No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

GREGORY BURLESON,

Petitioner, v.

UNITED STATES OF AMERICA, *Respondent*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Ninth Circuit Court of Appeals err in denying a Certificate of Appealability ("COA") consistent with the standards set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), to review the holdings of the district court that Mr. Burleson was not deprived of due process of law and a fair trial by ineffective assistance of trial counsel because he failed to have Mr. Burleson thoroughly examined for psychiatric, medical, social and personal information to obtain facts and arguments for suppression of evidence, plea bargaining, determination of guilt, and mitigation at sentencing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes and Rules

Other Authorities

I. PRAYER FOR RELIEF

Mr. Gregory Burleson respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his request for a Certificate of Appealability ("COA") from the denial of his Motion to Vacate, Set Aside and Correct Conviction and Sentence Under 28 U.S.C. § 2255. The basis of this petition is that the Ninth Circuit's denial of a COA is

(1) contrary to the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with the standards for a COA set by 28 U.S.C. § 2253(c)(1)(B) and (2) and by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) and *Slack v. McDaniel*, 529 U.S. 473 (2000) and their progeny, and

(2) contrary to the Sixth Amendment to the United States Constitution as determined by this Court's binding precedents under *Strickland v. Washington*, 466 U.S. 668 (1984) and other prior and subsequent Supreme Court precedents requiring effective assistance of counsel in plea bargaining, trial and sentencing, and

(3) as inexplicable as it was unexplained, in violation of this Court's authority in *Jackson v. Felkner*, 562 U.S. 594 (2011).

In the alternative, the courts below have decided an important question of federal law that has not been, but should be, settled by this Court.

II. OPINION BELOW

A two-judge panel of the Ninth Circuit denied Mr. Burleson's petition for a COA in an Order that was final and unpublished. *United States of America v. Gregory P. Burleson,* No. 25-2540 (9th Cir. October 24, 2025), *Appendix A.*

III. JURISDICTION

On October 24, 2025, a two-judge panel of the Court of Appeals for the Ninth Circuit issued an unpublished Order denying Mr. Burleson's petition for a COA. *Appendix A.* This is the final judgment for which a writ of certiorari is sought.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime…
> nor be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 28 U.S.C. § 2255. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Facts Material to the Questions Presented

i. Background and Setting of this Case

Cliven Bundy ("Bundy") is the elderly patriarch of a large extended family of cattle ranchers in rural Nevada, where they have lived and grazed their cattle since the 1940s. Bundy holds extremely conservative beliefs, including that the federal government (and hence the Bureau of Land Management or "BLM") has no authority over public lands in Nevada, which he believes belong to the state. Accordingly, while Bundy grazes his cattle on public land, he has not paid federal grazing fees since the early 1990s. The BLM sued Bundy several times over this issue and obtained court orders prohibiting him from grazing his cattle on BLM land, which he disregarded. In 2014, the BLM obtained an order allowing them to seize any "trespassing" cattle and sell them at auction to pay grazing fees.

Bundy, his grown sons and neighboring ranchers, resisted. They also disseminated social media videos saying that government contractors were trying to steal their cattle and were locking everyone else out of public lands in the process. The videos included graphic instances and allegations of government agents arresting one Bundy son and grinding his face in the gravel for "failure to disburse

and resisting arrest" just for taking photographs on the side of a public road, tasering another Bundy son at a protest as he kicked away an agent's dog that was lunging at him, picking up and body slamming an elderly woman to the ground at another protest, alleging that the agents were surrounding the Bundy home with snipers (they were), and other abuses. They also showed that the agents had set up a small patch of desert far from the cattle roundup as a "First Amendment Zone" as the sole location for public protests, which upset not only the Bundys and their supporters, but also the Governor of Nevada who issued a statement that this violated the constitutional rights of Nevadans. Some U.S. Senators also criticized the BLM operation. The videos went viral.

The Bundys compared their resistance to the Minutemen at Lexington and Concord and sent out urgent pleas for supporters. In response to these calls, numerous supporters, including a number of armed militia members, arrived from Nevada and surrounding states.

The BLM halted its operation on April 11, 2014 after seizing 377 of the Bundy's cows.

On April 12, 2014, hundreds of Bundy supporters traveled to the desert wash where the cattle were impounded. They were surprised to see dozens of heavily armed men dressed in military-type uniforms with body armor and helmets and carrying AR-15 assault rifles still at the gate to the cattle impound area, rather than the typical uniformed agents representing the BLM, a conservation and resource management agency, who they had been told had already left. They were

also surprised and disconcerted to see what appeared to be snipers on the mesa above the impound area.

There were about 400 rural protesters, about 80 of whom had what the government admitted were lawful firearms. The agents testified to seeing at least one or two and possibly more protesters pointing their weapons at them, and described the crowd's raucous behavior—yelling, name calling, etc. Eventually, a group of protesters on horseback arrived carrying American and other flags (*e.g.* the Gadsden flag) and in some cases guns. Some of the agents testified that they feared for their lives. They also testified about the large number of unarmed women and children among the protesters. One agent acknowledged that they had a tactical team in a "stack" position which pointed their weapons at the crowd. The protesters testified about snipers both on the ground and overlooking them on the mesa above. After unsuccessfully ordering the protesters to leave *the agents expressly threatened the use of "lethal" and "deadly" force over a bullhorn if they did not stop walking slowly toward the gate* the agents were stationed behind. This caused enormous fear among the protesters, particularly because of the number of children in the crowd.

Eventually, the agents were ordered by superiors off-site to withdraw. Ultimately, no shots were fired, no physical violence of any kind occurred, and nobody was injured or even touched by an adversary.

Of great importance is the fact that both local and national media were present (including Fox News) filming the entire incident. The agents also filmed the

incident from the ground and from aircraft and drones overhead. And the protesters also had numerous cameras and phones filming and photographing the event. Consequently, there were hundreds of hours of films and thousands of photographs that the government obtained and presented at length during the first 32-day trial.

ii. The Petitioner and the Reason for this Petition

Gregory Paul Burleson is an Arizona militia member who saw the viral videos and went to Nevada to support the Bundys because he believed they were innocent ranchers being physically and illegally abused by rogue federal agents, as the Bundys portrayed them.

He arrived at the protest just as the agents announced they would use lethal force against the crowd and as a hysterical woman screamed that they were pointing their guns at the crowd. He descended into the wash where he remained for about 90 minutes with the protesters until the agents withdrew and released the cattle.

The evidence against Mr. Burleson was as follows. Before he left Arizona Mr. Burleson posted a series of Facebook posts about the situation and what he intended to do when he got there that were violent, unhinged and frankly not even rational, which are summarized below. After the protests the government created a fake movie company that purported to make a documentary film portraying the protesters as heroes and interviewed on camera various protesters including Mr. Burleson, who bragged about his leadership role in forcing the agents at gunpoint to give up the cattle and how he would have killed them if they had not retreated. He posted more violent and unhinged Facebook posts after the protests as well. And at

one point he placed an unsolicited call to an FBI agent in which he bragged about his role in defeating the federal agents at the protest. See below for details.

Mr. Burleson was charged with more than 20 other defendants, including numerous Bundy family members, with assaulting federal agents and related felonies. They were divided into three groups for trial; Mr. Burleson was put into the group of the "least culpable" defendants and tried first. Mr. Burleson was convicted and sentenced originally to 68 years in prison, later reduced to 32 years. All the other defendants either had their charges dismissed with prejudice based on findings of gross prosecutorial misconduct, which was upheld on appeal, one defendant who represented himself at trial had his conviction overturned on appeal and was not retried, a few were acquitted, and a few pled to time served after multiple hung juries. Mr. Burleson is the only defendant out of more than 20 who is in prison.

Here is the problem: no witness at trial testified to even *seeing* Mr. Burleson during his 90 minutes at the protest, let alone being frightened by him (a necessary element of an assault). Nor does any video or photo out of the thousands produced at trial shows him getting anywhere near any of the agents (he never got closer than about 75 yards from them and behind the crowd of protesters from their point of view). And no photo shows him doing anything aggressive—they just show him being present with his (lawful) rifle pointed at the ground, with his finger not on the trigger, never shouldered or sighted. Nor do they ever show him obviously communicating with any other protester (it is undisputed that he didn't know

anyone else when he arrived). And none of the photos even indicates whether he was facing towards or away from any of the agents. All contrary to what he said in his social media posts, to the fake movie producers, and in his unsolicited call to the FBI.

Mr. Burleson is a lifelong alcoholic and drug user. He is 62 years old, and his prior criminal history earned him a total of 2 days in local jail for a DUI and for a disorderly conduct incident with a firearm stemming from a road rage incident. His trial attorney admitted at sentencing that he should have had a psychological examination done on him but did not. Nor did his attorney investigate or produce evidence of facts that he knew, such as the fact that Mr. Burleson had consumed extreme amounts of alcohol before his fake movie interview, where the agents who were pretending to be admiring movie producers served him more, and was intoxicated when he made his Facebook posts. In fact, trial counsel did *nothing* to investigate or explain the stark difference between the shocking things that Mr. Burleson said and confessed to and what the government witnesses' testimony and photographic evidence showed.

Undersigned counsel did what trial counsel failed to do, had Mr. Burleson psychologically evaluated and his medical and personal history researched in depth. They showed psychological, medical and behavioral problems that explained the difference between what he said he did—which got him convicted—and what the evidence showed he did. This includes the fact that Mr. Burleson suffers from paranoid delusions, has "bizarre" thought patterns involving a combination of

actual events and persecutory delusions, suffers from a "little man's complex" that causes him to exaggerate and talk about things that he would do or had done in a grandiose way not necessarily consistent with what had actually occurred, that he often says anything for attention, and that his only friends were his militia buddies—many of whom held extreme anti-government views—and that he wanted to fit in and be a big shot among them. Had his trial counsel both had and used this information—at least some of which he actually knew (e.g. about Mr. Burleson's compulsive alcohol use at the time) and all of which he should have suspected and investigated—it would have been extremely useful for suppression of evidence, plea bargaining, defense at trial, and sentencing.

Mr. Burleson became totally blind after the protest but before trial. He is 62 years old, suffers from grand mal seizures, and other painful medical conditions.[1] He is serving a 32-year sentence in a high-security prison even though he was the subject of the same prosecutorial misconduct that got the charges of most of his co-defendants—including all the alleged leaders of the alleged conspiracy--dismissed with prejudice.

That his trial counsel was ineffective for failing to have Mr. Burleson psychologically and medically and historically evaluated was the basis of the § 2255 motion that was rejected by the courts below and is the subject of this petition for writ of certiorari.

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[1] Although not in the record below, Mr. Burleson also suffered a serious stroke and was hospitalized for almost a week just days before this cert petition was filed.

iii. Evidence at Trial

1. Before The Standoff—Social Media Posts

Before he traveled to Nevada to support the Bundys, Mr. Burleson saw social media posts along with his fellow militia members indicating that an elderly cancer patient and mother of 11 children was picked up and slammed to the ground by government agents, one Bundy son was physically abused and injured, another Bundy son was tasered and accosted by police dogs, the Bundy home was surrounded and under active and video surveillance by government agents and snipers, that those agents were antagonizing and provoking the Bundys in various ways, and so on, according to his trial attorney. This caused the militia group of which Mr. Burleson was a member to vote to go to Nevada to support the Bundys. Before leaving on that trip, Mr. Burleson posted a series of deranged posts on social media, a representative sample of which are below:

> … I was giving friends the option to GET PAID, you know, make some cash to braid my hair up like Ragnar's from Vikings... any ways, I AM PAYING CASH, to ANYONE who can do the braids before 2 a.m. Saturday. I'm going into "battle" and I'd like to present my adversary a beautiful Scalp/Trophy… if he can survive the journey to collect said trophy. I am dead serious. So either send a name of someone in Phoenix who can do it or do it yourself and make some bucks. Ready. Set. GO!
> I see all those who have gone before me and they beg me to take my place beside them in Valhalla... Feds and BLM have started confiscating weapons from civilians (unconfirmed). 400 more "BLM" rangers are on their way to the Bundy Ranch... I look forward to joining my ancestors in the afterlife. ~WAGONBURNER [This is what Mr. Burleson called himself]~ Wish me a good fight and a GOOD DEATH.
>
> Relatives of senators conspiring with hostile foreign nations to steal land, military and mercenaries masquerading as federal law

> enforcement battering citizens for exercising God's given Constitutional rights, cattle wrestling, somebody farted, take your pick, and there's even more reasons. If you ain't raging mad by now, go to Drudge Report and read the headlines. If you don't explode, you're already dead. BLM willing to fire on citizens. We must remedy that situation.[2]

2. After The Standoff—Social Media Posts

After the standoff, Mr. Burleson found his photograph in the paper. He was thrilled and his Facebook posts became even more outrageous as he enjoyed his 15 minutes of fame. He responded to a query of "what you hunting for" by saying "federal agents" who were pointing their weapons at him and he was ready to "take them out" in the photo, bragged about having "drove BLM fed thugs from the battle field," how he was a "Real Minute Man," how he had his rifle pointed at an agent, how the only power the feds understand comes from the barrel of a gun, that if the feds arrested just one Bundy protester "the rest of us will burn this whole damned thing to the ground. Understand? We The People have the RIGHT to defend our people, again one last Warning, Arrest even One of the militia from the Bundy Ranch Stand off and WE WILL Burn you to the ground, that includes your wives and children too…." And so on.

3. After The Standoff—Fake Journalist Interview

Months after the standoff, the government created a fake documentary company called Longbow Productions. Undercover agents contacted various attendees at the demonstration, plied them with hard liquor (Mr. Burleson was

[2] Minor spelling corrections made by counsel.

offered and accepted at least two glasses of hard liquor on camera while he was questioned), and had consumed much more hard liquor before he arrived for the evening interview (which his trial counsel knew), and encouraged them to tell their tales of heroism for a documentary to be entitled "America Reloaded." In summary, during that interview, Mr. Burleson said the following:

(a) He described himself as an "independent militia," who deals with various militia groups. His main group goes out to the desert to act as the eyes and ears of the government by locating illegal immigrants and drug couriers for them. It was through a militia contact that he found out about the Bundy situation where he saw the social media and some news stories about a rancher being harassed, and saw videotapes of them being abused, thrown to the ground, "tased," their lives threatened, and so on. He also heard that the agents had gone to Cliven [Bundy's] house and told his grandchildren that they were going to kill their granddad. That's why he left with others for Nevada, taking half his guns with him.

(b) When he arrived at the wash, he heard someone say "The BLM is pointing their weapons at the unarmed protesters." The fact that the government agents were pointing their weapons at unarmed protesters and that he was there to protect them was something Mr. Burleson repeated multiple times during the interview.

(c) Mr. Burleson bragged that he went to Nevada to kick some ass, that he went there for the purpose of engaging rogue federal agents that were breaking the law and "put them six feet under." He bragged that he was hell bent on "killing federal agents" who had acted in an unlawful and unconstitutional manner. He

said his "whole life revolves around dying in battle" and keeping his community safe.

(d) Mr. Burleson told a story of how he and others, with him as leader, knowing the government had snipers in position, took up positions to box the rogue federal agents in, how he had one in his gun sights and would have shot him if shooting had started. He said the agents were outnumbered and out positioned. He said he told the agents to cease and desist or suffer consequences that they won't survive.

(e) He also said that if he had been stopped by agents on his way home after the standoff, he would have "capped him" and called up the FBI to tell them he had executed one of their guys. His "handle" was Wagon Burner.

(f) He was disappointed that the standoff ended peacefully.

(g) He also informed the interrogators that he had a DUI conviction.

4. <u>After The Standoff—Unsolicited Call To The FBI</u>

Long after the standoff and the fake media interview, Mr. Burleson initiated a phone call to an FBI agent. In summary, during that lengthy telephone conversation, which the agent recorded, Mr. Burleson bragged about getting his picture in the newspaper with his gun at the wash. He again described how agents were pointing their weapons at unarmed men, women and children, with their safeties off and their fingers on the triggers. He also discussed the abuse that the Bundy family had taken from the agents. He bragged about being ready to "take out" the agents if they took the first shot, and how he "grabb[ed] people with guns"

and repositioned them to outflank the agents and told his guys which officers to target and maneuvered them into a "kill box" to be able to do it. He gave directions to others who were with him. He had one agent sighted in case he shot an innocent unarmed bystander.

To be clear, *no witness at trial, and no photograph or video produced at trial (or anywhere else to undersigned counsel's knowledge) showed Mr. Burleson doing any of the things he bragged about doing at the wash on April 12, 2014.*

To be equally clear, trial counsel knew all of the relevant facts that are set forth above—that Mr. Burleson was motivated to go to Nevada by what he saw and heard on social media and from other militia members about federal agents abusing, as they saw it, the Bundy family and their authority; about Mr. Burleson's alcoholism and drug problems, including his drinking of hard liquor not only during, but also prior to the fake media interview described above; and the other facts described above and below.

Most importantly, for the purposes of this claim, trial counsel admitted at Mr. Burleson's sentencing that

> I think we have to look at kind of the psychological profile of Mr. Burleson's understanding and try to analyze why he would make such awful, you know, just really destructive statements over the internet. I think what happened, and this is my theory—and *I probably should have had a psychological examination done on Mr. Burleson, and I didn't…. Possibly in mitigation I should have thought further ahead in preparing my case*.

Or as trial counsel put it to undersigned counsel, "I should have had him psyched." That raises an excellent question.

5. The Question

Photographic and video evidence showed that Mr. Burleson appeared at the wash while the protest was already well under way and just at the moment the agents were threatening to use deadly force against the protesters who were slowly walking toward the agents. He is then photographed descending into the wash with his lawful gun and approaching to within about 75 yards at the closest to the agents, behind the crowd of protesters from the agents' point of view. There is no photographic evidence of his aiming his lawful weapon at anyone, shouldering or sighting it or placing his finger on the trigger, and no *witness* testified to even *seeing* him in the wash on that day. The *only* evidence of his unlawful conduct, and of his unlawful --not to mention violent--***intent*** (albeit intent that was never acted upon) is his unhinged, irrational, violent and disturbed statements on social media, and his otherwise uncorroborated and often unhinged bragging about his actions to the fake film crew and his *sua sponte* confession to an FBI agent. Prior to trial, the government prosecutors specifically told trial counsel that they would make their case based on Facebook posts and his unsolicited recorded call to the FBI agent.

Leaving aside whether or not his unhinged statements reflected his actual (unrealized) intent, or his irrational, unforced, self-inculpatory bragging to a large public audience and an FBI agent reflected his actual (unseen) behavior, *why would any sane person make those statements?*

To find out, undersigned counsel *did* have Mr. Burleson "psyched," to use trial counsel's term, and as discussed below, had trial counsel done so, it would have

given him enormous ammunition at several stages—suppression of the *only* evidence of Mr. Burleson doing anything other than being present at the wash for 90 minutes and of his all-important *criminal intent*, the plea bargaining stage, the guilt phase at trial, and the mitigation stage at sentencing. Each will be discussed in turn.

6. The Psychological Examination And Report

Mr. Burleson was evaluated by Dr. Kirk Heilbrun, Ph.D. of the Department of Psychological and Brain Sciences at Drexel University in Philadelphia. Dr. Heilbrun's 50-page CV was presented to both the trial court and prosecution, neither of which questioned his overwhelming qualifications and experience in the fields of forensic psychology, psychiatry, criminal justice and law.[3]

Dr. Heilbrun and his associate interviewed Mr. Burleson in person for approximately six hours, administered a variety of tests for mental and emotional functioning and for measuring rehabilitation needs and risk of recidivism. They also conducted interviews with Mr. Burleson's mother, sister, friend, and a defense investigator who spend very considerable time with Mr. Burleson in the days before, during and after his 32-day trial. Finally, Dr. Heilbrun reviewed an extraordinary number of documents including, but not limited to, Mr. Burleson's social media posts, the written and audio of his unsolicited call to the FBI and his video to the fake movie producers, the images admitted at trial and government trial exhibits and undercover interview transcripts, Mr. Burleson's Presentence Report and

[3] That 50-page CV is available to this Court upon request.

Sentencing Transcript, various briefs from his case, relevant sentencing guidelines, certain correspondence, and Mr. Burleson's medical records. His report was submitted to the district along with the § 2255 motion under seal.[4]

The pertinent facts and conclusions from Dr. Heilbrun's report include the following:

a. Mr. Burleson suffers from *paranoid delusions*, including his beliefs that he personally is the subject of conspiracies involving high-ranking public figures such as Harry Reid, Hillary Clinton, Bill Clinton and Barack Obama. Dr. Heilbrun described his thinking as "bizarre" and "extreme" and involving a combination of actual events and persecutory delusions.

b. Mr. Burleson suffers from a "*little man's complex*," and is prone to *exaggeration* and self-reference. He is also prone to talking about things that he would do or had done in a grandiose way *not necessarily consistent with what actually occurred*. He does this to seek an audience, which he loves, particularly a sympathetic one, which is consistent with his "little man's complex." According to Ms. Abbott, Mr. Burleson "would brag to try to seem important…he had a big attitude and *often would say anything for attention*."

c. Mr. Burleson's mother indicated that *his only friends were his "militia buddies*," and that his involvement with the militia was "Greg trying to fit in somewhere and be a big shot."

[4] This report is summarized above and below and is also available to this Court upon request, preferably under seal if the Court will permit it.

d. Mr. Burleson has an extensive history of alcohol and marijuana abuse beginning in his late teens. Part of this was to self-medicate to control his seizures. Mr. Burleson was very sensitive to alcohol and "*it didn't take very much to get him drunk*" according to his mother. Mr. Burleson's DUI conviction and alcoholism is also documented in the PSR and the sentencing transcript as noted above. He was a heavy user of alcohol and medical marijuana at the time of the offenses and influenced the "rage" messages of his Facebook posts at the time.

e. Mr. Burleson's profile was suggestive of certain somatic, emotional, behavioral and interpersonal difficulties, and of significant emotional dysfunction and a risk of self-harm, possibly suicide.

f. Mr. Burleson's awareness of the illegality of the offenses of his convictions was impaired by his belief that the government was overreaching and that he and others needed to defend the Bundy's as the victims of that overreach, consistent with his paranoid delusions and his little man's complex. For many of the same reasons, "*his capacity to control his actions—to consider the Bundy's call for support rationally, think it through, appraise its legality, and behave accordingly—was also impaired*." While perhaps not fully compromised, *there is "strong evidence that he was impaired in both domains"—the ability to understand the wrongfulness of his actions and the capacity to control his behavior*.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously holding that "appellant has not made a 'substantial

showing of the denial of a constitutional right.'" *Appendix A.*

A. Applicable AEDPA Standards

AEDPA permits the federal district courts and court of appeal to issue a COA on an issue when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2)-(3). The Ninth Circuit itself has explained what it takes under this Court's authority to meet this standard:

> In *Barefoot [v. Estelle,* 463 U.S. 880 (1983)], the [Supreme] Court established several ways in which a petitioner can make the 'substantial showing of the denial of a constitutional right.' To meet this threshold inquiry, Slack [v. McDaniel, 529 U.S. 473,] 120 S. Ct. [1595] at 1604 [2000], the petitioner 'must demonstrate *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."… *We will resolve any doubt about whether the petitioner has met the Barefoot standard in his favor.*…
> …At this preliminary stage, we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus. Indeed, the Supreme Court has cautioned that, in examining a petitioner's application to appeal from the denial of a habeas corpus petition, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor."… In non-capital as well as capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus….

Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (emphasis added; citations omitted). The court went on to say that even "an issue apparently settled [against petitioner] by the law of our circuit remained debatable for purposes of issuing a COA." *Id.* at 1026. "[I]t is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to *reconsider* circuit law that apparently forecloses relief." *Id.* (emphasis added). The purpose of

the COA requirement is not to set a much higher bar for habeas appeals than other criminal appeals, or to prevent the court of appeals from hearing argument on issues that may at first glance appear to lack merit, but to prevent the wasting of judicial resources on issues that are truly *frivolous*. See *id.* at 1025. Indeed, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Id. See also Tennard v. Dretke*, 542, U.S. 274, 282, 288 (2004); *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle,* 463 U.S. 880, 893 & n. 4 (1983); 2 CEB, *Appeals and Writs in Criminal Cases*, § 4.190 (2d ed. 2003).

B. The Ineffective Assistance of Counsel Issue In This Case More Than Meets The Standard for a COA

Strickland v. Washington, 466 U.S. 668 (1984) governs claims of ineffective assistance of trial counsel and sets the standard applied to counsel's performance. Reversal is required if (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 687-94; *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001).

Among other things, it is ineffective assistance for trial counsel to:

1. Refuse to investigate psychological evidence, which is not a reasonable strategic decision. *Weeden v. Johnson,* 854 F.3d 1063, 1070 (9th Cir. 2017).

2. Fail to investigate mental health defenses. *Bemore v. Chappell,* 788 F.3d 1151, 1163 (9th Cir. 2015).

3. Fail to investigate or present mitigating sentencing or penalty phase evidence. *Burger v. Kemp,* 483 U.S. 776 (1987); *Mayfield v. Woodford,* 270 F.3d 915 (9th Cir. 2001).

4. Fail to offer favorable evidence. *Williams v. Taylor,* 529 F.3d 914 (9th Cir. 2001); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995).

"[E]ven when making strategic decisions, counsel's conduct must be reasonable. *Roe v. Flores-Ortega,* 528 U.S. 470, 481… (2000). [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland,* 466 U.S. at 690-91…. The focus in failure-to-investigate claims, then, is the reasonableness of the investigation (or lack thereof). *See Wiggins v. Smith,* 539 U.S. 5110…(2003). *English v. Romanowski,* 602 F.3d 714, 726 (6th Cir. 2010). *Accord Strickland,* 466 U.S. at 690-91.

"Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. *See Strickland,* 466 U.S. at 690–91, 104 S. Ct. at 2065–67". *United States v. Gray,* 878 F.3d 702, 711 (3d Cir. 1989).

Defense counsel is ineffective if he fails to subject important components of

the State's case to meaningful adversarial testing. *United States v. Cronic,* 466 U.S. 648, 659 (1984).

Ineffective assistance of trial counsel in the plea-bargaining process that causes a defendant to reject a relatively favorable plea offer is subject to habeas relief. *Lafler v. Cooper,* 566 U.S. 156, 174 (2012); *Johnson v. Uribe,* 700 F.3d 413, 427 (9th Cir. 2012). *See also Missouri v. Frye,* 566 U.S. 134, 145 (2012) (failure to communicate settlement offer to defendant is ineffective assistance of counsel where it causes defendant to fail to accept better plea offer or go to trial); *Estrada v. Biter,* 774 Fed. Appx. 1041 (9th Cir. 2019)

It is also ineffective assistance to fail to investigate or present favorable defense evidence. *Burger v. Kemp,* 483 U.S. 776 (1986); *Cannedy v. Adams,* 706 F.3d 1148 (9th Cir. 2013); *Williams v. Taylor*, 529 F.3d 914 (9th Cir. 2001); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Eggleston v. United States*, 798 F.2d 374 (9th Cir. 1986).

So how did trial counsel's failure to investigate and present essential evidence prejudice Mr. Burleson? In the following four ways.

C. SUPPRESSION OF EVIDENCE

Trial counsel moved to suppress the evidence of Mr. Burleson's statements to the fake movie crew made under the influence of alcohol, and his self-instigated call to the FBI, as well as some of his alcohol-fueled Facebook posts. Regarding his responses to the fake movie crew's attempts to get him to brag about his exploits at the wash, trial counsel argued that Mr. Burleson was "extremely intoxicated" and

therefore was not capable of making a knowing or intelligent waiver of his Fifth Amendment right to silence, due process of law and Sixth Amendment right to counsel. He argued that an evidentiary hearing would establish that the agents had supplied Mr. Burleson with "multiple" alcoholic drinks before the interview, then continued supplying him with alcohol with the deliberate intent to induce him to make incriminating admissions, knowing he had a weakness for alcohol.

The Magistrate Judge denied the motion and denied an evidentiary hearing. The District Judge reviewed the Magistrate Judge's decision *de novo* and affirmed it.

1. The court agreed with and adopted the Magistrate Judge's analysis and findings and incorporated them in its order. This included the findings that the motions were not supported by an affidavit or offer of proof, e.g. of how much alcohol Mr. Burleson claimed he consumed or that he would testify that he was grossly intoxicated, and do not allege facts which warrant an offer of proof, and that the video does not support the allegations that Mr. Burleson was grossly intoxicated.

2. In addition, the court ruled that after examining the video, it showed that Mr. Burleson spoke coherently and without slurring his words, making an evidentiary hearing about the amount and effect of the alcohol on him unnecessary.

3. The court also ruled that trial counsel provided no foundation for his assertion that the agents knew of Mr. Burleson's proclivity for alcohol knowing of his prior conviction for DUI.

Finally, although the district court did not base its ruling on this point, it

found that trial counsel's motion to suppress was untimely.

In other words, trial counsel moved to suppress the evidence of the fake movie interview after the deadline set by the Court and did so in a wholly incompetent way.

But that's just the beginning. Trial counsel already had information that he could have, and should have, included in his motion that would have greatly bolstered his cause, and he would have had a great deal more, if he had "psyched" Mr. Burleson as he admitted he should have done, but did not.

As noted above, trial counsel already knew that Mr. Burleson, an alcoholic from an early age, had been drinking on his own before he even arrived for the evening interview with the fake movie crew. But he didn't use that fact in his motion to suppress. And had he done even cursory research, trial counsel would have been able to inform the Court, as Mr. Burleson did at his sentencing, that in alcoholics, intoxication doesn't always manifest itself in slurred speech. This is because experienced alcoholics develop a tolerance for its effects so that consumption of a constant amount of alcohol produces a lesser effect or increasing amounts of alcohol are necessary to produce the same effect, allowing the drinker to show few obvious signs of intoxication even at high blood alcohol concentrations which in others would be incapacitating or even fatal. He would also have been able to educate the Court that in long-term alcoholics who have already suffered liver damage, the failure of the liver to metabolize alcohol well can have the reverse effect—the alcoholic can become very intoxicated on much smaller quantities of

alcohol than the person who rarely drinks. Thus, neither the amount of alcohol consumed, nor the "slurring" or non-slurring of his speech, are reliable indicators of how intoxicated he is at the time.[5]

On the contrary, Mr. Burleson would testify at an evidentiary hearing (and his trial counsel could have and should have attached an affidavit to his motion) that, in fact, he had been drinking a considerable amount *prior* to arriving at the Longbow fake movie interview. Specifically, prior to arriving at the FBI's set, he had consumed some of his favorite drinks, horchata and spiced rum, with a total of 8 shots of rum, and he was feeling "pretty loose" when he arrived. The video of the Longbow interview confirms that the FBI served him *at least* two more shots of hard liquor during the interview, and he would testify that there were at least two or three more, leaving him quite intoxicated and unable to pass a blood alcohol test. The video also confirms that he informed the agents of his prior DUI conviction. In other words, Mr. Burleson was very intoxicated when the FBI led him to recount his heroic exploits to an adoring movie audience.

In addition, had trial counsel had his client "psyched," he could have explained to the trial court that Mr. Burleson suffered from paranoid delusions and a "little man's complex" and was prone to grandiose proclamations that were not true in order to get attention and be a big shot, particularly to his sole support group, the militias, and to a movie audience in which he was portrayed as a hero. Not to mention the fact that his psychological conditions impaired his ability to

[5] Authorities from groups on alcohol use disorder on these points were attached to the §2255 motion in the district court.

think rationally and control his behavior.

Trial counsel's failure to bring timely, well drafted, complete suppression motions relating to the fake movie documentary, the unsolicited call to the FBI, and the alcohol-fueled Facebook posts, severely prejudiced Mr. Burleson because his own statements were the *only* evidence not only of his criminal intent, but also of almost all of his allegedly criminal actions in the wash at the standoff. The same evidence, had trial counsel pursued and used it, would have supported successful motions to suppress virtually all of his alcohol fueled and psychologically driven unhinged and counter-factual statements online, to the fake movie producers, and to the FBI agent who he surprised with an unsolicited confession to things there was no other evidence of him actually doing.

D. PLEA BARGAINING

Counsel incorporates the facts and arguments set forth above by reference rather than repeating them here.

Trial counsel's failure to do the necessary investigation of Mr. Burleson's alcoholism and his psychological and social state led, as discussed above, to his failure to successfully challenge the admission of the only evidence of Mr. Burleson's allegedly criminal intent and of his criminal actions (e.g. pointing his gun at agents and threatening to shoot them) in the wash during his presence for 90 minutes when he arrived at the most critical moments of the standoff—when the agents were *already* threatening the use of deadly force against the protesting men, women and children. No disinterested person can doubt that Mr. Burleson's violent,

threatening and unhinged language was the most damning evidence against him. Indeed, it was *the* distinguishing fact between his conviction and the acquittals and repeated hung juries obtained by four of his Tier 3 co-defendants.[6] Without his Facebook posts and his boasts to the fake movie producers and surprised FBI agent who Mr. Burleson called out of the blue to confess, the government would have had no more against Mr. Burleson than it had against any of the 400 other protesters, approximately 80 of which were also armed, that it did *not even charge* with any crime.

Had his efforts to suppress those statements succeeded, trial counsel would have been in a position to seek a dismissal from the government. Had he sought a plea bargain while a strong set of suppression motions were pending, he would have been in a position to obtain an even better plea offer than he was ultimately offered. (More about that is discussed below). Even if the suppression motions had failed, trial counsel was still in a better position to explain to the jury, and hence to the government, why the damning statements were the product of alcoholism and psychological dysfunction that did not reflect reality in either intent or objective fact, and thus blunted their impact both for plea bargaining and, ultimately, at trial. The fact that trial counsel did not do the most basic and obvious investigation and competent motion practice and negotiation with the government severely prejudiced Mr. Burleson at the plea-bargaining stage.

[6] Aside from Mr. Burleson, only Todd Engel in Tier 3 was convicted at trial, but he represented himself, a virtual guarantee of conviction in any criminal trial. His conviction was overturned by the Ninth Circuit and he was not retried.

E. GUILT PHASE AT TRIAL

Counsel incorporates by reference the facts and arguments stated above rather than repeating them here.

As noted above, Mr. Burleson was tried with five other Tier 3 (least culpable) co-defendants, four of whom were either acquitted or repeatedly got hung juries and pled to time served. The difference between Mr. Burleson and his co-defendants (aside from one of them testifying in his own defense) was Mr. Burleson's unhinged statements, described at length above. Trial counsel argued mere presence as his defense to the jury, as the trial court's rulings prevented him from arguing self-defense/defense of others as he would have preferred. But Mr. Burleson's statements online, to the fake movie producers and to the FBI agent were too much to overcome.[7] Had those statements not occurred, or had they been suppressed, mere presence would have been a perfectly viable defense.

Given the fact that they did occur and were not suppressed, defense counsel's problem was that he could not separate those statements from what the photographic and video evidence actually showed. Had he done a proper investigation of Mr. Burleson's psychological and social background and status, including his lifelong alcoholism, he would have had a basis for explaining to the jury why Mr. Burleson made those statements. Not because they reflected his actual intentions or the reality of what occurred, but because they were the result of paranoid delusions, of the exaggerations of a person with a little man's complex

[7] Trial counsel's assistant at trial described seeing the fear in the jurors' eyes as the tapes of Mr. Burleson talking about his desire to kill federal agents were played.

seeking attention and acclaim from a specific support group (his militia buddies), that they stemmed from a man who was unable to fully control his behavior even when sober and in the case of the Facebook posts and the Longbow interview were made while seriously intoxicated in any event. He could have called a psychiatrist and/or an addiction specialist in his defense case. He could also have called Mr. Burleson's mother and others who knew about his alcohol addiction to testify about his addiction and his habit of making outrageous statements to get attention. (These are people such as Dr. Heilbrun, Mr. Burleson's mother and others who were interviewed and referenced in Dr. Heilbrun's report). Trial counsel's failure to do the most basic and obvious investigation and make use of the results severely prejudiced Mr. Burleson by depriving him of what under the circumstances was the only effective defense given the trial court's rulings.

F. MITIGATION

The Court granted a variance at sentencing for Mr. Burleson's physical impairment (blindness) and his resulting vulnerability and his alcoholism, but not for his psychological impairments. Nor did it take account of the fact that his unhinged boasts were counter-factual rants unrelated to the reality of his actions and the result of his paranoid delusions, which rendered him substantially unable to control his behavior in that regard. Had trial counsel done an adequate investigation into Mr. Burleson's psychiatric and social history he would have been able to present to the Court substantial mitigating evidence at sentencing that would have justified a sentence less than what is in reality a life sentence in a

maximum-security prison for a blind man. Trial counsel himself admitted his failure at the sentencing hearing:

> I think we have to look at kind of the psychological profile of Mr. Burleson's understanding and try to analyze why he would make such awful, you know, just really destructive statements over the internet. I think what happened, and this is my theory—and *I probably should have had a psychological examination done on Mr. Burleson, and I didn't…. Possibly in mitigation I should have thought further ahead in preparing my case.*

Trial counsel's ineffective failure to investigate and have a thorough psychiatric, medical, social and personal examination and history of Mr. Burleson to obtain facts and arguments for suppression of evidence, plea bargaining, determination of guilt, and mitigation at sentencing, fell far below any objective standard of reasonableness and resulted in a far more than reasonable probability that but for trial counsel's ineffectiveness the result of the proceeding would have been different.

In summary, there was a shockingly clear difference between what Mr. Burleson said and what the evidence showed he did. What he said was deranged and often irrational. What rational person posts an online ad for someone to braid his hair like a Viking warrior so he can present a good scalp to the FBI agent who kills him in battle over a stranger's cattle when he goes to Valhalla? What competent attorney would not take that (and everything else Mr. Burleson thought fit to tell the entire world), and call and volunteer to an FBI agent, as a sign that maybe he should have psychologically evaluated him before plea bargaining, trial and sentencing? What competent attorney fails to investigate and present evidence

about his client's *known* alcoholism and consumption of 8 hard liquor drinks before his movie interview (where he was served at least two more hard liquor drinks on camera) before a suppression hearing on whether his on-camera admissions to federal crimes were knowing, intelligent and voluntary? Trial counsel *admitted* that he should have done these things, and many more, to the sentencing Judge. If, given the evidence presented to the district court in the § 2255 motion, this doesn't meet the relatively low bar of being *debatable among jurists of reason* and *being not truly frivolous* but *deserving encouragement to proceed,* it is difficult to know what would.

G. Failure To Explain

Finally, by denying a COA in a *one sentence Order, Appendix A.* without any explanation other than citing a summary of the standard, the Ninth Circuit ruling was "as inexplicable as [it was] unexplained," contrary to this Court's stern admonition in *Jackson v. Felkner,* 562 U.S. 594 (2011), and certiorari should be granted for that reason as well.

VII. CONCLUSION

For the foregoing reasons, petitioner Gregory Burleson respectfully requests that this petition for writ of certiorari be granted.

Dated: November15, 2025

Respectfully submitted,

/s/ Mark D. Eibert
Mark D. Eibert
Counsel for Petitioner
GREGORY BURLESON

APPENDIX A

ORDER DENYING CERTIFICATE OF APPEALABILITY
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
OCTOBER 24, 2025

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2025

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY P. BURLESON,

Defendant - Appellant.

No. 25-2540

D.C. Nos. 2:16-cr-00046-GMN-NJK-16
2:24-cv-02325-GMN
District of Nevada,
Las Vegas

ORDER

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

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

Any pending motions are denied as moot.

DENIED.

APPENDIX B

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE
UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA
APRIL 10, 2025

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

GREGORY P. BURLESON,

Petitioner/Defendant.

Case No.: 2:16-cr-00046-GMN-NJK-16

ORDER DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Pending before the Court is Petitioner Gregory P. Burleson's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("§ 2255 Motion"), (ECF No. 3605). The Government filed a Response, (ECF No. 3619), to which Petitioner replied, (ECF No. 3624).

Because Petitioner fails to establish either element under *Strickland v. Washington*, the Court **DENIES** Petitioner's § 2255 Motion.

I. BACKGROUND

Following a jury trial in 2017, Petitioner was convicted of eight counts including assault on a federal officer, threatening a federal officer, obstruction of the due administration of justice, interstate commerce by extortion, interstate travel in aid of extortion, and three counts of using and carrying a firearm during and in relation to a crime of violence, all relating to his actions at the Bundy protest against the Bureau of Land Management's cattle roundup in Bunkerville, Nevada in April 2014. (J. at 1, ECF No. 2220); (§ 2255 Mot. 2:8–14, ECF No. 3605). Petitioner was originally sentenced to 819 months (68.25 years) in prison. (*See generally* J.). The sentence was later reduced to 32 years following a Motion for Compassionate Release/Reduction of Sentence. (*See generally* Order Granting Sentence Reduction, ECF No. 3574).

Petitioner appealed his conviction, and the Ninth Circuit upheld it. (*See* Orders of USCA, ECF Nos. 3576–3579). Petitioner then filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied. (§ 2255 Mot. 2:24–25). Petitioner filed the instant § 2255 Motion which the Court discusses below. (*See generally id.*).

II. LEGAL STANDARD

Section 2255 provides, in pertinent part: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." *See Davis v. United States*, 417 U.S. 333, 344–45 (1974). To warrant relief, the prisoner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("Brecht's harmless error standard applies to habeas cases under section 2255[.]"). Relief is warranted only upon the showing of "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346.

Under Section 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section, '[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (emphasis in original) (quoting 28 U.S.C. § 2255). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996). To earn the right to a hearing, therefore, the movant must make specific factual allegations which, if true, would entitle him to

relief. *Id*. Mere conclusory statements in a section 2255 motion are insufficient to require a hearing. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980).

III. DISCUSSION

Petitioner filed the instant § 2255 Motion, arguing that his conviction and sentence should be vacated based on the ineffective assistance of his trial counsel. (*See generally* § 2255 Mot.). Because the instant § 2255 Motion can conclusively be decided based on the existing record, the Court need not hold an evidentiary hearing.

To establish ineffective assistance of counsel, a petitioner must first show that his counsel's conduct was not "within the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a petitioner must show that he was prejudiced by his counsel's deficient performance. *See id.* at 692. Under this analysis, the question is whether "counsel's representation fell below an objective standard of reasonableness;" and the Court's inquiry begins with a "strong presumption that counsel's conduct [falls] within the wide range of reasonable representation." *United States v. Ferreira–Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1987) (as amended). "[T]he standard for judging counsel's representation is a most deferential one" because "the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). "The benchmark for judging any claim of ineffectiveness must be whether counsel's actions so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Petitioner argues that his trial counsel was ineffective because he (1) failed to have Petitioner thoroughly examined to obtain additional facts and arguments; (2) advised Petitioner not to testify in his own defense when doing so would have resulted in his acquittal or a hung jury as it did for his co-defendant; and (3) failed to adequately present, explain and advise him

of the absolute necessity to accept a seven-year plea offer which would have had him out of prison by now. (§ 2255 Mot. 1:22–28). The Court takes up each of Petitioner's arguments in turn.

A. Psychiatric Evaluation/Medical Defenses

Petitioner's several claims based on ineffective assistance of counsel begin with the allegation that his trial counsel failed to have him submit to a psychiatric evaluation even though he exhibited signs of having a "deranged mindset."[1] (*Id.* 4:19–23). Petitioner ultimately argues that his Fifth and Sixth Amendment rights were violated by trial counsel's failure to investigate and have a thorough psychiatric, medical, social, and personal examination and history of Petitioner to obtain facts and arguments for suppression of evidence, plea bargaining, determination of guilt, and mitigation at sentencing. (*Id.*).

Petitioner contends that trial counsel's failure to explore his psychiatric and/or medical issues as an avenue to suppress certain previous statements that were used against him at trial, would have affected the outcome of the criminal proceedings. (*See id.* 11:26–14:7). First, Petitioner argues that his "deranged mindset" was apparent based on his social media posts and communications with others. (*Id.* 5:13–9:8). Petitioner further avers that had his mental health conditions been evaluated, some of his statements would have been suppressed. (*Id.*). For instance, Petitioner contends that the only evidence of his unlawful conduct, and of his unlawful intent "is his unhinged, irrational, violent and disturbed statements on social media, and his otherwise uncorroborated and often unhinged bragging about his actions to [undercover law enforcement]". (§ 2255 Mot. 16–20). Petitioner avers that had he undergone a psychiatric evaluation then these statements would have been suppressed and he would have either been acquitted or received a lesser sentence. (§ 2255 Mot. 9:26–10:3). But Petitioner does not

[1] Petitioner refers to himself as having a "deranged mindset." Dr. Kirk Heilbrun, the psychologist who prepared Petitioner's Forensic Report, does not diagnose Petitioner as "deranged." (*See generally* Forensic Report, Ex. 3 to § 2255 Mot., Sealed ECF No. 3606-2).

explain why or how the statements would be suppressed by virtue of him submitting to an evaluation. Even more, Petitioner cites no case law holding that a defendant's statements are suppressible solely because of his mental health conditions.

Next, Petitioner argues that his trial attorney erred in not further exploring his alcoholism, which would have led to certain social media statements and statements to law enforcement being suppressed. (*Id.* 13:3–6, 14:13–14). This argument likewise has no legal support. Petitioner cites no case law in his nearly three-page argument on this topic, let alone case law holding that a defendant's statements are suppressible merely because they were made while intoxicated. In fact, the only case law addressing the admissibility of statements made while intoxicated involves statements a defendant makes during an interrogation, which is inapplicable to the statements Petitioner made on social media. *See United States v. Evanston*, 441 F. App'x 492, 492 (9th Cir. 2011) (citation omitted) ("Intoxication does not preclude voluntariness unless it reaches the level of incapacitation that overcomes the defendant's free will."). Even more, the Court addressed this very issue when ruling on a Motion to Suppress during the criminal proceeding, regarding statements Petitioner made to undercover law enforcement officers. *United States v. Burleson*, No. 2:16-CR-46-GMN-PAL, 2017 WL 484084, at *1–2 (D. Nev. Feb. 6, 2017). The Court found that Petitioner was not so intoxicated to the point that it overcame his free will, and that his statements to law enforcement officers were voluntary. *Id.*

Petitioner further avers that had trial counsel's efforts to suppress statements made on social media and to undercover law enforcement succeeded, trial counsel would have been able to discuss a more advantageous plea bargain for Petitioner, Petitioner would not have been found guilty at trial, and his sentence could have been mitigated. (§ 2255 Mot. 14:19–17:16). But again, Defendant offers no case law to support his argument in his § 2255 Motion. In his Reply, Petitioner seeks to remedy the deficiencies of his § 2255 Motion by putting forth some,

albeit scant, case law and expanding on previous arguments in more depth. (*See generally* Reply, ECF No. 3628). But the Court is unconvinced by Defendant's myriad arguments for the reasons discussed above.

In sum, Petitioner has failed to meet his burden of establishing ineffective assistance of counsel based on trial counsel's decision to forego a psychiatric or medical evaluation.

B. Discouraged from Testifying

Next, Petitioner avers that his Fifth and Sixth Amendment rights were violated by trial counsel discouraging him from testifying in his own defense. (§ 2255 Mot. 17:17–19). Petitioner bears the burden of showing a reasonable possibility of constitutional error. *See Brecht*, 507 U.S. at 637. Here, Petitioner does not allege that he would have testified or even that he wished he had testified in his § 2255 Motion. In fact, it is not until his Reply that he affirmatively asserts that he wanted to testify in his own defense. (Reply 13:3–8). Moreover, Petitioner does not sufficiently plead that the outcome of his trial would be different had he testified, he merely speculates in his § 2255 Motion and then tries to remedy this downfall in his Reply. (*See id.* 13:24–14:6). But after considering all the arguments that Petitioner presents, the Court finds that he has not met his burden of establishing his claim. Thus, the Court is not persuaded by Petitioner's argument that his trial counsel was ineffective in exercising his discretion to discourage Petitioner from testifying at trial.

C. Plea Agreement

Lastly, Petitioner contends that his rights under the Fifth and Sixth Amendments were violated by trial counsel's failure to adequately present, explain, and underscore "the absolute necessity of accepting the Government's plea offer." (§ 2255 Mot. 19:12–15). However, in his Reply, Petitioner withdraws this section of his § 2255 Motion. (Reply 15:1–7). Accordingly, Petitioner's § 2255 Motion as to this claim is DENIED as moot.

D. Certificate of Appealability

The Court must now address whether Petitioner should be granted a Certificate of Appealability. Petitioners must receive a Certificate of Appealability from the court to proceed with an appeal of a § 2255 Motion Order. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950–51 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001). To warrant a Certificate of Appealability, Petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). He bears the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 483.

The Court has considered the issues raised by Petitioner, with respect to whether they satisfy the standard for issuance of a Certificate of Appealability and determines that none of the issues meet that standard. The Court therefore DENIES Petitioner a Certificate of Appealability.

IV. CONCLUSION

IT IS HEREBY ORDERED that Petitioner's § 2255 Motion, (ECF No. 3605), is **DENIED**.

DATED this 10 day of April, 2025.

Gloria M. Navarro, District Judge
United States District Court