sealed), pg. 19, L. 8-19. The district court badgered the defendant to either accept Mr. Matters as counsel or waive his right to counsel *BEFORE* explaining the potential dangers of that choice.

39. The district court's repeated statements that the defendant was entitled to counsel, so confused Mr. Elbeblawy that he asked "[w]hat type of attorney? Like a – like somebody I hire? ... Private attorney you mean?" *Id.*

40. Third, the district court prejudiced the defendant by actively discouraging him from seeking to retain counsel through the assistance of the local Sunni Muslim Community. The district court's unprompted, preemptive statement that it would not continue trial served to dissuade Mr. Elbeblawy from potentially seeking private legal assistance. The district court exerted improper influence over the defendant's decisions regarding counsel. This improper influence had the effect of underscoring the structural errors, i.e., deprivation of the Sixth Amendment right to counsel.

41. Fourth, the district court errored in permitting Mr. Elbeblawy to represent himself. Notwithstanding the Hobson's Choice that led to this decision, based on the criteria set forth in *Faretta v. California*, 422 U.S. 806 (1975), the Defendant was completely unqualified and wholly unprepared to defend himself in a complex criminal trial. Even less so, was Mr. Elbeblawy positioned to take the reins of his own defense *mid-trial*.

42. The most appropriate remedy to the situation was also the remedy most readily available to the district court, i.e., substitution of counsel. The *Faretta* colloquy conducted by the district court clearly demonstrated the degree to which Mr. Elbeblawy was incapable of defending himself. *Trial Tr. Day 4 pg. 44, L. 1-17.*

> THE COURT: Are you familiar with the Rules of Criminal Procedure?
> THE DEFENDANT: No.
> THE COURT: Are you familiar with the Federal Evidence Code?
> THE DEFENDANT: No.
> THE COURT: Mr. Elbeblawy, I recognized that you have absolutely no legal training, and that would include the knowledge of any objections and what may constitute proper impeachment. You are aware that that is a detriment to you in making a decision to represent yourself?
> THE DEFENDANT: I'm fully taking the responsibility.
> THE COURT: You will not know when and how to make proper objections.
> THE DEFENDANT: I'm sorry?

43. Where the above transcript reads as though a person with no legal training made a voluntary, knowing waiver of his right to counsel, fully aware of the dangers, the sealed transcript tells a different and

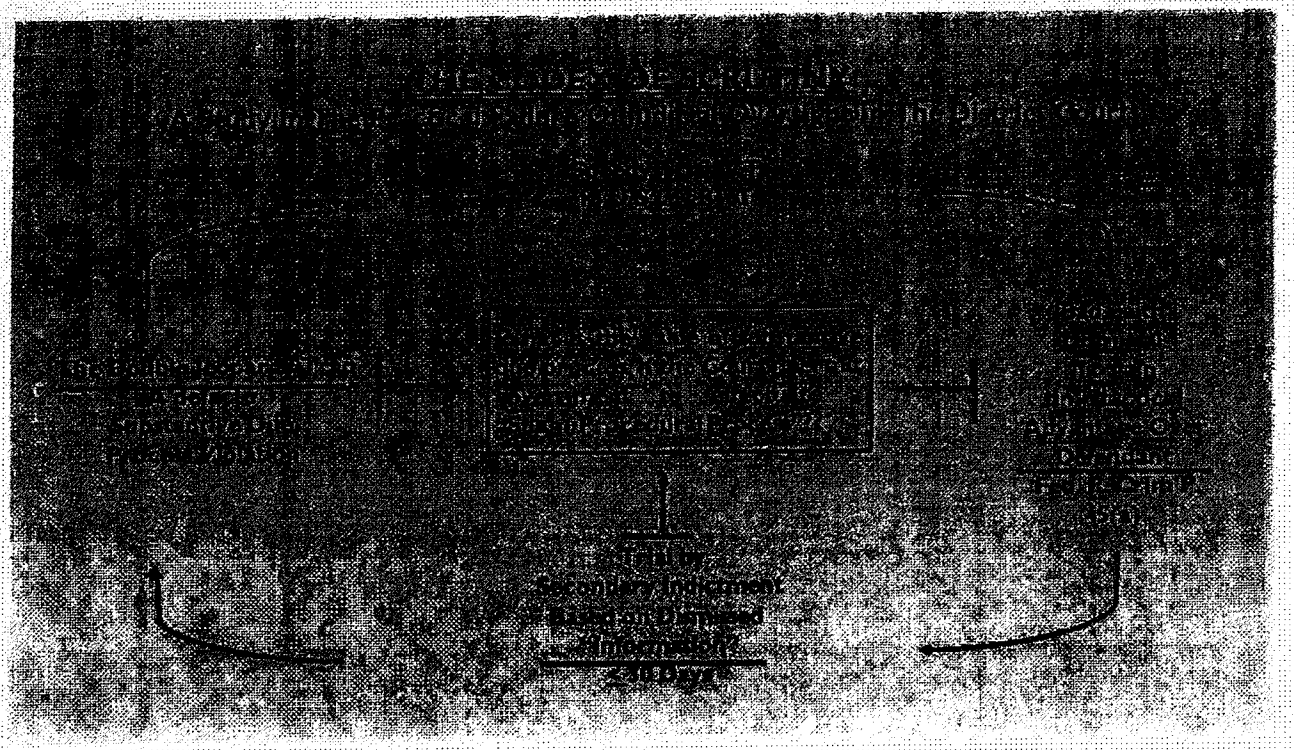
very important story. The "public colloquy" took place *after* the more informative "sealed colloquy". It was the district court itself that recognized the impropriety of its decision. The district court's statement was prescient, "Mr. Elbeblawy, you have already made clear just by your question *your lack of understanding* of the jury trial process." Trial Tr. Day 4 (sealed) pg. 28, L. 20-22.

44. When the district court recognized in the record the defendant's "lack of understanding of the jury trial process," by definition Mr. Elbeblawy's waiver of his right to counsel could not be "knowing" as required, and was thus invalid.

45. In order to determine of the criminal defendant has effectively waived the right to counsel the court has held that "a district court must consider the totality-of-circumstances." See *Landry v. Cain*, 445 Fed. Appx. 817, 822-823 (5th Cir. 2011). Additionally, the courts have held that "[t]the presence of standby counsel does not satisfy the right to counsel, and harmless error review is unavailable when a court errs in denying a criminal defendant the right to counsel at trial. See *United States v. Virgil*, 444 F.3d 447, 453 and 455-456; see also United States v. Davis, 269 F.3d 514, 519.

(3) GOVERNMENT MISCONDUCT: SHAM PROCESS/DOUBLE JEOPARDY

46. The United States first attempted to prosecute this matter in case No. 1:15-CR-20456-BB. When the parties were unable to move forward with a plea agreement, and the Defendant moved to proceed with trial, the Plaintiff was *not prepared* for a trial. However, Mr. Elbeblawy had already been arrested, arraigned, and the speedy trial "clock" was ticking. The government averred it was going to indict Mr. Elbeblawy for the same offenses as he was charged in this case. After a continuance by the Defendant to review discovery – time exempted from the speedy trial clock – the United States was still unprepared to move forward with trial.



47. At a calendar call, the district court ordered the United States to produce the discovery items and witnesses for its case-in-chief within 24 hours and to be prepared to begin trial as set. The following day the district court held another calendar call to confirm the government's compliance and preparation for trial.

48. Again, the United States was not prepared for trial, and instead sought a continuance to seek an indictment of Mr. Elbeblawy. The district court *reminded* the United States the defendant had waived indictment, and was ready to proceed to trial on information.

49. The government then acted in "bad faith" by moving to dismiss under Fed. R. Crim. P. 48(a). Counsel for the defendant failed to timely object to the United States "bad faith" motion, and the district court dismissed the matter without prejudice.

50. Jeopardy does not attach until the trier-of-facts, e.g., the petit jury, is seated. Unless, as in this case, the United States acted in "bad faith". The *facts* in this matter are simple: (1) all of the alleged instances of overt acts are the same; (2) all of the aforementioned were known and available in the matter

of the first case; (3) the United States made the arrest and brought the case before the district court with full knowledge of its obligations under the Speedy Trial Act [18 U.S.C. § 3161]; and (4) when the United States was unable to extort a plea from the Defendant, the United States *knew* it lacked the necessary elements to prevail in a trial, *at that time and under the time requirements of the Speedy Trial Act,* it acted in bad faith by moving to dismiss without even a hint of legitimacy or legal pretext.

51. Absent the ability to bring the case to trial forthright under the law, the United States acted in "bad faith" having sought (and received) a dismissal under Fed. R. Crim. P. 48(a) without prejudice. The transcripts of the *ore tenus* motion demonstrated the United States had no legitimate reason, nor offered any reason, for the dismissal other than having been unable to proceed to trial within the time set forth under the statute. See Exhibit "A"

52. It is because the United States' actions were motivated and its intent was to thwart the Speedy Trial Act, that its actions were in "bad faith". Therein, jeopardy due to "bad faith" actions on the part of the United States, had attached and, the dismissal without prejudice was improper. Moreover, the "double jeopardy trap" employed by the United States and the error of the district court in its failure to recognize its lack of jurisdiction, served to further establish structural error in this case.

B. TRIAL ERRORS

53. Mr. Elbeblawy avers that trial and appellate counsel's performance was deficient to the extent that it fell below the bar for effective representation under the Sixth Amendment.

(1) DEFICIENT PERFORMANCE OF TRIAL COUNSEL

54. The hallmark of any reasonable defense strategy is rooted in an investigation of the fundamental facts of the case. See *United States v. Green* 882 F.2d. 994, 1003 (5th Cir. 1989) (citing *Strickland,* 466 U.S.C. at 687). In this case, Michael Matters, C.J.A. appointed defense counsel, despite having more than thirty-five years of criminal defense experience, failed to investigate the

basic facts and circumstances of *this case,* and their relationship to the previous case. Had Mr. Matters engaged in any meaningful investigative efforts, he would have (a) notified the district court of a challenge to its jurisdiction, (b) filed a meritorious motion to dismiss for lack of jurisdiction, and (c) advised Mr. Elbeblawy of the need to file a writ of Coram Nobis, to correct the improper dismissal of the previous case See *Unites States v. Torres,* 282 F.3d 1241, 1256 n.6 (10th Cir. 2002). In fact, however, Mr. Matters failed to do any of those things because he failed to investigate the case he was assigned by the court.

55. Notwithstanding his failure to investigate, Mr. Matters' performance was deficient where he failed to inform the Defendant of the opportunity to enter into a "conditional plea" contingent on an appeal of the jurisdictional challenge, if the district court had denied a motion to dismiss on jurisdictional grounds. "Direct review of an adverse ruling on a pretrial motion is available only if the defendant expressly preserves that right by entering a conditional guilty plea." *United States v. Locklear,* 581 Fed. Appx. 217, 218, (4th Cir. 2014) (quoting *United States v. Abramski,* 706 F.3d 307, 314 (4th Cir. 2013), aff'd. 134 S. Ct. 2259, 189 L. Ed. 2d 262 (2014).

56. The trial in this matter eminated from the breakdown in plea negotiations. Had counsel presented Mr. Elbeblawy the opportunity to choose between a plea desired by the United States with a lower potential sentence than at risk in trial contingent on a "win-go-free" appeal, any rational person would have accepted the conditional plea agreement.

57. "A defendant has no right to be offered a plea, nor a federal right that the judge accept it." *Missouri v. Frye,* 132 S. Ct. 1399, 1410 (2012). In this case, however, this second case was set for trial as the direct result of failed plea negotiations. The United States wanted a plea agreement as evidenced by the record. The defendant believed the government had exhausted its *lawful* opportunity to seek a conviction on the specific facts and conduct in dispute.

58. Put simply, Mr. Elbeblawy believed the United States had "cheated", had side-stepped the law, in an attempt to prosecute him a second time. Had Mr. Matters filed the meritorious motion to dismiss for lack of jurisdiction, based on a bad faith double jeopardy claim, and the district court denied it, the Defendant, the United States, and the district court would all have likely agreed to a conditional plea. A conditional plea under those circumstances would have been favorable to all parties. Specifically, a conditional plea would have address (1) the Defendant's double jeopardy/government cheating claim; (2) guaranteed a conviction with an appeal waiver for the United States; and (3) avoided the necessity of a jury trial for the district court.

59. Stated differently, while a plea offer is not a right, a competent attorney, upon due diligence, is obligated to inform his client of his right to plea guilty. Moreover, when circumstances dictate that plea agreement would offer a defendant substantial potential benefits, as was the case here, the attorney is obligated to advise and pursue such a plea. In this case when the facts and circumstances all but compelled a plea agreement, Mr. Matters' failure to investigate, file a meritorious motion to dismiss, or to advise his client, and seek a conditional plea, was both negligent and deficient performance. Mr. Matters' failure to advise his client of a viable legal strategy was a violation of Florida Bar Association. R. 4-21.

60. Mr. Matters' professional representation was deficient, when upon his own professional judgment, his attorney-client relationship with Mr. Elbeblawy was irretrievably broken and they could no longer communicate effectively. Mr. Matters reached this conclusion BEFORE the trial commenced, but he failed to timely file a meritorious motion to withdraw. Such a motion was required under Florida Bar Association. Rule 4-1.16.

61. Instead, Mr. Matters forced the Defendant to write multiple letters to the district court to request substitute counsel. The district court erred in the denial of Mr. Elbeblawy's request, supra, however, it would likely have viewed a motion to withdraw from professional counsel in a different light.

See *Melillo*, 631 Fed. Appx. at 766. Mr. Matters' failure to adhere to standards of professional conduct led to the festering of an ineffective attorney-client relationship that resulted in the prejudicial effects of a mid-trial termination of counsel.

62. The corrosive effects of Mr. Matters' failure to file a meritorious motion to withdraw that culminated in the district court's termination were exacerbated by his acceptance of appointment as stand by counsel. For all of the reasons Mr. Matters could not function effectively as "counsel", i.e., inability to communicate, irretrievably broken relationship, he could not and did not function effectively as "standby" counsel.

63. Mr. Matters's failure to object to his appointment as standby counsel served to buttress the overarching structural errors that pervaded the proceeding, Mr. Matters' acceptance of his appointment as standby counsel deprived Mr. Elbeblawy of the assistance of any counsel, professional, effective, standby, or any other kind. Additionally, his failure to object to an inherently conflicted appointment ran afoul of Florida Bar Association. R. 4-1.7, 4-1.16, and 4-3.1.

64. Mr. Matters's performance was deficient even in the ex parte hearing that resulted in his termination, Mr. Matters was acutely aware of his client's limitations in language, legal, experience, and understanding. The district court itself stated of Mr. Elbeblawy, "you have already made clear just by your questions your lack of understanding ...". As counsel for the Defendant, Mr. Matters was even more atuned to his client's fundamental lack of understanding. However, Mr. Matters did nothing to advocate for substitution of counsel in lieu of allowing a defendant to make a fatal decision he was hopelessly ill equipped to understand. In so doing, Mr. Matters' failure to advocate for his client was as reprehensible as it was ineffectual. Again, Mr. Matters' deficient and prejudicial performance was volitive of Florida Bar Association. R. 4-2.1.

(2) DEFICIENT PERFORMANCE OF APPELLATE COUNSEL

65. Appellate counsel, Richard C. Klugh's, performance was deficient where he failed to raise a meritorious issue on appeal. Specifically, the structural errors of the district court's deprivation of counsel of choice, the Sixth Amendment right to counsel, and the jurisdictional challenge (noting that due to trial counsel's deficient performance, direct review of the jurisdictional challenge would have been limited to plan error). Mr. Elbeblawy was prejudiced by appellate counsel's deficient performance where the standard of review for per se errors or structural errors is automatic reversal resulting in a new trial, but subject to *Strickland* on a collateral IAC claim.

66. Additionally, because the issue was available but not raised, further prejudice ensued by exposing the defendant to the procedural default doctrine. The United States is entitled, and may, assert procedural default as an affirmative defense.

67. But for Mr. Klugh's deficient performance, Mr. Elbeblawy's review of structural errors in his trial would have been viewed under a much more favorable standard. Based on that "per se error" standard, there is a reasonable probability the outcome of his appeal would have been different.

IV. CONCLUSION

68. This matter began and ended with fundamental errors that so infected the fairness of the proceedings that they undermined the reliability of the verdict. The nature of these errors were both structural of the type that they defy -- thus the Supreme Court has consistently held -- harmless error analysis, and trial errors where the performance of counsel was so deficient as to fall below the standard of representation guaranteed by the Sixth Amendment.

69. The United States acted in "bad faith" to bring this matter before the district court, using a "sham process" with the intent to thwart the guarantee of a prompt and fair trial. Trial counsel's performance was deficient from the inception of his appointment. The gross deficiency began with his

failure to investigate not merely the facts alleged by the United States but the actual circumstances that led the United States to bring "this" case, versus the previous case, that was based on the EXACT same alleged facts and conduct. This failure to conduct an investigation precluded trial counsel from basing his strategy on a foundation of fact. Mr. Matters' lack of preparation not only represented a failure to adhere to the Standards of Professional Conduct as defined by the Florida Bar Association, but also caused him to fail in his duty to advise the Defendant of his option to pursue a conditional plea.

70. Additionally, Trial counsel ceased to function as an advocate for the Defendant when he assumed an adversarial position driven by a desire to protect his professional reputation. Mr. Matters' unsolicited, disparaging, and speculative comments regarding Mr. Elbeblawy, his beliefs and his motives were prejudicial, not based on objective facts, and served no purpose but to undermine the Defendant before the Court and protect Matters' professional reputation.

71. Trial counsel and appellate counsel failed to raise meritorious issues before the court either in the form of motions in the district court and issues on appeal. The failure of counsel to undertake these basic actions were not based on professional judgment or strategy, they were based on a lack of preparedness and further motivated to preserve their professional reputations.

72. The district court erred and abused its discretion in substation of its opinion regarding the effectiveness of Mr. Matters as trial counsel, where the standard was whether the Defendant and counsel's attorney-client relationship was irretrievably broken and whether there was a complete breakdown in their communications. The district court ignored the direct testimony of BOTH Michael Matters and the Defendant who stated in clear and unambiguous terms that Mr. Matters could not effectively represent Mr. Elbeblawy and that they could no longer engage in productive communications. There could be no more clear statements of a broken and ineffectual relationship that the one testified to by both the Defendant and

counsel. The result -- the net effect -- of the district court's actions not only deprived the Defendant of his right to his "counsel of choice" but also of his right to any effective counsel.

73. It was because these events took place BEFORE the trial commenced, and continued throughout the trial that the error, is deemed structural, having pervaded the entirety of the proceedings. The district court's appointment of Mr. Matters as standby counsel in no way satisfied the Sixth Amendment's guarantee of counsel for a criminal defendant. Moreover, the mere fact that Mr. Matters' own testimony demonstrated the conflict in their primary attorney-client relationship, necessarily precluded his subsequent appointment as standby counsel for the same reasons. If an attorney is unable to function for professional or ethical reasons as counsel, obviously he or she cannot function as standby counsel for the same defendant.

74. The structural errors of this case were compounded by the trial errors, they further undercut any meaningful sense of propriety in the proceedings and undermined the fundamental fairness of the proceedings. The remedy for structural errors because of their nature, are the burden of the state. The remedy for both the structural errors and the trial errors in this case is the VACATEUR or the judgment of conviction.

75. The matters of justice, fairness, and public confidence in the court, must be balanced against the finality of a judgment. In this case however, it was Dr. Martin Luther King who captured the essence of this matter, "The moral arc of the universe is long, but it bends towards justice." The congruence of justice in a matter of structural error is the vacatur of the judgment.

WHEREFORE, in view of the foregoing arguments and citations of authority, the Defendant respectfully moves this Court for the entry of an order to VACATE the judgment of conviction and to set this matter for further proceedings, or in the alternative, to set an evidentiary hearing in this matter.

DATED: June 08, 2022

Respectfully Submitted,

Khaled Elbeblawy
Plaintiff
USM No. 08071104
Federal Correctional Institution
P. O. Box 779800
Miami, Florida 33177-9800

Exhibit

A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:15-cr-20456-BB-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KHALED ELBEBLAWY,

Defendant.

September 21, 2015
9:02 a.m.

Pages 1 THROUGH 4

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

Appearances:

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
VASANTH SRIDHARAN, AUSA
1400 New York Avenue Northwest, 8th Floor
Washington, DC 20005

FOR THE DEFENDANT: FEDERAL PUBLIC DEFENDER'S OFFICE
JAN CHRISTOPHER SMITH, II
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301

COURT REPORTER: Yvette Hernandez
U.S. District Court
400 North Miami Avenue, Room 10-2
Miami, Florida 33128
yvette_hernandez@flsd.uscourts.gov

(Call to order of the Court, 9:02 a.m.)

COURTROOM DEPUTY: Calling Case Number 15-20456, Criminal, United States of America v. Khaled Elbeblawy.

Counsel, please state your appearances for the record.

MR. SRIDHARAN: Vasanth Sridharan for the Government.

MR. SMITH: Your Honor, good morning. Jan Smith, from the Federal Defender's Office, on behalf of Mr. Elbeblawy, who is present.

THE COURT: Good morning to each of you.

Go ahead and have a seat.

What is the status of the case?

MR. SRIDHARAN: On Thursday, we sent a proposed order to dismiss the Information without prejudice.

THE COURT: It was my understanding that the Government was going to be convening a Grand Jury for the purpose of seeking an indictment.

MR. SRIDHARAN: Yes, Your Honor.

After deliberation, this is -- the Government decided, given the unique circumstances of this case, that it wanted more time to decide what the proper next step should be. And so we moved to dismiss the Information.

THE COURT: Mr. Smith, does the Defense wish to be heard with regard to this motion?

MR. SMITH: Your Honor, we are happy with dismissal. I've spoken to the Government. I believe that they are still

determining the next course of action. And I don't think that -- once they dismiss, that we have, well, any course of action at that point to pursue, Your Honor.

THE COURT: All right. Well, leave of court is necessary to dismiss the charges at this stage, and that motion is granted.

Is there anything further in this case?

MR. SMITH: No. Thank you, Your Honor.

MR. SRIDHARAN: No, Your Honor.

THE COURT: Okay.

(Proceedings concluded at 9:03 a.m.)

UNITED STATES OF AMERICA)

ss:

SOUTHERN DISTRICT OF FLORIDA)

C E R T I F I C A T E

I, Yvette Hernandez, Certified Shorthand Reporter in and for the United States District Court for the Southern District of Florida, do hereby certify that I was present at and reported in machine shorthand the proceedings had the 21st day of September, 2015, in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that this transcript contains pages 1 - 4.

IN WITNESS WHEREOF, I have hereunto set my hand at Miami, Florida this 15th day of December, 2021.

/s/Yvette Hernandez

Yvette Hernandez, CSR, RPR, CLR, CRR, RMR
400 North Miami Avenue, 10-2
Miami, Florida 33128
(305) 523-5698
yvette_hernandez@flsd.uscourts.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21212-BLOOM

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court upon Petitioner Khaled Elbeblawy's ("Petitioner") Motion to Correct Calculation of Time Pursuant to 28 U.S.C. § 2255(f)(1), ECF No. [12] ("Motion"). The Court has considered the Motion, the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

On August 31, 2016, the Court sentenced Petitioner to 240 months' imprisonment and entered his judgment of conviction. Cr-ECF No. [170]. On the same date, the Court entered an order of forfeiture. Cr-ECF No. [171]. On September 5, 2018, the Eleventh Circuit affirmed Petitioner's conviction and sentence but vacated the Court's forfeiture order. Cr-ECF No. [183] at 4-5, 13, 32. On March 18, 2019, the Supreme Court denied Petitioner's writ of certiorari challenging his conviction. Cr-ECF No. [184].

On February 24, 2020, the Court entered an amended forfeiture order. Cr-ECF No. [201]. On February 2, 2021, the Eleventh Circuit affirmed the Court's amended forfeiture order. Cr-ECF No. [227]. On June 7, 2021, the Supreme Court denied Petitioner's writ of certiorari challenging

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his amended forfeiture order. Cr-ECF No. [228]. On October 4, 2021, this Court ordered Petitioner to file a legally sufficient and properly verified § 2255 motion no later than November 4, 2021.

Petitioner contends that the correct date to file a legally sufficient and properly verified § 2255 motion is June 7, 2022, not November 4, 2021. Petitioner cites *Clay v. United States*, where the Supreme Court determined that when a federal prisoner files a petition for a writ of certiorari following affirmance on direct appeal, the judgment becomes final on the day that the Supreme Court either denies certiorari or affirms on the merits. 537 U.S. 522, 527 (2003). Petitioner's argument rests on the contention that the Supreme Court's denial of his writ of certiorari challenging his amended forfeiture order on June 7, 2021, started the 1-year period of limitation to file his amended § 2255 motion.

However, 28 U.S.C. § 2255(f)(1) states that the 1-year period of limitation will run from "the date on which the judgment of conviction becomes final." In this case, the judgment of conviction became final when the Supreme Court denied Petitioner's first writ of certiorari challenging his conviction on March 18, 2019. The subsequent amended forfeiture order, appeal, and denial of certiorari were in regard to his amended forfeiture order, not his judgment of conviction. As such, the 1-year limitation started on March 18, 2019, when the Supreme Court denied Petitioner's writ of certiorari challenging his conviction.

Because Plaintiff submitted his § 2255 motion on March 17, 2020, *see* ECF No. [5] at 2, his § 2255 motion was timely. Furthermore, because the Court stayed the case pending Petitioner's appeal of the amended forfeiture order, the Court finds that the doctrine of equitable tolling applies for Petitioner to file a legally sufficient and properly verified § 2255. *See Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999) (finding that "§ 2255's period of limitations may be equitably tolled").

Under the doctrine of equitable tolling, the Court finds that the November 4, 2021, deadline gives Petitioner sufficient extra time to file a legally sufficient and properly verified § 2255 motion.

Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner's Motion to Correct Calculation of Time, **ECF No. [12]**, is **DENIED**. Petitioner shall file a legally sufficient and properly verified § 2255 motion as indicated in Judge Reid's Report, ECF No. [5] at 2, **no later than November 4, 2021**.

DONE AND ORDERED in Chambers at Miami, Florida, on October 14, 2021.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Khaled Elbeblawy, 08071-104
Miami FDC – Federal Detention Center
Inmate Mail/Parcels
Post Office Box 019120
Miami, FL 33101

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

Khaled Elbeblawy,
Plaintiff

V.

United States of America
Defendant

PLAINTIFF'S MOTION TO CORRECT CALCULATION OF TIME PURSUANT TO 28 U.S.C. § 2255 (f)(1)

Comes Now Khaled Elbeblawy ("the Plaintiff") and files this his motion to Correct the celulation of time for the filing of his motion under 28 U.S.C. § 2255 (f)(1), where filing deadline stipulated in this Court's Order [ECF No. 11], improperly calculated the filing deadline.

FINALITY WHEN CERTIORARI IS SOUGHT FOLLOWING AFFIRMANCE ON DIRECT APPEAL

1. When a federal prisoner files a petition for a writ of certiorari following affirmance on direct appeal, the judgement becomes final on the day that the United States Supreme Court either denies certiorari or affirms on the merits. See Clay v. United States, 537 U.S. 522, 527, 123 S. Ct. 1072, 1076, 155 L. Ed. 2d 88 (2003).

2. In this case, the United States Supreme Court denied the Plaintiff's petition for writ of certiorari on June 7 2021. See Elbeblawy v. United States — S. Ct. —, No. 20-7940, 2021 WL 2302075 (June 7 2021).

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3. Thus, pursuant to 28 U.S.C. § 2255 (f)(1), the judgement in this matter became final on June 7, 2021, and the Corrected statutory deadline for filing a "legally sufficient and properly Verified § 2255 motion" is June 7 2022.

DATED: October 7, 2021

Respectfully Submitted,

Khaled Elbeblawy
Registration No. 08071-104
Plaintiff
Federal Correctional Institution
P.O. Box 779800
Miami, Florida 33177-9800

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21212-BLOOM

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

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On August 31, 2016, the Court sentenced Petitioner to 240 months' imprisonment and entered his judgment of conviction. Cr-ECF No. [170]. On the same date, the Court entered an order of forfeiture. Cr-ECF No. [171]. On September 5, 2018, the Eleventh Circuit affirmed Petitioner's conviction and sentence but vacated the Court's forfeiture order. Cr-ECF No. [183] at 4-5, 13, 32. On March 18, 2019, the Supreme Court denied Petitioner's writ of certiorari challenging his conviction. Cr-ECF No. [184].

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his amended forfeiture order. Cr-ECF No. [228]. On October 4, 2021, this Court ordered Petitioner to file a legally sufficient and properly verified § 2255 motion no later than November 4, 2021.

Petitioner contends that the correct date to file a legally sufficient and properly verified § 2255 motion is June 7, 2022, not November 4, 2021. Petitioner cites *Clay v. United States*, where the Supreme Court determined that when a federal prisoner files a petition for a writ of certiorari following affirmance on direct appeal, the judgment becomes final on the day that the Supreme Court either denies certiorari or affirms on the merits. 537 U.S. 522, 527 (2003). Petitioner's argument rests on the contention that the Supreme Court's denial of his writ of certiorari challenging his amended forfeiture order on June 7, 2021, started the 1-year period of limitation to file his amended § 2255 motion.

However, 28 U.S.C. § 2255(f)(1) states that the 1-year period of limitation will run from "the date on which the judgment of conviction becomes final." In this case, the judgment of conviction became final when the Supreme Court denied Petitioner's first writ of certiorari challenging his conviction on March 18, 2019. The subsequent amended forfeiture order, appeal, and denial of certiorari were in regard to his amended forfeiture order, not his judgment of conviction. As such, the 1-year limitation started on March 18, 2019, when the Supreme Court denied Petitioner's writ of certiorari challenging his conviction.

Because Plaintiff submitted his § 2255 motion on March 17, 2020, *see* ECF No. [5] at 2, his § 2255 motion was timely. Furthermore, because the Court stayed the case pending Petitioner's appeal of the amended forfeiture order, the Court finds that the doctrine of equitable tolling applies for Petitioner to file a legally sufficient and properly verified § 2255. *See Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999) (finding that "§ 2255's period of limitations may be equitably tolled").

Under the doctrine of equitable tolling, the Court finds that the November 4, 2021, deadline gives Petitioner sufficient extra time to file a legally sufficient and properly verified § 2255 motion.

Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner's Motion to Correct Calculation of Time, **ECF No. [12]**, is **DENIED**. Petitioner shall file a legally sufficient and properly verified § 2255 motion as indicated in Judge Reid's Report, ECF No. [5] at 2, **no later than November 4, 2021**.

DONE AND ORDERED in Chambers at Miami, Florida, on October 14, 2021.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Khaled Elbeblawy, 08071-104
Miami FDC – Federal Detention Center
Inmate Mail/Parcels
Post Office Box 019120
Miami, FL 33101

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE No. 20-CV-21212-BB

FILED BY _____ D.C.
NOV 03 2021
ANGELA E. NOBLE
CLERK U.S. DIST. CT.
S. D. OF FLA. - MIAMI

KHALED ELBEBLAWY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S MOTION FOR INDICATIVE RULING
PURSUANT TO FED. R. CIV. P. 62.1

COMES NOW, Khaled Elbeblawy ("the Plaintiff-Appellant"), and files this, this motion for indicative ruling during the pendency of the appeal in this matter. Herein, the Plaintiff-Appellant respectfully moves this Court for the entry of an Order for an indicative ruling.

I. STATEMENT OF UNDISPUTED FACTS, CIRCUIT PRECEDENT, AND BASIS OF DISPUTE

1. The parties and this Court agree to the procedural history of this case, and of the primary, secondary, and tertiary triggering dates therein.

2. The applicable time limitations under 28 U.S.C. Section 2255 is not jurisdictional, and as a consequence, the established one (1) year limitation for filing "is subject to equitable tolling in appropriate cases." See Holland v. Florida, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d. 130 (2010).

3. The Plaintiff-Appellant disputes this Court's discretionary application of a consolidated briefing schedule that does not accurately represent an equitable deadline based on the parallel and overlapping triggers and tolling applicable in this matter.

II. MULTIBLE TRIGGERS AND TOLLING

4. This case presents this Court with two (2) triggering events combined with a tolling event. The first triggering event was the vacateur and remand of the forfeiture order following the first direct appeal of the conviction, sentence, and forfeiture. This event triggered the one (1) year statutory period for filing a motion under 28 U.S.C. Sect. 2255. That one (1) year period "closed" on March 17, 2020.

5. The Mandate on Remand had the effect of "splitting" the window for collateral proceedings based on the remand of the forfeiture only. Therein, the Plaintiff-Appellant filed a timely, if basic, motion for relief under the one (1) year statutory deadline from the finality of the judgment of conviction. However, the second direct appeal of the second forfeiture order [Crim-ECF No. 201] necessitated that this Court issue a Stay [Civ-ECF No. 7]of the proceedings on the motion under Sect. 2255 during the pendency of the appellate proceedings. Those appellate proceedings became final with the denial of the petition for a writ of certiorari on June 7, 2021.

6. The denial of the petition for a writ of certiorari created a second triggering event in the Section 2255 context where the

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issue of forfeiture did not become "ripe" for collateral attack until the petition for a writ of certiorari was denied.

7. The tolling of the first triggering event (the first appellate/remand) and the denial of a cert. on the forfeiture on (the second) appeal, created overlapping windows for filing a motion to vacate where different claims became "ripe" at different times. Specifically, the claims of deficient performance of counsel and jurisdiction were ripe, but tolled due to the remand and subsequent appeal of the forfeiture issue. The claims of deficient performance of counsel related to the forfeiture issue became "ripe" more than one (1) year after the other issues.

III. IMPEDIMENTS UNDER SECTION 2255(f)(2)

8. The majority of the aforementioned proceedings took place during the global pandemic of COVID-19. The Plaintiff-Appellant was moved between prisons, held in quarantine, restricted in pandemic lockdowns, contracted COVID-19 himself, and both prisons where he was held were operated under "emergency conditions" for several months. Even as this motion comes before this Court, the Federal Correctional Institution Miami ("FCI-MIA") remains under "modified operations" with limited inmate movement and manditory segregation of inmates to limit the spread of the virus in the prison(s).

9. In the midst of the pandemic, the administration of FCI-MIA undertook an ill-conceived plan to renovate the Education, Inmate Law Library, and Inmate Resource Center. An utter lack of planning and foresight combined with the rapidly unfolding events of a global pandemic left the entire prison population without access to the physical law library, word-processors, typewriters, paper, etc., needed to research and prepare a legally sufficient and substantive motion from May 2020 until its partial re-opening fourteen (14) months later.

10. Notwithstanding the physical barries presented by the Bureau of Prisons' ("BOP") haphazzard response to the pandemic, Mr. Elbeblawy is an Egyptian national and native Arabic speaker. Although he speaks colloqual English, he has been represented by court appointed counsel and assisted by court provided Arabic translators throughout all previous proceedings. The BOP has: (a) No Arabic language imterpretors; (b) No Arabic language legal resources; and (c) until recently Mr. Elbeblawy was the only Arabic speaker at FCI-MIA. See Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d. 606 (2002), see also Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000). When the Plaintiff-Appellant requested Arabic language legal support, resources, books, or interpretation from the BOP, he was advised to hire a private attorney as the BOP did not offer support to Arabic speakers.

11. This Court may note in the record of this, and the related cases, that in every prior phase of the litigation of this matter, Mr. Elbeblawy was aided by BOTH counsel AND an interpreter. In contrast, at this juncture he has neither counsel, interpreter, nor even access to basic Arabic language resources.

12. The combined effects of the pandemic, the incongruent actions of the BOP, and the significant language barrier created an "unlawful or unconstitutional" impediment to preparing or filing a substantive and legally sufficient motion under Section 2255 (f)(2).

IV. PRACTICAL IMPLICATIONS

13. In simple terms, the Plaintiff-Appellant is faced with three (3) practical barriers to compliance withethe briefing schedule ordered by this Court: (1) the Plaintiff-Appellant has been unable to obtain a COMPLETE set of transcripts from the various counsel and proceedings; (2) Mr. Elbeblawy has very limited access to the physical resources necessary to prepare any substantative legal pleading, and (3) he lacks the native (English) language skills, or in the alternative, the Arabic language support necessary to articulate substantive arguments in English as required by this Court.

14. The briefing schedule set by this Court is bounded by discretion verses statute.

V. INDICATIVE RULING

15. Based on the facts and circumstances set forth above, Mr. Elbeblawy respectfully moves this Court for the following indicative relief: (1) to direct the Clerk of Court to provide one (1) copy of all transcripts from all proceedings (as identified on the transcript request forms [ECF No. ___]; (2) to reset the briefing schedule in such a discretionary manner as to accommodate the physical and language barriers; and (3) such other relief as this Court may deem fair and equitable.

16. Similarly, this Court may apply that which Dr. Martin Luther King taught us all, that "the arc of the moral universe is long, but it bends towards justice."

V. CONCLUSION

WHEREFORE, in view of the foregoing, the Plaintiff-Appellantrespectfullyl moves this Court for the entry of an Order for Indicative ruling.

Respectfully Submitted,

Khaled Elbeblawy
Plaintiff-Appellant
USM No. 08071-104
Federal Correctional Institution
P.O. Box 779800
Miami, Florida 33177-9800
Tel.: 305-259-2402

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE No. 20-CV-21212-BB

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the enclosed:

PLAINTIFF-APPELLANT'S MOTION FOR INDICATIVE RULING PURSUANT TO FED. R. CIV. P. 62.1

was filed with the Clerk of Court for the Southern District of Florida located at 400 North Miami Avenue, Room 8N09, Miami, Florida 33128-7716 on this date.

All parties noticed for service in this matter pursuant to FLSD Local Rule 5.2, Fed. R. Civ. P. 5(a) and 5(b)(2)(E) are served pursuant to FLSD Administrative Procedures Section 3B.

DATED: November 1, 2021.

Khaled Elbeblawy
Plaintiff-Appellant
USM No. 08071-104

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21212-BLOOM

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ON MOTION FOR INDICATIVE RULING UNDER FEDERAL RULE OF CIVIL PROCEDURE 62.1

THIS CAUSE is before the Court upon Petitioner Khaled Elbeblawy's ("Petitioner") Motion for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1, ECF No. [18] ("Motion"), filed on November 3, 2021. The Court has carefully reviewed the Motion, the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

I. BACKGROUND

On August 31, 2016, in the related criminal case against Petitioner, 1:15-cr-20820-BB, the Court sentenced Petitioner to 240 months' imprisonment and entered his judgment of conviction. Cr-ECF No. [170]. On the same date, the Court entered an order of forfeiture. Cr-ECF No. [171]. On September 5, 2018, the Eleventh Circuit affirmed Petitioner's conviction and sentence but vacated the Court's forfeiture order. Cr-ECF No. [183] at 4-5, 13, 32. On March 18, 2019, the Supreme Court denied Petitioner's writ of certiorari challenging his conviction. Cr-ECF No. [184]. Petitioner timely submitted his § 2255 motion on March 17, 2020, the last day of the 1-year period of limitation to file his § 2255 motion. *See* ECF No. [5] at 2.

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On February 24, 2020, before Petitioner submitted his § 2255 motion, the Court entered an amended forfeiture order. Cr-ECF No. [201]. Petitioner subsequently appealed the amended forfeiture order. Cr-ECF No. [202]. On May 19, 2020, due to the pending appeal of the amended forfeiture order, the Court stayed Petitioner's § 2255 motion pending his appeal, noting that upon the resolution of his appeal, Petitioner would be required to file a legally sufficient and properly verified § 2255 motion. ECF No. [7]. On February 2, 2021, the Eleventh Circuit affirmed the Court's amended forfeiture order. Cr-ECF No. [227]. On June 7, 2021, the Supreme Court denied Petitioner's writ of certiorari challenging his amended forfeiture order. Cr-ECF No. [228]. As such, on October 4, 2021, this Court ordered Petitioner to file a legally sufficient and properly verified § 2255 motion no later than November 4, 2021. ECF No. [11]. In effect, the Court granted additional time to file an amended § 2255 motion under the doctrine of equitable tolling, even though Petitioner's 1-year period of limitation, which started with the Supreme Court's first denial of Petitioner's writ of certiorari, had elapsed. *See id.*

On October 12, 2021, Petitioner filed a Motion to Correct Calculation of Time Pursuant to 28 U.S.C. § 2255(f)(1), ECF No. [12] ("Motion to Correct Calculation"). Petitioner argued that the correct date to file a legally sufficient and properly verified § 2255 motion was June 7, 2022, not November 4, 2021. Petitioner's argument rested on the contention that the Supreme Court's denial of his writ of certiorari challenging his amended forfeiture order on June 7, 2021, started the 1-year period of limitation to file his amended § 2255 motion. *See id.*

On October 14, 2021, the Court denied the Motion to Correct Calculation. ECF No. [13]. In denying the Motion to Correct Calculation, the Court noted that 28 U.S.C. § 2255(f)(1) states that the 1-year period of limitation shall run from "the date on which the judgment of conviction becomes final." *See id.* at 2. In this case, the judgment of conviction became final when the

Supreme Court denied Petitioner's first writ of certiorari challenging his conviction on March 18, 2019. *See id.* The subsequent amended forfeiture order, appeal, and denial of certiorari were in regard to his amended forfeiture order, not his judgment of conviction. *See id.* The Court reiterated in its Order that the November 4, 2021, deadline gave Petitioner sufficient extra time to file a legally sufficient and properly verified § 2255 motion under the doctrine of equitable tolling. *See id.* at 2; *Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999) (finding that "§ 2255's period of limitations may be equitably tolled"). Petitioner filed an appeal of the Court's Order denying his Motion to Correct Calculation. ECF No. [14].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 62.1 authorizes district courts to issue an indicative ruling on a pending motion that implicates issues under consideration on appeal. *See* Fed. R. Civ. P. 62.1(a) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."). "Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission." Fed. R. Civ. P. 62.1 advisory committee's note to 2009 adoption.

III. ANALYSIS

In the instant Motion, Petitioner requests pursuant to Rule 62.1 that the Court "reset the briefing schedule in such a discretionary manner as to accommodate the physical and language barriers" and "direct the Clerk of Court to provide one (1) copy of all transcripts from all proceedings[.]" ECF No. [18] ¶ 15. The Court considers each relief sought in turn.

In regard to the first relief sought, Petitioner, in effect, seeks the same relief that is currently on appeal—namely, that the Court equitably toll the 1-year period of limitations for § 2255 and grant an extension of time to file a legally sufficient and properly verified § 2255 motion. *See* ECF Nos. [14], [18]; *see also* ECF No. [13]. Because the issue of equitable tolling has been appealed, the Court would ordinarily be powerless to continue. *See Doe, 1-13 ex rel. Doe Sr. 1-13 v. Bush*, 261 F.3d 1037, 1064 (11th Cir. 2001) ("[A]s a general rule, the filing of a notice of appeal divests the district court of jurisdiction ...") (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *Weaver v. Fla. Power & Light Co.*, 172 F.3d 771, 773 (11th Cir. 1999)).[1] However, the Court considers the relief sought pursuant to its authority under Rule 62.1. *See* Fed. R. Civ. P. 62.1(a).

Petitioner raises two arguments to support his request for additional time. First, Petitioner states that pandemic lockdowns and limited access to the law library warrant additional equitable tolling. ECF No. [18] ¶¶ 8, 9. However, the Eleventh Circuit has decided that equitable tolling for § 2255's period of limitations is appropriate only when there are "extraordinary circumstances" that are both beyond a petitioner's control and unavoidable even with diligence. *See Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999). The Eleventh Circuit has determined that prison lockdowns that limit access to the prison law library are not extraordinary circumstances. *See Akins v. U.S.*, 204 F.3d 1086, 1090 (11th Cir. 2000). Furthermore, Petitioner notes in his Motion that the library has been "partial[ly] re-open[ed]" since July 2021. ECF No. [18] ¶ 9. Therefore, the Court determines that the pandemic lockdown and partial access to the library do not warrant equitable

[1] While there are some exceptions to this general rule, the Motion asks for the use of the Court's discretion to adjust the briefing schedule, which necessarily implicates the subject of Petitioner's pending appeal. *See Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990) ("The district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded."); *Madura v. BAC Home Loans Servicing, LP*, 655 F. App'x 717, 723 (11th Cir. 2016) (same).

tolling. Second, Petitioner argues that his limited English language abilities warrant additional equitable tolling. *See id.* ¶¶ 10, 11. However, the Eleventh Circuit has stated that difficulties with the English language are not extraordinary circumstances that justify equitable tolling. *U.S. v. Montano*, 398 F.3d 1276, 1280 n.5 (11th Cir. 2005). In light of Eleventh Circuit precedent, the Court does not consider Petitioner's alleged physical and language barriers to constitute extraordinary circumstances that warrant additional tolling.

Petitioner also requests that the Court direct the Clerk of Court to provide "one (1) copy of all transcripts from all proceedings (as identified on the transcript request forms [ECF No. ___][.]" ECF No. [18] ¶ 15. The Court determines that the request for transcripts is not properly before the Court pursuant to Rule 62.1. As noted above, Rule 62.1 only allows the Court to entertain a motion that it cannot grant because the relief sought is subject to a pending appeal. Fed. R. Civ. P. 62.1(a). Petitioner's appeal does not pertain to the request for transcripts. ECF No. [14]. As such, the Court cannot consider the relief requested in a motion filed pursuant to Rule 62.1.

Furthermore, even if the Court were to consider the Petitioner's request for transcripts apart from Rule 62.1, the Eleventh Circuit has determined that, once an appeal is pending, "[t]he district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded." *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990). In this case, it is evident that the requested relief will not aid the appeal. According to the Fed. R. App. P. 10(b), Petitioner must separately request transcripts in aid of his appeal. *See* Fed. R. App. P. 10(b); *see also* 11th Cir. R. 10-1. Given the Eleventh Circuit's Local Rules that establish the proper procedure for Petitioner to request transcripts, granting the requested relief in this case would merely circumvent the Eleventh Circuit's Local Rules and would not act in aid of the appeal. *See* 11th Cir. R. 10-1. It

is also apparent that the relief requested would not correct a clerical mistake and Petitioner does not allege a clerical mistake in regard to his transcript request. *See generally* ECF No. [18]. Finally, granting the requested relief would not aid the execution of a judgment that has not been superseded because there is no pertinent judgment that has not been superseded in this case.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner's Motion for Indicative Ruling, **ECF No. [18]**, is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, on November 8, 2021.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Khaled Elbeblawy
08071-104
Miami FDC
Federal Detention Center
Inmate Mail/Parcels
Post Office Box 019120
Miami, FL 33101
PRO SE

EXHIBIT D

FCI MIAMI MEMO REGARDING LIMITED ACCESS TO LAW LIBRARY

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution
15801 S.W. 137th Avenue
Miami, Florida 33177

March 19, 2020

MEMORANDUM FOR INMATE POPULATION, FCI MIAMI

FROM: J. Knight, Supervisor of Education

SUBJECT: **Law Library Access**

At the current time, access to the FCI Law Library will be made available in limited numbers to inmates who have an imminent court deadlines. Inmates with an imminent court deadline must first notify their Unit Team. Once the inmate's Unit Team has confirmed the court deadline, arrangements will be made to ensure the inmate has adequate access to the FCI Law Library.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21212-BLOOM
(Case No. 15-cr-20820-BLOOM)

KHALED ELBEBLAWY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER OF DISMISSAL ON AMENDED MOTION UNDER 22 U.S.C. § 2255

THIS CAUSE is before the Court on Movant Khaled Elbeblawy's ("Elbeblawy" or "Petitioner") *pro se* Amended Motion Under 28 U.S.C. § 2255, ECF No. [27] ("Amended Motion") raising ineffective assistance of counsel challenges to his underlying criminal conviction in Case No. 15-cr-20820-BLOOM. The Court has carefully considered the Amended Motion and supporting Memorandum of Law, ECF No. [28], the Government's Response, ECF No. [31], Elbeblawy's Reply, ECF No. [32], the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Amended Motion is dismissed as untimely.

I. BACKGROUND

On August 31, 2016, the Court sentenced Elbeblawy in his related criminal case, 15-cr-20820-BLOOM, to 240 months' imprisonment and entered his judgment of conviction for the offenses of conspiracy to commit healthcare and wire fraud and conspiracy to defraud the United States and pay healthcare kickbacks. *See* CR ECF No. [170].[1] On September 5, 2018, the

1 References to docket entries in Petitioner's criminal case, Case No. 15-20820-CR-BLOOM, are denoted with "CR ECF No."

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Eleventh Circuit affirmed Elbeblawy's conviction and sentence, but vacated the district court's forfeiture order. *See* CR ECF No. [183]. On March 18, 2019, the U.S. Supreme Court denied Elbeblawy's petition for a writ of certiorari. *See* CR ECF No. [184]. On February 24, 2020, the Court entered an amended forfeiture judgment, *see* CR ECF No. [201], which Petitioner then appealed. *See* CR ECF No. [202]. Petitioner docketed his initial Motion Under 28 U.S.C. § 2255 on March 19, 2020. *See* ECF No. [1].

On April 27, 2020, Petitioner's § 2255 motion was stayed and administratively closed by the Report of Magistrate Judge Lisette M. Reid for the pendency of Petitioner's direct appeal of the amended forfeiture order. *See* ECF No. [5]. Petitioner was ordered "to notify the district court within fourteen (14) days of the Eleventh Circuit's issuance of its mandate in Case No. 20-10769 so that the court may lift the stay and order [Petitioner] to file a legally sufficient and properly verified § 2255 motion." *Id.* at 4. Petitioner was additionally cautioned that his "failure to timely file the notification described in the previous paragraph will result in dismissal of the instant § 2255 motion without prejudice, which in turn will likely result in any further § 2255 motion being dismissed with prejudice as untimely." *Id.* On May 19, 2020, the Court entered an Order Adopting Report of Magistrate Judge. *See* ECF No. [7].

On February 2, 2021, the Eleventh Circuit affirmed the amended forfeiture order, *see* CR ECF No. [227], and on June 7, 2021, the U.S. Supreme Court denied Petitioner's writ of certiorari challenging his amended forfeiture order. *See* CR ECF No. [228]. Accordingly, on October 4, 2021, the Court ordered Petitioner to "file a legally sufficient and properly verified

§ 2255 motion" . . . "**no later than November 4, 2021**." ECF No. [11] at 2 (emphasis in original).[2]

On October 12, 2021, Petitioner docketed a Motion to Correct Calculation of Time Pursuant to 28 U.S.C. 2255(f)(1). *See* ECF No. [12]. The Court entered an Order denying the Motion on October 14, 2021, noting that "[u]nder the doctrine of equitable tolling, the Court finds that the November 4, 2021, deadline gives Petitioner sufficient extra time to file a legally sufficient and properly verified § 2255 motion." ECF No. [13] at 3. The Court once again ordered Petitioner to "file a legally sufficient and properly verified § 2255 motion" . . . "**no later than November 4, 2021**." *Id.* (emphasis in original). Petitioner failed to do so. Instead, on October 21, 2021, he filed a Notice of Appeal of the Court's Order denying his Motion to Correct Calculation of Time. *See* ECF No. [14] ("Interlocutory Appeal"). On October 26, 2021, the U.S. Court of Appeals acknowledged receipt of the Interlocutory Appeal. *See* ECF No. [17].

On November 3, 2021, Petitioner filed a Motion for Indicative Ruling stating equitable reasons for additional tolling. *See* ECF No. [18]. On November 8, 2021, the Court entered an Order denying Petitioner's Motion for Indicative Ruling. *See* ECF No. [19]. On March 23, 2022, the Eleventh Circuit entered an Order dismissing the Interlocutory Appeal due to lack of jurisdiction. *See* ECF No. [26].

Petitioner filed the instant Amended Motion on June 8, 2022.[3]

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2 The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

3 "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). In the Amended Motion, the date provided in the prison mailbox stamp is unreadable. *See* ECF No. [27] at 13. However, Petitioner signed the Amended Motion on June 8, 2022. *See id.* at 12; *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) ("Unless there is evidence to the contrary, like prison logs or other

II. DISCUSSION

A. The Amended Motion is Untimely

Under 28 U.S.C. § 2255(f), a movant must file their § 2255 motion within a one-year period that runs "from the latest of" the following dates:

> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Petitioner does not assert that an unconstitutional government-created impediment to filing his Amended Motion existed, that he bases his claims on a right newly recognized by the United States Supreme Court, or that the facts supporting his claims could not have been discovered through the exercise of due diligence. Accordingly, the statute of limitations is measured from the remaining trigger, which is the date Petitioner's judgment of conviction became final.

Because Petitioner appealed his judgment, the judgment of conviction became final on March 18, 2019, when the U.S. Supreme Court denied Petitioner's first writ of certiorari challenging his conviction. *See* CR ECF No. [184]. Petitioner's subsequent appeal and denial of certiorari were regarding his amended forfeiture order and not his judgment of conviction. *See* ECF Nos. [202–03]; *see also Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ

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records, we assume that a prisoner's motion was delivered to prison authorities on the day he signed it.") (citation omitted).

of certiorari, or when the time for filing a certiorari petition expires."). Thus, Petitioner's one-year filing period started on March 18, 2019. Petitioner timely submitted his initial § 2255 motion on March 17, 2020. *See* ECF No. [1]. However, the initial motion was neither legally sufficient nor properly verified. *See* ECF Nos [5], [7], [13].

Although Petitioner's one-year limitations period had elapsed, on October 4, 2021, the Court granted Petitioner an additional month — until November 4, 2021 — to file an amended § 2255 motion. *See* ECF No. [11]; *see also* ECF No. [13] at 2–3 (clarifying that Petitioner was granted additional time under the doctrine of equitable tolling). Petitioner failed to do so. Instead, he opted to file a Motion to Correct Calculation of Time on October 12, 2021, *see* ECF No. [12], as well as the Interlocutory Appeal on October 21, 2021. *See* ECF No. [14]. Then, on November 3, 2021 —the day before the November 4, 2021 deadline — he filed a Motion for Indicative Ruling. *See* ECF No. [18]. Simply put, Petitioner spent the additional month filing other motions and appeals. Petitioner's litigious record shows that he had the ability to file an amended § 2255 motion by November 4, 2021, but he opted not to. Thus, the Amended Motion is untimely.

B. Equitable Tolling is Not Warranted

Petitioner concedes that the Amended Motion is untimely. *See* ECF No. [27] at 11. As justification, he states that "the deadline for filing was equitably tolled during the pendency of interlocutory appellate proceedings in Appeal No. 21-13694-G." *Id.*

"Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). Moreover, "[t]he petitioner has the burden of establishing his entitlement to equitable tolling; his supporting allegations must be specific and not conclusory." *Cole v. Warden, Georgia State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014)

(citation omitted). The Government states that Petitioner fails to "provide specific allegations explaining why the Interlocutory Appeal 'stood in his way' or 'prevented timely filing' of the Amended Motion[,]" and further notes "that there were no court orders from the Interlocutory Appeal staying proceedings in the district court that could have caused Petitioner to confuse or miscalculate the filing deadline." ECF No. [31] at 5. The Court agrees.

As explained, the Court granted Petitioner additional time and ordered him multiple times to "file a legally sufficient and properly verified § 2255 motion" . . . "**no later than November 4, 2021**." ECF No. [11] at 2 (emphasis in original); ECF No. [13] at 3. Instead, he opted to use the additional grant of time to file a series of motions and appeals, none of which included an amended § 2255 motion. Then, on June 8, 2022 — 216 days past the November 4, 2021, deadline — Petitioner filed the Amended Motion. Petitioner has not provided specific allegations supporting equitable tolling. *See Cole*, 768 F.3d at 1158. And, on this record, the Court finds that no "unavoidable" or "extraordinary circumstances" exist to justify it. *See Sandvik*, 177 F.3d at 1271.

C. Certificate of Appealability

A certificate of appealability ("COA") "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). Where, as here, the court denies claims on procedural grounds, a COA should issue if "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Jurists of reason" would not find the Court's procedural ruling "debatable." *Id.* Therefore, a COA is denied.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Movant Khaled Elbeblawy's Amended Motion Under 28 U.S.C. § 2255, **ECF No. [27]**, is **DISMISSED** as time-barred.
2. A certificate of appealability is **DENIED**. Because there are no issues with arguable merit, an appeal would not be taken in good faith, and Elbeblawy is not entitled to appeal *in forma pauperis*.
3. To the extent not otherwise disposed of, any pending motions are **DENIED AS MOOT** and all deadlines are **TERMINATED**.
4. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, on March 10, 2023.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

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EXHIBIT B

MOTION FOR INDICATIVE RULING