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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Respondent-Plaintiff,

v.

[redacted],

Petitioner-Defendant.

Case No. [redacted]
Originating Case No [redacted]

[redacted]
United States District Judge

PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE AND ENTRY OF JUDGMENT

[redacted]

Attorney for Petitioner-Defendant
[redacted]

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURES

The following information is submitted pursuant to Fed. R. App. P. 26.1:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list the identity of the parent corporation or affiliate and the relationship between it and the named party: NO.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: NO.

Respectfully submitted,

/s/ [redacted]
Counsel for Petitioner-Defendant

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Petitioner-Defendant [redacted] respectfully requests oral argument to address any questions the United States District Court, Eastern District of Michigan, Southern Division may have regarding the facts and applicable law.

STATEMENT OF JURISDICTION

This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question). This Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 2255(a).

STATEMENT OF ISSUES

1. Did Petitioner-Defendant's trial counsel perform ineffectively by failing to reasonably investigate and gather evidence related to the claims against Petitioner-Defendant?

   PETITIONER-DEFENDANT: YES

2. Did Petitioner-Defendant's trial counsel perform ineffectively by failing to call critical witnesses essential to Petitioner-Defendant's defense?

   PETITIONER-DEFENDANT: YES

3. Did Petitioner-Defendant's trial counsel perform ineffectively by failing to impeach critical witnesses against Petitioner-Defendant?

   PETITIONER-DEFENDANT: YES

4. Did Petitioner-Defendant's trial counsel perform ineffectively by inexplicably withholding relevant evidence, essential to Petitioner-Defendant's defense, from the jury?

   PETITIONER-DEFENDANT: YES

5. Did Petitioner-Defendant's trial counsel perform ineffectively by failing to raise relevant claims on appeal?

   PETITIONER-DEFENDANT: YES

STATEMENT OF THE CASE

Petitioner, [redacted] ("[redacted]"), by and through counsel, seeks relief from a [redacted] jury conviction and [redacted] sentence in this Court. The instant motion to vacate, set aside, or correct sentence and order of judgment is based on the ineffective assistance of [redacted]'s trial counsel, [redacted] ("[redacted]").

The record is rampant with examples of [redacted]'s ineffective assistance. Indeed, [redacted], on numerous occasions, failed to reasonably investigate and gather evidence related to the claims against [redacted]. [redacted] inexplicably failed to call corroborating and helpful witnesses at trial on [redacted]'s behalf. [redacted] failed to adequately impeach witnesses against [redacted]. Further, [redacted] withheld from the jury a mountain of evidence both relevant and helpful to [redacted]'s defense. Finally, last but not least, [redacted] failed to raise relevant constitutional claims on appeal.

As shown below, [redacted]'s trial counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of [redacted]'s trial would have been different. Therefore, this Court should grant [redacted]'s instant motion and vacate, set aside, or correct [redacted]'s sentence and order of judgment.

I. STATEMENT OF RELEVANT FACTS

A. Procedural History

In [redacted], [redacted] was hired to work for a [redacted], company, [redacted],

to provide in-home health care to homebound [redacted] patients. See Petitioner's Appeal, dated [redacted], U.S. Circuit Court for the Sixth Circuit, Case No. [redacted] ("Appeal"), Doc No. [redacted], pg [redacted]. [redacted] worked out of [redacted]'s [redacted] branch. *Id*. [redacted] was 40 years old and had no prior criminal record. *Id*. Less than a year later, in [redacted], the federal government executed a search warrant on [redacted] branch and the branch's office was closed. *Id*. at 13-14. On [redacted], [redacted] was indicted on one count of conspiracy to commit health care fraud (18 U.S.C. § 1349) and two counts of health care fraud (18 U.S.C. § 1347).[1] *Id*. at 14. [redacted] was not the only [redacted] employee named in the indictment; his co-defendants made plea agreements. *Id*.

On [redacted], a jury trial began in this Court before the Honorable [redacted].[2] *Id*. at 14-15. On [redacted], the jury returned a guilty verdict on only count 1 (conspiracy to commit health care fraud), the jury found [redacted] was not guilty of counts 2 and 3 (health care fraud). *Id*. at 27. On [redacted], this Court sentenced [redacted] to 24 months in prision and ordered him to pay [redacted] in restitution. RE 107, pg [redacted]. At all relevant times, [redacted] was represented at trial by his attorney, [redacted].

On [redacted], [redacted] filed his Appeal in the United States Court of Appeals

[1] Forfeiture was also alleged under 18 U.S.C. § 981 (a)(1)(C), 28 U.S.C. § 2461, and 18 U.S.C. § 982 (a)(7).
[2] For brevity's sake [redacted] will not recount the trial in its entirety here, however a succinct retelling can be found in his Appeal, Case [redacted], Doc. [redacted], pp [redacted].

for the Sixth Circuit (the "Court of Appeals"). See generally Appeal, *supra*. [redacted] raised ten grounds for reversal on appeal. *Id*. On [redacted], the Court of Appeals issued its opinion affirming [redacted]'s conviction and sentence. See Opinion of the United States Court of Appeals for the Sixth Circuit, dated [redacted], Case No. [redacted] (the "COA Opinion"). At all relevant times during his appeal, [redacted] was represented by his attorney, [redacted].

No petition for certiorari was filed and this is [redacted]'s first motion under 28 U.S.C. § 2255.

B. [redacted] And His Attorney, [redacted]

[redacted] started working for [redacted] one day after he received his first medical license, in [redacted]. See Affidavit of [redacted], dated [redacted], (the "[redacted] Affidavit"), attached hereto as Exhibit A. The [redacted] branch manager, [redacted] ("[redacted]") impressed him with [redacted]'s credentials and assured him that [redacted] would handle all medical billing ethically. *Id*. Indeed, [redacted] even assured [redacted] that it was typical for [redacted] to underbill [redacted] for care provided by [redacted]. *Id*. Further, [redacted] made a practice of reporting unprofessional and unethical behavior that he observed to [redacted], who was, for all intents and purposes, his boss. *Id*.

After the [redacted] raid of the [redacted] office, [redacted] was interiewed by FBI agents and was shocked to find that the FBI was alleging that [redacted] and, in

particular, [redacted] were overbilling [redacted]. *Id*. [redacted] was further shocked to find out in [redacted] that the FBI was investigating him. *Id*. So, [redacted] arranged to meet and cooperate with the FBI during two proffer sessions, wherein he provided the FBI with billing sheets at their request. *Id*.

Next, [redacted] hired [redacted] to counsel him through the FBI investigation. *Id*. [redacted] wanted to know more about what [redacted] was doing and how it might affect him. *Id*. Although [redacted] had not yet been indicted, he began to collect evidence and provided it to [redacted]. *Id*. [redacted] collected, among other items, material emails from his scheduler, [redacted] ("[redacted]"), and an affidavit of [redacted] CEO [redacted] ("[redacted]"), explaining how [redacted] upbilled [redacted]. *Id*.

After he was indicted, in [redacted], [redacted] continued to collect evidence and provide it to [redacted]. *Id*. Indeed, during discovery he found an email from an FBI interview with the [redacted] branch assistant manager that was very material. *Id*.; see also discussion of this email in the COA Opinion, *supra*, at 10-11. It was an email between [redacted] and [redacted] stating that they should keep [redacted] "in the dark" as it relates to [redacted] billing. *Id*.

Sadly, it has become clear that [redacted] did more work and spent more time related to his defense than [redacted]. [redacted] Affidavit, *supra*. Time and time again [redacted] chose inaction or silence as a strategy to the great detriment of

[redacted]. *Id*. At the plea stage, [redacted] refused [redacted]'s request for plea counter-offers and did not provide [redacted] with plea terms, eventually telling [redacted] that there was "no choice" but to go to trial. *Id*.

During discovery, [redacted] refused [redacted]'s requests for: (1) more emails between [redacted]; (2) subpoena requests for [redacted], and other [redacted] involved in the FBI investigation; (3) co-defendant billing records; (4) exploration into potential Brady violations by the U.S. government for not providing information regarding related [redacted] cases stemming from the FBI investigation; (5) a [redacted] billing expert [redacted], to disprove conspiracy; (6) for interviews of U.S. government witnesses or co-defendants prior to trial; (7) preparation of [redacted] to take the stand at his trial; (8) an investigation into [redacted] billing of suspicious tests in [redacted]; (9) interviews or contact with potential witness who could attest that [redacted] kept [redacted] in the dark regarding fraudulent [redacted] billing; and (10) information regarding trials in [redacted] related to [redacted] and fraudulent [redacted] billing. *Id*.

At trial, [redacted]'s inaction and silence continued. [redacted] did not: (1) object to certain evidence and charts brought forth by the U.S. government against [redacted]; (2) enter into evidence emails from [redacted] to [redacted] which tend to show that [redacted] was not a co-conspirator; (3) establish for the jury that there was no agreement to conspire between [redacted]; (4) use [redacted]'s [redacted] data which

would have rebutted the U.S. government's argument regarding homebound patients; (5) share any defense that [redacted] was altering patient charts and ordering unnecessary tests behind doctor's backs; (6) explain to the jury any of the finer points of the [redacted] process, including how the home office, not the doctors, ordered home care and added patients to the doctor's schedule; (7) impeach [redacted] agent [redacted] on inconsistent testimony; (8) object to the U.S. government's use of billing reports provided by [redacted] as part of a proffer against him; (9) argue potential Brady violations against the U.S. government; (10) call numerous defense witnesses, including, a [redacted] billing expert, the director of billing for [redacted], three individuals who were aware of [redacted] billing [redacted] behind [redacted]'s backs, or two other [redacted] who were unaware of the fraud going on at [redacted]; and (11) attempt to get a continuance to ensure that [redacted] would get to testify on [redacted]'s behalf. *Id*.

[redacted]'s inaction continued on appeal too. Although [redacted] promised to include certain arguments in [redacted]'s appeal, such as potential Brady violations, or the U.S. government's violation of [redacted]'s Fifth Amendment rights by using information obtained by proffer against him, they never ended up in the appeal. *Id*.; see also U.S. Const. Amend V. Indeed, [redacted] did not even provide [redacted] with a copy of the appeal prior to filing. *Id*.

Because his freedom was at stake, [redacted] rightly took his charges, trial, and

appeal seriously, and spent countless hours gathering evidence and researching pertinent issues and cases in an attempt to help his cause. Unfortunately, [redacted] met [redacted]'s enthusiasm and hard work with scorn and ridicule. [redacted] told [redacted] to stop pretending to be a lawyer and insulted [redacted], calling him "[redacted]" or "[redacted]" for trying to give [redacted] suggestions. *Id*.; see also emails attached to the [redacted] Affidavit, like one sent by [redacted] on [redacted] ("[redacted]"); and one sent by [redacted] on [redacted] ("[redacted]."). [redacted] expressed concern that [redacted] was spending too much time "lawyering." *Id*.; see also emails attached to the [redacted] Affidavit, like one sent by [redacted] on [redacted] ("[redacted]."); and one sent by [redacted] on [redacted] ("[redacted]").

Finally, and perhaps most glaring, was that [redacted]'s inactive approach to [redacted]'s defense was pointed out by Judge [redacted]. When [redacted] submitted the defense's evidence list he did so without providing a copy to Judge [redacted], who remarked, "[redacted] Doc # [redacted], pg ID [redacted].

Ultimately, [redacted]'s approach to [redacted]'s defense can be expressed in five major failures:

(1) Failure to reasonably investigate and gather evidence related to the claims against [redacted];
(2) Failure to call critical witnesses essential to [redacted]'s defense;
(3) Failure to impeach critical witnesses against [redacted];

(4) Failure to present the jury with available, relevant evidence, essential to [redacted]'s defense; and
(5) Failure to raise relevant claims on appeal.

For the reasons set forth below, [redacted] respectfully requests that this Honorable Court grant this 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, and Entry of Judgment.

II. STANDARD OF REVIEW

To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-pronged *Strickland* test. *Strickland v Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, the petitioner must show that his counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness." *Id.* at 688. The Court determines "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. The Court's review is deferential, as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-691.

Second, the petitioner must show that the deficiency prejudiced his defense; in other words, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 695.

III. ARGUMENTS

As prologue to the arguments below, [redacted] was only convicted of one count of conspiring with [redacted] to commit [redacted] [redacted] fraud. The most effective argument in [redacted]'s defense to the conspiracy charge, based upon available evidence, was that [redacted] did not know that [redacted] practiced a scheme to fraudulently [redacted], that [redacted] had a policy designed to keep [redacted] in the dark about that scheme, and that [redacted] even went so far as to actively provide [redacted] with training documents which misstated [redacted] regulations to keep [redacted] from asking questions regarding [redacted]'s scheme. As shown below, [redacted]'s performance fell below an objective standard of reasonableness on a number of fronts which kept the jury from seeing the finer points of the above stated argument and ultimately prejudiced [redacted].

A. [redacted] Received Ineffective Assistance Of Counsel When [redacted] Failed To Reasonably Investigate And Gather Evidence Related To The Claims Against [redacted]

[redacted] conducted an unreasonable investigation related to [redacted]'s defense, particularly where [redacted] failed to gather: (1) certain emails between [redacted] and [redacted]; (2) evidence from other trials related to [redacted]'s misconduct and [redacted] practices; (3) evidence that could be used to impeach witnesses who testified against [redacted]; and (4) evidence that [redacted] provided [redacted] (and other [redacted]) documents that falsely claimed that [redacted] was following [redacted] policy. "In any

ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." See *Mason v. Mitchell*, 320 F.3d 604, 620 (6th Cir. 2003); citing *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997), *cert. denied*, 523 U.S. 1079, 140 L. Ed. 2d 677, 118 S. Ct. 1526 *and* 523 U.S. 1088 (1998); *cf. Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir.) ("[T]he complete failure to investigate mitigating evidence constitutes ineffective assistance of counsel."). Further, "[w]ithout effective research into the available mitigating testimony, of course, it would be impossible for the lawyers to have made an informed decision either way." *Id*. Emphasizing the importance of an independent investigation the Sixth Circuit has also found that "[t]he sole source of mitigating factors cannot properly be that information which [a] defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." *Id*.; citing *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000).

i. Failure to gather certain emails between [redacted] and [redacted]

[redacted], despite no less than 17 requests by [redacted], upon information and belief, unreasonably failed to investigate and gather hundreds of emails between [redacted] and [redacted]. See [redacted] Affidavit, *supra*. [redacted]'s above failure is gallingly unreasonable, particularly where [redacted] failed to get an email between [redacted] and [redacted], which supported [redacted]'s defense against the conspiracy

charge, admitted at trial under the business records exemption of the Federal Rules of Evidence. Pursuant to Federal Rule of Evidence 803(6), a business record must have been: (a) made at or near the time by, or from information transmitted by, a person with knowledge; (b) kept in the course of a regularly conducted business activity; and (c) made as part of a regular practice of the business. See Fed. R. Evid. 803(6). Moreover, all of these conditions must be shown by the testimony of a qualified witness. *Id*.

The email which was fought over at trial and discussed on appeal, dated [redacted], was sent from [redacted] to [redacted] stated, in part:

[REDACTED]

Trial Exs., R. [redacted], Page ID # [redacted]. Both this Court and the Court of Appeals agreed, that the above email was "[redacted]"[3] See COA Opinion, *supra*, at [redacted]. However, the above conculsion of both Courts, which prejudiced [redacted]'s defense, stemmed from [redacted]'s failure to adequately investigate [redacted], and in particular [redacted] and [redacted]. Indeed, [redacted]'s unreasonableness is apparent because the above email was not a "one-time" email, and [redacted] knew it. [redacted] was aware of a [redacted] interview conducted by the FBI with [redacted] where she admitted that she emailed [redacted] on a daily basis. See [redacted] Affidavit, *supra*. A reasonable attorney would have, at least, made an

[3] The Court of Appeals also noted that [redacted] also failed to call a qualifying witness, which is necessary under the Federal Rules of Evidence in order to get the email admitted (more on this below). See Appeal, *supra*, pg [redacted] note [redacted].

attempt to gather those emails between [redacted] and [redacted]. *Mason*, 320 F.3d at 620; citing *Carter*, 218 F.3d at 596. Those hundreds of emails likely would have provided evidence that the above email was made as part of a regular practice of [redacted]'s business. Fed. R. Evid. 803(6). With those emails, and a qualifying witness, [redacted] would have received the great benefit of having the jury see with its own eyes that [redacted] was acting behind the backs of its [redacted], thereby raising doubt as to any conspiracy between [redacted] and [redacted].

Further, there is no telling what other relevant,[4] probative evidence would have been uncovered had [redacted] gone to the reasonable length of beginning an investigation into the daily emails between [redacted] and [redacted]. There is no excuse, and it was unreasonable for [redacted] to fail to even attempt, either by subpoena or by request through the prosecutor, to gather the daily emails between [redacted] and [redacted]. For that reason, and the reasons set forth below, [redacted] respectfully requests that this Court grant the instant motion. *Scott*, 209 F.3d at 881 ("the complete failure to investigate mitigating evidence constitutes ineffective assistance of counsel.").

[4] The Court of Appeals reversed the trial Court's ruling that the above-mentioned email was that [redacted] failed to get admitted at trial was irrelevant. Appeal, *supra*, at [redacted].

ii. Failure to gather evidence from other trials related to [redacted]'s misconduct

[redacted] had a number of offices throughout the United States and investigations into [redacted] fraud reached well beyond the [redacted] branch where [redacted] worked. Indeed, those investigations led to numerous cases being filed and [redacted]'s, plea agreement. See [redacted]'s Affidavit, *supra*. The information illicited as a result of these investigations and cases would have been helpful to [redacted]'s defense related to the conspiracy charge, particularly where the information illustrates [redacted]'s policy of keeping their [redacted] in the dark as it relates to [redacted], and altering their [redacted]'s charts, going so far as to change medical orders prescribed by [redacted] and ordering unnecessary tests without notifying the [redacted]. *Id*.

Of particular interest were certain whistleblower cases againt [redacted] in Chicago. Information gathered from the [redacted] who brought [redacted]'s fraudulent acts to the Federal investigators would have been helpful at trial to show the jury that [redacted] was acting on its own with knowledge of their [redacted], including [redacted]. Further, information gathered from the [redacted] in Chicago who handled billing for every [redacted] branch, including the [redacted] branch where [redacted] worked, would have been useful to show that [redacted] was not involved with [redacted] as it related to [redacted]. *Id*.

However, upon information and belief, [redacted] did not seek out the above information, did not subpoena the whistleblower doctors, and did not request information related to other [redacted] cases from the U.S. attorneys prosecuting [redacted]'s case. *Id.* Indeed, upon information and belief, [redacted] did not even interview [redacted], the Director of [redacted] for [redacted], who was in the best position to attest to [redacted]'s [redacted] practices, including keeping [redacted] in the dark, and could have been helpful to [redacted]. *Id*. Putting information in front of the jury that [redacted] actively tried to keep their [redacted] in the dark regarding [redacted] and that [redacted] employees altered [redacted] charts, upbilled, and ordered unnecessary tests without [redacted]'s knowledge would have been very helpful to [redacted]'s defense that he did not conspire with [redacted] to defraud [redacted]. Not investigating and putting the above evidence in front of the jury prejudiced [redacted], and there is no reasonable excuse why [redacted] failed to investigate the above evidence.

There is also no reasonable excuse why [redacted] did not look into why the U.S. government did not voluntarily provide evidence from the other [redacted] cases. Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a defendant's due process rights are violated if the prosecution suppresses material exculpatory evidence that is favorable to the defense. Likewise, the prosecution violates *Brady* if it fails to honor a defense request for specific exculpatory evidence or if it fails to volunteer evidence not requested by the defense, or requested only

generally. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997). *Brady* applies regardless of the good or bad faith of the prosecution. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

In addition to showing that the prosecution withheld evidence, establishing a *Brady* violation requires a defendant to show that: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or it was impeaching, *id*. at 281-82; and (2) the evidence was material, such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Jells v. Mitchell*, 538 F.3d 478, 501-02 (6th Cir. 2008). On its face, it appears that evidence from the other [redacted] cases is exculpatory to [redacted]'s defense, particularly where they also involved fraudulent [redacted]. See [redacted] Affidavit, *supra*. Further, it is likely that a thorough investigation into the other [redacted] cases would have yielded further exculpatory evidence known to the U.S. government, that was not provided to [redacted]. *Id*. Where, as here, the jury acquitted [redacted] of two counts of [redacted] fraud, but found him guilty of conspiracy to commit [redacted] fraud, evidence that [redacted] was unaware that [redacted] was fraudulently [redacted], and that [redacted] made sure that their [redacted] were kept in the dark regarding [redacted], would have changed the outcome at

trial. Indeed, [redacted]'s failure to investigate the other [redacted] cases, or the U.S. government's failure to provide exculpatory evidence, likely cost [redacted] an acquittal at trial and a valid Constitutional argument on appeal.

For these reasons, and the reasons set forth below, [redacted] respectfully requests that this Court grant the instant motion. *Scott*, 209 F.3d at 881, *supra*.

iii. Failure to gather evidence that could be used to impeach witnesses who testified against [redacted]

At [redacted]'s trial, the U.S. government called two [redacted] to testify against [redacted], [redacted] ("[redacted]") and [redacted] ("[redacted]"). RE Doc No. [redacted], pg [redacted]; RE Doc No. [redacted], pg [redacted]. [redacted] were one-time co-defendants of [redacted], but both took plea agreements and eventually became witnesses against [redacted]. *Id*.

[redacted]'s testimony helped support the U.S. government's case against [redacted], that he was, allegedly, a greedy [redacted] who knew how to [redacted] and maximize his returns from [redacted]. *Id*. Of course, [redacted] tried to impeach [redacted], however, inexplicably, he did so without gathering certain helpful evidence. Indeed, despite [redacted]'s request, [redacted] did not request the billing reports of either [redacted]. See [redacted] Affidavit, *supra*.

[redacted]'s billing reports could have been used to show that, like what happened to [redacted], [redacted] was [redacted] without the knowledge of their [redacted], and that [redacted] was altering charts, upbilling, and ordering unnecessary tests.

Getting [redacted] to admit in front of the jury that they were in the dark regarding [redacted]'s [redacted] billing as it related to their specific bills would have supported [redacted]'s defense against the conspiracy charge, the only charge [redacted] was convicted of. *Id*. Not investigating, gathering, and putting [redacted]'s and [redacted]'s billing reports in front of the jury prejudiced [redacted], and there is no reasonable excuse why [redacted] failed to investigate, gather, or use the above evidence. For that reason, and the reasons set forth below, [redacted] respectfully requests that this Court grant the instant motion. *Scott*, 209 F.3d at 881, *supra*.

iv. Failure to gather evidence that [redacted] provided [redacted] (and other [redacted]) documents that falsely claimed that [redacted] was following [redacted] policy

As mentioned above, [redacted]'s ideal defense against the conspiracy charge would have included that he could not have conspired with [redacted] to defraud [redacted], particularly where [redacted] handled all of the billing, altered [redacted]'s chart, upbilled [redacted], and ordered unnecessary tests for [redacted]'s patients. Further, [redacted] and [redacted] in particular, did all of the above behind [redacted]'s back, and did their best to keep [redacted] in the dark. To ensure that their [redacted] were kept in the dark, [redacted] even provided corporate training documents to their [redacted], including [redacted], which misrepresented [redacted] policies. See [redacted] Affidavit, *supra*; see also [redacted] Training Binder (the "Training Documents"), attached hereto as Exhibit [redacted]. In particular, [redacted] provided the Training Documents to [redacted] which

misstated the rule regarding homebound [redacted], leading [redacted] to believe that he was following [redacted] policy. *Id*.

Unfortunately for [redacted], [redacted] inexplicably chose not to use the Training Documents to support [redacted]'s defense. Although the Trianing Documents were provided to [redacted] by [redacted], upon information and belief, [redacted] did not review them. *Id*. Indeed, the Trianing Documents were critical to [redacted]'s defense against the conspiracy charge, but [redacted], for some unknown "strategic" reason, failed to use them at trial. See Training Documents, *supra*.

Not investigating the Training Documents and not putting them in front of the jury prejudiced [redacted], because the best available evidence to create doubt for the jury was not provided to them. The jury was not given the complete picture of how [redacted] was not acting in concert with their [redacted], but rather [redacted] [redacted] without [redacted] input. There is no reasonable excuse why [redacted] failed to investigate the Training Documents, and for that reason, and the reasons set forth below, [redacted] respectfully requests that this Court grant the instant motion. *Scott*, 209 F.3d at 881, *supra*.

B. [redacted] Received Ineffective Assistance Of Counsel When [redacted] Failed To Call Critical Witnesses Essential To [redacted]'s Defense

[redacted] was prejudiced at his trial, particularly where [redacted] failed to call critical witnesses essential to [redacted]'s defense, including: (1) [redacted]'s personal

scheduler at [redacted]; (2) [redacted] and/or [redacted]; (3) any [redacted] employee who handled [redacted] billing; and (4) any [redacted] who was unaware of [redacted]'s [redacted] practices. The failure to call favorable witnesses can amount to ineffective assistance where it results in prejudice to the defense. *Pillette v. Berghuis*, 408 F. App'x 873, 884 (6th Cir. 2010); citing *Towns v. Smith*, 395 F.3d 251, 258-60 (6th Cir. 2005) (counsel ineffective for failing to call a witness who could have created an alternative theory of the case). "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); quoting *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, but something less than a showing that the outcome more likely than not would have been different." *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004).

i. Failure to call [redacted]

As mentioned in section A. iv., above, [redacted] failed to use the Training Documents, which established that [redacted] provided [redacted] with fabricated [redacted] policies, at trial. See Section A. iv., *supra*; see also Training Documents, *supra*. Even more inexplicably, [redacted] failed to call [redacted]'s scheduler, [redacted], to testify at trial. [redacted] provided [redacted] with an email from [redacted] that clearly established, in conjunction with the Training Documents, that provided [redacted] and

other [redacted] with "tips" for billing [redacted]. See [redacted] Affidavit, *supra*. These "tips" claimed to be based on [redacted] regulations, but, insidiously, were meant to fool [redacted] into unwittingly complying with [redacted]'s scheme to defraud [redacted]. *Id*. [redacted] was willing to testify to the above and, additionally, that [redacted] was pushing [redacted] schedulers, like [redacted], to overload [redacted]'s schedules, which resulted in [redacted] having to see 25 [redacted] on a single day.[5] Nevertheless, [redacted] failed to call [redacted] to the stand. See [redacted] Affidavit, *supra*.

In [redacted]'s defense, prior to trial [redacted] became ill, suffering from pneumonia. *Id*. However, [redacted] did not ask the Court for a continuance, or file a motion to elicit [redacted]'s testimony remotely. *Id*. Indeed, [redacted] did nothing as it relates to [redacted]'s testimony, never allowing the jury to hear exactly how sinister [redacted]'s operation was, and more importantly for [redacted], how [redacted] strategically kept their [redacted] in the dark about [redacted]'s illegal actions. *Id*.

So, due to the unreasonable inaction of [redacted], the jury never got to hear the full breadth of [redacted]'s defense. Had the jury been provided with the additional evidence described above that [redacted] was ready to provide, it would have created doubt as to the existence of any conspiracy and the jury would have been free to return a different verdict. Therefore, [redacted]'s unreasonable inaction prejudiced [redacted]. For these reasons and the reasons set forth below, [redacted] asks that this

[5] Recall that [redacted] and [redacted] did not work out of an office. They had to travel from home to home in order to see their [redacted].

Court grant his instant motion. *Pillette*, 408 F. App'x at 884; citing *Towns*, 395 F.3d at 258-60 (counsel ineffective for failing to call a witness who could have created an alternative theory of the case).

ii. Failure to call [redacted] and/or [redacted]

As mentioned above, a key piece of evidence at trial, which also elicited much discussion on appeal, was the email between [redacted]. See Section A. i., *supra*. The email, which the Court of Appeals found was relevant to [redacted]'s defense, openly discusses [redacted]'s desire to keep their [redacted] in the dark regarding [redacted]. *Id*. As discussed above, [redacted] was unable to get this email admitted at trial because he could not show that the email was part of a regular business practice, and because he did not call a qualifying witness. *Id*.

Either [redacted] could have acted as a qualifying witness for the above email, and either [redacted] could have attested that [redacted], as a regular practice, sent [redacted] an email every day. See [redacted] Affidavit, *supra*. Nevertheless, [redacted] did not subpoena either [redacted], did not interview either [redacted], and certainly did not put either [redacted] in front of [redacted]'s jury. *Id*. Not only could [redacted] have testified regarding the above email and the full extent of the [redacted] scheme to keep [redacted] unaware of [redacted]'s [redacted], but either could have testified about the Training

Documents and any other unscrupulous activity perpetrated by [redacted] regarding its relationship with their doctors. *Id*.

[redacted]'s unreasonable inaction in not calling either [redacted] prejudiced [redacted], particularly where the jury did not get to see the above email, see or hear about the Training Documents from [redacted]'s bosses at [redacted], and/or hear about any other activity that [redacted] was perpetrating to perpetuate its scheme to keep [redacted] in the dark about [redacted] practices. For these reasons and the reasons set forth below, [redacted] asks that this Court grant his instant motion. *Pillette*, 408 F. App'x at 884; citing *Towns*, 395 F.3d at 258-60.

iii. Failure to call an [redacted] employee who [redacted] for [redacted]

In their case in chief, the U.S. government called a nurse/expert to testify regarding [redacted] related to homebound patients. See Testimony of [redacted], RE Doc No. [redacted], pg. [redacted]. The government's expert described that when a [redacted] provider [redacted] for care they provide particular codes to [redacted] which [redacted] uses to determine how much money to reimburse the provider. *Id*. Generally, the codes are provided by the [redacted]'s [redacted] who administered the care. *Id*. The government expert testified that often more than one code can be used to [redacted] for certain types of care. *Id*. Further, the government expert described a certain type of fraud where the [redacted] provider always uses the code that provides the greatest reimbursement from [redacted], or [redacted] using codes

that correspond to care that was not actually provided. *Id*. This type of fraud is what the U.S. government alleged [redacted] was committing in conspiracy with [redacted].

[redacted] hamstrung [redacted]'s defense by refusing to call [redacted], a defense [redacted] expert who could have explained to the jury how [redacted]'s role in [redacted] for care provided to his [redacted] was subverted by [redacted]. See [redacted] Affidavit, *supra*. [redacted] could have also explained to the jury that the [redacted] on [redacted]'s patients was not proof of any alleged conspiracy with [redacted]. *Id*.

[redacted]'s unreasonable inaction in not calling [redacted] has not been explained as part of some "strategy," and further it prejudiced [redacted], particularly where the jury only heard from an expert partial to the U.S. government. [redacted]'s defense could have benefited from the presence of a competing expert called to testify on his behalf. For these reasons and the reasons set forth below, [redacted] asks that this Court grant his instant motion. *Pillette,* 408 F. App'x at 884; citing *Towns,* 395 F.3d at 258-60.

iv. Failure to call any [redacted] who was unaware of [redacted]'s [redacted] practices

As noted above, one of the main points that [redacted] needed to make clear to the jury, to establish that he was not involved in any conspiracy with [redacted], was that he was unaware that [redacted] was engaged in any [redacted] fraud. Again, his defense relies in part on the existence of a scheme where [redacted] kept their [redacted]

in the dark regarding billing and relayed false information regarding [redacted] regulations to their [redacted]. [redacted] was in possession of evidence of both. See the Email in section A. i., *supra*; see also the Training Documents, *supra*.

[redacted] failed to get the email where [redacted] discuss keeping the [redacted] in the dark regarding [redacted] admitted at trial, and chose not to use the Training Documents at all. See COA Opinion, pp [redacted]. Inexplicably, [redacted] also failed to call as a witness any [redacted] who, like [redacted], was unaware of [redacted]'s [redacted] practices. See [redacted] Affidavit, *supra*. This decision is particularly galling when there was an [redacted] available to testify, [redacted]. *Id*. [redacted] could have testified that as an [redacted], in [redacted]'s position, he was unaware [redacted] was involved in practices such as chart altering, upbilling, and ordering unnecessary tests, in order to procur greater reimbursements from [redacted], and further that he was also provided the Training Documents, which were designed to keep [redacted] from questioning [redacted]'s [redacted] practices. *Id*.; see also Training Documents, *supra*.

[redacted] told [redacted] that he did not see any benefit to calling [redacted] as a witness, but did not provide any good strategic reason. *Id*. Not calling [redacted] to testify on [redacted]'s behalf prejudiced [redacted], particularly where no witness at trial was called to corroborate [redacted]'s allegation that he was not involved in any conspiracy, because any fraud by [redacted] was committed behind his back. [redacted]'s

defense could have benefited from the presence of a corroborating witness. For these reasons and the reasons set forth below, [redacted] asks that this Court grant his instant motion. *Pillette*, 408 F. App'x at 884; citing *Towns*, 395 F.3d at 258-60.

C. [redacted] Received Ineffective Assistance Of Counsel When [redacted] Failed To Impeach Critical Witnesses Against [redacted]

[redacted]'s performance at trial was unreasonable and prejudiced [redacted], particularly where [redacted] failed to impeach: (1) a [redacted] agent who testified against [redacted]; and (2) two [redacted] who testified against [redacted]. A number of Circuit Courts, including the Sixth Circuit, have found deficient performance where, as here, counsel failed to challenge the credibility of the prosecution's key witness. *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006); citing, *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness"); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (finding deficient performance where counsel failed to confront the prosecution's star witness with inconsistent statements, thus "sacrific[ing] an opportunity to weaken the star witness's inculpatory testimony").

i. Failure to impeach an [redacted] agent who testified against [redacted]

One of the U.S. government's witnesses against [redacted] was a [redacted] agent [redacted]. See Testimony of [redacted], RE Doc No. [redacted], pg. [redacted].

[redacted] conducted the first interview with [redacted] in [redacted] [redacted]. *Id*. At trial, [redacted] recounted that interview with [redacted] and stated that [redacted] was aware that [redacted] was committing fraud. *Id*. However, [redacted] was not aware that [redacted] was committing fraud and did not say as much to [redacted]. See [redacted] Affidavit, *supra*.

[redacted] was aware of [redacted]'s inaccurate testimony, but failed to question him about it. *Id*. [redacted] spent nearly his entire cross examination of [redacted] asking whether the interview with [redacted] was recorded or whether [redacted] was able to verify [redacted]'s notes from that interview. RE Doc No. [redacted], pp. [redacted]. But, inexplicably, [redacted] stopped short of illustrating for the jury that [redacted]'s account of the [redacted] interview is quite different from [redacted]'s. *Id*. By not going that extra step, [redacted] failed to actually impeach [redacted] at all. *Id*. Instead, [redacted] allowed to the jury to hear [redacted]'s account of the interview with [redacted] without calling its veracity into question. *Id*.

As it relates to the conspiracy charge, [redacted] was a star witness for the U.S. government. By testifying that [redacted] was aware that [redacted] was committing fraud related to [redacted], [redacted] was able to connect for the jury [redacted]'s actions with those of [redacted]. Knowing that [redacted]'s account of the interview was different from [redacted] and not impeaching [redacted] on that fact is professionally unreasonable. [redacted] laid the groundwork for impeachment by noting that there was no recording

of the interview, and by noting that [redacted] did not sign off on [redacted]'s account of the interview, but failed to go the natural next step and question [redacted] on the veracity of his account of the interview. It is completely unreasonable to allow a star witness, like [redacted], to testify unscathed. *Nixon*, 888 F.2d at 115 (finding deficient performance where counsel failed to confront the prosecution's star witness with inconsistent statements, thus "sacrific[ing] an opportunity to weaken the star witness's inculpatory testimony"). Not properly impeaching [redacted] prejudiced [redacted] by not placing doubt into the minds of the jury as it related to the conspiracy charge, the only charge upon which [redacted] was convicted. For these reasons and the reasons set forth below, [redacted] asks that this Court grant the instant motion. *Higgins v. Renico*, 470 F.3d at 633.

ii. Failure to impeach two [redacted] who testified against [redacted]

Two witnesses who also played prominently in [redacted]'s conviction were [redacted] and [redacted]. RE Doc No. [redacted], pg [redacted]; RE Doc No. [redacted], pg [redacted]. As mentioned above, [redacted] and [redacted] were one-time co-defendants of [redacted] who, at the trial in this matter, helped the U.S. government paint [redacted] as a greedy [redacted] who, along with [redacted], was gaming the system for his own personal gain. *Id*. The testimony of [redacted] and [redacted] clearly hurt [redacted] in the eyes of the jury.

Nevertheless, [redacted] failed to impeach [redacted] on his inconsistent statements from [redacted] - [redacted]. In his cross examination of [redacted], [redacted] established that [redacted] had committed fraud at [redacted] and another employer, and that [redacted]'s testimony was part of a cooperation agreement with the U.S. government. RE Doc No. [redacted], pp. [redacted] - [redacted]. But [redacted], again, stopped short of questioning [redacted] about how his account of his time at [redacted] changed from [redacted] - [redacted]. *Id*. A review of [redacted]'s cross-examination of [redacted] makes [redacted]'s decision not to impeach [redacted] on his inconsistent account more inexplicable. For example, [redacted] used former interviews and statements made by [redacted] to illustrate for the jury how [redacted] changed his story over the years. RE Doc No. [redacted], pp. [redacted] - [redacted]. [redacted] could have done the same for [redacted] but, for some unknown reason, did not.

Under any circumstance, [redacted], by failing to request [redacted]'s and [redacted]'s billing statements, was unable to effectively question [redacted] and [redacted] about specific bills altered by [redacted], and was unable to support [redacted]'s account that [redacted] [redacted] were in the dark regarding [redacted]'s [redacted]. See Section A. iii., *supra*. For these reasons and the reasons set forth below, [redacted] asks that this Court grant the instant motion. *Higgins v. Renico*, 470 F.3d at 633.

D. [redacted] Received Ineffective Assistance Of Counsel When [redacted] Failed To Present The Jury With Available, Relevant Evidence, Essential To [redacted]'s Defense

[redacted]'s performance at trial was unreasonable and prejudiced [redacted]. [redacted], particularly where [redacted] failed to present the jury with evidence in the form of: (1) emails between [redacted] and [redacted]; (2) [redacted] corporate documents shared with [redacted]; (3) evidence of [redacted]'s medical issues; and (4) evidence from other related cases involving [redacted]. A trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986). When a trial counsel fails to investigate his options and make a reasonable choice between them, his strategic decisions cannot be reasonable. *Glenn v. Tate*, 71 F.3d 1204, 1207 n.1 (6th Cir. 1995), *cert. denied*, 519 U.S. 910, 136 L. Ed. 2d 196, 117 S. Ct. 273 (1996). A trial counsel's failures cannot be excused as reasoned strategy when he does not present evidence to the jury because he has never taken the time to develop it. *Id*.

i. Failure to present the jury with emails between [redacted] and [redacted]

Essential to [redacted]'s defense against the conspiracy charge is the notion that [redacted] was unaware of what [redacted] was doing regarding [redacted] and that [redacted] was actively misleading [redacted] doctors that [redacted] was acting ethically and according to [redacted] regulations. Indeed, [redacted] was originally enamored with [redacted] after interviewing with [redacted] and impressed by her promises that [redacted] was an allegedly ethical organization. See [redacted] Affidavit, *supra*. To that end,

[redacted] followed [redacted] policies, which he was told corresponded to [redacted] policies, and even reported potential ethics violations to [redacted] when he saw them. *Id*.

After [redacted] was charged in this matter he provided [redacted] with many emails between [redacted] and [redacted], which [redacted], inexplicably, chose not to place in front of the jury. *Id*. These emails show that [redacted] assured [redacted] that [redacted] was acting ethically. *Id*. Not only did [redacted] fail to put these emails in front of the jury, he also failed to question [redacted] about them when [redacted] took the stand at trial. See generally, Testimony of [redacted], RE Doc [redacted], pg. [redacted].

[redacted]'s decisions here are unreasonable and prejudiced [redacted]. Critical to [redacted]'s defense was getting the jury to understand that [redacted] was not knowingly involved in any wrong-doing, and even more important, as it relates to the conspiracy charge, that any unethical behavior by [redacted] was done behind his back and that [redacted] was actively trying to keep its wrong-doing from [redacted]. These emails would have gone a long way in showing the jury that [redacted] was not a co-conspirator with [redacted], but merely a pawn in [redacted]'s scheme to defraud [redacted]. Keeping these emails away from the jury made it nearly impossible for the jury to disconnect [redacted]'s behavior from [redacted]'s.

[redacted]'s failure to present these emails to the jury cannot be excused as reasoned strategy. *Kimmelman*, 477 U.S. at 384. When a trial counsel fails to

investigate his options and make a reasonable choice between them, his strategic decisions cannot be reasonable. *Glenn*, 71 F.3d at 1207 n.1. A trial counsel's failures cannot be excused as reasoned strategy when he does not present evidence to the jury because he has never taken the time to develop it. *Id*. For these reasons and the reasons set forth below, [redacted] asks this Court to grant the instant motion.

ii. Failure to present the jury with [redacted] corporate documents shared with [redacted]

As mentioned above, the Training Documents were exculpatory evidence that [redacted] was actively mislead by [redacted] regarding the [redacted]'s and the company's compliance regarding [redacted]. See Section A. iv., *supra*. The Training Documents show that [redacted] used false interpretations of [redacted] regulations to encourage [redacted] to unwittingly commit [redacted] fraud. See [redacted] Affidavit, *supra*; see also Training Documents, *supra*. That [redacted] was actively misleading their [redacted], and [redacted] in particular, goes directly to [redacted]'s point that he did not conspire with [redacted].

[redacted]'s decision not to put these documents in front of the jury, particularly where they clearly illustrate the absence of a conspiratorial connection between [redacted] and [redacted], was strategically unreasonable and prejudiced [redacted]. The point that [redacted] was actively misleading [redacted] into believing that he was complying with [redacted] regulations should have been hammered home to the jury by

putting the Training Documents in front of them. Sadly, [redacted] did not place this powerful evidence in front of the jury.

For these reasons and the reasons set forth below, [redacted] asks this Court to grant the instant motion. *Kimmelman*, 477 U.S. at 384; *Glenn v. Tate*, 71 F.3d at 1207 n.1.

iii. Failure to present the jury with evidence of [redacted]'s medical issues

Another defense theory that was explored, but not utilized, were the medical issues that [redacted] suffered from. During his year at [redacted], [redacted] was diagnosed with diabetes, after suffering from fatigue and thirst for months. See [redacted] Affidavit, *supra*. [redacted] also had trouble finishing his residencies because he was diagnosed with [redacted]. *Id*.

[redacted] brought his medical issues to [redacted]'s attention, including that undiagnosed diabetes can lead to cognitive impairment, however, [redacted] chose not to use this information. *Id*. One of the U.S. government's primary arguments is that [redacted] should have been aware of the fraud that was going on around him. [redacted]'s medical issues could have been used to refute the U.S. government's above argument.

It was unreasonable for [redacted] not to present [redacted]'s medical issues to the jury, particularly where it could have directly refuted one of the prosecutor's primary arguments. Presenting this evidence would have raised doubt in the minds of the

jurors whether [redacted] knew that [redacted] was committing [redacted] fraud. Not raising that doubt prejudiced [redacted]'s defense at trial. For these reasons and the reasons set forth below, [redacted] asks this Court to grant the instant motion. *Kimmelman*, 477 U.S. at 384; *Glenn v. Tate*, 71 F.3d at 1207 n.1.

iv. Failure to present the jury with evidence from other cases involving [redacted]

As mentioned frequently above, [redacted]'s fraudulent behavior was company-wide and led it to be the subject of nation-wide investigations. These investigations led to numerous federal cases. Much of the evidence from these investigations is relevant to the instant matter, particularly where it demonstrates [redacted]'s scheme to keep their [redacted] in the dark regarding [redacted]'s fraudulent behavior.

Inexplicably, as mentioned above, [redacted]'s investigation into these matters was negligent at best. Even worse, [redacted] did not present the jury with evidence from these other [redacted] cases and investigations. It was critical to [redacted]'s defense that the jury understand that [redacted] was not privy to [redacted]'s bad behavior and that [redacted] did its best to make sure that [redacted] was not aware of [redacted]'s actions. Evidence from the other [redacted] cases and investigations would have raised doubt in the jury whether there was a conspiracy between [redacted] and [redacted]. Not presenting any of the above evidence was unreasonable and prejudiced [redacted]'s defense.

For these reasons and the reasons set forth below, [redacted] asks this Court to grant the instant motion. *Kimmelman*, 477 U.S. at 384; *Glenn v. Tate*, 71 F.3d at 1207 n.1.

E. [redacted] Received Ineffective Assistance Of Counsel When [redacted] Failed To Raise Relevant Claims On Appeal

[redacted]'s performance on appeal was unreasonable and [redacted], particularly where [redacted] failed to argue that the United States prosecuting attorneys violated a proffer letter executed between their office and [redacted]. On his first appeal of right, a defendant is entitled to effective assistance of appellate counsel. *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1986, 173 L. Ed. 2d 1090 (2009). Claims of ineffective assistance of appellate counsel are judged under the *Strickland* standard, which requires that the appellant affirmatively establish: (1) that counsel's performance was objectively deficient; and (2) prejudice, which means that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. (internal quotation marks omitted); See also *Mason v. Mitchell*, 543 F.3d 766, 772 (6th Cir. 2008) ("Claims of ineffective assistance of counsel have 'two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.'" (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003))), *cert. denied*, 130 S. Ct. 492, 175 L. Ed. 2d 376 (2009).

Contract law principals that courts use in construing proffer agreements "are glossed with a concern that the defendant's consent to appear at a proffer session should not become a lever that can be used to uproot his right to fundamental fairness under the Due Process Clause." *United States v. Melvin*, 730 F.3d 29, 39 (1st Cir. 2013); citing *United States v. $87,118.00 in U.S. Currency*, 95 F.3d 511, 517 (7th Cir. 1996). "'Unlike the normal commercial contract,' it is 'due process [that] requires that the government adhere to the terms of any . . . immunity agreement it makes.'" *Id.*; quoting *United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir. 1990). "Because the government's adherence to the terms of the proffer agreement is insured by the Due Process Clause, its failure to adhere is perforce of constitutional dimension." *Id*. "It follows inexorably that the stricter harmless-error standard applies to such a failure." *Id*.; citing *United States v. Hill*, 643 F.3d 807, 877-79 (11th Cir. 2011).

Following the [redacted] raid of [redacted]'s [redacted] branch federal agents met with [redacted] to question him about his employment with [redacted]. See [redacted] Affidavit, *supra*. During one of these meetings [redacted] was presented with a proffer agreement, where [redacted] agreed to provide truthful information to the U.S. government in consideration for the U.S. government's promise not to use anything provided by [redacted] against him. *Id*.; see also United States Department of Justice letter re: [redacted], dated [redacted], (the "Proffer Agreement"), attached hereto as

Exhibit [redacted]. [redacted] held up his end of the bargain, by speaking honestly to the federal agents and by providing the federal agents with his billing sheets. See [redacted] Affidavit, *supra*. Unfortunately, at the trial in this matter, the U.S. government used information it obtained as a result of the proffer agreement against [redacted], thereby violating the proffer agreement. See U.S. Government's Exhibt [redacted]; see also Proffer Agreement, *supra*.

[redacted] raised this issue with [redacted] no less than [redacted] times over two years, to no avail. See [redacted] Affidavit, *supra*. [redacted] did not raise the issue with the Court at trial, and he did not raise the issue on appeal. [redacted]'s decision not to raise the U.S. government's violation of its proffer agreement with [redacted] was unreasonable and an example of deficient performance. Indeed, a violation of a proffer agreement by the U.S. government cuts right to the heart of a defendant's Due Process rights under the 5th Amendment to the Constitution. *Melvin*, 730 F.3d at 39; see also U.S. Const. Amend V. There is no good, strategic, reason why [redacted] failed to protect [redacted]'s Due Process rights.

[redacted]'s inaction both at trial and on appeal is particularly stark upon consideration of relevant case law regarding proffer agreements in situations similar to the instant matter. In *United States v. Melvin*, *supra*, the defendant gave a statement during a proffer session. *Id*. It was agreed that his statement could not be used against him at trial under the typical proffer conditions. *Id*. At trial, an agent

was permitted to identify the defendant's voice on recorded wiretaps and said he knew the voice from the proffer session. *Id*. The First Circuit held that this violated the terms of the proffer agreement. *Id*. In *United States v. Hill*, *supra*, the defendant signed a proffer agreement that provided "Anything *related to* the proffer cannot and will not be used against [the defendant] in any Government case-in-chief. . . [T]he government is completely free to pursue any and all investigative leads derived in any way from the proffer." *Id*. The Eleventh Circuit concluded that the proffer agreement in *Hill* must be interpreted as a *Kastigar*[6] use and derivative use immunity agreement and the matter was remanded to the district court for a full evidentiary hearing on whether the government's case was built entirely independent of any information obtained, or derived from, the immunized cooperation of the defendant. In *United States v. Oluwanisola*, 605 F.3d 124 (2d Cir. 2010), the defendant signed a proffer agreement that provided that the government could introduce the defendant's statements as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf the defendant at any stage of the criminal prosecution. *Id*. The Second Circuit held that challenging the sufficiency of the evidence in general, or questioning a witness about certain dates, did not allow the government to introduce the defendant's statements that were subject to the proffer agreement. *Id*.; see also *United States v. Barrow*, 400 F.3d 109

[6] *Kastigar v. United States*, 406 U.S. 441; 92 S. Ct. 1653; 32 L. Ed. 2d 212 (1972).

(2d Cir. 2005). In *United States v. Al-Esawi*, 560 F.3d 888 (8th Cir. 2009), the defendant signed a proffer agreement and provided a statement to the government. *Id*. Settlement discussions were not successful and he proceeded to trial. *Id*. The agreement stated that the defendant's statements could be used at trial if he provided testimony that contradicted his statements, or if the defense presented evidence that contradicted his statements. *Id*. The prosecutor, however, introduced the statements in its case-in-chief. *Id*. This was error; the statements were not admissible until after the defendant offered inconsistent evidence. *Id*.

While it is impossible to climb into [redacted]'s head, it is hard to imagine why none of the above cases were used to protect [redacted]'s Due Process rights at trial or upon appeal, particularly where [redacted] tried so many times to urge [redacted] to raise the issue. See [redacted] Affidavit, *supra*. Perhaps if [redacted] had been less concerned with ridiculing [redacted] for doing too much "lawyering," [redacted]'s performance would have risen to that of a reasonable attorney, one who protects the Constitutional rights of his client and raises valid claims at trial and on appeal. *Id*. By not raising the issues related to the above-mentioned proffer agreement, [redacted] allowed the U.S. government to use evidence against [redacted] in violation of [redacted]'s rights guaranteed by the 5th Amendment. See Proffer Agreement, *supra*; see also U.S. Const. Amend V. This violation of [redacted]'s rights clearly prejudiced him at trial and on appeal. For these reasons [redacted] respectfully requests that this Court grant

the instant motion. *Mahdi*, 522 F.3d at 636; *Mason*, 543 F.3d at 772; *Melvin*, 730 F.3d at 39.

IV. CONCLUSION

As a result of the foregoing, [redacted] respectfully requests that this Honorable Court grant this Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence, and Entry of Judgment.

By: */s/* [redacted]
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LawCompany

CERTIFICATE OF COMPLIANCE

I, [redacted], certify that this brief compliance with the length, word, and type-volume limitations specified in FRAP 32(7)(B)(i) and 6th Cir. 32 (b)(1), containing 5,876 words, and is therefore within the allowable limits under these rules.

By: */s/* [redacted]
[redacted] ([redacted])
[redacted]
[redacted].com

LawCompany

CERTIFICATE OF SERVICE

I hereby certify that on [redacted] . I electronically filed the foregoing paper with the clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

/s/ [redacted]
[redacted] ([redacted])