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General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 23-11007
Nature of Suit: 2510 Prisoner Petitions -Vacate Sentence
Khaled Elbeblawy v. USA
Appeal From: Southern District of Florida
Fee Status: Fee Not Paid

Docketed: 03/31/2023
Termed: 09/08/2023

Case Type Information:
1) U.S. Civil - Prisoner
2) Motion to Vacate
3) -

Originating Court Information:
District: 113C-1 : 1:20-cv-21212-BB
Civil Proceeding: Beth Bloom, U.S. District Judge
Secondary Judge: Lisette Marie Reid, U.S. Magistrate Judge
Date Filed: 03/19/2020
Date NOA Filed:
03/29/2023

Lead: 1:15-cr-20820-BB-1

APPX 2
1 [redacted]

05/08/2023	9	*MOTION for certificate of appealability filed by Khaled Elbeblawy. Opposition to Motion is Unknown. [9]* [23-11007] (ECF: Sara Kopecki) [Entered: 05/08/2023 06:52 PM]
05/09/2023	11	*MOTION to proceed IFP filed by Appellant Khaled Elbeblawy. Opposition to Motion is Unknown [11]* [23-11007] (ECF: Sara Kopecki) [Entered: 05/09/2023 06:10 PM]
05/10/2023	12	No action will be taken on filing submitted by Appellant Khaled Elbeblawy. Motion to proceed in forma pauperis [10] because Appellant has Counsel. [Entered: 05/10/2023 02:23 PM]
09/08/2023	13	ORDER: Motion for certificate of appealability filed by Appellant Khaled Elbeblawy is DENIED. [9]; Motion to proceed in forma pauperis filed by Appellant Khaled Elbeblawy is DENIED as MOOT. [11] BCG (See attached order for complete text) [Entered: 09/08/2023 10:48 AM]
09/29/2023	14	*MOTION for certificate of appealability, for certificate of appealability filed by Khaled Elbeblawy. Opposing Counsel takes no Position. [14]* [23-11007] (ECF: Sara Kopecki) [Entered: 09/29/2023 05:38 PM]
10/03/2023	15	Notice of deficient Motion filed by Khaled Elbeblawy. Incorrect Event used to file a document Counsel should re- file a corrected motion using the Amend, Correct or Supplement Motion event within 5 days. If this is a motion for COA, this case is closed and no action will be taken on it. If this is a motion for reconsideration, you may refile as such and choose the correct event. For assistance with correct filing you may call our help line at 404-335-6125. [Entered: 10/03/2023 04:48 PM]
10/04/2023	16	*MOTION for certificate of appealability filed by Khaled Elbeblawy. Opposition to Motion is Unknown. [16]* [23-11007] (ECF: Sara Kopecki) [Entered: 10/04/2023 12:07 PM]
10/05/2023	17	Notice of deficient Motion filed by Sara Kopecki for Khaled Elbeblawy. Incorrect Relief selected for Motion Filed Counsel must file a corrected motion using the Amend, Correct or Supplement Motion event within 5 days. If this is a motion for COA, this case is closed and no action will be taken on it. If this is a motion for reconsideration, you may refile as such and choose the correct event. For assistance with correct filing you may call our help line at 404-335-6125. [Entered: 10/05/2023 11:23 AM]
10/05/2023	18	*MOTION for reconsideration of single judge's order entered on 09/08/2023 filed by Khaled Elbeblawy. Opposing Counsel takes no Position. [18]* [23-11007] (ECF: Sara Kopecki) [Entered: 10/05/2023 02:31 PM]
10/23/2023	19	ORDER: Motion for reconsideration of single judge's order filed by Appellant Khaled Elbeblawy is DENIED. [18] CRW and BCG (See attached order for complete text) [Entered: 10/23/2023 02:38 PM]

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Billable Pages:	1	**Cost:**	0.10

UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

UNITED STATES OF AMERICA	:	
	:	1:20-CV-21212
v.	:	
	:	
KHALED ELBEBLAWY	:	

APPLICATION FOR CERTIFICATE OF APPEALABILITY

(Underlying District Court Case No. 15-CR-20820)

Sara E. Kopecki, Esq.
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(*Pro Hac Vice* and *Pro Bono*)

APPX 2
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEEMENT (CIP)

In accordance with 11th Cir. R. 26.1-1(a), appellant provides the following names in alphabetical order of those trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Bloom, Hon. Beth

Booker, Maureen

Elbeblawy, Khaled

Ferrer, Wilfredo A.

Gobena, Gejaa

Hough, Meredith

Klugh, Richard C.

Masis, Raquel

Matters, Michael

McAliley, Hon Chris M.

Pogozelski, Alexander

Robbins, Alexander

Smachetti, Emily M.

Sombuntham, Nalina

Sridharan, Vasanth

Surmacz, Nicholas

Warren, Andrew

Wax, Barry M.

Williams, Hon. Kathleen M.

CERTIFICATE OF COMPLIANCE

Undersigned certifies that the Application for Certificate of Appealability does not exceed 30 pages, and it has a 6,674 word count, according to MS Word's word count means.

/s/ *Sara E. Kopecki*

RELIEF SOUGHT

Khaled Elbeblawy (Petitioner), through counsel, hereby applies for a certificate of its appealability (COA) on the district court's denial of a COA in connection with its denial of his Motion to Vacate the Sentence (2255). The court found that Petitioner's 2255 was untimely and equitable tolling was unwarranted. (ECF No. 37. Exhibit A)

Statement of the Issues

I. Whether jurists of reason would find it debatable that Petitioner's 2255 states a valid claim of the denial of a constitutional right where he raises claims of denial of assistance of counsel and denial of effective assistance of counsel under the Sixth Amendment where the government's case was not exposed to meaningful adversarial testing; and

II. Whether jurists of reason would find it debatable that Petitioner's 2255 states a valid claim of the denial of a constitutional right of effective assistance of counsel where the government acted in bad faith in manipulating his situation by bringing one charge and dismissing it to bring additional charges a month later, after Petitioner declined to sign a plea agreement and after nearly two years of pro-active cooperation.

III. Whether jurists of reason would find it debatable that the court was correct

in its procedural ruling where Petitioner made diligent efforts to comply with the court's scheduled due date for the amended filing; moved for a new due date and gave notice that he was unable to satisfy that deadline under his circumstances which included the Covid pandemic-modified operations at his place of detention and no legal assistance for an Egyptian native filing in the United States criminal justice system.

Standard of Review

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. sec.2253(c)(2).

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue when the prisoner shows that jurists of reason would find it debatable whether the petitioner 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, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

CONSTITUTIONAL ISSUES

I. Jurists of Reason that Petitioner's 2255 does in fact state a valid claim of the denial of a constitutional right where his claims are of denial of assistance of counsel and denial of effective assistance of counsel under the Sixth Amendment.

Background Facts: Petitioner was charged by superseding indictment with two counts alleging Medicare fraud: Count 1: Conspiracy to Commit Health Care Fraud and Wire Fraud (18 U.S.C. sec. 1349) and Count 2: Conspiracy to Defraud the United States and Pay Health Care Kickbacks (18 U.S.C. sec. 371).

He was found guilty on both counts after six days of trial, and sentenced to 240 months on Count 1 and 60 months on Count 2, to be served concurrently, and three years of supervised release.

Before trial started, Petitioner asked the court to appoint new counsel. In a letter he stated that he and his attorney had irreconcilable differences and he did not trust in his attorney to represent him. (Case No. 15-20820. ECF No. 71) At a sealed hearing, both Petitioner and his attorney made it clear that the attorney-client relationship was irretrievably broken; they had irreconcilable differences. (Tr. 1/4/2016, pp. 7-8) The attorney stated that Petitioner did not trust him; did not agree with his theories of defense, and the differences were irreconcilable. (Tr. 1/4/2016, p.8)

When asked by the court if he could continue representing Petitioner, the attorney responded: "[Y]our Honor, based on the three weeks of discussions with my client, we have irreconcilable differences which are going to preclude me from representing him." (*Id. See id.,* at 14-18 (Attorney further explanation).

Despite both Petitioner's and his defense attorney's statements that they could not work together, the court denied the motion and compelled the furtherance of an unproductive and distrustful attorney-client relationship. (Tr. 1/4/2016, p.24)

Trial began eight days later. The attorney-client relationship remained irretrievably broken. Mid-trial, the issue resurfaced and again the court denied Petitioner's request for new counsel. In doing so, it advised Petitioner that his options were to continue in the attorney-client relationship or represent himself; the court would not appoint new counsel. (Tr. 1/19/2016 Sealed, p.14) In doing so, the court imposed a "Hobson's choice;" that is, either Petitioner proceeded with his existing appointed counsel or he proceeded *pro se*. Under the circumstances, Petitioner believed he had no choice but to proceed *pro se*. (Tr. 1/19/2016, p.15 (Court), p.16 (Petitioner)

Petitioner is an Egyptian national, totally unfamiliar with the criminal justice system. He did not ask to proceed *pro se*; he asked for new counsel. However, when given the choice of proceeding with his existing counsel or *pro se*, he chose to proceed *pro se*. The court then engaged in a colloquy with Petitioner regarding the dangers he was facing by representing himself. The court immediately recognized that Petitioner was not competent to represent himself. It stated: "Mr. Elbeblawy, you have already made clear just by your question your lack of understanding of the jury trial process." (Tr. 1/19/2016 Sealed, p.28)

Nevertheless, the court gave no option but for the trial to continue and for Petitioner to proceed.

The court ordered defense counsel to remain on the case as "stand-by," even though both counsel and Petitioner made it clear they could not work together and that Petitioner did not trust the attorney. Petitioner asked the court to appoint someone else as stand-by counsel. (Tr. 1/19/2016 Sealed, p.25) The court denied Petitioner's motion and then went further. It made stand-by counsel responsive only to specific questions raised by Petitioner. The court advised that standby counsel was "not going to be writing things down and sending them to you to assist as co-counsel. He's here for the limited purpose of stand-by counsel." (DE:140:45)

As the trial progressed, Petitioner asked his stand-by counsel for assistance in procuring copies of discovery and the exhibits for trial, which counsel was unable to provide. (*See, e.g.,* De;141:6-12 (Petitioner asked stand-by counsel to provide discovery from the beginning of the case, which the attorney had not done), (DE:141:6) Petitioner ask to see some exhibits: "97 checks, 24 checks, a 100 and something checks, and bank records I did not receive." *Id.)* (DE:141:8 At one point, the court noted that the government had made these exhibits available to the defense "for quite sometime," saying:

"The fact that you, yourself – your eyes may not have viewed each and every exhibit leads the Court to again caution you that I am concerned about your decision mid-trial to represent yourself." (DE:140:147)

Petitioner noted that his lawyer had been handling the case for three months but his lawyer did not provide him with the information and he needed to defend himself. Petitioner stated he asked his attorney to provide him with the exhibits and his attorney did not do so. (DE:141:6)

The court tried to accommodate Petitioner's need to review the government's exhibits, by having him remain for an hour at the court to review the exhibits.[1]

Petitioner's unfamiliarity with the government's exhibits was a problem pervading the trial. (*e.g.,* DE:142:122-24 (Prosecutor moving exhibits into evidence and Petitioner asking to review them – he had been given copies only ten minutes before court began that morning.) DE:141:49-50))

When asked why he did not provide discovery to his client, the attorney replied that the discovery was voluminous and he did not provide it because to do so would require copying thousands of pages. (DE:140:154) Petitioner's unfamiliarity with the government exhibits continued to be a problem throughout the trial. (*See, e.g.,* DE:141:21-24) On more than one occasion, the

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1 The first evening petitioner was wary of working with the government to view the exhibits. Thereafter, he availed himself of every opportunity. (DE:141:3-5)

court stated that it had concerns about Petitioner's decision to represent himself (DE:140:147)

At one point, Petitioner gave the court a list of exhibits he needed to review. The government's exhibit list was over 80 exhibits. The court accepted Petitioner's list but reiterated that she would not delay the trial to allow him to review the exhibits. (DE:141:6-10)

No witnesses were under subpoena for the defense even though Petitioner asked his attorney to subpoena certain witnesses, including doctors and employees to explain certain procedures in handling Medicare claims. (DE:140:49) Petitioner asked his attorney for assistance in securing witnesses to testify for the defense. He provided his attorney with the names and contact information for the witnesses. His attorney declined to subpoena the witnesses, saying he had "no desire to subpoena these witnesses." (DE:140:50) In another instance, his attorney said he could not find the witness who was the director of nursing at a nursing school in Northern Miami. *Id.* His attorney presumed that subpoenaing Petitioner's witness would result in each witness asserting their Fifth Amendment privilege. (DE:140:50-51)

The defense attorney allowed into evidence damaging evidence that was not authenticated and that could not be confronted. For example, witness Stephen Quindoza testified as an expert. (DE:139:6-52; DE:138:236-259) He was

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qualified as an expert in "areas of Medicare coverage, reimbursement and claim filings requirements." (DE:138:239) Quindoza was used to testify about Exhibit 11, a report prepared by a company Quindoza did not work for, Safeguard Services. (DE:139:27) Quindoza had not participated in the study; could not explain the statistical analysis used in the study; and could provide no testimony regarding the reliability or unreliability of the study. (*See generally* DE:139:6-136) Nevertheless, the study came in as evidence and it was published to the jury.

Errors in the reliability of random sampling are well-established. A recent Indiana University study prepared in evaluating the cost and effectiveness of using probability models to predict accounting fraud reported that the probability model in the hands of regulators (the government) where it can only audit numbers, can at best only identify which companies have a higher probability of an audit producing a positive result relative to the cost of the audit and the possible subsequent litigation. An excerpt from the Abstract follows:

"We compare seven fraud prediction models with a cost-based measure that nets the benefits of correctly anticipating instances of fraud, against the costs borne by incorrectly flagging non-fraud firms. We find that even the best models trade off false to true positive at rates exceeding 100:1."[2]

Petitioner cross-examined two key government witnesses; that is, Melissa Parks, a hired accountant from Meyers and Stauffer, and Agent Alvarez Kearns, an

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[2] The Cost of Fraud Prediction Errors by Massod D. Beneish, Patrick Vorst. December, 2021, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529662#:~:text=We%20compare%20seven%20fraud%2

FBI investigator who was "lead" investigator in Petitioner's case. The government objected repeatedly; the court sustained the objections and often advised the jury not to consider the question. (*See generally* DE:140:88-101).

The same problem persisted when Petitioner tried to testify. Indeed, when Petitioner had not completed his testimony, the court asked him again to allow his stand-by counsel to take over. (DE:142:3-10). Petitioner responded by asking if his former counsel was ready to represent him. (DE:142:6) The court turned to stand-by counsel and asked him if he could step in. (DE:142:6-10) Petitioner said he would continue to represent himself.

The court admonished Petitioner pressing again and again to prepare quickly in this ongoing, complex trial. The court advised that it had an obligation "to control the pace and flow of the case including the very real possibility that this jury may be here longer than necessary." (DE:142)11) In short, the court pressed Petitioner to go forward without delay, knowing he could not do so. Indeed, he had not even been given the evidence before trial to review.

At no time did the defense attorney move for mistrial. At no time did the court rule "mistrial." Instead of compromising Petitioner's 6th Amendment right to counsel, the trial should have been stopped and rescheduled with a new defense attorney. To continue as the trial did, was a denial of assistance of counsel.

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Argument: The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. *Accord Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). When a breakdown in attorney-client communication is so severe that it prevents even the ability to conduct an adequate defense – that is, when the likelihood of defense counsel's providing effective assistance is so small that it is virtually nil – the assistance of counsel is fatally compromised. *United States v. Smith,* 640 F.3d 580, 582 (4th Cir. 2011). More than a "warm body" is required to satisfy the Sixth Amendment. *Id.*

In the instant matter, the attorney-client relationship was irretrievably broken down. The defense attorney made representations to the court denigrating Petitioner and Petitioner did not trust the attorney to act in his best interests. (Tr. 1/4/2016, p. 8 ("Number one, Mr. Elbeblawy does not trust me."), p.9 ("He thinks I'm working against him.")) Petitioner raised many issues including his attorney yelled at him instead of discussing the case with him.

This was true before trial and it was true at trial. All critical stages of representation were affected. Before trial, Petitioner was unaware if a plea offer was made and he was unaware that he could make an offer to the government, and that his two years of cooperation could benefit him under a plea agreement. Before trial, Petitioner was unaware of the discovery or aware of very little of it. At trial,

defense counsel failed to defend; that is, he failed to confront the substantive evidence. His cross -examination consisted of impeachment of the witness's character but not a challenge to the substance of the testimony. Two of the essential witnesses for trial were cooperators. Of course, they had bases for impeachment of their character. However, to the extent that each cooperating witness corroborated each other, there was no defense.

The attorney's limited preparation was consistent with what he told the court in the January 4, 2016 sealed hearing:

> " The attack that I had planned to use in this case to defend him is to impeach and attack each and everyone of the main witnesses against him by showing that their hands are dirtier than even what the Government is attempting to show about my client." (Tr. 1/4/2016, p. 8 (Sealed))

It is unclear how the defense posed could gain an acquittal. If his defense was to mitigate Petitioner's misconduct then he needed to have his client agree to a mitigation defense. *See Strickland,* 466 U.S. 688 (defense counsel undoubtedly has a duty to discuss potential strategies with the defendant.)

Stated differently, despite Petitioner's efforts to subpoena witnesses who could testify about the procedures and checks in place in filing claims with Medicare, his attorney made no effort. It was important information. Medicare, itself, has ongoing means of approving or denying claims which it finds lacking or questionable. The jury never heard that.

At JEM Health Care, Petitioner tried to part company with Escalona. Escalona testified that Petitioner pushed him out. At each of the home health agencies (Willsand, JEM, and Healthy Choice) there was a process in place for reporting services provided to each patient. Petitioner was not the one who put that information together. The jury never heard of the processing involved in submitting Medicare claims or the number of people who participate in that process or who had access to those records. Or the number of people who had a reason to falsify records.

Petitioner tried to take over his defense and in doing so, to present evidence of how the system worked. However, because he had no assistance of counsel prior to trial and none at trial, his efforts were without success.

The defense attorney did not do the investigation and preparation required to represent Petitioner in a complex Medicare fraud prosecution. In fact, in many instances the attorney did not act in the best interests of his client, and there is no strategic justification. Counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, and he could have done so. Petitioner's trial demonstrates the denial of the Sixth Amendment guarantee to the assistance of counsel, and it makes the adversarial process presumptively unreliable. *See Florida v. Nixon,* 543 U.S. 175, 178, 125 S.Ct. 551, 160 L.3d.2d 565 (2004), citing *United States v. Cronic,* 466 U.S. 648, 658-59, 104 S.Ct. 2039, 80 L.Ed.2d

657 (1984) The Supreme Court in *United States v Cronic*, stated that prejudice should be presumed when the prosecution's case is unexposed to "meaningful adversarial testing." 466 U.S. 648, 658-59.

A structural error is defined as "an error that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds." Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury, 2009 U.S. Dist. LEXIS 103373 (D. Or. Nov. 5, 2009). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 582 U.S. at ___, 137 S.Ct. 1899, 1907-08 (2017). In this matter, Petitioner was denied assistance of counsel and a fair trial; it was structural error.

Alternatively, he asserts that his counsel was ineffective under the *Strickland v. Washington* standard; that is, his attorney's performance was not objectively reasonable and it prejudiced him throughout the trial. Even when Petitioner was given the Hobson's choice midtrial to represent himself, which he accepted, it was his attorney's failure to provide discovery; failure to provide government exhibits; and failure to investigate or to subpoena witnesses that precluded Petitioner's *pro se* efforts.

Jurists of Reason that Petitioner's 2255 does in fact state a valid claim of the denial of a constitutional right where his claims are of denial of assistance of counsel and denial of effective assistance of counsel under the Sixth Amendment.

II. Jurists of reason would find that Petitioner's 2255 states a valid claim of the denial of a constitutional right of effective assistance of counsel where the government acted in bad faith in manipulating his situation by bringing one charge and dismissing it to bring additional charges a month later, after Petitioner declined to sign a plea agreement and after nearly two years of proactive cooperation.

Background Facts. Petitioner unwittingly but willingly agreed to cooperate with the Government in March 2013. His cooperation took place before the government filed a charge with the court; before the Sixth Amendment guarantee to effective assistance of counsel attached. By the time the government posed a plea offer, Petitioner had proactively cooperated for two years.

Petitioner's meetings with the government, his proactive cooperation and his consideration of the plea agreement all occurred before the Sixth Amendment guarantee attached. Petitioner worked with the government without any agreement, not even an agreement that law enforcement would not use his statements against him.

When the government presented the plea agreement, Petitioner's attorney pressed him to take the offer. Petitioner signed the plea paperwork on June 15, 2015. However, he decided not to go forward with it.

The plea agreement posed two extraordinary particulars: (1) the contract did not precede cooperation; it followed it, and (2) the agreement had a one-sided provision binding the Petitioner if there was a "failure to tender" the agreement to the court. (Exhibit C, paragraph (23)). Although the court found that Petitioner signed the agreement knowingly and voluntarily, it is unclear to what extent the , Petitioner understood the written agreement.

The government threatened to take Petitioner to trial on felony charges, and it filed an Information on June 17, 2015 charging him with Conspiracy to Commit Healthcare Fraud.

After multiple pretrial status hearings, the government announced it was not ready to go forward. It dismissed the charges on its own motion. (No. 15-20456, ECF 28, September 21, 2015) A month later, without additional investigation, the government brought new charges in a new case. They charged two offenses of Conspiracy. (No. 15-20820, ECF 1, October 22, 2015)[3]

Because the government had not filed a case against throughout the time period of his meetings with law enforcement to the offer of the written plea agreement, Petitioner was not entitled to the guarantee of effective assistance of counsel. By the time the government posed the plea agreement, Petitioner's

[3] The new case indicted on the Conspiracy to Commit Health Care Fraud in violation of 18 U.S.C. secs. 1347 and 1349. It also indicted on Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. sec. 371. It increased the alleged loss amount from $27,000,000 to $42,000,000 in the new indictment. (No. 15-20820, ECF No. 59)

attorney had not participated or appeared in any of Petitioner's meetings with the investigation team, in over a year. Upon the government's delivery of a plea agreement, Petitioner's attorney pressed him hard to take the plea. It was only because his attorney insisted that he take the plea, that Petitioner signed the agreement.

The government clearly anticipated that Petitioner would be a cooperating witness at trial, and they intended to use him in many future prosecutions. Petitioner produced 35 video or audio tapes of individuals targeted in Medicare fraud.

The government brought charges on June 17, 2015. (No. 15-20456, ECF No. 1) The government charged one count in its first indictment, a violation of 18 U.S.C. 1347, 1349. The government dismissed those charges days before trial. (No. 15-20456, ECF No. 28) By doing so, the government averted a dismissal under the Speedy Trial Act and gave themselves more time to prepare their case. No new investigations were going on; no new evidence was being considered. Nevertheless, the government increased the number of charges from its first case to its filing of the second case.

Defense counsel did not challenge the government's disingenuous manipulation of the Rules of Criminal Procedure, the Speedy Trial Act to Petitioner's detriment.

Petitioner has a right to rely on the government's good faith. Here the government manipulated Petitioner, giving him no protection from his meetings with law enforcement and extending no protection to the plea agreement which seems to anticipate Petitioner's not "tender[ing]" the plea to the court which opened the door for the government to use his cooperation against him at trial. When Petitioner declined to go forward, the government brought charges. But those charges were not enough and the government could not get ready in time for trial. So, the government dismissed those charges and brought more charges to the grand jury, based on the same evidence. Defendant is entitled to a rebuttable presumption of vindictiveness by the government in its handling of the matter. *See Simms v. United States*, 41 A.3d 482, 483 (D.C. 2012 (cited accordingly, *United States v. Brown*, 862 F.Supp. 1276, 1290 (11th Cir. Ala, April 16, 2013)

The *Simms* Court stated that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." 41 A.3d at 487. In its ruling, the Court noted that in certain cases in which the prosecution has taken actions against the defendant after the defendant exercised a protected statutory or constitutional right, the courts have presumed an improper vindictive motive which may warrant the dismissal of the prosecution's charges. *Id.* The rationale for the presumption is not grounded on the proposition that actual retaliatory motivation must inevitably exist, rather since the fear of such

vindictiveness may unconstitutionally deter a defendant's exercise of his or her rights, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the prosecutor.

In the instant matter, the government abused Petitioner. The government acted in bad faith.

There was no motion filed by defense counsel challenging the government's handling of the matter. The court never had an opportunity to consider the government's manipulation of the system at Petitioner's expense. Consequently, the government benefitted from its misdeeds.

Defense counsel's performance fell below an objectively reasonable standard. His failure to perform prejudiced Petitioner. The outcome of the trial is unreliable.

Jurists of reason would find that Petitioner's 2255 states a valid claim of the denial of a constitutional right of effective assistance of counsel where the government acted in bad faith in manipulating his situation by bringing one charge and dismissing it to bring additional charges a month later and a superseding indictment increasing the alleged loss amount, after Petitioner declined to sign a plea agreement and after nearly two years of proactive cooperation involving multiple Medicare fraud targets being caught on audio or video tape.

III. Jurists of reason would find it debatable that the court was correct in its procedural ruling where Petition made diligent efforts to comply with the

court's scheduled due date for the amended filing; moved for a new due date and gave notice that he was unable to satisfy that deadline under his circumstances which included the Covid pandemic-modified operations at his place of detention and no legal assistance for an Egyptian native filing in the United States criminal justice system.

Background Facts. Petitioner filed his initial 2255 motion on March 19, 2020. It was accepted as timely. He filed his amended 2255 motion which was docketed on June 10, 2022. The court dismissed the motion, denied a certificate of appealability, and closed the case. (ECF No. 37)

At the time, Petitioner filed *pro se* his initial post-conviction motion for relief under 18 U.S.C. sec. 2255 (ECF No. 1), it was accepted as timely-filed. However, the court stayed the matter pending the Circuit's mandate in Case No. 20-10769, a related forfeiture matter, (ECF No. 7), and it also ruled that the initial filing needed to be "legally sufficient and properly verified." (*Id.*) The matter was administratively closed pending the Circuit's forfeiture decision.

On October 4, 2021, the district court ordered Petitioner to file an "amended complaint" that was "legally sufficient and properly verified" within 30 days from the issuance of the order, or November 4, 2021. (ECF No. 11) The order was delivered to Petitioner some time after October 4, 2021; however, it's delivery date does not appear to be recorded in the prison's logbook. [4]

[4] Petitioner, upon recognizing a delay problem between him and the court, sought assistance from a commercial provider, Research Assistant. Research Assistant provided assistance by advising Petitioner of changes in his docket and

The order posed confusing wording for a laymen and especially for an Egyptian native without access to legal counsel. In particular, the words, "legally sufficient and properly verified," were undefined for Petitioner. Petitioner's access to the law library during the pandemic was limited and sometimes completely barred. Nevertheless, his first effort to respond to the court's order was to learn the meaning of "legally sufficient and properly verified."

In another example in that same order, the court's stated the following: "As such, Petitioner's appeal is no longer pending, and Petitioner's sec. 2255 motion is no longer premature."(ECF No. 11, p.2) "Premature" is easily understood and its meaning is often "too early." That meaning was consistent with Petitioner's understanding of how intervening circumstances triggered tolling of acceptable time periods for a habeas corpus filing. He filed a handwritten Motion to Correct Calculation of Time Pursuant to 28 U.S.C. sec. 2255 (f)(1). (ECF No. 12)

The court denied the Motion. (ECF No. 13) Petitioner filed to appeal the denial on October 21, 2021 (ECF No. 14) The Court of Appeals ultimately denied review. (ECF No. 26).

Petitioner was unable to put together in the time allotted, which was less than 30 days during the pandemic, his amended 2255. He filed a Motion for an

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by finalizing Petitioner's filings into an acceptable form for submission to the courts. It is not a licensed legal service and it does not provide legal counsel.

Indicative Ruling (Indicative Motion) asking for a new date for filing his amended motion, assistance in getting his trial transcripts, and advising that his surrounding circumstances impaired his ability to file timely. (ECF No. 18. Exhibit B) The Indicative Motion stated that Petitioner's circumstances which impaired him from filing the amended motion timely included the following: (1) limited access to the prison's law library and Education Department[5] as a result of BOP's modified Covid-19 operations, (2) reconstruction of the law library and Education Department causing no or nearly no access to those services, (3) difficulty understanding and responding appropriately or quickly because English was not his first language and legalese was new for him, and (4) no access to his trial transcripts. He asked the district court for more time to file by rescheduling the due date and he asked for assistance in getting the transcripts.

The court denied Petitioner's Motion. (ECF No. 19. Exhibit C) In doing so, the court stated that Petitioner did not pose extraordinary circumstances warranting a rescheduled date for filing and the language barrier was not recognized as an extraordinary circumstance. Arabic speaking individuals are rare at the BOP, especially when compared to other languages, such as Spanish which is a common second language in the BOP. The court also stated that Petitioner's decision to

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5 The Education Department is a place to study and it provides a means of word processing for drafting a filing.

appeal denial of his Motion to Correct the Calculation of Time precluded the district court from acting.

The court's denial issued on November 8, 2021, after the due date for the amended 2255 of November 4, 2021.

During this time period, BOP's operations focused on thwarting the spread of Covid-19 throughout their facilities. BOP had never before been faced with such an emergency and its response was remarkable in many ways. However, it was not perfect. Recently, the Department of Justice issued the Capstone Report from the Office of Inspector General. That report publishes the findings of the Inspector General's Office regarding BOP's mishandling of matters during their pandemic emergency operations. Those findings included two areas of immediate affect on inmates such as Petitioner: (1) failure to provide legal counsel to inmates, and (2) failure to maintain adequate staffing during the pandemic.[6] No visitors were allowed into BOP. Indeed, no visitors are allowed to this day at FCI Miami as a result of Covid-19 concerns. Inadequate staffing means programs and services, including the law library and the Education Department are unavailable or restricted. Safety and security pre-empt even those necessary services, creating extraordinary circumstances beyond an inmate's control.

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6 Capstone Review of the Federal Bureau of Prisons' Response to the Coronavirus Disease 2019 Pandemic, at https://oig.justice.gov.reports.capstone-reivew-federal-bureau-prisons-response-coronavirus-disease-2019-pandemic.

Also during this time period, FCI Miami was undergoing reconstruction of its law library and Education Department. The reconstruction began in 2020, lasted through 2021 and into September, 2022, and Petitioner's deadline was November 4, 2021.

To make matters worse, staffing shortages during this time period meant even if the law library or Education Department could have been used, no staff members was there to oversee inmates and so it could not be used. Without secure staffing, the law library and Education Department were closed to inmates, regardless of what the schedule may have indicated.

Nevertheless, Petitioner continued to put together his amended 2255 motion. He continued to do research to produce a properly amended motion to make his 2255 "legally sufficient and properly verified." His first efforts went toward addressing the meaning "legally sufficient and properly verified." As noted earlier, Petitioner had no access to legal assistance and no access to an Arabic interpreter or translator, and although his English skills were good as a second language, they were not enough for a complex legal filing based on complex fraud offenses.

Petitioner put together the facts and issues he believed to show a miscarriage of justice and sent his draft to Research Assistant for their input in presenting those issues properly.

In preparing his amended 2255 motion, Petitioner took advantage of every opportunity BOP provided to study at the law library and to write notes and draft the filing at the facility's Education Department. Through February, 2022, FCI Miami where Petitioner was housed remained in modified operations. Protocols of social distancing and mask-wearing by inmates and staff were enforced to the extent possible. Quarantines and lockdowns were imposed as needed to isolate instances where the threat of Covid-19's spread appeared more dire. Visitation to the facility was stopped because of concerns of a visitor introducing the virus into the facility. BOP publishes its policies in "Program Statements." It tries at all times to provide "reasonable access to legal materials and counsel, and reasonable opportunity to prepare legal documents." (BOP Program Statement No. 1315.07, "Legal Activities, Inmates," Nov. 5, 1999). However, the safety and security of the BOP staff and residents during the pandemic outweighed the need for legal materials and counsel.

To the extent possible, FCI Miami provided access to the law library and its Education Department, and to the extent possible Petitioner took advantage of those opportunities. However, "to the extent possible" was compromised routinely by staffing shortages which effectively closed the law library and Education Department due to lack of supervisory personnel, which in effect negated the schedule and frustrated the inmates including Petitioner. Each BOP facility could

make its own decisions about how to modify its operations depending on their circumstances. FCI Miami prepared schedules for providing law library services; however, that schedule was not enforced, and it was highly vulnerable to other FCI considerations such as Covid-19 isolation and quarantines, staff shortages, and reconstruction of the law library and Education Department. (Exhibit D. FCI Miami Memo)

The BOP issued a plan giving direction to its administrative staff in each facility on how to handle the pandemic threat. There were three defined operational levels and each facility was responsible for determining which operational level was appropriate, given its circumstances. At each level, an infection prevention procedure or modification to operations was permissible to mitigate the risk and spread of covid-19. The plan specifically stated that "inmate programming and services" could be modified. BOP's modified operations Plan & Matrix is available at the following site: https://www.bop.gov/coronavirus/covid19_modified_opoerations_guide.jsp.) "Inmate programming and services" includes access to the law library and Education Department.

Petitioner filed his *pro se* amended 2255 motion (Amended Motion) on June 10, 2022. (ECF Nos. 27 and 28, docketed respectively as "Amended Complaint under 28 U.S.C. sec. 2255 to Vacate, Set Aside or Correct Sentence," and

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"Memorandum of Law in Support of Amended Complaint") The Amended Motion was a meaningful supplement to Petitioner's initial 2255 filing. It was prepared by Petitioner when FCI Miami's restrictions on his use of the law library and Education Department remained in force. It was prepared without the help of legal counsel or an Arabic interpreter or translator; it was prepared by Petitioner trying to get-it-right.

On June 14, 2022, the court issued a "Limited Order to Show Cause" directing the government to provide its position on the timeliness of the Amended Motion. (ECF No. 29) The government filed its response on July 13, 2022. (ECF No. 32) Although not required, Petitioner opted to file a response which was docketed on July 26, 2022. (ECF No. 32)

At this time, there has been no formal review of the merits of Petitioner's 2255 or his Amended Motion. The court dismissed the 2255 and Amended Motion as untimely under 28 U.S.C. sec. 2255(f), denied a certificate of appealability stating that it found no merit to Petitioner's filing, and denied *in forma pauperis* status. The district court closed the case on March 15, 2023 (ECF No. 37). Of note, the dismissal order was docketed on March 10, 2023 but "entered" on March 15, 2023. The order was concurrent with Petitioner's motion through counsel to enter her appearance *pro hac vice*.

Petitioner timely filed a certificate of appealability in accordance with 28 U.S.C. sec. 2253 by filing a Notice of Appeal of the district court's dismissal and denial of a certificate of appealability.

Argument Regarding Procedural Bar: A habeas corpus filing is subject to 28 U.S.C. sec. 2255. There is a filing deadline of one year from the finality date of the conviction. The relevant finality date in this matter is the last date the court made a decision on that conviction, or March 19, 2020.[7] Petitioner filed a timely 2255 motion. However, the filed motion lacked information and was unsigned (although it was sent in an envelope from the prison which clearly showed Petitioner's name and contact information).

Petitioner could not satisfy the court-ordered deadline of November 4, 2021 because of extraordinary circumstances beyond his control. In these circumstances, equitable tolling is appropriate.

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7 28 U.S.C. 2255(f) provides as follows: 1-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 becomes 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.

"Equitable tolling can be applied to prevent the application of AEDPA's[8] statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001). A petitioner establishes equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)).

The circumstances; that is, (1) no access to legal counsel, (2) no access to the law library or severely limited and unpredictable access to the law library, because of short-staffing, the pandemic, lockdowns, quarantines, and reconstruction, and (3) no access to an English/Arabic interpreter or translator were beyond Petitioner's control precluded him from satisfying the November 4, 2021 deadline for his amended 2255.

This Court may be wary of recognizing the Covid-19 pandemic or a petitioner's language barrier as "extraordinary" circumstance, warranting tolling of a filing deadline. However, each circumstance is codependent on the next, and

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[8] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, enacted April 24, 1996.

although each circumstance on its own may warrant recognition as "extraordinary," the totality of Petitioner's unique circumstances certainly warrants consideration as extraordinary. Where a petitioner is without access to legal counsel, he necessarily requires more time to put together his legal bases. More time is not possible when BOP's primary concern and primary focus is the health of its staff and residents during an emergency pandemic.

Equitable tolling is recognized as an appropriate remedy when a petitioner's filing is late because of extraordinary circumstances beyond his control. Petitioner asks the Court to toll the November 4, 2021 deadline in this case, and to recognize his Amended Motion supplementing his 2255.

CONCLUSION

Petitioner respectfully asks this Court for a certificate of appealability.

Respectfully submitted,

Sara Kopecki

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was sent by way of Pacer-ECF to the U.S. Attorney's Office on this 8th day of May, 2023.

Sara Kopecki

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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.

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EXHIBIT D

FCI MIAMI MEMO REGARDING LIMITED ACCESS TO LAW LIBRARY

UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

UNITED STATES OF AMERICA	:	
	:	1:23-11007
v.	:	
	:	
KHALED ELBEBLAWY	:	

MOTION TO RECONSIDER DENIAL OF

APPLICATION FOR CERTIFICATE OF APPEALABILITY

(Underlying District Court Case No. 15-CR-20820)

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Attorney for Petitioner Elbeblawy
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APPX 2
P. [redacted]
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STATEMENT OF INTERESTED PARTIES

Petitioner Khaled Elbeblawy

Petitioner's *Pro Bono and Pro Hac Vice* Attorney Sara Kopecki

The U.S. Attorney's Office in Washington, D.C. and Southern District of Florida

Appellate Attorney Earl Klugh

Trial Attorney Michael Matters

The Honorable Beth Bloom

Compliance Statement

In accordance with the Federal Rule of Appellate Procedure, counsel certifies that the word count of this filing is 4,251, as reported by the MS Word calculator.

/s/ Sara E. Kopecki

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MOTION TO RECONSIDER DENIAL OF COA

I. The Court Denied Petitioner's Application for Certificate of Appealability, Basing Its Decision on a Finding That Petitioner Failed to Satisfy the Second Prong of Slack v. McDaniel.

A. AEDPA was not intended to allow a trial court's procedural error to bar vindication of substantial constitutional rights. The relevant statute is 28 U.S.C. 2253(c), which governs the appellate court proceedings. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a certificate of appealability under 2253(c), Congress expressed no intention of allowing the trial court's procedural error to bar vindication of substantial constitutional rights on appeal. *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

In the instant matter, the lower court dismissed petitioner's amended 2255 motion, finding untimely. (Dismissal Order, ECF **). In doing so, the court did not consider the circumstances surrounding petitioner's ability to satisfy the court's order. The order allowed for less than 30 days for a crucial legal response stemming from a complex fraud trial, for a prisoner from another country whose first language is Arabic, during the Covid pandemic emergency when there was no legal assistance available and severely limited access to the prison's law library

and Education Department. The 2255 with its Amended Motion was dismissed without a hearing.

B. To obtain a certificate of appealability, a habeas prisoner/petitioner must make a substantial showing of the denial of a constitutional right. That substantial showing includes a demonstration that reasonable jurists could debate whether or, for that matter, agree that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack.,* at 483-84.

The petitioner is not entitled to counsel even under the aegis of the Criminal Justice Act for habeas corpus filings. In this case, as so often happens, Petitioner was indigent and unable to pay for professional legal services. He also had no prior experience with the criminal justice system. This Circuit routinely recognizes that a *pro se* filing warrants liberal construction. *E.g., Gomez-Diaz v. United States,*433 F.3d 788, 791 (11th Cir. 2005). Liberal construction is warranted in nearly all *pro se* cases but especially here where the petitioner is inexperienced and unsophisticated in the rules and the law that applies, not a native-born citizen and not having an educational background based in this country.[1] Indeed, in the case of filing under

[1] Liberal construction of a *pro se* petitioner's filings is based on recognition of the petitioner's lack of familiarity with the statutory construct of the law.

AEDPA,[2] the rules, law and limitations are complex, and not easily understood by even an experienced legal practitioner.

Even if the petitioner can understand the framework for habeas corpus filings under AEDPA, he may not have access to the caselaw clarifying AEDPA's requirements for a successful habeas corpus filing. For example, even if the petitioner has access to *Slack v. McDaniel, supra*, it is unlikely that he will interpret it meaningfully.

Petitioner in this matter filed *pro se* in an unfamiliar environment with unfamiliar rules articulated in an unfamiliar language. With this in mind, the Circuit's recognition of allowing liberal construction is well-placed in the context of considering the viability of a *pro se* habeas corpus petitioner.

C. The time limitations on a 2255 filing are difficult to satisfy for a naturalized citizen unable to access legal resources because he is imprisoned during a pandemic which substantially affects the prison operations causing, among other things, no access to legal counsel and severely limited access to legal resources. Prisoner/petitioner in 2020 was part of the Covid-19 pandemic experience. He was living in high-density prison setting where there were staff shortages. Staff shortages occurred more so than usual due to Covid-19 infection and quarantining. Staff

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2 Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA) Pub. L. No. 104-132, 110 Stat. 1214, codified as amended at 28 U.S.C. §2255.

shortages caused lockdowns for safety and security but limiting petitioner's access to possible legal resources. In lockdowns, the law library was inaccessible. There was no legal assistance for a prisoner, especially petitioner whose first language is Arabic. The pandemic caused courts to shut down or to revise drastically their ways and means of adjudicating. The nation was under orders to wear face-covering masks, wash hands often and for at least 20 seconds, maintain a distance of six feet from all others, and stay home to the extent possible. No exception was made for the prisons and petitioner's prison complied to the extent possible with the Covid-19 protocols. The pandemic was undoubtedly an extraordinary event and its effect on petitioner as a prisoner was heightened. Access to legal assistance and support stopped.

The pandemic's effect on petitioner's prison (FCI Miami) made it impossible for him to anticipate the timing of the court's ruling; to prepare an Amended Motion that put forth his issues, or to respond in less than 30 days as ordered by the lower court.

D. Petitioner's efforts to produce a timely 2255 Amended Motion are notable and indicative of a diligent effort by a diligent prisoner. In this case, petitioner's criminal matter was on appeal and then under review for a petition for certiorari to the Supreme Court. Nevertheless, he satisfied the due date for filing a 2255 within the one-year limitations period. [ECF No. 1]

He did not satisfy the lower court's timetable for amending his motion. However, that order came out on October 4, 2021 and required a final amended motion to be filed by November 4, 2021. (ECF No. 11) The court's scheduling order allowed one month for an amended motion. However, it did so without taking into consideration any of the obstacles petitioner was facing. The order was delivered sometime after October 4, 2021 to petitioner at the prison. Its delivery date was not recorded by the prison – probably resulting from the prison's short staffing problems caused by the pandemic.

Without legal counsel, petitioner filed a Motion to Correct Calculation of Time Pursuant to 28 U.S.C. 2255(f)(1). (ECF No, 12). The motion miscalculated the time because it relied on the pending petition for a Writ filed with the Supreme Court in connection with the civil forfeiture ruling in his case, not the criminal verdict. Clearly, petitioner without legal assistance did not immediately comprehend that the forfeiture matter was outside the criminal matter. The mistake was made in good faith; not as a result of a lack of diligence. Petitioner then filed an appeal of the lower court's denial of his Motion to Correct, (ECF No. 14), which was ultimately denied review. (ECF No, 2)

Not surprisingly, petitioner was unable to put together an Amended Motion within the time allotted. He made every effort to comply with the Order; however, he recognized that he was unable to do so within the allotted time frame. He then

filed a Motion for an Indicative Ruling (Indicative Motion) asking for an extension of time to file. At the same time, he asked the court for his trial transcripts. (ECF No. 18). In the Motion, petitioner stated that his ability to prepare the Amended Motion was hampered by the following: (1) severely limited access to the prison's law library and Education Department as a result of the prison's Covid-19 operations, (2) renovation of the law library and Education Department causing no or nearly no access to those services;[3] (3) difficulty understanding and responding appropriately or quickly because English was not his first language and legalese was new, and (4) no access to his trial transcripts.

The court denied his Indicative Motion. (ECF No. 19). In doing so, it gave no consideration for the extraordinary circumstances caused by the pandemic or the complications if not impossibility for an Arabic petitioner to find legal counsel or legal assistance to help interpret the law that applied and the transcripts during the pandemic. The court did state that petitioner's decision to appeal denial of his Motion to Correct the Calculation of Time precluded it from acting on his Indicative Motion.[4]

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[3] The prison's law library and Education Department were undergoing renovation beginning some time before 2020 and lasting through September, 2022. Petitioner's deadline for filing his Amended Motion was November 4, 2021, which fell within the renovation time-period. Time allowed for researching was severely limited and had to be shared with many, many others.

[4] It is unclear how petitioner's appeal of the Motion to Calculate Time precluded the court from granting petitioner more time for filing an Amended Motion.

Nevertheless, petitioner did not give up on filing his Amended Motion. In preparing his Amended Motion, petitioner took advantage of every opportunity that arose to use the prison's law library and the Education Department's typewriters. He did so even though the prison remained in Covid-modified operations throughout the relevant time period;[5] no legal counsel was available inside the prison during Covid-modified operations, and even though he was unfamiliar with the law.

E. The combination of Covid-related obstacles including severely limited access to the law library and Education Department, late access to trial transcripts, and no access to Arabic legal counsel caused petitioner to produce an Amended Motion out of time. His failure to satisfy the 30-day deadline was not a consequence of lack of diligence or lack of sincerity in filing for habeas corpus relief. Indeed, he had sought an extension of time for filing with the court. (Indicative Motion). He did not "sit on it," allowing the amended filing to languish.

Equitable tolling is appropriate when a § 2255 motion is untimely because of "extraordinary circumstances that are both beyond [the defendant's] control and unavoidable even with diligence." *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003) (citing *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir.

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5 In this Motion to Reconsider, counsel does not restate the findings of the Capstone Review of the Federal Bureau of Prisons' Response to the Coronavirus Disease 2019 Pandemic. The review found the BOP operations lacking in many ways, not the least of which was in providing legal counsel. https://oig.justice.gov.reports.capstone-review-federal-bureau-prisons-response-coronavirus-disease-2019-pandemic.

2002); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)). A petitioner, seeking equitable tolling, bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007) (citation omitted); *Hutchinson v. Florida*, 677 F.3d 1097, 1100 (11th Cir. 2012). It only applies in "truly extraordinary circumstances." *Johnson*, 340 F.3d at 1226 (citing *Jones*, 304 F.3d at 1039-40; *Drew*, 297 F.3d at 1286).

This is not a case where petitioner "sat upon his rights" and allowed time to go by without addressing the Amended Motion. *See United States v. Cicero,* 214 F.3d 199, 203, 341 U.S.App. D.C. 439 (D.C. Cir. 2000) (other citations omitted). The totality of the circumstances are extraordinary, unlikely to ever exist again. Petitioner, an Egyptian native with a first language of Arabic, in a prison setting during a pandemic, who has no access to legal counsel and very limited access to legal resources who is given less than 30 days to submit an amended habeas corpus motion. Petitioner submits that he made diligent efforts to satisfy the filing date for an amended motion; however, due to circumstances beyond his control, he was unable to do so. Equitable tolling is appropriate.

Conclusion. Petitioner submits that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. He asks for an evidentiary hearing.

II. Petitioner's Claims Are of Constitutional Magnitude; He was Denied his Constitutional Guarantee of Assistance of Counsel and Effective Assistance of Counsel.

The Order denying Petitioner's Application for Certificate of Appealability stated that petitioner "has failed to make the requisite showing as to the second prong of *Slack's* test, his motion for a COA is denied." (D.E. 13-2, p.2). A prisoner whose habeas corpus petition is denied can appeal only if a judge issues a COA. Issuing a COA requires that the prisoner make a substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2). To make that showing, the prisoner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Johnson v. Vandergriff*, 143 S.Ct. 2551, 2553, 2023 LEXIS 2962, *6 (Aug. 2023), citing, *Slack,* 529 U.S. at 484 (internal quotations omitted).

As a *pro se* petitioner, Mr. Elbeblawy raised issues of constitutional magnitude. At the least, those issued deserved encouragement to proceed further. No doubt that the volumes of post-conviction filings weigh down the judicial system. However, deprivation of a constitutional guarantee in favor of judicial

economy is inconsistent with our criminal justice system, far outside of our constitutional guarantees, and with no consideration for *Slack's* guidance for "deserv[ed] encouragement."

In most cases, deserving encouragement can probably be satisfied with appointment of counsel to an indigent petitioner. That was not done in this case. However, when a constitutional guarantee is clearly in issue; the petition is not frivolous, then appointment of counsel seems to be a small but necessary next step. Petitioner deserved appointment of counsel when he filed his Amended Motion.

A. The Lower Court Incorrectly Stated The Legal Analysis for Petitioner's Primary issue; that is, Denial of Assistance of Counsel (Dismissal Order, p.1)

Petitioner filed an Amended Motion raising multiple claims. The first claim was denial of his Sixth Amendment right to assistance of counsel. He raised it under "structural error," that is, an error that seriously affected the trial's fairness, integrity or the public reputation of judicial proceedings.

The lower court, however, did not include findings on "structural error" in its Dismissal Order. It only posed "ineffective assistance of counsel" as subject to legal analysis.[6] (Dismissal Order, p.1)

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[6] In his Application for a Certificate of Appealability, he restated his argument and asked the Court to consider the issues under structural error and under ineffective assistance of counsel. (App. COA, p.13)

The law relevant to a structural error inquiry is quite different from *Strickland v. Washington'* prescription for legal analysis of an ineffectiveness claim.

B. Petitioner Received Neither Effective Assistance of Counsel or Assistance of Counsel.

The facts supporting that challenge included that his attorney failed to share discovery with him, failed to discuss with him crucial strategies at trial; failed to investigate or follow-up with potential witnesses; failed to prepare petitioner to testify, and failed to work with him professionally (rather than hostilely).[7]

A crucial time was when petitioner attempted for the *second* time to have new counsel appointed to represent him. The second attempt was midtrial, and it followed petitioner's and counsel's first pretrial effort to advise the court that the attorney-client relationship was broken. There had been no change in the attorney-client relationship from the petitioner's first effort to have new counsel appointed. Indeed, there was no reason to expect change given the attorney's representations that the relationship had been broken for three months, preceding the trial. No explanation was demanded of the attorney why the broken attorney-client relationship was not brought to the court's attention earlier.

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7 Counsel refers this Court to the facts with cites to the record as asserted in his Application for COA, pages 4-10..

Despite the nonexistent attorney-client relationship, the court ordered petitioner to represent himself or to continue with his appointed counsel. It was a "Hobson's Choice." Petitioner opted to go forward *pro se,* not because he wanted to represent himself but because the court would not allow him to retain counsel and it would not appoint new counsel. Petitioner knew that he and his attorney could not work together.

At the time, the judge imposed the Hobson's Choice, petitioner's attorney was silent. He was silent even though he *knew* petitioner was not prepared to represent himself. His attorney *knowing* that he had not even shared discovery with his client, should have interjected that petitioner was unable to represent himself at this stage; petitioner did not even know what evidence was coming in against him. His attorney had not provided petitioner with most of the discovery, and petitioner was completely unaware of the government's tangible evidence.

The problem was apparent to the court when trial recommenced. To resolve it, the court allowed petitioner to view the 80 exhibits for about an hour after the trial day had ended. The exhibits included bank account information, patient files, a report of predicted Medicare fraud prepared by a subcontractor to Medicare, and other exhibits. Petitioner was given little time and no explanation for the significance of the exhibits, and he had to familiarize himself with the many exhibits while trying to sit in the courtroom with marshals around him who were busy

conducting transfers of defendants. It was an unrealistic setting and an unreasonable time limitation for studying new evidence, especially midtrial.

Petitioner's ability to review the exhibits was hampered further by the trial judge who repeatedly admonished that she was not delaying the trial to accommodate petitioner's need to familiarize himself with the evidence.

Not advising the trial judge of petitioner's circumstances when the attorney is aware that petitioner cannot go forward *pro se* for reasons outside the Faretta[8] colloquy is ineffective assistance of counsel.

How can an attorney become his client's adversary by his own doing, and still satisfy the Sixth Amendment guarantee of effective assistance of counsel? The trial attorney had a duty to advise the trial judge that petitioner had not viewed all of the discovery; had not seen the government's tangible evidence (exhibits); and was unaware of some lengthy exhibits, for example, "patient files" and "ban account" evidence, that could be used against him at trial. At the time of the Hobson's Choice, the defense attorney should have advised the judge that petitioner could not go forward; he had not received much of the discovery and he did not know the evidence

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8 *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1974). *Faretta* held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel *when he voluntarily and intelligently elects to do so.*" Id. at 807 (emphasis added). Thus, in order for there to be a *Faretta* violation, the defendant must have indicated that he wishes to conduct his own defense. Petitioner's statements to the trial court did *not* express this wish. Rather, petitioner asked for new counsel. In one instance, when the court denied new appointed counsel, he asked if he should retain counsel. Petitioner opted to represent himself when the trial judge gave him a "Hobson's Choice;" that is, represent yourself or continue with this appointed counsel.

he would be confronting. At no time did the defense attorney advise the court of petitioner's status regarding discovery or the government's exhibits, and further, at no time did the attorney move for a mistrial.

The circumstances were compounded by the trial judge's admonition to the attorney, directing him to assist petitioner only if petitioner asked him a question. (DE: 140:45).

In effect, petitioner was given no option but to represent himself at trial without the assistance of counsel. His attorney knew before trial, at least three months before trial, that there were serious problems with the attorney-client relationship, yet he did nothing to bring it to the attention of the court. (Tr. 1/4/2016, pp. 7-8) Petitioner, not the attorney, first brought the problem to the attention of the court. He did so by letter, which letter was addressed by the lower court on the first day of the suppression hearing in a sealed hearing. At the time he did so, his complaints about the attorney-client relationship included his attorney's hostility; failure to provide discovery, and failure to listen to his input for his defense.

B. Conclusion. Petitioner was denied assistance of counsel. It is structural error.

Alternatively, he was denied effective assistance of counsel. Under *Strickland*, petitioner must show that his attorney provided deficient performance and that he was prejudiced. In the instant matter, his attorney provided deficient performance: He failed to satisfy the foundational principal of respecting the attorney-client

relationship; failed to provide discovery; failed to investigate the client's defenses; failed to discuss with his client his trial strategy or to explain why that strategy could not yield an acquittal; failed to bring to the court's attention that the attorney-client relationship was broken before trial, and failed to advise the court that his client could not proceed *pro se* at the midtrial hearing for reasons including the client had not been given adequate discovery. Petitioner was seriously prejudiced at trial. Among other reasons, he was simply unprepared to confront the government's evidence – and trying to prepare at the end of the trial day in the courtroom was not a realistic option for effective confrontation.

The convictions resulting from this trial are a serious miscarriage of justice.

III. Petitioner Was Denied Effective Assistance of Counsel When His Attorney Did Not Raise a Challenge to the Government's Blatant Bad Faith in Manipulating the Criminal Procedural Circumstances to Increase Substantially the Jeopardy Petitioner was Facing after Petitioner Declined to Cooperate Further with Law Enforcement.[9]

The government represents everybody, including the defendant. The defendant/petitioner has a right to expect the government to act in good faith. In this case, they did not do so. In this case, the government delayed filing an action against Petitioner. They did so because filing an action triggered the need for effective assistance of counsel.

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9 Petitioner relies on the facts asserted in his Application for COA, pp. 15-17.

Without advising Petitioner of the time he could be facing, the government used him for nearly two years to assist in undercover law enforcement efforts to catch others engaging in Medicare fraud. Petitioner did so with blind faith in the government to act in good faith.

When Petitioner declined to go forward; declined the government's plea offer, the government reacted vindictively. The initial charges brought by the government were dismissed by the government when it purportedly could not be ready for trial, and then one month later, the government indicted the case with more charges having substantially more serious loss amounts which increased the penalties.

Petitioner is entitled to a rebuttable presumption of vindictiveness by the government under these circumstances. *See Simms v. United States*, 41 A.3d 482, 483 (D.C. 2012), relied on by *United States v. Brown*, 862 F.Supp. 1276, 1290 (11th Cir., April 16, 2013).

The *Simms* Court stated: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." 41 A.3d at 487. Because the fear of vindictiveness must not affect a defendant's exercise of his rights, due process requires that a defendant be free of apprehension of retaliation on the part of the prosecutor.

In the instant matter, the government's handling of this case from the outset through the indictment process is blatantly retaliatory. The facts support the

rebuttable presumption that the government acted in retaliation to his repudiation of further cooperation and their plea offer.

Nevertheless, the issue was never raised by petitioner's defense attorney. The court never considered the government's misconduct; it never was given the opportunity. The government was allowed to benefit from its misdeeds.

Under the circumstances, the attorney's failure to raise the government's apparent retaliation fell below the diligence standards for legal advocacy. Petitioner was prejudiced because the court was not given the opportunity to evaluate the government's misdeeds, and petitioner was not given his day in court regarding the government's misdeeds. The indictment on greater charges with greater loss amounts should have been raised by his attorney and petitioner should have had the opportunity at least for judicial review of the government's handling of his case.

Strickland's two pronged legal analysis is satisfied here: (1) petitioner's attorney's failure to act fell below accepted norms, and (2) petitioner was prejudiced by his attorney's failure. The outcome of the trial without evaluation of the government's apparent retaliatory actions is unreliable.

Conclusion. Petitioner was denied effective assistance of counsel as guaranteed by the Sixth Amendment.

Jurists of reason would find that petitioner's 2255 stated a valid claim of a constitutional right; that is, he was denied his 6th Amendment guarantee of effective assistance of counsel.

Relief Sought

Petitioner submits that his 2255 was filed out of time but only because of extraordinary circumstances that were beyond his control. He further asserts that his diligence in addressing the 2255 was consistent throughout its pendency. Equitable tolling is appropriate.

Petitioner reasserts that his 2255 raised claims of constitutional magnitude worthy of being encouraged rather than barred for procedural reasons. He has been deprived of his 6th Amendment guarantee to assistance of counsel and effective assistance of counsel. He submits that his issues should be encouraged.

Accordingly, he reiterates that he seeks a certificate of appealability on the issues raised herein.

Respectfully submitted,

/s/ *Sara E. Kopecki*

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was sent by way of Pacer-ECF to the U.S. Attorney's Office on this 29th day of September, 2023.

/a/ *Sara E. Kopecki*