No. _____

In The Supreme Court of The United States

MOHAMED OSMAN MOHAMUD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Mohamed Osman Mohamud, was convicted of Attempted Use of a Weapon of Mass Destruction, 18 U.S.C. § 2332a(a)(2)(A), arising from a government sting operation in which FBI agents, posing as Islamist extremists, encouraged petitioner to devise a plot to detonate an explosive device at the annual Christmas tree lighting ceremony in downtown Portland, Oregon. The conviction was upheld on direct appeal.

Petitioner moved to vacate the conviction under 28 U.S.C. § 2255, alleging, among other things, that he was denied due process because the presiding judge was implicitly biased because his adult family member and the judge's law clerk attended the ceremony, and that petitioner was denied effective assistance of counsel for counsel's failure to move to recuse the judge, counsel's failure to peremptorily strike a juror whose minor children also attended the event, and appellate counsel's failure to appeal the denial of a for-cause challenge of that juror. The district court issued a 32-page published opinion denying relief on the merits and denying a certificate of appealability under 28 U.S.C. § 2253(c)(2). The United States Court of Appeals for the Ninth Circuit also denied a certificate of appealability.

The issue presented is whether the Court of Appeals is genuinely adhering to this Court's well-established instruction to appellate courts that certificates of appealability must issue when an appellant has shown that "jurists of reason could disagree with the district court's resolution of [petitioner's] constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), or whether the Court of Appeals is instead *sub silentio* denying certificates of appealability on the substantive merits.

LIST OF PROCEEDINGS

1. Underlying criminal proceeding – *United States of America v. Mohamed Osman Mohamud*, US District Court, District of Oregon, Case No. 3:10-cr-00475-HZ

2. Direct appeal of underlying conviction – *United States of America v. Mohamed Osman Mohamud*, United States Court of Appeals for the Ninth Circuit, Case No. 14-30217.

3. Petition for Writ of Certiorari in direct appeal – *Mohamed Osman Mohamud v. United States of America*, United States Supreme Court Case No. 17-5126.

4. Habeas proceeding – *United States of America v. Mohamed Osman Mohamud*, United States District Court, District of Oregon, Case Nos. 3:20-cv-00883-HZ and 3:10-cr-00475-HZ.

5. Habeas appeal – *United States of America v. Mohamed Osman Mohamud*, United States Court of Appeals for the Ninth Circuit, Case No. 23-3594.

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Mohamed Osman Mohamud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

1. *United States of America v. Mohamed Osman Mohamud*, 843 F.3d 420 (9th Cir. 2016), *cert. denied*, 583 U.S. 1060 (2018) (published opinion affirming conviction).

2. *United States of America v. Mohamed Osman Mohamud*, 666 Fed. Appx. 591 (9th Cir. 2016) *cert. denied*, 583 U.S. 1060 (2018) (unpublished opinion affirming conviction).

3. *United States of America v. Mohamed Osman Mohamud*, 693 F. Supp. 3d 1070 (D. Or. 2023) (opinion and order denying relief under 28 U.S.C. § 2255 and denying certificate of appealability) (Appendix 3).

4. *United States of America v. Mohamed Osman Mohamud*, 2024 WL 4814549 (9th Cir. 2024) (order denying certificate of appealability) (Appendix 1).

5. *United States of America v. Mohamed Osman Mohamud*, Order denying motion for reconsideration of Court of Appeals' denial of certificate of appealability, September 13, 2024. (Appendix 2).

JURISDICTION

The Court of Appeals' order denying the certificate of appealability was entered on August 2, 2024. (Appendix 1). The Court of Appeals' order denying petitioner's motion for reconsideration was entered on September 13, 2024. (Appendix 2). This Court has jurisdiction to review on a writ of

certiorari the Court of Appeals' order denying the certificate of appealability pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

28 U.S.C. § 2253 provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) *only if the applicant has made a substantial showing of the denial of a constitutional right*.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(Emphasis added).

The Fifth Amendment to the United States Constitution provides:

> * * * [N]or shall [any person] be deprived of life, liberty, or property, without due process of law; * * *.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Mohamed Osman Mohamud was charged with Attempted Use of a Weapon of Mass Destruction, 18 U.S.C. § 2332a(a)(2)(A), arising from an FBI sting operation in which FBI agents posing as Islamic extremists encouraged Mr. Mohamud to conspire to detonate an explosive device at the annual Christmas tree lighting ceremony in downtown Portland, Oregon, in November 2010. Mr. Mohamud's defense was entrapment. The two agents encouraged this impressionable 19-year-old young man to devise a terror plot and provided what seemed to Mr. Mohamud all material and logistical means to carry it out. There was no question Mr. Mohamud would not have had the wherewithal to devise and execute such a plot without the agents' guidance. There was no evidence that he had considered such a plot before his first contact with the agents. The entrapment issue at trial came down to whether he nevertheless was "predisposed" to commit such an act as evidenced by past online writings and associations.

The case was assigned to Senior District Court Judge Garr M. King. Judge King presided over two years of pretrial litigation and a 14-day trial

that ended with a guilty verdict. Judge King imposed a sentence of 30 years imprisonment and a lifetime of supervised release. Mr. Mohamud pursued a direct appeal of his conviction, asserting several evidentiary and instructional errors that he argued unfairly prejudiced the jury's consideration of his entrapment defense. Mr. Mohamud also appealed Judge King's denial of his motions challenging the government's use of warrants issued under the apparent authority of the Foreign Intelligence Surveillance Act (FISA). The Court of Appeals affirmed Mr. Mohamud's conviction in published and unpublished opinions. *United States v. Mohamud*, 843 F.3d 420 (9th Cir. 2016); *United States v. Mohamud*, 666 Fed. Appx. 591 (9th Cir. 2016).

Mr. Mohamud filed his Motion to Vacate, Set Aside or Correct the Sentence Under 28 U.S.C. § 2255 in 2020. (ECF 557, 562).[1] By that time, Judge King had passed away. The case was reassigned to Judge Marco A. Hernandez.

Mr. Mohamud's Section 2255 motion alleged eleven grounds for relief, not all of which are discussed in this petition. Central to Mr. Mohamud's claims were two circumstances that Mr. Mohamud argued rendered his trial fundamentally unfair; first, that Judge King presided over the case despite

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[1]References to ECF are to the electronic case file docket number in the underlying criminal case, *United States of America v. Mohamed Osman Mohamud*, US District Court, District of Oregon, Case No. 3:10-cr-00475-HZ.

the fact that his adult family member and Judge King's law clerk and her family attended the Christmas tree lighting ceremony. Judge King advised the parties of this matter at the first opportunity, but stated that he did not believe he was required to recuse himself. He did not invite the parties to move for recusal. In his Section 2255 motion, Mr. Mohamud alleged that Judge King should have been disqualified from the case for implied bias and that his involvement resulted in a due process violation. He also alleged that trial counsel provided ineffective assistance of counsel by failing to move for Judge King's recusal and in other related respects.

The second circumstance that rendered Mr. Mohamud's trial unfair was that one of the empaneled juror's minor children also attended the Christmas tree lighting ceremony. Petitioner alleged ineffective assistance of counsel relating to counsel's failure to use a preemptory strike to remove the juror, and appellate counsel's failure to appeal the trial court's denial of a for-cause challenge against the juror.

In support of his motion, Mr. Mohamud submitted the declaration of Michael Levine, an Oregon attorney with over 40 years of experience as a prosecutor and defender. (Appendix 35). In the declaration, Mr. Levine set forth his expert opinion that trial counsel's failure to recuse Judge King was deficient performance and fell below the prevailing professional norms; that counsels' failure to adequately inform Mr. Mohamud about Judge King's

conflict and to obtain his informed consent not to move to recuse the judge similarly was deficient performance; that trial counsels' failure to use a peremptory challenge against the juror whose children attended the event also was deficient; and that appellate counsel's failure to raise on direct appeal the district court's preserved error in failing to grant Mr. Mohamud's for-cause challenge of the juror also fell below an objective standard of reasonableness. On that last point, Mr. Mohamud also submitted a declaration of his trial and appellate counsel stating that counsel did not recall making a tactical decision not to raise the for-cause challenge issue on appeal, and that doing so would have been consistent with his appellate strategy. (Appendix 43).

The district court denied Mr. Mohamud's Section 2255 motion in a 32-page Opinion and Order. (Appendix 3). The opinion is published at *United States v. Mohamud*, 693 F.Supp.3d 1070 (D. Or. 2023). In contrast to the extent to which the district court addressed Mr. Mohamud's substantive Section 2255 claims, the Court summarily denied a certificate of appealability, stating only that "Defendant has not made a substantial showing of the denial of a constitutional right." (Appendix 34).

Mr. Mohamud moved for a certificate of appealability with the United States Court of Appeals for the Ninth Circuit. A motions panel of the Ninth Circuit summarily denied a certificate of appealability, ruling:

> The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] 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); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

(Appendix 1). A different two-judge panel of the Ninth Circuit denied Mr. Mohamud's motion for reconsideration. (Appendix 2).

ARGUMENT

A person denied relief in the district court on a motion to vacate a conviction under 28 U.S.C. § 2255 may appeal the district court's judgment with a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As this Court repeatedly has recognized, Congress did not intend for this requirement of a "certificate of appealability" (COA) to be particularly onerous. The petitioner is not required to show ultimate entitlement to relief on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Instead, the petitioner must show 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 v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal citations omitted).

This Court applied this standard most recently in *Buck v. Davis*, 580 U.S. 100 (2017). The Court reiterated its holding from *Miller-El*:

> At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." [*Miller-El*,] at 327, 123 S.Ct. 1029. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id.*, at 336, 123 S.Ct. 1029.

Buck, 580 U.S. at 115.

In *Buck*, this Court held that the appellate court erred by denying the petitioner's habeas claim on the merits and then justifying the denial of the COA based on its adjudication on the merits. *Id.* at 115-16. The Court held that the appellate court did not have jurisdiction to reach the merits until it first made the "threshold inquiry" whether the district court's decision was debatable. Responding to the dissent's argument that a determination that a claim is meritless is equivalent to nondebatable, the Court stated:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller-El*, 537 U.S., at 336-337, 123

> S.Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*

Buck, 580 U.S. at 116-117 (emphasis in original).

On the surface, the Ninth Circuit appears to be applying this Court's standard for issuing COAs as announced in *Miller-El* and other cases. In *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000), it held that a defendant meets the threshold for a COA by demonstrating "'that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are adequate to deserve encouragement to proceed further.'" *Id.* at 1024 & n4 (alteration and emphasis in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n4 (1983)); *see also, Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) (citing same standard). The Ninth Circuit has described § 2253(c)'s requirement as a "modest standard[,]" *Lambright*, 220 F.3d at 1024 & n4, and has stated that a COA should issue unless the claims are "utterly without merit." *Id.* at 1025, *quoting Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000). Of course, here, it cited to the *Miller-El* standard in summarily denying the COA.

But this case illustrates that, while citing to the correct standard, the Court of Appeals is not sincerely applying it. As discussed below, on its face, the district court's lengthy opinion denying relief illustrates that Mr.

Mohamud's constitutional claims meet the low threshold of "substantial showing of the denial of a constitutional right." To preview one example, in rejecting Mr. Mohamud's claim of judicial bias, the district court acknowledged that the subject is "necessarily fact-driven". (Appendix 13). The Court found the circumstances of this case were "particularly unique," that they do not "fall neatly" into one of the categories of cases this Court has held requires recusal under due process standards, and that they do not "closely track" the facts of other cases that Mr. Mohamud cited in support of this claim. (Appendix 13). To say that the unique circumstances of this case do not fall neatly within, or closely track the facts of other cases requiring recusal is a far cry from saying that Mr. Mohamud's claims are not debatable among reasonable jurists. As discussed below, whether Mr. Mohamud's case is sufficiently analogous to other cases in which recusal was required is reasonably debatable.

It is also worth highlighting as a preliminary matter that, in support of his claims of ineffective assistance of trial and appellate counsel, Mr. Mohamud submitted a sworn declaration of Michael Levine, a criminal defense attorney with more than 40 years of experience at the trial and appellate level. (Appendix 35). In his declaration, Mr. Levine testified that Mr. Mohamud's trial and appellate counsel's conduct fell below the professional standard of care in several respects. In rejecting all claims of

ineffective assistance of counsel, the district court declined to consider Mr. Levine's opinions about whether counsels' actions were deficient. (Appendix 18). Putting aside whether that was error, the very fact that an experienced trial and appellate criminal defense lawyer offered opinions about counsels' decisions that conflicted with the district court's ultimate findings is additional evidence that the claims of ineffective assistance of counsel are debatable among reasonable jurists or were adequate to deserve encouragement to proceed further.

1. The Ninth Circuit's Failure To Issue A Certificate Of Appealability On Mr. Mohamud's Claims Of A Due Process Violation And Ineffective Assistance of Counsel Arising From Judge King's Involvement In The Case Illustrates The Court Is Not Sincerely Applying This Court's Standard For Issuance of COAs, Warranting This Court's Review

In his claims of judicial bias, Mr. Mohamud alleged:

> **Ground One:** Petitioner was denied his right to a fair, impartial, and unbiased judge in violation of his right of Due Process under the Fifth Amendment to the United States Constitution, when the presiding judge (a) failed to disqualify himself from the case for implied or actual bias on the ground that his adult child and the judge's law clerk and her family were present at the Christmas tree lighting ceremony that petitioner intended to bomb; and (b) failed to obtain from petitioner a knowing and voluntary waiver of his right to an impartial judge presiding over his case.
>
> **Ground Two:** Petitioner was provided ineffective assistance of trial counsel in violation of his right to counsel under the Sixth Amendment when his counsel failed to move to disqualify the judge on the ground of actual or implied bias stemming from the fact that the judge's adult child and his law clerk and her family attended the tree lighting ceremony that petitioner intended to bomb.

> **Ground Three:** Petitioner was provided ineffective assistance of trial counsel in violation of his right to counsel under the Sixth Amendment when his counsel made the decision not to move to disqualify the presiding judge rather than permit petitioner to make a knowing, voluntary, and intelligent decision whether to move to disqualify the judge.
>
> **Ground Four:** Petitioner was provided ineffective assistance of trial counsel in violation of his right to counsel under the Sixth Amendment when his counsel failed to move for a court hearing in which petitioner would be fully advised on the record of the risks associated with proceeding with the assigned judge so that petitioner could make a knowing, voluntary, and intelligent decision whether to move to disqualify the judge.
>
> **Ground Five:** Petitioner was provided ineffective assistance of appellate counsel in violation of due process and his right to counsel under the Fifth and Sixth Amendments when his appellate counsel failed to assign error to the district judge's failure to disqualify himself from presiding over the case and to the judge's failure to obtain an adequate waiver from petitioner of his right to an impartial judge.

A. Ground One

At the first appearance before Judge King, he told the parties that a family member of his, as well as his law clerk and his law clerk's family, were present at the tree lighting ceremony. Judge King stated, "I do not consider that any of these factors require recusal. I think they have no effect on the Court or on my law clerk, but I wanted to state that for the record in this case." Judge King did not invite the parties to consider moving for disqualification or ask whether they would consent to his further involvement

in the case. Nothing more was said about the matter on the record until Mr. Mohamud filed his Section 2255 motion.

In Ground One, Mr. Mohamud contended that Judge King's failure to disqualify himself violated the Due Process Clause of the Fifth Amendment to the United States Constitution. The right to due process guarantees a "fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997). In denying Mr. Mohamud relief, Judge Hernandez found there was no evidence that Judge King was "subjectively" biased. (Appendix 14). But whether recusal is constitutionally required does not hinge on "whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'" *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016), *quoting Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). Recognizing that bias is "difficult to discern in oneself," this Court has established a "stringent rule" that recusal is constitutionally required not only when the judge consciously perceives that his or her neutrality is compromised by bias, but also when circumstances objectively create a risk, probability, or appearance of bias. *Williams*, 579 U.S. at 9.

Such a circumstance exists when the judge or close family member of the judge, or a member of the judge's staff, is a victim or intended victim of the defendant's offense. *See Rodriguez v. Copenhaver*, 823 F.3d 1238 (9th Cir. 2016) (judge who was victim of defendant's offense had actual conflict that precluded any involvement in defendant's case); *Nichols v. Alley,* 71 F.3d 347 (10th Cir. 1995) (judge whose courtroom and chambers were damaged by nearby bombing of Oklahoma federal building was required to recuse himself from case). Even when the offense is staged by law enforcement and the judge is not in real danger, recusal is required. *See In re Nettles*, 394 F.3d 1001 (7th Cir. 2005) (all judges in courthouse defendant wanted to bomb in FBI sting operation were barred from presiding over defendant's case).

Judge Hernandez concluded that the facts of Mr. Mohamud's case do not "fall neatly" into one of the cases the Supreme Court has found requires recusal, and that they do not "closely track the exceptional facts" of other appellate cases petitioner cited. (Appendix 13). The district court reasoned that petitioner's crime did not specifically target Judge King, his family, his law clerk or the judiciary. Also, the court pointed out that petitioner's plot was never going to hurt anyone. (Appendix 13-14).

But the very fact that the question of judicial recusal is necessarily "fact-driven," as Judge Hernandez recognized (Appendix 13), supports the conclusion that the issue is debatable among reasonable jurists. And the

view that the circumstances of this case do not "fall neatly" or "closely track" other cases in which a due process violation was found does not mean that the issue is not debatable among reasonable jurists. On the contrary, as Mr. Mohamud has argued, the risk of bias is magnified by the particular facts and circumstances of this case. Although no one was ever in any real danger from the fake bomb that the government agents created as part of its sting operation, the government presented evidence of petitioner's highly inflammatory statements to the undercover agents that his aim was to kill thousands of people, including children, attending the ceremony, and he asked the agents to help him build a truck bomb that would do the job. He expressed satisfaction that the weather was favorable and would induce a large turnout, and he discussed the timing of the explosion to correspond to the biggest crowd size. He did not hesitate when it came time to dial the number on a cell phone that he believed would trigger the explosion. The government's evidence included a video of the holiday revelers near the square, providing Judge King and his law clerk with a visual reminder of that evening and what might have occurred.

All told, the scale of the horror that petitioner intended to rain down on the Pioneer Square crowd was so massive that no one who attended that event could remain neutral and unbiased. Even if Judge King and his law clerk subjectively believed they could remain impartial and unaffected by

their direct involvement in the case, objectively, the circumstances created an unacceptable risk of actual bias and the appearance of bias. At least, reasonable jurists might debate whether this circumstance is sufficiently akin to others found to require recusal on due process grounds. The issue "deserves encouragement to proceed further," because an appellate decision on the merits likely would provide guidance to the bench and bar regarding judicial recusal.

As part of this claim, Mr. Mohamud argued that his right to an impartial judge was not waivable, or, alternatively, to the extent that it was waivable, Mr. Mohamud did not make a knowing, intelligent and voluntary waiver of a known right. That is, Judge King did not advise Mr. Mohamud about the potential risks of proceeding with him as judge and invite him to move for recusal. Mr. Mohamud was not advised about the role of the judge, his duty of neutrality and impartiality, and the sorts of decisions he would be asked to make about petitioner's case that, if affected by bias, could be very detrimental to his chance of success and, ultimately, to his liberty. There was no colloquy to ensure that petitioner was making a voluntary decision to proceed with Judge King. In support of his claim that such a colloquy should have occurred, Mr. Mohamud likened the situation to a waiver of other fundamental constitutional rights, such as the right to representation or the right to trial. *See New York v. Hill,* 528 U.S. 110, 114 (2000) ("For certain

fundamental rights, the defendant must personally make an informed waiver"); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *Faretta v. California*, 422 U.S. 806 (1975) (requiring that defendant who wishes to waive the right of representation must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.")

The district court declined to consider the issue of a lack of waiver because it rejected the claim of partiality. The Court noted that "no court has addressed waiver of the right to an impartial judge under the Due Process Clause or any associated requirements" and it "declin[ed] to do so in the first instance." (Appendix 15). The fact that no court specifically has addressed this question does not mean it is not reasonably debatable and underserving of further attention. In fact, this Court's decision in *Gonzalez v. United States*, 553 U.S. 242 (2008), suggests this issue has merit. The Court held that a criminal defendant is not required to personally waive a district court judge presiding over *voir dire* and that the lawyer may consent on the client's behalf to a magistrate judge handling that part of the proceeding. *Id.* at 251. But the holding expressly was premised on the defendant's concession that

the magistrate judge was "capable of competent and *impartial* performance." *Ibid.* (emphasis added). This suggests that a valid waiver must occur whenever a judge's circumstance gives rise to an unacceptable risk of a due process concern for the judge's impartiality.

The question of waiver is related to the question of procedural default. Judge Hernandez concluded that petitioner had procedurally defaulted this due process claim because he did not pursue it through a direct appeal. (Appendix 10-12). Procedural default may be excused by a showing of cause and prejudice. *Massaro v. United States*, 538 U.S. 500, 504 (2003). Procedural default is a court-created concept favoring judicial efficiency and finality; but, in certain circumstances, it must give way to the higher goal of preventing a serious miscarriage of justice. *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

In this case, Mr. Mohamud demonstrated "cause" by virtue of the fact that the Court did not inform him of the dangers of proceeding with an impliedly biased judge whose family and law clerk attended the tree lighting ceremony and did not attempt to obtain a valid waiver of the right to an impartial judge – a waiver that, petitioner argued, only he personally could make. The Court rejected that argument. But again, in the absence of controlling authority on either side of the question, petitioner submits that

this issue is at least debatable among reasonable jurists and is "adequate to deserve encouragement to proceed further."

The Court did not address the "prejudice" aspect of the "cause and prejudice" exception to procedural default. Petitioner argued that prejudice is established by virtue of the holding in *Williams v. Pennsylvania* that the denial of an impartial judge in violation of Due Process is structural error not subject to harmless error analysis. The error is structural for at least two reasons: (1) the error deprives the petitioner of the "basic protections" guaranteed by the Due Process Clause and renders the "trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570, 577 (1986), *citing Tumey v. Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge); and (2) the very nature of the error makes it virtually impossible to prove how it affected the outcome. *Williams,* 579 U.S. at 14-15. Actual prejudice is presumed. By the same logic, the prejudice prong of the "cause and prejudice" exception to the procedural default rule is established. At least, the issue is reasonably debatable. *See Khaimov v. Crist*, 297 F.3d 783 (8th Cir. 2002) (a COA should be granted if procedural default is not clear and the substantive constitutional claims are debatable among jurists of reason).

B. Grounds Two Through Five

In these claims, Mr. Mohamud alleged that counsel provided ineffective assistance of counsel by failing to move to disqualify Judge King, failing to

ensure that Mr. Mohamud was fully aware of all risks associated with proceeding with Judge King, failing to ensure a valid waiver, and failing to appeal Judge King presiding over the case. Judge Hernandez denied these claims, concluding that counsel made a reasonable, tactical decision not to object to Judge King and advised their client accordingly. (Appendix 18-20).

The Court's rulings deserve a certificate of appealability for two over-arching reasons. First, as with other claims, petitioner submitted a declaration of a trial and appellate lawyer with over 40 years of experience offering the opinion that counsel's performance fell below the standard of care. This alone indicates that these claims have merit. As Mr. Levine states, counsel's view that Judge King would be favorable based on their prior experience with him did not account for the very different and unprecedented situation of Judge King, and his law clerk, being victims of the petitioner's crime. (Appendix 37-38).

Second, trial counsel's assessment of Judge King did not account for the role that his law clerk would play through the course of the proceedings. The full extent of her involvement as a close advisor to Judge King in all aspects of pre-trial and trial proceedings is described at length in Mr. Mohamud's Section 2255 memo. (ECF 562, pages 61-65). In sum, her role was extensive and reflective of how one court has described a law clerk's job:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the law suit or his most intimate family members may be.

In re Asbestos School Litig., No. 83-0268, 1989 WL 19395, at *2 (E.D. Pa. Mar. 1, 1989). "[A] clerk is forbidden to do all that is prohibited to the judge." *Ibid., citing Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir.1980), *cert. denied* 454 U.S. 1099 (1981). *Compare United States v. Martinez*, 446 F.3d 878 (8th Cir. 2006) (judge was not required to recuse self in criminal case, because conflicted law clerk worked on civil matters, and her role in instant criminal case was limited to ministerial duties).

The record reveals that Judge King's clerk was very attentive to all that was occurring on and off the record and was providing great assistance to the judge in moving the case forward. Due process demanded that she should not have been involved in the case at all. She and her family were among the people whom petitioner intended to kill. It is an understatement to say that a reasonable observer would have reason to question her impartiality. The risk of actual bias against the petitioner was too high for her involvement to be constitutionally permissible. Whether counsel erred in failing to recognize this problem is, at the very least, debatable by reasonable jurists, warranting a COA on these claims of ineffective assistance of counsel.

2. The Ninth Circuit's Failure To Issue A Certificate Of Appealability On Mr. Mohamud's Claims Of Ineffective Assistance Of Trial and Appellate Counsel Arising From The Empaneling Of The Juror Whose Children Attended The Event Further Illustrates The Court Is Not Sincerely Applying This Court's Standard For Issuance of COAs, Warranting This Court's Review

Mr. Mohamud alleged:

> **Ground Six:** Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment right to counsel when counsel: (a) failed to use a peremptory challenge to remove Juror No. 7 whose presence on the jury violated petitioner's Sixth Amendment right a fair and impartial jury by virtue of the fact that the juror's two minor children attended the tree lighting event at Pioneer Square that petitioner intended to target; and (b) failed to advocate for Juror No. 7's removal from the jury when two opportunities arose during the trial for her to be replaced by a favorable and unbiased alternate juror.
>
> **Ground Seven:** Petitioner was denied effective assistance of appellate counsel in violation of the Fifth and Sixth Amendments when his appellate counsel failed to assign error to the district court's denial of petitioner's for-cause challenge of Juror No. 7, an error that would have resulted in a reversal of the conviction without regard to a harmless error analysis.

A. Ground Six

During *voir dire*, Juror No. 7 disclosed that her two minor children attended the tree lighting ceremony with their father. Judge King and trial counsel questioned Juror No. 7 about whether that circumstance would affect her ability to remain fair and impartial. When pressed repeatedly on that question, Juror No. 7 was equivocal although she ultimately stated that she could be impartial. Defense counsel made a "for-cause" challenge to Juror

No. 7 remaining on the panel on the ground that "her own children were at the event." (ECF 381-1, page 1). The Court denied that "for-cause" challenge. (ECF 563, page 554). During peremptory challenges, defense counsel did not strike Juror No. 7. Thus, she was one of 12 jurors who found Mr. Mohamud guilty.

In Ground Six, Mr. Mohamud argued that counsel should have used a peremptory strike to remove Juror No. 7 from the jury and thereafter should have seized opportunities to have her replaced with an alternative, such as when she later asked to be excused and then showed up late for a trial day. Having Juror No. 7 remain on the jury violated petitioner's Sixth Amendment right to a fair trial by impartial jurors. *See Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (recognizing the right). Juror No. 7 did not exhibit "actual bias" but instead, fell into the recognized category of "implied or presumptive" bias by virtue of her status as the mother of intended victims of the crime. Implied bias requires removal "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) (internal quote omitted). Implied bias exists when, viewed objectively, because of a juror's relationship to the case, "the potential for

substantial emotional involvement, adversely affecting impartiality, is inherent." *Id.* at 1111-12 (citations omitted).

In rejecting the claim of implied bias, the district court cited to *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990), in which the Ninth Circuit wrote that courts should "hesitate before formulating categories of relationships which bar jurors from serving in certain types of trials." (Appendix 26). The Court noted two such categories in which implied bias had been found: *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979), in which a juror whose sons were imprisoned for heroin-related crimes could not remain impartial in a heroin conspiracy trial; and *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977), in which jurors who worked for a different branch of the bank the defendant robbed were found to be presumptively partial even though they said they could be fair. Judge Hernandez found that Juror No. 7's situation was not analogous to either case, and therefore, she was not impliedly biased. (Appendix 26). Thus, the Court concluded that Mr. Mohamud's trial counsel was not ineffective for failing to remove Juror No. 7 with a peremptory strike.

Whether Judge Hernandez erred is debatable by reasonable jurists. Throughout the trial, the jury heard repeated evidence through petitioner's recorded conversations with the undercover agents of his intent to cause tremendous human carnage in the Pioneer Square at the time that Juror No.

7's children were present. The point was emphasized in the government's opening and closing statements. Juror No. 7's participation in the case created an unacceptable risk that feelings of animosity towards him arising from his intent to kill her children would unfairly impact her ability to dispassionately consider his defense of entrapment. Mr. Mohamud's expert, Mr. Levine, testified that for this reason, counsel's failure to strike and to advocate for the removal of Juror No. 7 "was deficient performance and fell below professional norms." (Appendix 40-41). It was one thing for the district court to have not accepted that opinion; it is another to conclude that the issue is beyond debate or unworthy of further consideration.

The district court did not reach the prejudice prong of the *Strickland* analysis. *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Mohamud had argued that, if Juror No. 7 was impliedly biased, then allowing her to sit on the jury was structural error that does not require a showing of actual harm or prejudice. *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018); *Gonzalez*, 214 F.3d at 1111; *see also Styers v. Schriro*, 547 F.3d 1026, 1030 n5 (9th Cir. 2008) (when attorney's deficiency results in structural error, no additional showing of prejudice is necessary). At the very least, this issue is debatable among reasonable jurists. The Court of Appeals erred in failing to issue a COA on this issue.

B. Ground Seven

Mr. Mohamud should have had a COA on his claim of ineffective assistance of appellate counsel arising from counsel's failure to assign error to the trial court's denial of the for-cause challenge against Juror No. 7. On this issue, appellate counsel admitted that he had no strategic reason not to raise this issue on appeal and that including it would have been consistent with appellate strategy. (Appendix 44). To hold that this issue on appeal was not winnable is not merely subject to reasonable debate; it is wrong according to a fair reading of Ninth Circuit caselaw reasonably on point.

The one advantage to counsel's failure to remove Juror No. 7 with a peremptory challenge was that her participation in the verdict preserved for appellate review the trial court's denial of the for-cause challenge. *See United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (holding that, when a trial court denies a for-cause challenge, the defendant has the option of either using a peremptory strike to remove the juror or letting the juror sit on the petit jury and "upon conviction, pursuing a Sixth Amendment challenge on appeal."). Here, having opted to let Juror No. 7 sit on the jury, appellate counsel neglected to pursue the "Sixth Amendment challenge on appeal," to Mr. Mohamud's detriment.

Mr. Mohamud would have won this issue on appeal because Juror No. 7's participation on the jury violated his Sixth Amendment right to an

impartial jury. Again, the issue turns on whether Juror No. 7 was impliedly or presumptively biased given her status as the mother of intended victims. Mr. Mohamad has argued that her status is not materially different from that of potential jurors in other cases whose status disqualified them from service. The most striking example to support the point comes from the Ninth Circuit's *Allsup* decision.

In *Allsup*, the government charged the defendant with robbing two banks on separate days. Two prospective jurors worked for one of the banks. Notably, they were not present at the bank when it was robbed; moreover, they did not even work at the branch that was robbed. They simply worked for the same corporate entity. The trial court denied the defendant's for-cause challenge of the two jurors, because in *voir dire*, the jurors said that they could remain impartial despite their relationship with the bank.

On appeal, the Court of Appeals held that the trial court erred in failing to excuse the bank employees for cause. *Id.* at 71. At stake was the defendant's Sixth Amendment right to a fair trial, which includes the right to impartial and "indifferent" jurors. *Ibid.* The judge must remove jurors whose bias is revealed by express admissions or by "circumstantial evidence" that gives rise to a presumption of bias. *Ibid.* The Court stated:

> We agree with the observation in *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3rd Cir. 1965): "That men will be prone to favor that side of a cause with which they identify themselves either economically,

> socially, or emotionally is a fundamental fact of human character." The potential for substantial emotional involvement, adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed.

Id. at 71.

Despite the jurors' promise that they could be fair and impartial, the Court held that their bias must be "presumed" from their relationship with the bank and reasonable apprehension of violence by bank robbers. *Id.* at 71-72.

As mentioned, another case in which the Court found implied or presumed bias based on the "potential for substantial emotional involvement, adversely affecting impartiality inherent in certain relationships," is *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979). In *Eubanks*, a heroin conspiracy trial, one juror failed to disclose in *voir dire* that his sons were serving prison sentences for heroin-related crimes. The Court presumed that the juror was biased because of his sons' involvement with heroin. *Id.* at 517. Other courts have found implied bias when the juror previously had been a victim of a crime reminiscent of the one charged. *See, e.g., Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (implying bias where several jurors were victims of a robbery that was "profoundly similar" to the robbery for which defendant was on trial); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1,

8 (3rd Cir. 1957) (bias imputed where juror was victim of a robbery similar to the robbery charged against the defendant).

Here, Judge Hernandez concluded that Juror No. 7's situation was not sufficiently similar to that of any other case in which implied bias was found, noting that her children did not suffer any actual harm and were not the specific targets of the threat. (Appendix 25-26). But the same could be said for the jurors in *Allsup*. And, although Juror No. 7 and her kids had not experienced some *previous* trauma that might dredge up strong emotions against the petitioner, that is not to say that their experience *in this case* of being present in the square that petitioner intended to wipe out would not give rise to equally strong emotions. Using the language from *Eubanks* and *Gonzalez*, Juror No. 7's status inherently created the "potential for substantial emotional involvement, adversely affecting [her] impartiality."

Judge Hernandez relied on the length of the counsel's opening brief, and the fact that the original version had to be substantially edited to meet this Court's order, as evidence that appellate counsel's performance was not deficient. (Appendix 28). In addition, the Court relied on the oft-cited admonition that appellate counsel is afforded wide deference to choose which issues to appeal and to decline to raise weak issues. (Ibid).

But this degree of deference to appellate counsel assumes that appellate counsel made a tactical decision to exclude an issue from the

appeal. That did not happen here. Mr. Mohamud submitted a declaration of appellate counsel stating that he did not identify and research the issue, and did not make a tactical decision to omit it. (Appendix 44). Also, counsel did not say he purposefully omitted the issue from the brief because of the size limitation. Thus, the foundations for Judge Hernandez' reasoning is lacking. *See Doe v. Ayers*, 782 F.3d 425, 444-45 (9th Cir. 2015) ("The presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance is inapposite, or at least firmly rebutted, when * * * defense counsel had no strategy, because he has unequivocally said as much.")

Nor is it sufficient to reject Mr. Mohamud's claim on the ground that appellate counsel raised a number of meritorious issues in an oversized opening brief. As this Court has held, even a single, serious error can support a claim of ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986), *citing United States v. Cronic*, 466 U.S. 648, 657 n20 (1984) ("[T]he type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well.").

Counsel's errors in failing to exclude Juror No. 7 from the jury and failing to appeal the denial of the for-cause challenge were serious and of

constitutional magnitude because petitioner was denied his Sixth Amendment right to an impartial jury. Juror No. 7's circumstance clearly should have resulted in her excusal. But of course, the Court does not need to reach that conclusion at this point. At the very least, the issue warranted a COA. Even Judge Hernandez acknowledged that the for-cause issue "would not have been frivolous * * * " had it been raised on appeal. (Appendix 28). Indeed, the line demarking implied bias is not clearly drawn because the range of circumstances giving rise to a presumption of partiality are diverse. Reasonable jurists may differ on whether certain circumstances require excusal on Sixth Amendment grounds.

Judge Hernandez did not reach the prejudice prong of the *Strickland* analysis, except to state that the issue would not have succeeded on appeal. The prejudice prong does not require petitioner to establish that he would have been acquitted without Juror No. 7 on the jury. The failure to remove a presumptively biased juror is structural error and not subject to the harmless error analysis. *See Martinez-Salazar*, 528 U.S. at 316 (the seating of a biased juror who should have been dismissed for cause "would require reversal."); *Gonzalez*, 214 F.3d at 1111, ("the error requires a new trial without a showing of actual prejudice"); *Dyer v. Calderon*, 151 F.3d 970, 973 n2 (9th Cir. 1998) ("* * * the presence of a biased juror introduces a structural defect not subject to harmless error analysis"). The Ninth Circuit

views *Strickland* prejudice as established when an attorney's mistakes cause structural error. *See Styers*, 547 F.3d at 1030 n5 (where counsel's deficiency resulted in structural error, "no * * * additional or separate showing of prejudice would appear necessary."); *United States v. Withers*, 638 F.3d 1055, 1067–68 (9th Cir. 2011) (citing *Styers* with approval).

In sum, these authorities demonstrate that the issue is, at the very least, reasonably debatable and is "adequate to deserve encouragement to proceed further," because an appellate decision on the merits will provide further guidance to the bench and the bar on where to find the line of implied bias.

CONCLUSION

This case demonstrates that the Ninth Circuit is not sincerely applying this Court's standard for issuance of certificates of appealability under 28 U.S.C. § 2253(c)(2), calling for an exercise of this Court's supervisory power. The Court should allow this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

INDEX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 2 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant - Appellant.

No. 23-3594

D.C. No. 3:10-cr-00475-HZ-1
District of Oregon,
Portland

ORDER

Before: S.R. THOMAS and PAEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] 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); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SEP 13 2024

MOLLY C. DWYER, CLERK
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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant - Appellant.

No. 23-3594

D.C. No. 3:10-cr-00475-HZ-1
District of Oregon,
Portland

ORDER

Before: CALLAHAN and M. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 9) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MOHAMED OSMAN MOHAMUD,

Defendant.

No. 3:10-cr-00475-HZ
(3:20-cv-00883-HZ)

OPINION & ORDER

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Appendix 3

HERNÁNDEZ, District Judge:

On January 31, 2013, Defendant was convicted of one count of Attempted Use of a Weapon of Mass Destruction, 18 U.S.C. § 2332a(a)(2)(A). On October 1, 2014, Defendant was sentenced to thirty years in custody. Now, Defendant moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Court denies Defendant's motion.

BACKGROUND

In November 2010, Defendant was indicted of one count of Attempted Use of a Weapon of Mass Destruction, 18 U.S.C. § 2332a(a)(2)(A). The charges stem from a plot to detonate an explosive device at the annual Christmas tree lighting ceremony in Portland, Oregon. In August 2009, the FBI began surveilling Defendant after his father contacted the FBI for help trying to prevent Defendant from leaving the country. Based on that surveillance, the FBI used undercover agents to contact Defendant. After a series of meetings between Defendant and the agents, a plan was set in motion to detonate an explosive device at the tree-lighting ceremony. And on November 26, 2010, Defendant—in the presence of the agents—attempted to detonate the bomb and was arrested.

A fourteen-day jury trial began on January 10, 2013, resulting in a guilty verdict against Defendant. Defendant was represented by three senior attorneys from the Federal Public Defender's Office throughout the trial and appellate proceedings. On October 1, 2014, the District Court imposed a below-Guidelines sentence of thirty years and a lifetime of supervised release. J. & Commitment, ECF 524. At sentencing, the Court took into consideration Defendant's lack of a criminal history, acceptance of responsibility, low risk of recidivism, and the imperfect entrapment involved in the commitment of the crime. Sent. Tr., ECF 529.

Additional facts are included in the discussion below as relevant to the analysis.

STANDARDS

Section 2255 permits "[a] prisoner in custody under sentence of a court established by Act of Congress" to move the court that imposed the sentence to vacate, set aside, or correct the sentence on the ground that:

> [T]he sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]

28 U.S.C. § 2255(a). To warrant relief, a defendant must demonstrate that an error of constitutional magnitude had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.").

Under § 2255, the defendant is entitled to a hearing in which the court determines the issues and makes findings of fact and conclusions of law, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. "The standard for granting an evidentiary hearing [under § 2255] entails assuming the truth of [the defendant's] factual allegations." *United States v. Leonti,* 326 F.3d 1111, 1121 (9th Cir. 2003). When faced with conflicting sworn accounts from a defendant and his trial attorney, a district court is required to hold an evidentiary hearing if the defendant's version of the facts would entitle him to relief. *United States v. Reyes-Bosque*, 624 F. App'x 529, 530 (9th Cir. 2015) (finding that district court erred in holding that the defendant's claim was self-serving because Section 2255(b) imposes no requirement of independent corroboration, and a declaration is not inherently unbelievable merely because it is self-serving). "Therefore, 'a hearing is mandatory

whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims,' and failure to grant one in such a circumstance is an abuse of discretion." *Id.* (quoting *Baumann v. United States,* 692 F.2d 565, 571 (9th Cir. 1982)).

DISCUSSION

Defendant asserts that he is entitled to relief under § 2255 for four reasons: (1) Judge King's failure to recuse himself from trying this case; (2) errors in jury selection; (3) issues surrounding evidence gathered pursuant to the Foreign Intelligence Surveillance Act (FISA); and (4) discovery and evidentiary errors. This Court disagrees.

I. Judicial Bias

The facts underlying Defendant's first claim are not in dispute. At the first court appearance before Judge King after Defendant's arraignment, Judge King informed the parties of potential conflicts, stating:

> The law clerk assigned to this case and her family and a member of my family were at the tree-lighting ceremony. I have three grandchildren who went to the same middle school as the defendant in this case. I have no indication that they knew or associated or had a social relationship with the defendant.
>
> I do not consider that any of these facts require recusal. I think they have no effect on the Court or on my law clerk, but I wanted to state that for the record in this case.

Def. § 2255 Ex. 4 at 4, ECF 563. There were no further court proceedings related to this issue. The referenced law clerk worked closely with Judge King on the case through sentencing. Judge King did not identify which of his family members attended the tree lighting ceremony.

After the first hearing, Defendant met with one of his trial attorneys—Steve Sady—who told Defendant they should "keep Judge King as the Judge." Def. § 2255 Ex. 14 ("Mohamud Decl.") ¶ 3. According to Defendant, Mr. Sady explained that Judge King's honesty about the event was a reason to "keep him," that Judge King was the best judge for sentencing, and that he

did not think that Judge King would be prejudiced against Defendant. *Id.* Defendant "went along with" his attorneys' decision regarding Judge King, but the potential risks of proceeding with Judge King and the risk of bias were never explained to Defendant. *Id.* ¶¶ 4–6.

Michael Levine—a local criminal defense attorney with forty years of experience—provided a declaration in support of Defendant's motion. Def. § 2255 Ex. 1 ("Levine Decl.") ¶ 1. Mr. Levine conferred with Defendant's attorneys regarding their decision not to move to recuse Judge King. *Id.* ¶ 14. They told Mr. Levine that they "understood the risk but believed, based on their collective experience, that Judge King was the most favorable judge in the district towards criminal defendants." *Id.* Though Mr. Levine generally agrees with that statement, he believes that the risk of bias in this case—given Defendant's intent to harm many people, including individuals close to the judge—outweighed his generally favorable attitude towards criminal defendants. *Id.* Because of the specific facts and circumstances of this case, Mr. Levine opines it was deficient performance not to move to recuse Judge King. *Id.* ¶¶ 12, 13, 15–17.

Defendant makes essentially three arguments in his five grounds for relief related to Judge King's failure to recuse himself. First, Defendant argues that Judge King's failure to recuse himself violated Defendant's right to due process under the Fifth Amendment. Def. Mem. 18, ECF 562. Second, Defendant argues that trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment when they failed to move to disqualify Judge King; failed to permit Defendant to make a knowing, voluntary, and intelligent decision as to whether to move to disqualify the judge; and failed to move for a hearing in which Defendant would be fully advised of the risks associated with the assigned judge. *Id.* at 18–19. Third, Defendant argues that appellate counsel was ineffective under the Fifth and Sixth Amendments in failing to

assign error to Judge King's failure to disqualify himself from the case. *Id.* at 19. The Court addresses each set of arguments in turn.

A. Judge King's Failure to Recuse Himself (Ground 1)

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[1] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. Thus, "[d]ue process may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice between contending parties." *Caperton*, 556 U.S. at 886 (internal quotations omitted).

"'[M]ost matters relating to judicial disqualification,'" however, "'[do] not rise to a constitutional level.'" *Id.* at 876 (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)); *see also United States v. Heffington*, 952 F.2d 275, 279 (9th Cir. 1991) ("[T]he cases

[1] Both parties rely on cases analyzing recusal under the federal statute in their briefs. Def. Mem 27–35; Gov't Resp. 9–11. Accordingly, the Court will consider the facts and circumstances of those cases as well in its analysis. The Court notes, however, that "the federal recusal statutes provide stricter grounds for recusal than the Due Process Clause." *Barroca v. United States*, No. CR-94-0470 EMC, 2014 WL 5513708, at *4 (N.D. Cal. Oct. 31, 2014) (citing cases from the Fifth, Eighth, and Eleventh Circuits); *see Davis v. Jones*, 506 F.3d 1325, 1336 (11th Cir. 2007) ("But a § 455 violation stemming from the appearance standard does not automatically mean the defendant was denied constitutional due process."); *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) ("The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge's impartiality."); *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) (holding the statute "reaches farther than the due process clause, which is concerned primarily with the individual rights of parties"). Indeed, the Supreme Court has recognized that the Due Process Clause "demarks only the outer boundaries of judicial disqualifications" such that "[a]pplication of the constitutional standard . . . will . . . be confined to rare instances." *Caperton*, 556 U.S. at 890 ("Because the codes of judicial conduct provide more protection than due process requires, most disputes will be resolved without resort to the Constitution.").

demonstrate a measure of caution on the part of courts before concluding that mere appearances of partiality have, in fact, risen to the level of constitutional error."). Rather, the Supreme Court has identified some circumstances that require recusal: where the judge has "'a direct, personal, substantial, pecuniary interest' in a case," *Caperton*, 556 U.S. at 876 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); where the same person serves as both accuser and adjudicator in a case, *In re Murchison*, 349 at 136–37; where "a man chooses the judge in his own case" through, for example, large campaign donations, *Caperton*, 556 U.S. at 886; and where the judge "becomes embroiled in a running, bitter controversy with one of the litigants, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *see also Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007) (noting Supreme Court precedent has only identified limited circumstances where an appearance of bias necessitates recusal under the Due Process Clause). "These are circumstances 'in which experience teaches that the probability of actual biases on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 877 (*Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *see also Rippo v. Baker*, 580 U.S. 285, 287 (2017) (emphasizing that Supreme Court precedents require courts to ask "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable").

The "risk of unfairness has no mechanical or static definition" and "cannot be defined with precision because circumstances and relationships must be considered." *Hurles v. Ryan*, 752 F.3d 768, 789 (9th Cir. 2014) (internal citation and quotations omitted). This is an objective inquiry, asking "whether the average judge in her position was likely to be neutral or whether there existed an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881.

Defendant argues that Judge King was required to disqualify himself from presiding over this case because one of his family members and the law clerk assigned to the case were present

at the tree-lighting ceremony. Def. Mem. 19. According to Defendant, these circumstances presented an unconstitutional potential for bias in violation of the Fifth Amendment. *Id.* at 21–48. The Government responds by arguing that Defendant has procedurally defaulted on his claim and that Defendant received a fair trial from Judge King, who was not biased. Gov't Resp. 7–11, ECF 573. The Court agrees with the Government.

i. Procedural Default

Defendant has procedurally defaulted on his claim. Habeas review is not an alternative to direct appeal. *Bousley v. United States*, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal quotation marks omitted). Absent a showing of cause and prejudice, a habeas petitioner procedurally defaults all claims that were not raised in his direct appeal other than claims asserting ineffective assistance of counsel. *Massaro v. United States*, 538 U.S. 500, 504 (2003). "[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167–68 (1982).

To demonstrate "cause," the defendant must establish that "'some objective factor external to the defense' impeded his adherence to the procedural rule." *United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "External factors include obstacles such as 'a showing that the factual or legal basis for a claim was not reasonably available to counsel,' or that 'interference by officials . . . made compliance impracticable." *Bradford v. Davis*, 923 F.3d 599, 612 (9th Cir. 2019) (quoting *Murray*, 477 U.S. at 488). "Attorney ignorance or inadvertence is not cause," *id.*, nor is a tactical decision, absent a

showing that the attorney error constitutes ineffective assistance of counsel, *Reed v. Ross*, 468 U.S. 1, 13–14 (1984); *see also Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

For "prejudice," the defendant must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. The district court does not need to address both prongs if the defendant fails to satisfy one. *Id.* at 168.

A defendant who fails to show cause and prejudice to excuse a procedural default, may still obtain review on a § 2255 collateral attack by demonstrating the likelihood of his actual innocence. *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007). To establish actual innocence, the defendant must demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *see also Bousley*, 523 U.S. at 623 ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency.").

Defendant argues that cause is established in this case because (1) Judge King did not engage in a colloquy with Defendant to ensure he understood the risks associated with his presiding over the case and (2) the Government failed to speak up and ensure Defendant was advised of those risks. Def. Mem. 62. According to Defendant, these failures amount to interference with Defendant's rights, depriving him of an ability to question Judge King's impartiality or interject an objection. *Id.* In other words, the actions of Judge King and the Government made compliance with the procedural rule impracticable.[2] *Id.*

[2] Defendant does not argue actual innocence or that the factual or legal basis for his claim was not available to counsel.

Defendant has not demonstrated cause sufficient to excuse his procedural default. Judge King and the Government did not make compliance with the procedural rule impracticable. Indeed, Judge King was transparent about both his own and his law clerk's relationship to the underlying facts of the case from the beginning. Defendant's evidence demonstrates that he discussed this issue with his attorneys, who gave tactical reasons for their recommendation that Judge King continue to preside over the case. As discussed below, this tactical decision did not amount to ineffective assistance of counsel. The Court is unwilling to find, without more, that the manner in which Judge King presented his potential conflict at the hearing or the Government's failure to take any action in relation to that conflict amount to interference with Defendant's ability to raise this issue earlier. Accordingly, Defendant has procedurally defaulted on this claim.

ii. Merits

Even assuming Defendant had not procedurally defaulted on his First Ground for Relief, Defendant's claim fails. This case is distinguishable from the cases cited by Defendant. Two of the cited cases involved threats that were directed at the judge or judges in the district. *See United States. v. Holland*, 519 F.3d 909 (9th Cir. 2008) (discussing whether a judge must recuse himself *sua sponte* under § 455 after receiving a threatening message from a criminal defendant before his sentencing); *Rodriguez v. Copenhaver*, 823 F.3d 1238 (9th Cir. 2016) (finding a judge—who had previously recused himself in criminal proceedings against a defendant for a robbery of a fellow judge's home—violated the due process clause when he presented a sentencing recommendation to the Bureau of Prisons recommending severe sanctions); *see also United States. v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (holding recusal was not required under § 455 where there was some question as to the seriousness of a threat against the judge); *United*

States v. Greenspan, 26 F.3d 1001 (10th Cir. 1994) (finding recusal was required under § 455 where a credible threat was made against the judge and his family and there was no evidence the threat was a device to force recusal); *Clemens v. U.S. Dist. Ct. for the Cent. Dist. of Calif.*, 428 F.3d 1175 (9th Cir. 2005) (holding recusal of an entire district was not required due to a threat against three of the judges in that district). One involved a threat directed at a federal courthouse. *See In re Nettles*, 394 F.3d 1001 (7th Cir. 2005) (finding recusal was required where the defendant moved for recusal under § 455 and the underlying case involved an attempt to destroy a federal courthouse even though there was no actual threat to the courthouse because the defendant's accomplices were undercover federal agents). And still another involved massive damage to a United States federal courthouse and harm to court staff and their families. *See Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995) (finding recusal was required even though the presiding judge had not lost any family in a nearby bombing because the explosion caused massive damage to the courthouse, injured a member of the judge's staff and other court personnel, and some employees had friends or relatives killed or injured in the explosion). Further, the Ninth Circuit has cautioned that questions involving recusal are necessarily fact-driven and require an independent analysis of the facts in each case. *See Holland*, 519 F.3d at 913 (discussing the analysis under § 455).

The facts in this case are particularly unique. It does not fall neatly into one of the categories of cases the Supreme Court has found requires recusal under the Due Process Clause, *see supra* Part I.A, nor does it closely track the exceptional facts of the cases cited by Defendant. In this case, the conflict Defendant argues requires recusal is the attendance of Judge King's family member and his law clerk at the tree-lighting ceremony. But Defendant's crime was not specifically targeted at Judge King, his family, his law clerk, the federal judiciary, or the

courthouse. Rather, the threat was to the holiday event itself, which took place in a public square in downtown Portland and had thousands of people in attendance. Moreover, Defendant's plot was never going to come to fruition, and no harm was suffered by anyone. Indeed, Defendant argued that he was entrapped by the FBI and would not have committed the crime but for the federal officers' involvement.

Taken together, the Court finds that Judge King did not violate Defendant's due process right to a fair trial in not recusing himself from the case. Subjectively, Judge King was not biased. From the outset, Judge King was open about his potential conflict and determination that he could be neutral in this case, Def. § 2255 Ex. 4 at 4, and Defendant has not pointed to anything that Judge King did or said to suggest that he was biased,[3] *cf. Rodriguez*, 823 F.3d at 1243 (emphasizing a letter that the judge wrote strongly recommending severe sanctions for a crime committed against his colleague and opining that an earlier release date would be an insult to the judge-victim); *Greenspan*, 26 F.3d at 1007 (noting that the judge chose to accelerate court procedures to protect himself and his family after he learned of a genuine death threat against them). Indeed, at sentencing, Judge King acknowledged—among other things—the imperfect entrapment involved in the commission of this crime as well as Defendant's low risk of recidivism, ultimately sentencing Defendant well below the Guidelines recommendation of life in prison and 10 years below the sentence requested by the Government. Objectively, there is not an unconstitutional potential for bias. The average judge in his position would be likely to be neutral. *See Williams v. Ryan*, No. CV171834PHXDWLJFM, 2020 WL 7232628, at *36 (D. Ariz. Sept. 30, 2020), *report and recommendation adopted*, No. CV-17-01834-PHX-DWL, 2020

[3] Rather, it appears Defendant argues that the outcomes of Judge King's evidentiary and pretrial rulings demonstrate "uneven" treatment between the parties. Def. Reply 7. The Court disagrees.

WL 7022233 (D. Ariz. Nov. 27, 2020) ("[T]he Due Process standard . . . focuses on the effect on the judge" not on the perceptions of laymen.). Judge King was not the intended target of the crime, and the harm was not specifically directed at the district court, his family, or his clerk. No harm was suffered by any individual attending the tree-lighting ceremony because Defendant was working with undercover FBI agents. This case does not present extreme circumstances where the risk of bias is too high to be constitutionally tolerable. Accordingly, Defendant is not entitled to relief on this claim.

As to Defendant's arguments regarding waiver, the Court declines to address those further as Defendant's judicial bias argument is both procedurally defaulted and fails on its merits. Further, as Defendant's memorandum demonstrates, no court has addressed waiver of the right to an impartial judge under the Due Process Clause or any associated requirements. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 250–53 (2008) (holding that "express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial" and noting that the structural nature of a violation of a right does not necessarily require personal waiver of that right). The Court declines to do so in the first instance.[4]

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[4] In addition, the Court notes the relevant disqualification statute—28 U.S.C. § 455—"does not regulate the detailed manner in which waiver must be effected." *United States v. Nobel*, 696 F.2d 231, 236–37 (3d Cir. 1982) ("[I]t is sufficient under the statute if the judge provides full disclosure of his or her relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion. The election to proceed after full disclosure of the relevant facts satisfies those requisites and constitutes an effective waiver under the statute."); *see also United States v. Rogers*, 119 F.3d 1377, 1381–82 (9th Cir. 1997) ("Rogers' election to proceed after this disclosure constitutes an effective waiver under § 455(e)."). Indeed, § 455(e) merely provides that a "waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

B. Ineffective Assistance of Trial & Appellate Counsel (Grounds 2, 3, 4 & 5)

Defendant has also failed to demonstrate that he was not afforded effective counsel under the Sixth Amendment. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence," U.S. Const. amend. VI. "[T]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.'" *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (internal citation omitted). Therefore, the right to counsel guaranteed in the Sixth Amendment is the right to *effective* assistance of counsel. *Id*. at 686. The right to effective counsel under the Sixth Amendment applies to all "critical stage[s] of the prosecution." *Kirby v. Illinois*, 406 U.S. 682, 690 (1972).

The defendant must prove two elements under *Strickland* to succeed on a claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687.

The Court must analyze counsel's performance considering the circumstances at the time: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 659. First, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Due to the difficulties in evaluating counsel's performance, courts must indulge a strong

presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id*. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

The appropriate test for prejudice is whether petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In proving prejudice with respect to the performance of appellate counsel, a petitioner must demonstrate a reasonable probability that but for appellate counsel's failure, "he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285–286 (2000).

i. Expert Testimony of Michael Levine

As a preliminary matter, the Court addresses the utility of some of the evidence from Defendant's expert, Michael Levine. *See* Levine Decl. In his declaration, Mr. Levine concludes that various acts of defense counsel—including counsel's failure to move to recuse Judge King—constitute deficient performance. *Id.* ¶¶ 12, 17, 18, 20, 24, 28, 31. Mr. Levine also speculates as to the effect that these failures had on the trial and appeal, including on Judge King's mental state. *See, e.g., id.* ¶ 12 (speculating that evidence of Defendant's desire to kill attendees at the tree-lighting ceremony "was bound to provoke rage and anger in the judge's mind and in his clerk's during the course of the trial if not at the pre-trial stage").

"Expert testimony is not necessary to determine claims of ineffective assistance of counsel." *Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010). Rather, "a district court is 'qualified to understand the legal analysis required by *Strickland,*' [and] it does not abuse its discretion in in excluding expert testimony relating to that analysis." *Id.* (quoting *Hovey v. Ayers*, 458 F.3d 892, 911 (9th Cir. 2006)).

Here, the Court finds that Mr. Levine's declaration is of limited value. Insofar as Mr. Levine offers legal determinations as to whether counsels' actions were deficient, the Court declines to consider that testimony. It does not aid the Court in resolution of the *Strickland* analysis. The Court also declines to consider counsel's statements speculating as to the mental state of the judge, law clerk, and jurors in this case. However, the Court will consider Mr. Levine's declaration to the extent that it offers his own interpretation of the record, insight into the actions of defense counsel, and why, in his experience as a criminal trial lawyer, alternatives may have been considered.

ii. Ineffective Assistance of Trial Counsel

With regard to Judge King's alleged bias, Defendant argues that trial counsel was ineffective for two reasons. First, Defendant argues that counsel was ineffective for failing to move to disqualify Judge King. Def. Mem. 63. Specifically, Defendant asserts that counsel's decision to proceed with Judge King was unreasonable because: (1) despite their past prior experiences with Judge King, this case was unique in introducing a "new personal element" that would have an impact on Judge King's impartiality; and (2) counsel failed to consider Judge King's law clerk's role in their decision. *Id.* at 66–67. Second, Defendant argues that counsel was ineffective in failing to ensure that Defendant consented to Judge King's involvement in the case and that said consent was "unequivocal, knowing, and voluntary." *Id.* at 69.

Because Judge King was not biased, *see supra* Part I.A.ii, trial counsel could not have be ineffective for failing to move to recuse Judge King. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.").

Furthermore, counsel made a reasonable, tactical decision in not objecting to Judge King. Here, defense counsel explained that they "understood the risk but believed, based on their collective experience, that Judge King was the most favorable judge in the district towards criminal defendants." Levine Decl. ¶ 14.[5] Counsel explained this to Defendant. They told Defendant they did not think Judge King would be biased and emphasized Judge King's honesty in disclosing the possible conflict and the benefits to having Judge King at sentencing. Mohamud Decl. ¶¶ 3–6. Indeed, Judge King ultimately gave Defendant a sentence that was significantly below the Guidelines range. And Mr. Levine notes that defense counsel's perspective that Judge King was the most favorable towards criminal defendants was generally correct. Levine Decl. ¶ 14. His own perception that the risk of bias in this case outweighed his favorable disposition does not alter the Court's ultimate conclusion: that defense counsel's decision not to move to recuse Judge King falls within the wide range of reasonable professional assistance. Accordingly, the Court finds that Defendant's trial attorneys were not ineffective.[6]

The Court also declines to find that counsel was ineffective in failing to obtain a waiver from Defendant or failing to ensure that Defendant's consent to Judge King's involvement was unequivocal, knowing, and voluntary. As noted above, no court has addressed waiver of the right to an impartial judge under the Due Process clause and its associated requirements. Nor has any court required that such a waiver be a personal to the Defendant. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004) (holding that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate," including

[5] The Court notes that many of the statements of defense counsel submitted by Defendant through his own declaration and the declaration of Mr. Levine are hearsay. Both parties, however, appear to rely on these statements without objection.

[6] The Court declines to address the "prejudice" prong of the analysis because Defendant has failed to demonstrate that counsel's performance was deficient.

"whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *see also Gonzalez*, 553 U.S. at 250 (holding that a tactical decision allowing a magistrate judge to oversee voir dire did not require the defendant's express consent); *United States v. Gamba*, 541 F.3d 895, 900–01 (9th Cir. 2008) (finding counsel's "decision to consent to [a magistrate judge] presiding over [the defendant's] closing argument . . . was also a strategic, tactical decision"). Indeed, "defense counsel may waive certain rights of the accused as part of the trial strategy without obtaining the accused's express, personal consent." *Gamba*, 541 F.3d at 900. In sum, Defendant's Second, Third, and Fourth Grounds for Relief fail.

iii. Ineffective Assistance of Appellate Counsel

Defendant argues that appellate counsel was ineffective for not appealing Judge King's failure to disqualify himself. Def. Mem. 71. He contends that "[a]ppellate counsel should have assigned on appeal the twin errors of Judge King failing to recuse himself and failing to obtain an unequivocal, knowing, and intelligent waiver from defendant personally of his right to an objectively impartial judge." *Id.*

Like trial counsel, appellate counsel could not have been ineffective for failing to appeal Judge King's failure to disqualify himself because Judge King was not biased. The "[f]ailure to raise a meritless argument does not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985); *see also Martinez v. Ryan*, 926 F.3d 1215, 1227 (9th Cir. 2019) ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal.") (internal citation and quotations omitted). Therefore, Defendant cannot succeed on his Fifth Ground for Relief.

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II. Ineffective Assistance of Counsel in Jury Selection (Grounds 6, 7 & 8)

"The conduct of voir dire 'will in most instances involve the exercise of a judgment which should be left to competent defense counsel.'" *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (quoting *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)); *see also Clark v. Neven*, 707 F. App'x. 450, 452–53 (9th Cir. 2017) (finding counsel's decision not to use his last peremptory challenge was a reasonable tactical choice). "Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased." *Davis v. Woodford*, 384 F.3d 628, 642–43 (9th Cir. 2004).

"The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "It is not required, however, that the jurors be totally ignorant of the facts and issues involved." *Id.* Rather, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

"The Supreme Court has suggested that the relevant test for determining whether a juror is biased is whether the juror had such fixed opinions that he could not judge impartially the guilt of the defendant." *Davis*, 384 F.3d at 643 (internal quotations, brackets, and ellipses omitted). This can be satisfied by a showing of either actual or implied bias. "[A]ctual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Gonzalez,* 214 F.3d 1109, 1112 (9th Cir. 2000) (internal quotations omitted). And "[i]n extraordinary cases, courts may presume bias based upon the circumstances." *Dyer v. Calderon*, 151 F.3d 970, 981 (9th Cir. 1998). In determining "implied

bias," the Court must ascertain "whether an average person in the position of the juror in controversy would be prejudiced." *Gonzalez*, 214 F.3d at 1112 (internal quotations omitted).

Defendant argues that trial and appellate counsel were ineffective in failing to exclude two different jurors. Def. Mem. 75. First, Defendant argues that trial counsel was ineffective in failing to use a peremptory challenge against Juror 7 or otherwise excuse her as opportunities arose throughout trial, and that appellate counsel was ineffective in failing to argue that the Court's denial of a for-cause challenge was an error. *Id.* at 76–77. Second, Defendant argues that trial counsel was ineffective in failing to use a peremptory challenge against Juror 5. *Id.* at 77. The Court addresses each in turn.

A. Juror 7

i. Background

Juror 7 was a 41-year-old teacher and mother of two children, ages 10 and 12, from the Portland metro area. Def. § 2255 Ex. 15 at 855. In her juror questionnaire, Juror 7 noted that she knew the attempted bombing had occurred because her children were at the tree-lighting ceremony. *Id.* at 858. She did not indicate whether she had formed any opinions about the case based on this knowledge but wrote that she was "[t]hankful [her] kids were safe." *Id.* at 858–59. Juror 7 also wrote that she could set aside her own prejudice or bias and decide the case solely based on whether Defendant was proved guilty of the crime charged. *Id.* at 858.

During voir dire, Juror 7 was questioned about her ability to remain neutral as a juror in light of her children's attendance at the tree-lighting ceremony. She said her reaction to learning about the situation after the ceremony was "disbelief," and she was "thankful . . . that [her] children were safe." Def. § 2255 Ex. 16 ("Voir Dire Tr.") 112:4–8. When asked by the Court

whether she might have some bias or prejudice against Defendant because of these circumstances, she replied:

> You know, I'm a teacher, also, so I feel very protective of kids and, of course, that I have mine. Yes, I think that's -- nobody wants to have a feeling of possibly thinking that their children are going to be harmed. I don't know how else to answer that.

Id. at 112:9–23. The Court asked in follow-up whether she felt she could be an unbiased juror in this case, and she said yes. *Id.* at 113:1–4.

Defense counsel also also asked Juror 7 questions about her ability to remain neutral. Specifically, counsel asked Juror 7 whether hearing the evidence in this case, thinking about what was going to happen, and seeing the device that was constructed could cause "emotional carryover" and affect her. *Id.* at 172:12-19. She responded:

> Yeah, that's a tough question. I feel like, you know, there are -- I wasn't there with my children, and that was something -- so I didn't personally experience it with them. When we found out that it had happened, it was much later. So it wasn't in a situation where I was panicked for my children in that moment. Knowing that it had -- hearing about it afterward and knowing that they were there, as I said, I was thankful that it -- obviously, that it did not happen. And, as you say, you can't change what your life experience is or how you come to a certain situation, and life is not a pie with slices. It's a whole big mix. I also know that life happens -- things can happen at any moment, and you can't be everywhere to protect your children, whether you want to or not. And I'm not sure what else to say about that.

Id. at 172:20–173:11. In follow-up, Juror 7 clarified that she would have the same feelings regardless of whether her children were there because "nobody wants these kinds of things to happen to anyone." *Id.* at 174:6–12. Counsel then asked Juror 7 if she could commit to being a fair and impartial juror to the best of her ability and that her emotions will not "enter into it." *Id.* at 174:13–18. She answered affirmatively. *Id.*

Defendant challenged Juror 7 for cause, citing her children's attendance at the event. Def. § 2255 Ex. 17. The Court denied the challenge. Voir Dire Tr. 197:15–18. Defendant did not use one of his peremptory challenges against her. Def. § 2255 Ex. 18.

Defendant did not challenge Judge King's denial of Defendant's for-cause challenges on appeal. Def. § 2255 Ex. 30 ("Sady Decl.") ¶ 2, ECF 580-1. Appellate counsel "do[es] not remember having identified, researched, or made a tactical decision regarding potential appellate issues regarding denial of challenges for cause during jury selection." *Id.* ¶ 3. Specifically, he explains:

> Raising the potential jury selection issue would have been consistent with appellate strategy. The initial issue in the Opening Brief was raised to elaborate the perhaps counterintuitive theory for winning the appeal the difference between predisposition to extremism and predisposition to commit the crime charged. With the first issue raising insufficiency of evidence and establishing the lack of harmlessness, the issues following were aimed at demonstrating that pervasive legal errors rendered the trial unfair. Any error during jury selection would have been consistent with this narrative, and I remember no tactical decision to omit this issue on appeal.

Id. ¶ 4. Defendant's original opening brief on appeal was 230 pages. Def. § 2255 Ex. 20. A 179-page amended opening brief was filed when the Ninth Circuit limited the length of Defendant's brief to 180 pages. Def. § 2255 Ex. 21. The amended brief excluded at least one issue from the opening brief and condensed its discussion, largely focused on errors related to Defendant's entrapment defense, the handling of classified evidence, evidentiary rulings, and alleged violations of the FISA Amendments Act. *Compare* Def. § 2255 Ex. 20 *with* Def. § 2255 Ex. 21.

iii. Ineffective Assistance of Trial Counsel

Defendant argues that counsel's failure to use a peremptory challenge to strike Juror 7 as well as their failure to advocate for her removal as other opportunities arose during trial constitute ineffective assistance of counsel. Def. Mem. 91. Defendant contends that counsel's

actions fell below a "reasonable standard of care because, categorically and as a matter of law, her status as the victim of defendant's intended crime rendered her unsuitable as a fact-finder in this case." *Id.* at 92. In making this argument, Defendant emphasizes (1) statements made by Juror 7 during voir dire and (2) the attendance of Juror 7's children at the Christmas tree lighting ceremony. *Id.* at 92–95.

Defendant's claim fails because Juror 7 was neither actually nor impliedly biased. *See Davis*, 384 F.3d at 643 ("Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury contained at least one juror who was biased."). Turning first to actual bias, Defendant has not demonstrated that Juror 7 had a "state of mind that leads to an inference that the person will not act with entire impartiality." *Gonzalez*, 214 F.3d at 1112. Quite the contrary: Juror 7 indicated again and again in thoughtful and thorough answers that she would be able to remain neutral in this case despite her children's attendance at the tree-lightening ceremony. She unequivocally told the Court and counsel she could be unbiased. And when questioned by counsel, she indicated that her response to the tree-lighting ceremony was no different than it would have been if her children had not been in attendance. Though she also admitted that the case presented difficult circumstances and she was thankful the bombing had not happened, these statements merely reflect that she was confronting her feelings about the underlying incident. Taken together, the record demonstrates that Juror 7 harbored no actual bias against Defendant and that she intended to approach the case with a neutral, unbiased perspective. *See Davis*, 384 F.3d at 643 (noting that juror comments reflected that they were "grappling with their feelings about the death penalty, and that they intended to approach the evidence with an understanding of the proper allocation of burdens in a criminal case").

Further, this case does not present the extreme circumstances under which the Court can presume bias. The Ninth Circuit has warned that "courts answering this question should hesitate before formulating categories of relationships which bar jurors from serving in certain types of trials." *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990). Indeed, few cases have resulted in a finding of implied bias. For example, the Ninth Circuit found that a juror could not remain impartial in a heroin-conspiracy trial where his sons were currently imprisoned for heroin-related crimes. *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979). Similarly, the circuit court has presumed bias where jurors worked in a different branch of a bank that the defendant was accused of robbing. *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). And in another, the court reversed a conviction for implied bias where a juror had concealed the murder of her brother during voir dire. *Dyer*, 151 F.3d at 981. As these cases illustrate, most findings of implied bias involve a looming threat of danger, special knowledge or understanding of the crime, a deep personal connection to a victim of the crime, or personal involvement in the criminal transaction. *But see United States v. Kechedzian*, 902 F.3d 1023, 1028 (9th Cir. 2018) (finding jurors' previous experience as a victim of identity theft was "not the type of 'extreme' situation where [the court] find[s] implied bias").

Here, Juror 7 was not impliedly biased. She was not personally involved in the underlying incident. Her children suffered no harm and were not the specific targets of the threat. Further, there was no future apprehension of this kind of crime to Juror 7's children. *Cf. Allsup*, 566 F.2d at 71–72 (emphasizing that the jurors—as bank employees—also had a "reasonable apprehension of violence by bank robbers"). And she had no special knowledge or understanding of the crime. Thus, Defendant has not demonstrated that counsel's failure to exercise a peremptory challenge against Juror 7 lead to a panel containing a biased juror. *Cf. Gonzalez*, 214

F.3d at 1114 (finding that the juror's equivocal responses to the court's questions "and the similarity between her traumatic familial experience and the defendant's alleged conduct" should have required the juror's excusal either for actual or implied bias). Defendant's Sixth Ground for Relief fails.

iii. Ineffective Assistance of Appellate Counsel

Defendant separately argues that appellate counsel was ineffective for failing to appeal Judge King's denial of trial counsel's for-cause challenge of Juror 7. Def. Mem. 98. Defendant argues that appellate counsel "simply missed" this issue as he did not "consciously make a strategic choice not to pursue this issue on appeal in favor of other issues." *Id.* at 99. In support of this argument, Defendant emphasizes (1) the significant size and scope of the appellate brief and (2) that the for-cause issue was a strong appellate issue that "would have provided the clearest path to reversal." *Id.* at 100.

Strickland's two-part test applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 284–86 (2000). However, the "two prongs partially overlap when evaluating the performance of appellate counsel." *Miller v. Keeney*, 882 F.2d 1428, 1434–35 (9th Cir. 1989). As the Ninth Circuit has observed:

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point—"just in case"—is likely to serve her client less effectively than one who concentrates solely on the strong arguments. Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason—because she declined to raise a weak issue.

Id. (internal citations omitted); *see also Martinez v. Ryan*, 926 F.3d 1215, 1227 (9th Cir. 2019) ("'[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal.'") (quoting *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001)).

Appellate counsel was not ineffective. Contrary to Defendant's argument, the size and scope of the appellate brief—and its history—illustrate that appellate counsel was faced with weeding out weaker issues on appeal. The scope of the proceedings in this case were significant. The pretrial period spanned over two years and involved robust motions practice. Defendant's trial was fourteen days long. And one-and-a-half years passed between the jury's verdict and sentencing, due in large part to additional, substantive motions practice. On appeal, counsel's brief was a whopping 230 pages and had to be edited significantly after the Ninth Circuit limited Defendant's brief to 180 pages. A review of the briefing shows that appellate counsel chose to focus on trial court rulings involving the entrapment defense, the handling of classified evidence, evidentiary rulings, and FISA evidence. Further, appellate counsel did not state that the jury selection issue was missed. Rather, counsel "do[es] not remember" having looked into or having made a tactical decision to omit the jury selection issue on appeal. Sady Decl. ¶ 3. In context of the record, Defendant has not demonstrated that this was not effective appellate advocacy.

Moreover, the for-cause issue was not a strong appellate issue that would have provided a path to reversal. As discussed above, Juror 7 was neither impliedly nor actually biased, and Judge King did not err in denying the for-cause challenge. Though the issue would not have been frivolous, Defendant would likely not have succeeded on this issue on appeal. *See Miller*, 882 F.2d at 1434 (finding counsel objectively competent in declining to raise a weak issue on appeal: "While raising [the incident] on direct appeal would not have been frivolous, neither would it

have led to a reasonable probability of reversal."); *Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy[.]"). Because appellate counsel did not err in declining to include a weaker issue in the appellate brief, Defendant fails on Ground Seven.

B. Juror 5

i. Background

Juror 5 was a 56-year-old retired operations director for the City of Tualatin, Oregon. Def. § 2255 Ex. 15 at 123. Juror 5 was also a member of a nonprofit organization called the "Patriot Guard Rider," which provides escort to and attends military funerals in response to military-funeral protests in the mid-2000s. Voir Dire Tr. 164:2–18. He expressed that he is a very patriotic person, but he stated that anti-American statements and evidence in the case would not make it more difficult for him to follow the law and decide the case:

> I can have my personal views on whether I think somebody should say something or not say something or if I'm personally offended by it. But I think I would look at what the law is in this case – well, I know I would – and try to, based on the instructions I'm given, to say was a law broken or not.
>
> And regardless of whether I agree with what somebody said – I mean, that's, to me, part of living in America is that you can say things that I'll be very offended of, and I'll defend your right to say it. I may not like it, but I'll defend your right to say it.

Id. at 166:6–24.

Juror 5 also revealed that he had experience working with police officers through his work in the Public Works Department of the City of Tualatin. *Id*. at 96:5–13. He was questioned repeatedly about how he would evaluate the testimony of law enforcement officers. *Id.* at 96:14–24. Though he expressed he would not generally give an edge to the police officer, in some of his

responses he indicated that he might find the law enforcement officer more credible under certain circumstances:

> THE COURT: So could you evaluate [an officer's] testimony just as you would any other person's testimony? They don't have an edge because they've got a badge?
>
> JUROR NO. 5: Correct. I think there are times that they would, if it came down to -- if it involved the officer saying that a person ran a stop sign, and the person said they didn't run a stop sign, and there are no other witnesses, I think I would give the edge to the police officer because of their duty and their swearing to do their job. If it's just their evidence or their opinion, I think I would look at what the facts were.

Id. at 96:14–24. In response to a similar question from defense counsel, Juror 5 said that he gives more weight to law enforcement testimony when the case boils down to the testimony of a defendant versus a police officer and there is "no negative against the officer" because he "hold[s] them to a higher standard." *Id.* at 162:2–14. He further clarified he did not believe the police are "infallible" and would "listen to" other facts and witnesses in a case. *Id.* at 162:15–19. Juror 5 also described his prior jury experience where a similar situation presented itself. There, the attorneys spent a lot of time on the officer's credibility such that he "felt confident that the officer was telling the truth," and "they put enough doubt on the defendant that [he] didn't believe they were telling the truth." *Id.* at 163:7–23.

Neither party made any challenges for cause or peremptory challenges against Juror 5.

ii. Analysis

Defendant argues that trial counsel was ineffective for failing to use a peremptory challenge against Juror 5. Def Mem. 105. Specifically, Defendant argues that "[d]espite [Juror 5's] assurances that he could be fair, he should have been struck with a peremptory challenge because his affiliation with the Patriot Guard Riders and his strong sense of patriotism and respect for military personnel made it extremely unlikely he would find that defendant was

entrapped." *Id.* at 105–06. Defendant further suggests that Juror 5 was the wrong juror to consider Defendant's entrapment defense because "he would have found defendant's support for violence against American service people completely unacceptable and so contrary to his own values." *Id.* at 106.

This Court disagrees. Defendant has not demonstrated that Juror 5 was biased. Juror 5 was absolute in his commitment to remaining neutral and unbiased in this case. While he did express that he holds very patriotic views and engages in pro-military volunteer work, he was unequivocal that the anti-American sentiments and evidence in the case would not make it more difficult for him to follow the law and decide the case. Juror 5 also gave thoughtful answers to questions about how he would weigh testimony, stating that he did not believe law enforcement were infallible and that he would listen to all the facts and witnesses in a case to weigh the credibility of witnesses and decide the issues. In other words, the record does not suggest that Juror 5 had a state of mind leading to an inference that he could not act impartially or appropriately consider Defendant's entrapment defense. *See Gonzalez*, 214 F.3d at 1112 (describing cases where courts found actual bias). Nor has Defendant demonstrated that an average person in Juror 5's position would be prejudiced. Accordingly, trial counsel was not ineffective in failing to use a peremptory strike to remove Juror 5.

III. FISA Motions (Grounds 9 & 10)

In his ninth and tenth grounds for relief, Defendant argues that his Fifth Amendment Due Process right was violated when he was denied FISA discovery and his Fourth Amendment right against unreasonable searches and seizures was violated with respect to surveillance conducted pursuant to FISA warrants. Def. Mem. 136. Citing recent reports revealing problems in the FBI's FISA process from the Office of Inspector General ("OIG"), Defendant essentially asks the

Court to reconsider FISA issues that were already presented to the trial and appellate courts in this case. The Court declines to do so.

As Defendant recognizes, many of the issues Defendant presents were already litigated in this Court and on direct appeal. *Id.* at 136–39, 179 (noting "the constitutional grounds for requiring the disclosure of FISA material and an adversary process . . . . were made and rejected in the first go-around in this case, but their persuasive strength has grown in the context of the abuses revealed by the ongoing OIG investigation"). Indeed, Defendant brought both Fifth and Fourth Amendment challenges to the FISA process, arguing many of the same points he argues here. *See* Def. FISA Disc. Mem., ECF 55; Def. Mot. Suppress Mem., ECF 503; May 7, 2012 Op. & Order, ECF 126; June 24, 2014 Op. & Order, ECF 517; Def. § 2255 Ex. 21 (Def. Appellate Br.); *United States v. Mohamud*, 666 F. App'x 591 (9th Cir. Dec. 5, 2016); *United States v. Mohamud*, 843 F.3d 420 (9th Cir. 2016). These claims are therefore barred. *See United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (finding a claim that was raised in a direct appeal and expressly rejected "cannot be the basis of a § 2255 motion").

The Court declines to find that the OIG reports can serve as a basis to relitigate these issues. Turning first to Defendant's Fifth Amendment claim, the Court finds that the OIG reports and related materials do not cast doubt on either the FISA materials or the ultimate conclusions of the district court and appellate court in this case. Defendant's argument is speculative. While the reports reflect significant issues in the FISA process from within the FBI, the cases discussed in the reports are unrelated to this case. *See* Def. § 2255 Exs. 23, 26 (2019 & 2020 OIG Reports). Nor is there temporal overlap between the reviewed cases and this case. *See id.* And of the 209 errors identified in the 2020 OIG report, only 4 were deemed material. Def. § 2255 Ex. 31 at 2. Finally, as the appellate court and this Court concluded, this case did not present complex or

novel questions in relation to the FISA surveillance. May 7, 2012 Op. & Order (agreeing with the Government that most of the factors identified by Defendant supporting disclosure of the FISA applications are "present in any court's review of FISA applications"); *Mohamud*, 843 F.3d at 438 ("Although § 702 potential raises complex statutory and constitutional issues, this case does not."). While the deficiencies in the FISA procedures identified by the OIG are undoubtedly troubling, the OIG reports are not a sufficient basis for Court to assume that "the same problems exist with the FISA applications in this case" such that it is appropriate to revisit Defendant's FISA motions. *See* Def. Mem. 183.

Defendant faces the same problems in his Fourth Amendment claims. As a general matter:

> A federal court may not grant . . . § 2255 habeas corpus relief on the basis that evidence obtained in an unconstitutional search or seizure was introduced [at trial] where the defendant was provided an opportunity to litigate fully and fairly his fourth amendment claim before petitioning the federal court for collateral relief.

Tisnado v. United States, 547 F.2d 452, 456 (9th Cir. 1976). Defendant argues that there are two reasons he was not given an opportunity to fully and fairly litigate this claim: (1) he was denied discovery of FISA-related materials before trial and (2) the OIG findings as to the accuracy of FISA applications undermines the justification for the ex parte, in camera FISA review processes that were relied on in this case. Def. Mem. 140–41. Neither argument serves as a basis for finding that Defendant was denied the opportunity fully and fairly litigate his Fourth Amendment claim. Rather, Defendant litigated these issues with the trial and appellate courts, and the OIG reports do not reasonably call into question these decisions. For the foregoing reasons, Defendant cannot succeed on his Ninth and Tenth Grounds for Relief.

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IV. Discovery & Evidentiary Errors (Ground 11)

In his Eleventh Ground for Relief, Defendant identifies nine categories of trial court rulings that he argues "must be considered anew despite the fact that they were rejected on direct appeal . . . because those appellate concepts presume an objectively impartial judge." Def. Reply 6, ECF 580. As Defendant appears to concede, the viability of these claims rests on whether the Court has found that Judge King was biased. *See id.* at 7 n.2. Because the Court has concluded that Judge King was not biased, it declines to revisit the identified trial court rulings. Defendant's Eleventh Ground for Relief fails.

CONCLUSION

Defendant's Motion to Vacate or Correct Sentence Under 28 U.S.C. § 2255 [557] is DENIED. The Court DENIES a certificate of appealability because Defendant has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED: September 19, 2023.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge

DECLARATION OF MICHAEL R. LEVINE

I, MICHAEL R. LEVINE, declare as follows under penalty of perjury:

1. I received a Bachelor of Science degree from Columbia University in 1966 and my law degree from the University of California at Berkeley in 1974, where I was selected an associate editor of the California Law Review on the basis of a writing competition. I am a member of the Bars of California, Hawaii, and Oregon. I have been practicing criminal law for over forty years.

2. I was a prosecutor for the City of Los Angeles from 1974-1976 and had more than 30 jury trials. I was an Assistant Federal Public Defender in Los Angeles from 1976-1978 and had about 12 jury trials. From 1982 until 1990, I served as the District of Hawaii's first Federal Public Defender, appointed by the Ninth Circuit Court of Appeals. I had about 10 jury trials.

3. From 1992 to 2002, I practiced as an Assistant Federal Public Defender in Portland. I had about seven jury trials. In 2002 I entered private practice and in 2010 I formed my current partnership, Levine & McHenry, LLC, with Mr. Matthew McHenry. In private practice I have had about seven jury trials in state and federal court.

4. I have filed and argued approximately 40 appeals before the Ninth Circuit Court of Appeals, and have argued twice before the United States Supreme Court. Some of my published cases are the following: *U.S. v. Becerra*, 939 F.3d 995 (9th Cir. 2019) (district court's failure to instruct the jurors orally, and having the jurors read the instructions at home, was structural error requiring reversal without any showing of prejudice); *U.S. v. Botello-Rosales*, 728 F.3d 865 (9th Cir. 2013) (Spanish-language warning given to Spanish-speaking defendant before he was interrogated was defective); *United States v. Price*, 566 F.3d 900 (9th Cir. 2009) (conviction reversed for prosecutorial misconduct in failing to disclose *Brady* material); *United States v. Lincoln*, 403 F.3d 703 (9th Cir. 2009) (conviction for threatening the President reversed because threat was just political hyperbole protected by First Amendment); *United States v. Rosacker*, 314 F.3d 422 (9th Cir.

2002) (sentence vacated because lab report was insufficiently reliable); *United States v. France*, 886 F.2d 223 (9th Cir. 1989) (conviction reversed where magistrate chose jury instead of Article III judge), aff'd by equally divided Supreme Court, 498 US 335 (1991); *United States v. Bell*, 983 F.2d 910 (9th Cir. 1992) (sentence vacated); *Iaea v. Sunn*, 800 F.2d 661 (9th Cir. 1986) (guilty plea and life sentence for murder vacated because of ineffective assistance of counsel who misunderstood the applicable state law); *United States v. Sae-Chua*, 725 F.3d 530 (9th Cir. 1984) (drug conviction reversed where judge coerced the hold-out juror); *Ayer v. Coursey*, 253 Or. App. 726 (Or. App., 2012) (rape conviction and 30 year sentence vacated because trial counsel was deficient in failing to understand applicable law).

Published district court cases include the following: *United States v. Winsor*, 675 F.Supp.2d 1069 (D. Or. 2009) (conviction for possession of child pornography reversed for ineffective assistance where trial counsel failed to raise double jeopardy issue); *Ben-Sholom v. Ayers*, 566 F.Supp.2d 1053 (E.D. Cal. 2008) (life sentence for murder vacated because trial counsel was ineffective in the penalty phase); *United States v. Brown*, 347 F.Supp.2d 920 (D. Or. 2004) (granting motion to suppress evidence in bank robbery case because of client's inability to read and understand *Miranda* warnings); *Cozine v. Crabtree*, 15 F.Supp.2d 997 (D. Or. 1998) (vacating sentence because of unlawful action by Bureau of Prisons in making federal sentence consecutive); *Jennings v. Oku*, 677 F. Supp. 1061 (D. Haw. 1988) (vacating conviction and sentence of life for murder because of jury misconduct).

5. I have been named an "Oregon Super Lawyer" every year since 2007. I have been chosen by my peers to be in "Best Lawyers in America" from 2014-2020.

6. I am the author of "171 Easy Mitigating Factors," a widely acclaimed publication used by federal defense attorneys across the country.

7. I have taught Legal Writing at UCLA, Criminal Law at the Richardson School of Law at the University of Hawaii, and Evidence at Lewis and Clark Law School.

8. I have been a speaker on various topics at multiple conferences held by the Oregon Criminal Defense Lawyers Association.

A. The Failure of defense counsel to move to recuse Judge King

9. I have reviewed selected transcripts of the trial in *U.S. v. Mohamud*, relating to voir dire. I have conferred briefly with trial counsel--Steven Wax, Steven Sady, and Lisa Hay-- respecting their decisions during voir dire, and their decisions on what issues to raise on direct appeal.

10. I have reviewed some of the newspaper publicity surrounding the arrest of Mr. Mohamud at the tree-lighting ceremony in Pioneer Courthouse Square in downtown Portland Oregon on November 26, 2010. According to reports, more than ten thousand persons including many children were in attendance. According to the reports, when Mr. Mohamud was told by the undercover FBI agents that there would be many children at the ceremony, he said that that was what he was looking for because he wanted the explosion to injure a huge mass of people with their families. The newspaper reported that he had been planning a mass attack for five years and successfully carried out a small test explosion a few weeks earlier. FBI reports revealed that Mr. Mohamud wanted to see the blood and body parts from the explosion.

11. At the status conference on January 5, 2011, Judge King advised the parties that one of his family members was at the tree-lighting ceremony. He also said that his law clerk, Cindy Canfield, and her family were also there. He also stated that three of his grandchildren went to the same middle school as Mr. Mohamud. Finally, Judge King said that none of these facts required his recusal, adding that: "I think they have no effect on the Court or on my law clerk, but I wanted to state that for the record in this case."

12. In my view defense counsel should have moved to recuse Judge King, and it was deficient performance not to do so. The judge's statement at the status conference that he *thought* the factors he outlined would have no effect on him or his law clerk, was hardly a ringing endorsement of impartiality. Even if the judge believed he could be impartial, the surrounding factors compelled a motion because an outside observer could reasonably question whether he could remain impartial. After all, one of Judge King's family members was at the ceremony, as was his clerk and her family. They were all potential victims of a mass bombing. Even though no one was ever in real danger, that Mr. Mohamud wanted to kill and maim a member of Judge King's family, a member of his staff and her family, and countless other men women and children, and that Mr. Mohamud wanted to see their blood and body parts, was bound to provoke rage and anger in the judge's mind and in his clerk's during the course of the trial if not at the pre-trial stage.

Finally that Mr. Mohamud attended the same middle school as did Judge King's grandchildren would be a reminder to the judge during the trial, whenever he saw one of his own grandchildren, that Mr. Mohamud wanted to initiate a massive explosion that would kill as many children as possible. Even if the judge truly believed he could be impartial, the risk was enormously high that after hearing evidence of the plot and how it unfolded, Judge King would lose that impartiality.

Nor is it clear how he could speak for Ms. Canfield's state of mind. She was a critical member of the judge's inner circle. It is only natural that a judge would be protective towards Ms. Canfield and her family. That Mr. Mohamud would have the state of mind to injure and kill innocents is bound to provoke rage and undercut any semblance of impartiality.

13. Mr. Mohamud's defense was going to be that he was entrapped into attempting the offense. Before and during trial, Judge King would be asked to resolve innumerable discovery and evidentiary matters that would materially affect the strength and effectiveness of the entrapment defense. Due process demanded that an impartial judge decide these matters. But the scale of the horror that Mr. Mohamud so fervently intended to rain down on the thousands of men, women and children at Pioneer Square was so massive that no one who had children or family or colleagues present at the event could remain unbiased.

14. Trial counsel have told me that they understood the risk but believed, based on their collective experience, that Judge King was the most favorable judge in the district towards criminal defendants. I agree that Judge King in general was the most favorable judge in the district. But not in this case. Regardless of Judge King's general attitude toward defendants, that Mr. Mohamud articulated a fervent desire to kill as many men, women, and children as possible, including potentially Judge King's own family member, his clerk and members of her family posed too great a risk that he would be biased against the defendant, even if only subconsciously. *See e.g., U.S. v. McVeigh*, 918 F.Supp. 1467, 1473 (W.D.Okl.,1996) ("Trust in [the factfinder's] ability to [put aside prior publicity] diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome.")

15. Trial counsel failed to consider Cindy Canfield's role in their decision not to move to recuse Judge King. She herself was present at the square that night along

with her family, and therefore, the risk of actual bias may have been even higher for her. She worked closely with Judge King as he worked through the many evidentiary and other legal issues that arose during the entire four year period this case was before the district court. In choosing not to move to disqualify Judge King, counsel failed to account for the influence Ms. Canfield played and would continue to play over the course of the proceedings.

16. The test under 28 U.S.C. § 455(a), (b) (1) is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." The analysis of a particular section 455(a) claim must be guided, "not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *Clemens v. U.S. Dist. Court for Central Dist. of California*, 428 F.3d 1175, 1178–79 (9th Cir. 2005).

17. Given the facts outlined above, I believe that a reasonable person would conclude that Judge King's impartiality "might reasonably be questioned." Thus the inquiry does not hinge on "whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). The Ninth Circuit has stated that "If it is a close case, the balance tips in favor of recusal." *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008). In light of the facts and the applicable law, in my opinion, trial counsel's failure to move to recuse Judge King was deficient performance and fell below the prevailing professional norms.

B. The failure to adequately inform Mr. Mohamud and to obtain his informed consent not to move to recuse Judge King.

18. I understand that after the status conference, defense counsel spoke with Mr. Mohamud and told him that keeping Judge King was the best choice. I do not know exactly what was said by them or by Mr. Mohamud. I also understand, however, that defense counsel did not explain to him the role of the judge and the kinds of decisions he would make during the trial. Failure to so inform him was deficient performance.

19. Defense counsel should have told Mr. Mohamud that whatever their personal opinion of Judge King, a reasonable person might have a different view about Judge King's ability to remain impartial given that his family and colleagues and

their families were intended victims. They should have told defendant that because of his stated fervent desire to kill and maim thousands of men, women, and children, including the judge's own family member, Judge King might lose his impartiality without being conscious of this loss. Finally, they should have discussed with Mr. Mohamud Cindy Canfield's role as Judge King's law clerk, and that her involvement in the case alone was cause for concern.

20. I understand that the transcript of the proceedings reveals that she directly assisted and advised the judge on all manner of procedural, administrative, legal and evidentiary issues that arose during pretrial motions, trial, post-trial motions, and sentencing. To the extent that trial counsel failed to inform Mr. Mohamud of the foregoing, they performed deficiently and below professional norms.

C. The failure to exercise a peremptory challenge against juror Shilhanek

21. Lisa Shilhanek, Juror No. 7, was the mother of two young children who attended the tree-lighting ceremony with their father. When questioned about her ability to be impartial, she was initially equivocal. She talked about her role as a mother and a teacher and being protective of kids. She talked of the shock, trauma and disbelief in hearing about what "might have been."

22. Ms. Shilhanek said she would try her best not to let emotions affect her impartiality. Regardless of her answers, however, defense counsel recognized that she could not be a fair and impartial juror, particularly with a defense of entrapment. They appropriately challenged her for cause. Presumably, they reasoned that upon hearing evidence of Mr. Mohamud's desire to kill as many men, women, and children as possible and to see their body parts, she was bound to become aroused against him to the extent that she would be blind to any defense of entrapment and any possible reasonable doubt. Judge King, however, overruled the challenge.

23. Trial counsel did not use a peremptory challenge against her. They did however, choose to strike at least three individuals for reasons that are not apparent from their juror questionnaires or from the transcript of *voir dire*—Kari Ann Casper, Kevin Hill, and Jamie Gabel.

24. In my opinion, defense counsel's failure to use a peremptory challenge against Ms. Shilhanek was deficient performance and below professional norms.

25. After the jury was selected and sworn in, two opportunities arose for Ms. Shilhanek to be removed and replaced by an alternate juror. The government put up no resistance. If counsel had reminded the court that she was also the subject of defendant's for-cause challenge that had been denied, the court would have had yet another reason to remove her so as to avoid an appellate issue.

26. Had Ms. Shilhanek been removed, she would have been replaced by the first alternate, Andrew Gehrke. There is nothing in his juror questionnaire or voir dire to suggest that he was less favorable to the defense than Ms. Shilhanek. Had counsel pressed for her removal, she likely would have been replaced.

27. Regardless of the desire of using the strikes on other jurors, failure to file a peremptory challenge against Ms. Shilhanek was deficient performance and fell below professional norms. Failure to press for her removal from the jury on two later occasions was likewise deficient performance.

D. The failure to raise on appeal the district court's refusal to sustain defense counsel's challenge for cause to Juror Shilhanek.

28. In my opinion, defense counsel were deficient in failing to appeal Judge King's denial of the for-cause challenge of Juror Shilhanek. Had it been raised, it would have been a very strong appellate issue, and very likely would have resulted in a reversal of the conviction. Defense counsel advised me that they did not consider raising this issue on appeal; their failure to raise it was not a matter of strategy. Nor did they realize that they could raise the issue even though they did not exercise a peremptory challenge against the juror. See *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000).

29. Ms. Shilhanek's situation created a strong case for implied bias because her children and their father were the intended victims of the crime. The trial court's denial of the for-cause motion to excuse Ms. Shilhanek violated defendant's right to an impartial jury. *See U.S. v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (In prosecution for robbery of bank, prospective jurors who worked for bank robbed should have been excused for cause, even though they did not work at particular branch which was robbed because persons "will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally"). Furthermore, had this issue been raised on appeal, it would not have been subject to harmless error analysis. At the time of defendant's appeal, it was well-established that the failure to remove a juror burdened by actual or implied bias is structural error requiring automatic reversal without regard to whether the juror's

participation actually affected the outcome. *See Martinez-Salazar,* 528 U.S. at 316 (the seating of a juror who should have been dismissed for cause would require reversal).

31. In my opinion, appellate counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, a reasonable probability exists that Mr. Mohamud would have prevailed on appeal.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated: August 27, 2020

/s/ *Michael R. Levine*
Michael R. Levine

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. MOHAMED OSMAN MOHAMUD, Defendant.	Case No. 3:10-CR-00475-HZ DECLARATION OF STEPHEN SADY

I, Stephen Sady, declare under penalty of perjury, that the following statements regarding my representation of Mohamed Mohamud are true:

1. I am the Chief Deputy Federal Public Defender for the District of Oregon and represented Mr. Mohamud from shortly after his arrest until after the denial of his petition for a writ of certiorari regarding his federal criminal charge of attempted use of a weapon of mass destruction.
2. I have been asked to elaborate regarding the reason there was not an issue raised in the direct appeal regarding the denial of defense challenges to jurors for cause.

3. I was the attorney primarily responsible for drafting the opening brief on the appeal from his conviction. During the trial of the case, I was only peripherally involved in the jury selection process. To the best of my current recollection, I do not remember having identified, researched, or made a tactical decision regarding potential appellate issues regarding denial of challenges for cause during jury selection.

4. Raising the potential jury selection issue would have been consistent with appellate strategy. The initial issue in the Opening Brief was raised to elaborate the perhaps counterintuitive theory for winning the appeal: the difference between predisposition to extremism and predisposition to commit the crime charged. With the first issue raising insufficiency of evidence and establishing the lack of harmlessness, the issues following were aimed at demonstrating that pervasive legal errors rendered the trial unfair. Any error during jury selection would have been consistent with this narrative, and I remember no tactical decision to omit this issue on appeal.

DATED this 14th day of June, 2021.

s/ Stephen Sady
Stephen Sady

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