No. 25-5135

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANWAR MITHAVAYANI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MATHIS, Circuit Judge.

Anwar Mithavayani, a federal prisoner proceeding pro se, appeals the district court's order denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mithavayani moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b). We deny his motion.

A federal grand jury charged Mithavayani with drug and money-laundering offenses in connection with his ownership of the Tennessee Pain Institute (TPI), a "pill mill" in southeastern Tennessee. After a monthlong trial, he was convicted of conspiring to distribute or dispense controlled substances, conspiring to commit money laundering, and conducting transactions with criminally derived proceeds, but acquitted of other money-laundering charges. The district court sentenced him to 300 months of imprisonment followed by three years of supervised release. We affirmed his conviction. *United States v. Gowder*, 841 F. App'x 770 (6th Cir. 2020).

Mithavayani timely filed a § 2255 motion to vacate, claiming prosecutorial misconduct and ineffective assistance of counsel. After the government responded to Mithavayani's pro se motion, retained counsel filed a reply on his behalf, raising new allegations of ineffective assistance of counsel. A magistrate judge recommended that Mithavayani's § 2255 motion be denied, determining that he had procedurally defaulted his prosecutorial-misconduct claims by failing to

raise them on direct appeal and that his ineffective-assistance claims lacked merit. Over Mithavayani's objections, the district court adopted the magistrate judge's report and recommendation and denied his § 2255 motion. The district court also denied him a certificate of appealability. Again proceeding pro se, Mithavayani timely filed a notice of appeal.

Mithavayani now moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b). To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the district court dismisses a claim on procedural grounds, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Prosecutorial Misconduct: The district court concluded (1) that Mithavayani's prosecutorial-misconduct claims were procedurally defaulted because he could have but did not raise them on direct appeal, and (2) that he had failed to overcome his procedural default by demonstrating either cause and prejudice or actual innocence. *See Vanwinkle v. United States*, 645 F.3d 365, 369 (6th Cir. 2011). Mithavayani does not address the district court's procedural-default ruling in his motion for a certificate of appealability, instead asserting that the prosecutor presented false testimony and withheld exculpatory evidence. But "a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). By not addressing the district court's procedural-default ruling, Mithavayani has failed to show that this outcome-determinative issue is reasonably debatable.

Ineffective Assistance of Counsel: The district court reviewed Mithavayani's ineffective-assistance claims under the two-part standard established in *Strickland v. Washington*, 466 U.S.

668, 687 (1984), requiring him to show (1) that "counsel's performance was deficient" and (2) that counsel's "deficient performance prejudiced the defense." To demonstrate deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires the defendant to "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.

Mithavayani claimed that his counsel performed deficiently in moving to sever his trial from the trial of his co-defendants. The district court denied Mithavayani's motion to sever as both untimely and unwarranted. To the extent that Mithavayani argued that his counsel was ineffective for filing the severance motion late, he could not show prejudice because the district court alternatively denied the motion on the merits. Mithavayani also asserted that his counsel was ineffective for failing to argue that he would be prejudiced by being tried alongside more culpable co-defendants. Notwithstanding his counsel's failure to raise this specific argument, the district court addressed the issue of "spillover" prejudice in denying Mithavayani's severance motion, concluding that its jury instructions could minimize the risk of such prejudice. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993). The district court ultimately instructed the jury "to separately consider the evidence against each defendant on each charge." The jury acquitted one co-defendant of all charges and acquitted Mithavayani of three charges, which, as the district court pointed out in denying his § 2255 motion, showed that the jury "assessed guilt individually and count-by-count, as directed." Reasonable jurists could not disagree with the district court's conclusion that Mithavayani could not show prejudice from his counsel's handling of the severance motion.

According to Mithavayani, his counsel was ineffective for failing to call Dr. John Blakely, a physician who had briefly worked at TPI. John Caudill, Mithavayani's trial counsel, explained that he made the tactical decision not to call Dr. Blakely as a witness because his prior statement to law enforcement detailed his concerns about TPI's prescribing and other practices. In light of Dr. Blakely's potentially damaging testimony, jurists of reason could not debate the district court's

conclusion that Caudill made a reasonable judgment call not to him as a witness. *See Strickland*, 466 U.S. at 689 ("Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (citation modified)).

Mithavayani also asserted that his counsel was ineffective for failing to call Edward Hadley, an attorney retained by TPI's owners, to support an advice-of-counsel defense. According to Caudill, he considered carefully whether to present an advice-of-counsel defense, which would have required Mithavayani or Hadley (or both) to testify. Yet Mithavayani elected not to testify. And Caudill expressed his concern that Hadley would invoke his Fifth Amendment right against self-incrimination if questioned at trial, which "would have created very damaging jury optics for Mithavayani." Additionally, because the advice-of-counsel defense requires "full disclosure of all pertinent facts to counsel," *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994), Caudill was also concerned that the prosecutor would cross-examine Hadley "on myriad unfavorable aspects of TPI's practices that likely were not disclosed to [him] at the time he was advising" TPI's owners. Jurists of reason would agree with the district court's conclusion that Caudill reasonably declined to call Hadley in light of these concerns.

Mithavayani raised other ineffective-assistance claims in his § 2255 motion that he does not raise in his motion for a certificate of appealability: his counsel's failure to recall Jenna Crawley after other government witnesses testified; to effectively cross-examine Amanda Boyd and Julie Hankins about the identification of Samantha Manning; to call Justin Woods of the Drug Enforcement Administration and Brian Reeder of the Kentucky State Police; to elicit certain testimony on cross-examination of Mary Katherine Bratton, the general counsel for the Tennessee Medical Board; to timely respond to the forfeiture judgment; to investigate the roles of other persons in the conspiracy; and to inform him of his right to enter a plea in lieu of going to trial. By failing to address these ineffective-assistance claims in his motion for a certificate of appealability, Mithavayani has forfeited review of them by this court. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

In his motion for a certificate of appealability, Mithavayani faults his trial counsel for not objecting to the prosecutor's misconduct, not calling accountant Walter Fulp, not impeaching Boyd's testimony with phone records, not properly cross-examining Crawley about her involvement in the conspiracy, not impeaching Hankins's testimony about meeting with him and a doctor recruit, and not requesting a jury instruction on false testimony. He also asserts that his appellate counsel failed to investigate Hankins's and Boyd's false statements. But Mithavayani did not raise these ineffective-assistance claims in his § 2255 motion. We will not consider issues presented for the first time in a reply or on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006); *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005).

For these reasons, we **DENY** Mithavayani's motion for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 09/29/2025.

Case Name: Anwar Mithavayani v. USA
Case Number: 25-5135

Docket Text:
ORDER filed: We DENY Mithavayani's motion for a certificate of appealability [7374837-2] [7307065-2]. Andre B. Mathis, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Anwar Mithavayani
F.C.I. Miami
P.O. Box 779800
Miami, FL 33177

A copy of this notice will be issued to:

Mr. Robert R. Carr
Mr. Charles P. Wisdom Jr.

UNITED STATES COURT OF APPEALS
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Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: MATHIS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Anwar Mithavayani for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA, Plaintiff, v. ANWAR MITHAVAYANI, Defendant.	)	No. 6:17-CR-25-REW-EBA-3 ORDER DENYING § 2255

*** *** *** ***

Before the Court is United States Magistrate Judge Edward B. Atkins's Report and Recommendation, *see* DE 741, which advises dismissal of Defendant Anwar Mithavayani's § 2255 motion. *See* DE 693 (Motion). For the following reasons, the Court **ADOPTS** DE 741, rejects the objections, *see* DE 751, and **DENIES** Mithavayani's motion in its entirety.

I. Background

After a long trial, a jury found Defendant Anwar Mithavayani guilty of conspiracy to distribute Schedule II controlled substances (21 U.S.C. § 846), conspiracy to commit money laundering (18 U.S.C. § 1956(h)), and multiple counts of engaging in monetary transactions in property derived from specified unlawful activity (18 U.S.C. § 1957). *See* DE 405 (Jury Verdict). The jury acquitted Mithavayani on some laundering allegations. The Court imposed a total sentence of 300 months' imprisonment. *See* DE 537 (Judgment). The Sixth Circuit wholly affirmed. *See United States v. Gowder*, 841 F. App'x 770 (6th Cir. 2020).

On March 18, 2022, Mithavayani, *pro se*, filed a § 2255 motion, seeking to vacate the conviction. *See* DE 693. In his motion, Mithavayani alleged prosecutorial misconduct and numerous instances of ineffective assistance of counsel. *See id.* at 4–8. Mithavayani, *pro se*, filed

two subsequent memoranda in support of his § 2255 Motion. *See* DE 706 (Memorandum); DE 715 (Amended Memorandum). On August 18, 2022, the Government responded in opposition to Mithavayani's motion. *See* DE 719 (Response). On October 10, 2022, Mithavayani filed a reply to the Government's response. *See* DE 732 (Reply). Movant retained counsel for reply and later purposes, including objection briefing.

After review, Judge Atkins issued a thorough product, sorting all claims and recommending denial. *See* DE 741. He dismissed the need for a hearing and suggested no COA issue. Mithavayani objected, DE 751, and the Government responded, DE 754. The matter is ripe for review.

II. Standard of Review

When a party objects to a magistrate judge's recommended disposition, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) (requiring that district judge "must consider de novo any objection"). The district court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) (enumerating options). Here, Judge Atkins expressly informed the parties of the fourteen-day objection period. *See* DE 741 at 35. Mithavayani timely objected. *See* DE 751. Thus, the Court reviews particular objections to Judge Atkins's recommended disposition de novo.

III. Analysis

The Court has reviewed again the full case, as it did for post-trial motions, and makes a few observations at the outset regarding Mithavayani's current description and its factual underpinnings. He now, per the Reply, describes himself as merely an investor, a remote and

barely appearing passive actor with respect to the sordid Tennessee Pain Institute (TPI) opioid-prescribing operation. The Court accurately canvassed the true state of the record in its post-trial ruling, DE 450. Without reiterating the whole thing, the Court noted then, and references here, Defendant's active recruitment of Dr. Gowder (the lynchpin illegal prescriber), his facility lease, his outsized (compared to the medical practitioners') profit share, his control over scheduling, rules, and patient administration, his involvement in Gowder's Tennessee Medical Board licensure defense (including payment of counsel), the concerning cash or cash-equivalent structure at TPI and other dicey office rules, and the involvement of Mithavayani's other entities (like the ostensible payroll company), which drew significant money for undocumented work. To the notion that Mithavayani was merely an investor, the Court responds by quoting from Exhibit 97, which touted the degree of involvement by Health Care Managers, the company Mithavayani and Tyndale co-owned and by which they managed TPI: "We specialize in direct complete medical practice management including administrative, and clinical personnel, medical billing, office maintenance, accounting, payroll, office maintenance, equipment maintenance, *basically we do complete running of the practice* so the doctor can provide patient care . . . ." Ex. 97 at 1 (Mithavayani Letter) (emphasis added). Indeed, "complete running of the practice" by Mithavayani and Tyndale squared with the sworn witness descriptions. *See, e.g.*, DE 440 at 108 (Hankins Testimony) (noting that Mithavayani and Tyndale set and altered rules); *id.* at 114 (describing Mithavayani as TPI's CEO); *id.* at 107 (noting as office manager that she reported to "Anwar").

Much of the § 2255 motion focuses on Jenna Crawley, who had been a stripper before Pete Tyndale romanced and then included her in Jacksonville area opiate shenanigans prior to 2010, including a pill mill. Crawley, in the Court's assessment, was largely a background witness,

merely depicting the origination of Tyndale's clinic conception and expertise. Mithavayani blames his plight on the supposed deception and manipulation of Crawley, who had an early but limited presence at TPI. The premise is counterfactual. The Court notes that Crawley, even by Mithavayani's description, exited the scene in late 2011, *six years* before the far-flung conspiracy concluded. *See* DE 732-1 ¶ 4 (Mithavayani Aff.). Indeed, Crawley was imprisoned for a long period during TPI's existence. It is more than a stretch for Mithavayani to blame Crawley, who paid her societal debt for wrongs in Jacksonville, for *his* choices at TPI.

And importantly, in all of Mithavayani's efforts to distance himself as a remote owner, he omits critical, telling aspects that surely were of great import to the jury. For instance, Mithavayani and Tyndale included a camera system at the Clinic, by which the owners could constantly monitor operations at TPI. Amanda Boyd testified that the cameras allowed Tyndale and Mithavayani to keep tabs from where they were. *See* DE 440 at 8–9 (Boyd Testimony Day 7) ("They [Anwar and Pete] said that they could see it from where they were located."). This eye in the sky completely undercuts any contention by Mithavayani that he was ignorant of or detached from practice details or was unaware of how the office actually operated. Further, when the Drug Enforcement Agency (DEA) raided TPI, the Clinic's denouement, Tyndale and Mithavayani reacted by closing shop in Tennessee and opening a new clinic in North Carolina. The environment was "not as strict up there," per manager Boyd's quote from the owners, "Anwar and Pete." *See id.* at 10. The North Carolina operation recruited prior TPI patients, promising prescriptions that would match the shady pill practices at TPI. *See* DE 450 at 8 (Post-Trial Opinion & Order) (discussing and detailing proof of "Defendants' mirroring efforts to set up a North Carolina" clinic). How can Mithavayani claim ignorance or separation, with any credibility, when his reaction to a DEA raid was relocation

and repetition of TPI's criminal operational approach, in a perceived laxer regulatory environment? Please.

Thus, as Mithavayani tries to erode the strength of the case at the margins, the Court must limn the broad and compelling inculpatory core that produced the guilty verdicts in the case.

a. Mithavayani's Prosecutorial Misconduct Allegations (Grounds 1 and 2) are Procedurally Defaulted.

After review, Judge Atkins found that Mithavayani procedurally defaulted his two prosecutorial misconduct claims by failing to raise them on direct appeal. *See* DE 741 at 4–10. Both of Mithavayani's arguments relate largely to Jenna Crawley, one of the Government's witnesses. *See* DE 693 at 4–6. In Ground One, Mithavayani alleged that "[t]he United States engaged in Overt Acts specifically, but not limited to, the knowing: (1) elicitation of testimony, known or reasonably known to have been false from government witnesses (a) Jenna Crawly [sic]; (b) Amanda Boyd, and (c) Julie Hankins; (2) failure to correct, and or concealment, of government witness Jenna Crawley's use of a false identity during her participation in the charged conduct; (3) 'bad faith' actions in the failure to fully disclose the criminal involvement and target as a potential co-defendant of Jenna Crawley in this and other criminal matters." *Id.* at 4. In Ground Two, Mithavayani alleged that "[t]he United States engaged in the Overt Acts specifically, but not limited to, the knowing 'bad faith' action in the failure to fully disclose the: (1) prior criminal involvement; (2) current criminal participation; (3) predisposition to the alleged crimes; and (4) role as witness and confidential informant for the Government, of Government witness Jenna Crawley." *Id.* at 5. Mithavayani did not raise the arguments on direct appeal, a negative status he does not contest. *See* DE 741 at 5.

In his motion, he blamed appellate counsel for failing to raise the arguments. *See* DE 693 at 4. However, Mithavayani did nothing to address or substantiate the requisite "cause and

prejudice" needed to avoid the procedural default bar. He also eschews the actual innocence path. Rather, and only in reply, Mithavayani instead pivoted to a different excuse, claiming he could *not* have raised the misconduct arguments "on direct appeal because it relied on factual assertions that, precisely due to the misconduct, had not been established at trial[.]" *See* 751 at 7. He contends that the Court should treat prosecutorial conduct in the way of ineffective assistance, which typically cannot be adjudicated on direct appeal and must await § 2255 proceedings. As Judge Atkins properly discerned, that is not the law, and the trial record fully provided the contours of Mithavayani's doubtful claims.

Generally, claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. *See Massaro v. United States*, 123 S. Ct. 1690, 1693 (2003) (citations omitted). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Id.* In *Massaro*, the Supreme Court held that, based on record development, an ineffective assistance of counsel claim may be brought under § 2255, whether or not it was raised on direct appeal. *See id.* at 1694. Relying on *Massaro*, Mithavayani argues that a prosecutorial misconduct claim similarly may be brought in a § 2255 petition, even if the issue was not raised on direct appeal. *See* DE 751 at 9.

The Court rejects the theory, for several reasons. First, Mithavayani delayed the justification until his reply, which is procedurally improper and directly contradicts the excuse posited in the § 2255 motion itself. Changing tactics in reply—which Judge Atkins rightly labeled as a "seismic shift," *see* DE 741 at 5—is irregular and improper. *See Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) ("[A]rguments made . . . for the first time in a reply brief are waived." (citing *Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004))).

Further, "[i]n order to demonstrate cause and prejudice to excuse default, a prisoner must ordinarily 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Poulsen v. United States*, 717 F. App'x 509, 517 (6th Cir. 2017) (quoting *Murray v. Carrier*, 106 S. Ct. 2639, 2645 (1986)). In his reply, Mithavayani relies almost exclusively on the trial transcripts to suggest prosecutorial misconduct. *See* DE 732 at 4–5. As the Government aptly notes, none or almost none of the evidence Mithavayani relies on to make his claims was unavailable to him at the time of his direct appeal. *See* DE 754 at 2. For instance, a review of the transcripts shows that Mithavayani's counsel had plenty of opportunities to develop and did develop the argument that Jenna Crawley and Samantha Manning were the same person. *See* DE 741 at 6–9. Mithavayani's attorney questioned Crawley about her "Samantha Manning" alias. *See* DE 435 at 61–63 (Crawley Testimony). Mithavayani's trial counsel also argued in his closing argument that Jenna Crawley and "Sam" were the same person, and that she hid her true identity from Mithavayani. *See* DE 432 at 101–03 (Closing Argument). "Therefore, this issue . . . was apparent from the face of the record." *See DiPietro v. United States*, 251 F. App'x 606, 607–08 (11th Cir. 2007) (holding that the petitioner's failure to raise a prosecutorial misconduct claim on direct appeal procedurally barred him from raising the claim in his § 2255 motion).

More pointedly, Judge Atkins properly determined that the state of the trial evidence equated Manning with Crawley. Crawley admitted she used the name "Sam," and though she doubted use of "Manning," she did not categorically deny the appellation from seven years prior. *See* DE 435 at 61–63. Further, Crawley identified both her photo and the photo of the other possible Sam, Samantha Felder. She identified Exhibit 131 as a picture of herself. *See id.* at 124. Later, witness Boyd expressly testified that the same Exhibit 131 was actually Crawley. *See* DE

437 at 266 (Boyd Testimony Day 6). The photos might not themselves have been admitted, but the identification testimony was clear and unrefuted.

Further, Crawley readily admitted using an alias with Mithavayani, and she conceded withholding her pending prosecution from him. *See* DE 435 at 61–70. Though she denied having any formal role at TPI, she admitted traveling to the Clinic with owner/boyfriend Tyndale, and she admitted that Tyndale involved her in speaking with potential employees using the name "Sam," and in recruiting efforts for at least one physician. *See id.* at 39, 60–64, 69–70. The defense lawyers grilled her long and hard about the Jacksonville charges, her bias from cooperation, and the propriety of Crawley making the Tennessee trips during the period she was under Florida supervision. The lawyers expressly contended, in examination of Crawley, that she was a co-conspirator earning immunity through cooperation. *See id.* at 103–04. All of this was known, used by the defense, and thus in the record relative to the murky misconduct theory.[1]

Thus, Mithavayani had the entire core of information he claims the prosecution falsely presented or wrongly withheld. He could have made the same argument on appeal, suggesting that Crawley falsely misstated her role, failed to fully disclose her presentation to Mithavayani, and failed to completely detail her activities intervening between the Jacksonville closure and her episodic appearances at TPI.[2]

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[1] The Court notes the irony of Mithavayani's alias contention. He claims that Crawley withheld her true identity, going only by Sam or Sam Manning. If he had known Crawley's identity, he claims he'd have diagnosed the truth about her past and run the other direction. But, if Mithavayani did due diligence on the people with whom he associated, one wonders why he didn't discover there was no "Sam Manning" and refuse to go forward with an alias actor.

[2] What new does Mithavayani offer? Not much, by way of his primary affidavit, which does nothing to advance the argument or avoid default. The second affidavit, again filed only in reply, suddenly is chock full of allegations. For example, Mithavayani, free of documentation or objective proof, contends that Crawley was a part owner and that he and Tyndale paid her $60,000 in cash for her clinic share in late 2011. *See* DE 732-1 ¶ 8. The Court finds proof of this type, late to the game and untethered to any corroboration, insufficient to undercut the procedural default analysis. Mithavayani, of course, would have had this proof available at trial; nothing suggests an effort to bring it to bear in the cross-examination of Crawley.

As such, Mithavayani's failure to raise his prosecutorial misconduct allegations on direct appeal bar him from raising such claims now, as Judge Atkins accurately determined.

Mithavayani argues that Judge Atkins's "Report and Recommendation's procedural default finding constitutes legal error" because the Recommendation does not cite any cases finding that a prosecutorial misconduct claim is procedurally barred when not raised on direct appeal. *See* DE 751 at 10–11. If the implication is that there are no cases that stand for this proposition, that is simply not true. Many courts have found that a prosecutorial misconduct claim made in a § 2255 petition can be procedurally barred if the petitioner did not raise the claim on direct appeal. *See, e.g.*, *Poulsen*, 717 F. App'x at 517; *Goward v. United States*, 569 F. App'x 408, 411 (6th Cir. 2014); *Noble v. United States*, Nos. 2:10-CR-51-JRG, 2:16-CV-38-JRG, 2018 WL 4441240, at *19–22 (E.D. Tenn. Sept. 17, 2018); *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003); *Delatorre v. United States*, 847 F.3d 837, 843–44 (7th Cir. 2017); *United States v. Smith*, No. 8:04-CR-190, 2010 WL 481000, at *1 (D. Neb. Feb. 4, 2010); *United States v. Efthimiatos*, Nos. 4:15-cv-45-SMR, 3:13-cr-00015-SMR-HCA, 2015 WL 10793427, at *9 (S.D. Iowa June 23, 2015); *United States v. Rockett*, No. 3:13-cr-557-SI, 2023 WL 2587470, at *3 (D. Or. Mar. 21, 2023). The recent *Hawkins v. United States*, No. 22-5265, 2022 WL 4682518, at *2 (6th Cir. Sept. 8, 2022), solidifies the currency of the point: "Hawkins's prosecutorial-misconduct,

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The claims related to other witnesses also fail. Mithavayani contends the Government falsely had Boyd testify to "daily" calls with Mithavayani and Tyndale and falsely had Julie Hankins testify that Mithavayani attended a meeting at TPI with tainted recruit Dr. Rodenberg. Mere inconsistencies in testimony do not equate to perjury. *See Monea v. United States*, 914 F.3d 414, 421 (6th Cir. 2019) (setting forth prosecutorial misconduct elements (that the Government "knowingly presented false testimony that materially affected the proceeding") and noting that "'mere inconsistencies' in the testimony will not suffice" and that the claimant must prove "that the Government's witness 'testified in an indisputably false manner'") (citations omitted). Boyd's testimony—that she called the owners "probably" once a day, *see* DE 440 at 8—simply was one of regular interaction, backed up by the continual remote video monitoring by the owners. Mithavayani's effort to impeach Hankins's testimony also fails. The Court sees no date specified by the witness for the TPI meeting with Rodenberg, so Mithavayani's touted travel records hardly are facially inconsistent. *See id.* at 110–11. The Court rejects Mithavayani's misconduct showing, even if otherwise credited, as to these witnesses.

officer-misconduct, and sufficiency-of-the-evidence claims are procedurally defaulted because Hawkins could have raised those claims on direct appeal but failed to do so."

Mithavayani defaulted Grounds 1 and 2 of his § 2255 motion, and the Court rejects them.[3]

b. Mithavayani's Ineffective Assistance of Counsel Claims Fail.

Unlike Mithavayani's prosecutorial misconduct theories, claims for ineffective assistance of counsel (IAC) are properly brought in a § 2255 motion. *See Massaro*, 123 S. Ct. at 1694 ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."). However, all of Mithavayani's ineffective assistance of counsel claims fail on the merits.

The Supreme Court discussed the standards for establishing an ineffective assistance of counsel claim in *Strickland v. Washington*:

> 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. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

104 S. Ct. 2052, 2064 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

[3] As the introduction and discussion suggest, the Court likewise rejects the showing that the prosecutor knowingly adduced false testimony that was material to the outcome. Crawley's warts were known across the case and used vigorously by the defense. She was a reluctant witness, and she ceded points to but gave damaging answers to both sides. Flyspecking her specific testimony by post-trial parsing does not even approach showing, in the Court's view, indisputably false testimony from Crawley that the prosecutor knowingly adduced or did not correct. The same is plainly true for the Boyd and Hankins testimony. And, the strength of the case convinces the Court of no materiality, as articulated in the Sixth Circuit, even if the Court reached that terminal step.

under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 2065 (quoting *Michel v. Louisiana*, 76 S. Ct. 158, 164 (1955)).

Mithavayani made ten claims in his § 2255 motion. *See* DE 693 at 7, 13. His first, third, fourth, fifth, and sixth claims relate to his trial counsel's failure to call or to recall certain witnesses. *See id.* "The decision whether to call a witness is generally a matter of trial strategy and, absent a showing of prejudice, the failure to call a witness does not deprive a defendant of effective assistance of counsel." *Samatar v. Clarridge*, 225 F. App'x 366, 372 (6th Cir. 2007) (citing *Ohio v. Williams*, 600 N.E.2d 298, 304 (Ohio Ct. App. 1991)). A trial attorney's failure to call a witness is presumed to be a matter of trial strategy; such failure only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *See Guzman v. United States*, Nos. 3:10-CR-161-TAV-DCP, 3:15-CV-57, 2018 WL 1586099, at *6 (E.D. Tenn. Mar. 30, 2018) (first citing *Chegwideen v. Capture*, 92 F. App'x 309, 311 (6th Cir. 2004); and then citing *Hutchinson v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002)). Judge Atkins thoroughly analyzed each of Mithavayani's claims and concluded that he failed to demonstrate that trial counsel acted in a manner, as to any of the grounds, that "was objectively unreasonable, or outside the realm of reasonable professional judgments." *See* DE 741 at 12, 16–17, 19, 22, 24 (quoting *Bentley v. Motley*, 248 F. App'x 713, 718 (6th Cir. 2007)). This is substantiated by trial counsel's affidavit, where he thoroughly and thoughtfully explained his decisions relative to the witnesses named by Mithavayani. *See* DE 719-1 (Caudill Aff.).[4]

[4] For example, trial counsel explained that he chose not to call Justin Woods of the DEA or Brian Reeder of the Kentucky State Police (KSP) because "[t]he potential helpful information either of these witnesses could have provided is speculative and negligible, and calling such plainly adverse witnesses is fraught with risk. . . . Mithavayani implies that Reeder could have been called to give testimony that none of the TPI employees nor any business partners knew of anything improper by [] Mithavayani. This is plainly inadmissible hearsay. Furthermore [counsel] elicited this point firsthand from [his] cross-examination of Julie Hankins." DE 719-1 at 6 (internal quotation marks omitted). This is confirmed by the trial transcript. *See* DE 440 at 176–78.

Judge Atkins got this area exactly right, and the Court has several confirmatory observations from trying the case. Mithavayani seeks to entirely recast and recharacterize the content of the trial record, portraying himself as misled or ensorcelled by Jenna Crawley. The Court has a very different view and treats Caudill's plain strategic choices as reasonable and without prejudice under the *Strickland* rubric. By nature, an IAC claim focused on the trial trenches is second guessing the difficult calls made in the context of a dynamic, indeterminant result. Going back later, after the jury has resolved the case, to question the battle moves, as it were, suggests the need for a high bar on relief. Caudill made rational, informed choices about witness strategy during an extensive trial, where the group of like-minded defendants sought to undercut Government witnesses and project a largely united front. That worked on some of the counts or enhancements, and fully so as to one of the Defendants. Mithavayani avoided liability in some areas, but the jury found against him on others. Caudill did not violate *Strickland* as to the witness roster and examination particulars.

Regarding the specifics:

The Court already discussed Crawley at length. Caudill secured many favorable answers from Crawley, specific to Mithavayani's conduct, awareness, and approach. Caudill also established Crawley's alias use, her withholding from Mithavayani the pending Florida prosecution, and her reasons for bias in favor of the Government. The identity of the fabled "Sam" was, as the prior discussion shows, before the jury. Recalling Crawley would have risked much and added little. The same is plainly even more true for Boyd and Hankins. Caudill crossed them effectively, scoring multiple points helpful to Mithavayani's theory of his own clear intent. The

Court already rejected the Rodenberg construct (as to Hankins)[5] and the generic call-frequency construct (as to Boyd). There was no deficiency and no prejudice.

Mithavayani touts an advice of counsel defense, which Caudill assessed but eschewed. Mithavayani claims the proof would be that he accurately vetted full clinic operations with counsel Hadley and that Hadley blessed the lawfulness of TPI's approach. First, Caudill was well aware of this potential defense and tactically abjured. He did this because he understood making the defense would require testimony from Mithavayani and/or from Hadley, and that the contours of the defense, such as it is, would fairly open both to impeachment on the darker and more troubling aspects of TPI's conduct. Caudill also worried that Hadley might take the Fifth, a move with threatening optics even under a proper admonition. The Court sees no *Strickland* violation. The advice-of-counsel potential benefit would have prompted a likely stem-to-stern comparison between what Hadley had been told (and had purportedly vetted) and the true state of affairs in the clinic. And again, with Mithavayani pointing to Hadley as fully blessing all TPI aspects, Hadley may well have perceived a reasonable concern about whether his answers could be self-incriminating. Mithavayani faults Caudill's investigation, but he offers no affidavit from Hadley regarding what the witness would have said and whether the witness, in fact, would have testified or raised a privilege claim. Finally, TPI's policies often provided a level of paper legitimacy, window dressing the operators could highlight as a badge of propriety. The case showed, and the

[5] As the Court noted, Hankins did not pin the meeting down to a particular date, so this forecloses the IAC claim, which hinges on Caudill's supposed failure to pursue alibi proof relative to Mithavayani's travels. Exhibit 47 pertained to an order form, with a notation from August 15—Hankins did not testify, in the Court's review, to when the meeting with Rodenberg occurred at TPI. The Court agrees that Mithavayani improperly inserted this theory by way of counsel's reply (DE 732 at 11–12). That's one reason to reject the theory, but on the merits as well, it fails.

jury perceived, the incriminating delta between a written standard and the actual functioning at TPI. Caudill saw the risks of adding to this dimension and reasonably eschewed those risks.[6]

Regarding Dr. Blakely, Mithavayani describes that physician, who worked for some period at TPI, as a magic bullet to the Government's case. Plainly, not so. Though Blakely may have been able to offer some anodyne views, relative to TPI, on his comparative experiences in the pain field, Caudill knew that Blakely had explosive factual knowledge or takes that quickly would have squelched any benefit. Those included Blakely's critical views of Gowder's opiate co-prescribing, a very negative experience with Tyndale (who Blakely depicted as a physically intimidating and "dangerous" "enforcer" for TPI on his departure), and the fact that the office manager called him an "asshole" for trying to reduce scripts. *See* DE 719-2 at 2–3 (Blakely Report). Blakely would have been a high-risk witness and much of his knowledge would have incriminated the operational integrity of TPI, of which Mithavayani (who recruited Gowder, the Medical Director) was CEO. The reasonable judgment call by Caudill is no basis for *Strickland* relief.

Finally, as to not calling Detective Reeder, Caudill did not transgress *Strickland*. As Judge Atkins carefully diagnosed, the theory involves Reeder's testimony from a hearing that addressed a doctor at the later, North Carolina clinic. This would have added only the most marginal of benefits, and Mithavayani wholly mischaracterizes the scope of Reeder's possible testimony, much of which looks like hearsay anyway. This yields no relief.

Mithavayani's second and seventh claims relate to his trial counsel's failure to elicit certain testimony from witnesses on cross examination. *See* DE 693 at 7, 13. As with the decision to call a witness, a trial attorney's choices related to cross examination are "effectively insulated from review" if based on trial strategy. *See Hurley v. United States*, 10 F. App'x 257, 260 (6th Cir.

[6] The Woods claim is undeveloped and warrants no discussion.

2001); *see also Dell v. Straub*, 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002) ("Where trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of an ineffective assistance of counsel claim."). Mithavayani's trial counsel detailed the strategic decisions he made when conducting the cross examinations of Jenna Crawley, Amanda Boyd, Julie Hankins, and Mary Katherine Bratton—the witnesses Mithavayani identified in his motion. *See* DE 719-1 at 3–5. His affidavit is reflective of a thoughtful trial strategy—one there is no reason to disturb, post hoc, in this Court.

Indeed, the Court already covered the witnesses from or around TPI itself. Caudill explained his approach as to Board counsel Bratton. Caudill thought he had the points Mithavayani lists otherwise covered, but in the Court's view, it would not have allowed Bratton to relay the specific testimony (what the doctors said about TPI) under the Rules of Evidence. As to Mithavayani's complaints regarding Dr. Eason, comparative data analysis, and Caudill's decision to forgo reliance on Mithavayani's work product? First, an exhibit for substantive use would have required a sponsor, a witness to detail the data and methodology used. Mithavayani posits Dr. Blakely could have done this, but nothing suggests he would or could have credibly been a conduit for Mithavayani's records-based ciphering. Caudill could not have just crossed Dr. Eason using charts of unknown provenance or reliability. Mithavayani now acts like he gladly would have been the mouthpiece; nothing in the trial record suggests that Mithavayani chose to testify, and that Caudill stopped him. Further, and critically, Caudill assessed the basis for Mithavayani's product (records wholly in the custody and control of Mithavayani himself) and found the result

not reliable. The Court sees nothing to impeach this determination by counsel, in the trenches of trial. Accordingly, Mithavayani's ineffective assistance of counsel claims on these grounds fail.[7]

In his eighth claim, Mithavayani argues that his trial counsel failed "to investigate the relevant criminal conspiracy, relationships and the plea/immunity/informant roles of [Pete] Tyndale, [Zachary] Rose, [Jenna] Crawley and [Edward] Hadley[.]" DE 693 at 13. Trial counsel explained that Rose, Crawley, and Tyndale operated pill mills in Jacksonville, Florida, and his "strategy was to show the jury that Mithavayani had nothing to do with th[e] illicit operation in Jacksonville and that TPI operated very differently." *See* DE 719-1 at 7. Judge Atkins found that "Mithavayani [did not] show that [trial counsel] deficiently performed, nor that he was prejudiced by any purported deficient performance," causing his eighth ineffective of counsel claim to fail. *See* DE 741 at 28 (citing *Strickland*, 104 S. Ct. at 2069). The Court agrees. In "hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful." *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993). So long as the decisions trial counsel made were reasonable, the Court must refrain from such speculation. *See Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002) (quoting *Campbell v. Coyle*, 260 F.3d 531, 551 (6th Cir. 2001)). As he explained, trial counsel did investigate the relationships between Tyndale, Rose, and Crawley[8]—he then made resulting strategic decisions at trial. *See* DE 719-1 at 7. These included profitable tacks, pursued during cross, that distanced Mithavayani from the louche Florida origins and tried to contrast the Florida clinics from TPI. Suffice it to say that Caudill (and the full defense team) subjected Crawley to a thorough, rigorous cross that put before the jury her

[7] Counsel, in reply, chides Caudill for not impeaching Eason with discharge facts. *See* DE 732 at 13–14. But Caudill did examine Eason regarding TPI's discharge history, and he separately admitted proof, through Hankins, that TPI discharged 430 patients over the course of just three years. *See* DE 440 at 156–66. Caudill did not perform, in hindsight, exactly how Mithavayani wanted, but here he covered the bases Mithavayani now claims he wanted covered.

[8] Hadley seems to be misplaced in this argument.

entire past, her record, her prior conviction and prison term, her biases, her exposure in the prosecution, and her inconsistencies. The Court sees nothing Caudill did not diligently assess and make a rational strategic decision about, as to the examination at issue.

Mithavayani's ninth claim relates to his trial counsel's failure to timely move for severance from his co-defendants and to timely respond to the forfeiture issue.[9] *See* DE 693 at 13. While it is true that trial counsel failed to *timely* move for severance, Mithavayani's theory does not support an ineffective assistance of counsel claim. As both the Government and Judge Atkins noted, the Court denied Mithavayani's severance motion not only because it was untimely, but also because this Court found the motion to be meritless. *See* DE 225 (Opinion & Order). This Court stated:

> Defendants missed their defensive motions deadlines by over five months. Mithavayani was clearly aware of this date. He mentioned it in his first motion to continue. Tyndale's defensive motion deadline expired even before Mithavayani's. However, unlike Co-Defendant Gowder, the moving Defendants never requested a deadline extension. Neither Defendant attempts to justify the tardy filings; and the Court, on this spare record, finds no good cause to excuse the delay.
>
> Further, as explained below, *the severance requests are meritless. This finding serves as an alternative denial basis and bolsters the tardiness rejection.* That is, the Court's severance rejection, on Rule 12 grounds, does not prejudice Defendants because their requests also fail under Rule 14.

Id. at 4 (emphasis added) (internal citations omitted). As such, the tardiness issue did not prejudice consideration. On the merits, Mithavayani *now* claims his lawyer should have staked severance on the spillover risk and disparities in the strength of prosecution evidence across the defense roster. Mithavayani depicts himself as significantly less culpable than his cohorts. The Court would not have severed under that theory, if argued. A properly instructed jury will follow instructions, and the Court here ensured individual determinations of guilt, all as Judge Atkins detailed. The not guilty verdicts surely show a jury that assessed guilt individually and count-by-

[9] The forfeiture resolution, not targeted within the scope of relief sought in Mithavayani's § 2255 motion, is a non-issue.

count, as directed. Even if Mithavayani had made the spillover argument, the Court, in this broad conspiracy case properly pursued under one indictment, would not have severed. Further, the CEO of the entity can hardly paint himself as categorically removed from his co-owner and from the TPI physicians he managed, paid, and employed. As the introductory remarks in this Order show, the trial record demonstrates a strong case directly against Mithavayani, defeating any prejudice case regarding severance. Caudill did not violate *Strickland* or cause Mithavayani prejudice in his handling of the severance request.[10]

Mithavayani's final *Strickland* basis is that his trial counsel failed to inform him of his right to enter a plea, in lieu of going to trial. *See* DE 693 at 13. In his affidavit, Mithavayani's counsel stated:

> I discussed a potential plea with Mithavayani, but he adamantly refused to consider pleading guilty. I advised him about the potential for providing the government with substantial assistance and how that could reduce his sentence. I did not advise him to plead guilty, but he was aware that a guilty plea was an option. He expressed no interest in resolving the case in that manner.

DE 719-1 at 7. This Court specifically asked Mithavayani's trial counsel whether plea offers had been communicated by the Government and whether those offers were communicated to the Defendant. *See* DE 577 at 29 (Pretrial Conference Transcript). Mithavayani's counsel responded in the affirmative. *Id.* Mithavayani did not speak up to negate the assertion made by his trial counsel. There is nothing in the record to support Mithavayani's claim that he did not know about his option to enter a plea agreement. More fundamentally, Mithavayani nowhere takes the second step; he does not claim he would have entered a plea (or any details of same) had he been aware

[10] Here, the central charges were conspiracy, so proof pertinent to the conspiracy would have been admissible against Mithavayani whether tried with the group or tried alone. The weighty case against him, in this context, eliminates the potential of unfair prejudice from proper joinder. *See United States v. Harris*, 200 F. App'x 472, 516 (6th Cir. 2006) (noting presumption of effective instructions and requirement that, to force severance because of spillover evidence, defendant must show "substantial prejudice").

of the option. As such, Mithavayani forecloses any accounting of the prejudice step that inheres in the argument. The Court rejects this final avenue.

Mithavayani does not carry his burden on any *Strickland* claim. The Court largely approached the matter from the performance prong, but as the introduction and evidence descriptions indicate, the strength of the guilt proof immunizes the case against any prejudice showing as well. Certainly, Mithavayani endeavors to clip at the margins of the proof, but the Government, through testimony of 45 witnesses (patients, employees, percipient observers, experts, law enforcement) over the twenty-day trial, established a compelling case of guilt on the pill mill and laundering core. Minor strategic tweaks, which is what Mithavayani cavils about here, would not create a reasonable probability of a different result.

c. Denial of Certificate of Appealability & Hearing.

The Court also rejects issuance of a certificate of appealability. Judge Atkins aptly marshaled that analysis. *See* DE 741 at 34. Mithavayani had a full and fair trial and a plenary appeal. The § 2255 result here—as a matter of procedure and as a matter of substance, as applicable—is not fairly debatable among reasonable jurists. *See Slack v. McDaniel*, 120 S. Ct. 1595, 1603–05 (2000). Mithavayani has not made a substantial showing of the denial of a constitutional right. No certificate of appealability should issue.

Finally, Judge Atkins rightly proceeded without a hearing. *See* DE 741 at 34. The claims rise or fall on the record of a twenty-day trial. Though Mithavayani attempts to conjure evidentiary questions, the Court sees a record that conclusively forecloses the relief sought, obviating the basis for an evidentiary hearing per § 2255(b).

IV. Conclusion

For these reasons, the Court **ADOPTS** Judge Atkins's Report and Recommendation (DE 741) and **DENIES** Mithavayani's § 2255 motion (DE 693). Although the Court reviewed the matter de novo, it agrees with and wholly adopts Judge Atkins's recommended disposition.

This the 27th day of December, 2024.

Signed By:
Robert E. Wier
United States District Judge

Orders on Motions

6:17-cr-00025-REW-EBA USA v. Gowder et al **CASE CLOSED on 09/03/2019**

3582,Amendment
821,M2255,R/R

U.S. District Court

Eastern District of Kentucky

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Document Number: 777

Docket Text:
ORDER: re [693] Motion to Vacate (2255) as to Anwar Mithavayani (3); [741] Report and Recommendations as to Anwar Mithavayani (3): For these reasons, the Court ADOPTS Judge Atkinss Report and Recommendation (DE 741) and DENIES Mithavayanis § 2255 motion (DE 693). Although the Court reviewed the matter de novo, it agrees with and wholly adopts Judge Atkinss recommended disposition. Signed by Judge Robert E. Wier on 12/27/2024. (JMB) cc: COR,USM,USP and Anwar Mithavayani by US Mail

6:17-cr-00025-REW-EBA-3 Notice has been electronically mailed to:

R. Kent Westberry kwestberry@landrumshouse.com, abuehner@landrumshouse.com

Jerry J. Cox jcox@kih.net, smproctor@kih.net

Kevin M. Schad kevin_schad@fd.org

Kevin Charles Dicken, AUSA USAKYE.ECFCrimLex@usdoj.gov, CaseView.ECF@usdoj.gov

Shane Allen Romines shane@copelandandromines.com, jeremy@copelandandromines.com

Lucas M. Joyner Joynerlawfirm@gmail.com, tisha@joynerfirm.com

Samuel Scott Marcum smarcum@marcumtennyson.com

Jon Paul Rion info@rionlaw.com

John H. Rion info@rionlaw.com

Conrad A. Cessna conrad@cessnageorge.com, saundra@cessnageorge.com

John L. Caudill john@caudill.legal

Jeffrey B. Lazarus jeffrey_lazarus@fd.org, christine_sason@fd.org

Gregory Rosenberg, AUSA Gregory.Rosenberg2@usdoj.gov, CaseView.ECF@usdoj.gov, Hailey.Williamson@usdoj.gov, Jason.Parman@usdoj.gov, Jennifer.Webb@usdoj.gov, Katherine.Smith@usdoj.gov, Rhonda.McQueen@usdoj.gov, Stephanie.Ebertshauser@usdoj.gov, Susan.Cassidy@usdoj.gov, USAKYE.ECFCrimLon@usdoj.gov

Rajbir Datta, AUSA USAKYE.ECFCivil@usdoj.gov, Beverly.Adams@usdoj.gov, CaseView.ECF@usdoj.gov, Diane.Dearinger@usdoj.gov, Haley.McCauley@usdoj.gov, John.Spires@usdoj.gov, Meg.Moseley@usdoj.gov, Vicki.Crawford2@usdoj.gov

Gregory A. Ousley gregory.ousley@gmail.com, c.wiese@gregoryaousley.com, j.crabtree@gregoryaousley.com, ousleyparalegal@gmail.com

Gregory P. Isaacs gpi@isaacslawfirm.com

James Franklin Ammons jfammons@isaacslawfirm.com, ang@isaacslawfirm.com

Donald Franklin Samuel dfs@gsllaw.com, hh@gsllaw.com

Amanda R. Clark Palmer aclark@gsllaw.com

Ashlee Brooke Mathis abmathis@isaacslawfirm.com

Alvin E. Entin aentin@hotmail.com, aeelegalassistant@entinlaw.com

Haley Trogdlen McCauley, AUSA Haley.McCauley@usdoj.gov, CaseView.ECF@usdoj.gov, Diane.Dearinger@usdoj.gov, John.Spires@usdoj.gov, Mable.Monhollen@usdoj.gov, Meg.Moseley@usdoj.gov, USAKYE.ECFCivil@usdoj.gov

Christian Mark Cavalier ccavalier@rionlaw.com, dmccleskey@rionlaw.com

Wade V. Davies wdavies@wadedavies.law, apassino@rddjlaw.com, debbie@rddjlaw.com, mfranklin@rddjlaw.com

Gregory Brown gb@lyblaw.net

William Scott Hickerson wsh@lyblaw.net

Daniel Tibbitt dan@tibbittlaw.com

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