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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Respondent-Plaintiff,

Case No.	
Originating Case N	lo

v.

United States District Judge

Petitioner-Defendant.

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



Attorney for Petitioner-Defendant

ORAL ARGUMENT REQUESTED



CORPORATE DISCLOSURES

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

- 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,





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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Petitioner-Defendant 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?

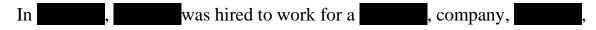
PETITIONER-DEFENDANT: YES

STATEMENT OF THE CASE

("**Constant**"), by and through counsel, seeks relief from a Petitioner. jury conviction and 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 's trial counsel, ('' "). The record is rampant with examples of 's ineffective assistance. Indeed, _____, on numerous occasions, failed to reasonably investigate and gather evidence related to the claims against inexplicably failed to call corroborating and helpful witnesses at trial on _____''s behalf. failed to adequately impeach witnesses against . Further, withheld from the jury a mountain of evidence both relevant and helpful to 's defense. Finally, last but not least, failed to raise relevant constitutional claims on appeal. As shown below, '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 's trial would have been different. Therefore, this Court should grant 's instant motion and vacate, set aside, or correct 's sentence and order of judgment.

I. STATEMENT OF RELEVANT FACTS

A. Procedural History

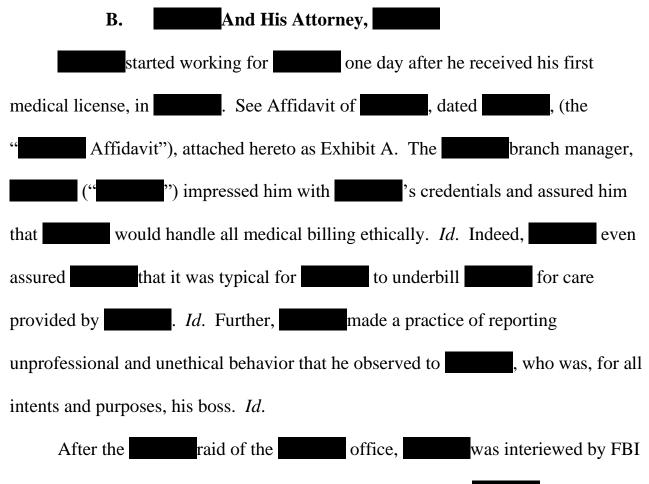


to provide in-home health care to homebound patients. See Petitioner's , U.S. Circuit Court for the Sixth Circuit, Case No. Appeal. dated ("Appeal"), Doc No. , pg worked out of . 's branch. was 40 years old and had no prior criminal record. *Id.* Less than a year Id. later, in _____, the federal government executed a search warrant on branch and the branch's office was closed. *Id.* at 13-14. On 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. was not employee named in the indictment; his co-defendants made plea the only agreements. Id. , a jury trial began in this Court before the Honorable 2 On *Id.* at 14-15. On the jury returned a guilty verdict on only count 1 (conspiracy to commit health care fraud), the jury found was not guilty of counts 2 and 3 (health care fraud). Id. at 27. On this Court sentenced to 24 months in prision and ordered him to pay in restitution. RE 107, pg attorney, filed his Appeal in the United States Court of Appeals On

for the Sixth Circuit (the "Court of Appeals"). See generally Appeal, supra.

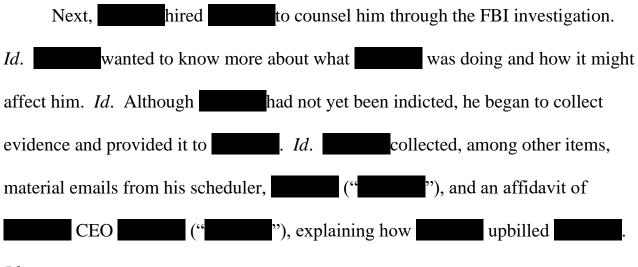
raised ten grounds for reversal on appeal. *Id.* On **and a**, the Court of
Appeals issued its opinion affirming **and a**'s conviction and sentence. See
Opinion of the United States Court of Appeals for the Sixth Circuit, dated **and a**,
Case No. **and a** (the "COA Opinion"). At all relevant times during his appeal,
was represented by his attorney, **and a**.
No petition for certiorari was filed and this is **and a**'s first motion under 28

U.S.C. § 2255.



agents and was shocked to find that the FBI was alleging that and, in

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



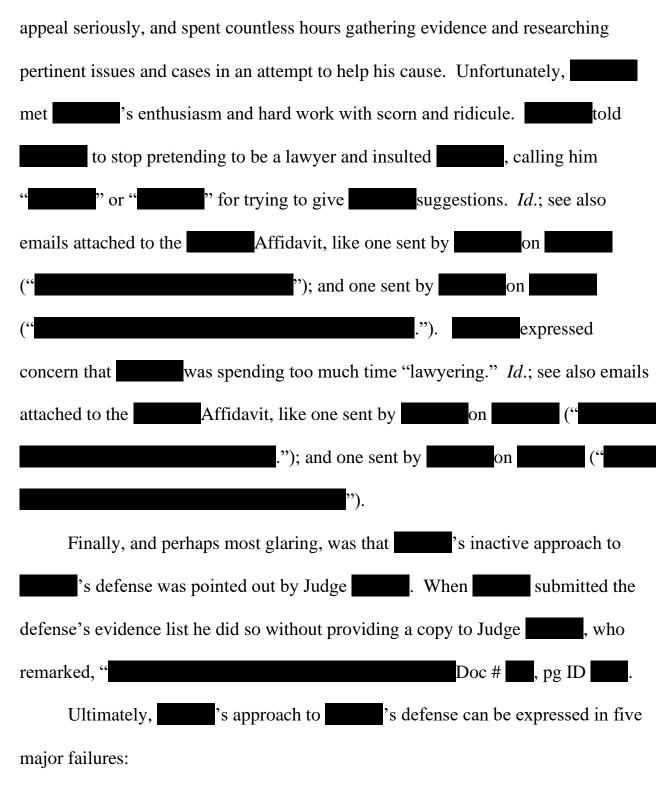
Id.

, continued to collect evidence and After he was indicted, in interview with the 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 and between as it relates to billing. *Id*. Sadly, it has become clear that did more work and spent more time Affidavit, *supra*. Time and time related to his defense than . chose inaction or silence as a strategy to the great detriment of again

. *Id.* At the plea stage, refused 's request for plea counter-offers and did not provide with plea terms, eventually telling that there was "no choice" but to go to trial. Id. During discovery, refused 's requests for: (1) more emails between ; (2) subpoena requests for , and other 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 cases stemming from the FBI investigation; (5) a billing expert , to disprove conspiracy; (6) for interviews of U.S. government witnesses or co-defendants prior to trial; (7) preparation of to take the stand at his trial; (8) an investigation into billing of suspicious tests in ; (9) interviews or contact with potential witness who could attest kept in the dark regarding fraudulent that billing; and (10) information regarding trials in **Example 1** related to **Example 2** and fraudulent billing. Id. At trial, 's inaction and silence continued. did not: (1) object to certain evidence and charts brought forth by the U.S. government against ; (2) enter into evidence emails from to which tend to show that was not a co-conspirator; (3) establish for the jury that there was no agreement to conspire between ; (4) use 's data which would have rebutted the U.S. government's argument regarding homebound patients; (5) share any defense that was altering patient charts and ordering unnecessary tests behind doctor's backs; (6) explain to the jury any of the finer points of the process, including how the home office, not the doctors, ordered home care and added patients to the doctor's schedule; (7) impeach agent on inconsistent testimony; (8) object to the U.S. government's use of billing reports provided by as part of a proffer against him; (9) argue potential Brady violations against the U.S. government; (10) call numerous defense witnesses, including, a billing expert, the director of billing for , three individuals who were aware of billing 's backs, or two other who were unaware of the fraud behind going on at ; and (11) attempt to get a continuance to ensure that would get to testify on 's behalf. *Id*.

's inaction continued on appeal too. Although promised to include certain arguments in some 's appeal, such as potential Brady violations, or the U.S. government's violation of '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, **Const** did not even provide **Const** with a copy of the appeal prior to filing. *Id*.

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



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



- (4) Failure to present the jury with available, relevant evidence, essential to **a constant**'s defense; and
- (5) Failure to raise relevant claims on appeal.

For the reasons set forth below, **Set Constant** 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

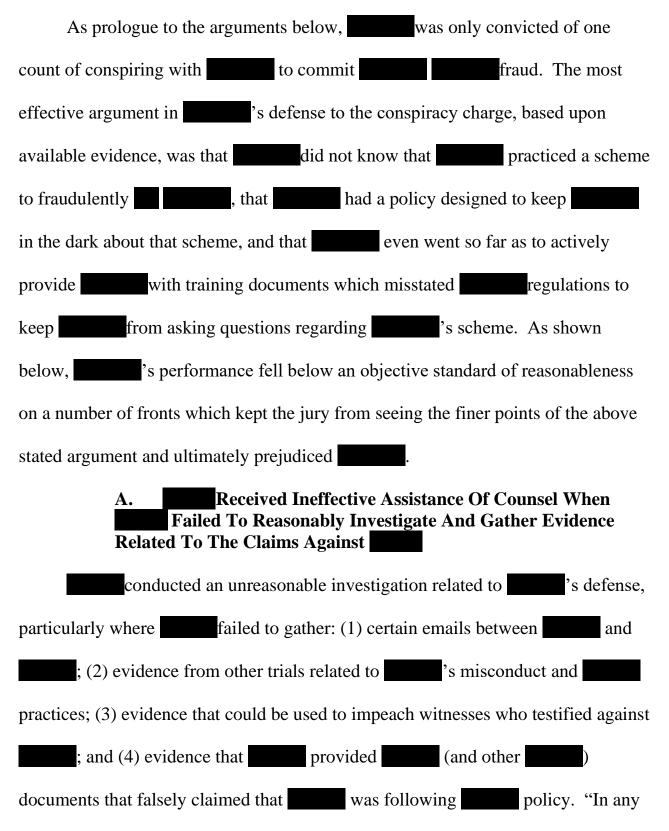
To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-pronged *Strickland* test. *Strickland v Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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.



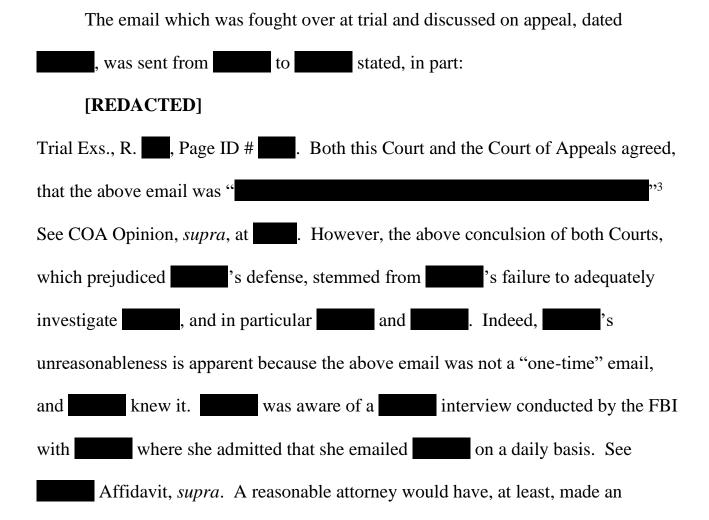
III. ARGUMENTS



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. <u>Failure to gather certain emails between</u> and

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



³ The Court of Appeals also noted that 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 note .

investigation into the daily emails between **and and** . There is no excuse, and it was unreasonable for **and** to fail to even attempt, either by subpoena or by request through the prosecutor, to gather the daily emails between **and and .** For that reason, and the reasons set forth below, **and** 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 failed to get admitted at trial was irrelevant. Appeal, *supra*, at

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

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

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

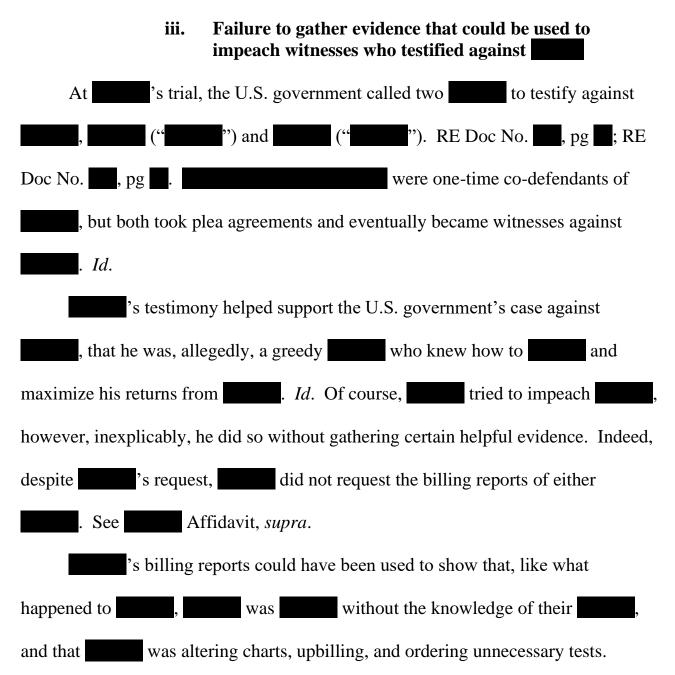
However, upon information and belief, did not seek out the above information, did not subpoen athe whistleblower doctors, and did not request information related to other cases from the U.S. attorneys prosecuting 's case. *Id.* Indeed, upon information and belief, did not even , the Director of for ,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

There is also no reasonable excuse why did not look into why the U.S. government did not voluntarily provide evidence from the other 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 cases is exculpatory to 's defense, particularly where they also involved fraudulent Affidavit, *supra*. Further, it is likely that a thorough . See investigation into the other cases would have yielded further exculpatory Where, as here, the jury acquitted of two counts of fraud, but found him guilty of conspiracy to commit fraud, evidence that was unaware that was fraudulently , and that made sure that their were kept in the dark regarding , would have changed the outcome at

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

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



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

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

As mentioned above, **and 's ideal defense against the conspiracy charge** would have included that he could not have conspired with **and to defraud and**, particularly where **and handled all of the billing, altered and 's chart, upbilled and ordered unnecessary tests for and 's patients**. Further, **and and in particular, did all of the above behind and 's back, and did** their best to keep **and in the dark**. To ensure that their **and were kept in the dark**, **and even provided corporate training documents to their and**, including **also and Training Binder (the "Training Documents"), attached hereto as Exhibit in particular, and provided the Training Documents to the** misstated the rule regarding homebound **and a**, leading **beauties** to believe that he was following **beauties** policy. *Id*.

Unfortunately for **1999**, **1999** inexplicably chose not to use the Training Documents to support **1999**'s defense. Although the Trianing Documents were provided to **1999** by **1999**, upon information and belief, **1999** did not review them. *Id.* Indeed, the Trianing Documents were critical to **1999**'s defense against the conspiracy charge, but **1999**, 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 **matrix**, 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

was not acting in concert with their **and**, but rather **and and** without **and** input. There is no reasonable excuse why **and** failed to investigate the Training Documents, and for that reason, and the reasons set forth below, **and** respectfully requests that this Court grant the instant motion. *Scott*, 209 F.3d at 881, *supra*.

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

was prejudiced at his trial, particularly where failed to call critical witnesses essential to 's defense, including: (1) 's personal scheduler at ; (2) and/or ; (3) any employee who billing; and (4) any who was unaware of handled 's 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

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

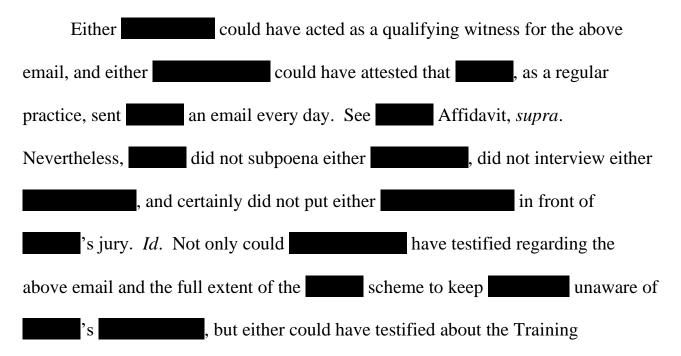
with "tips" for billing . See Affidavit, *supra*. These other "tips" claimed to be based on regulations, but, insidiously, were meant to into unwittingly complying with 's scheme to defraud fool was willing to testify to the above and, additionally, that Id. was pushing schedulers, like , to overload 's schedules, which resulted in having to see 25 on a single day.⁵ Nevertheless, failed to call to the stand. See Affidavit, *supra*. 's defense, prior to trial became ill, suffering from In pneumonia. Id. However, did not ask the Court for a continuance, or file a motion to elicit 's testimony remotely. *Id.* Indeed, did nothing as it 's testimony, never allowing the jury to hear exactly how sinister relates to 's operation was, and more importantly for , how strategically kept their in the dark about 's illegal actions. *Id.* So, due to the unreasonable inaction of the pure set to hear the full breadth of 's defense. Had the jury been provided with the additional evidence described above that 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, 's unreasonable inaction prejudiced . For these reasons and the reasons set forth below, asks that this

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

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 and/or

As mentioned above, a key piece of evidence at trial, which also elicited much discussion on appeal, was the email between **and and and appeals**. See Section A. i., *supra*. The email, which the Court of Appeals found was relevant to **and appeals**'s defense, openly discusses **and appeals**'s desire to keep their **and appeals** in the dark regarding **and appeals**. *Id*. As discussed above, **and appeals** 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*.



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

's unreasonable inaction in not calling either **see** the above email, prejudiced **see** the Training Documents from **see** or hear about the Training Documents from **see** or hear about the Training Documents from **see** or hear about any other activity that **see see** preparating to perpetuate its scheme to hear about any other activity that **see practices**. For these reasons and the reasons set forth below, **see** 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 employee who

In their case in chief, the U.S. government called a nurse/expert to testify regarding related to homebound patients. See Testimony of , RE Doc No. , pg. . The government's expert described that when a provider for care they provide particular codes to which uses to determine how much money to reimburse the provider. *Id*. Generally, the codes are provided by the **sector**'s **sector** who administered the care. *Id*. The government expert testified that often more than one code can be used to **sector** for certain types of care. *Id*. Further, the government expert described a certain type of fraud where the **sector** provider always uses the code that provides the greatest reimbursement from **sector**, or **sector** using codes that correspond to care that was not actually provided. *Id.* This type of fraud is what
the U.S. government alleged was committing in conspiracy with sectors.
hamstrung was 's defense by refusing to call was 's role in
defense was expert who could have explained to the jury how was 's role in
for care provided to his was subverted by was subverted by was . See
Affidavit, *supra*. Could have also explained to the jury that
the was not proof of any alleged conspiracy with . *Id.*

's unreasonable inaction in not calling **and the set of a set of some** "strategy," and further it prejudiced **and set of some** "strategy," and further it prejudiced **and set of set of**

iv. Failure to call any who was unaware of practices

As noted above, one of the main points that **and a needed** to make clear to the jury, to establish that he was not involved in any conspiracy with **and**, was that he was unaware that **and** was engaged in any **and** fraud. Again, his defense relies in part on the existence of a scheme where **and** kept their in the dark regarding billing and relayed false information regarding **sector** regulations to their **sector**. **See the** Was in possession of evidence of both. See the Email in section A. i., *supra*; see also the Training Documents, *supra*.

failed to get the email where discuss keeping the in the dark regarding admitted at trial, and chose not to use the Training Documents at all. See COA Opinion, pp also failed to call as a witness any who, like , was practices. See Affidavit, *supra*. This unaware of 's decision is particularly galling when there was an available to testify, could have testified that as an , in 's position, he . Id. was unaware was involved in practices such as chart altering, upbilling, and ordering unnecessary tests, in order to procur greater reimbursements from and further that he was also provided the Training Documents, which were designed to keep from questioning 's practices. *Id.*; see also Training Documents, supra. told that he did not see any benefit to calling as a witness, but did not provide any good strategic reason. *Id.* Not calling to testify on 's behalf prejudiced , particularly where no witness at trial

conspiracy, because any fraud by was committed behind his back. 's

was called to corroborate 's allegation that he was not involved in any

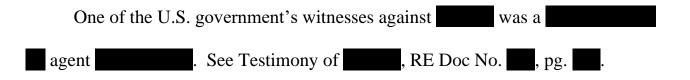
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defense could have benefited from the presence of a corroborating witness. For these reasons and the reasons set forth below, **asks that this Court grant his instant** motion. *Pillette*, 408 F. App'x at 884; citing *Towns*, 395 F.3d at 258-60.

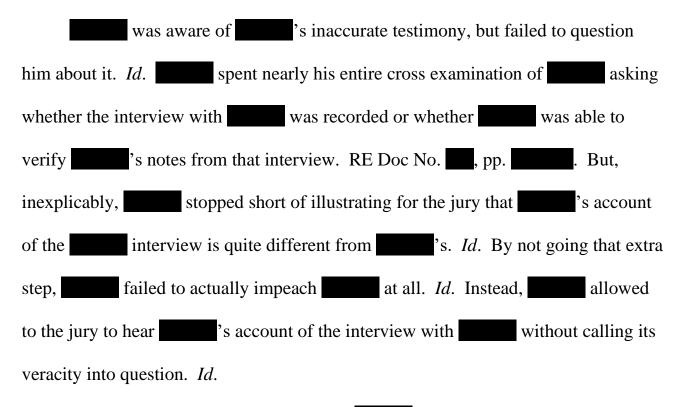
C. Received Ineffective Assistance Of Counsel When Failed To Impeach Critical Witnesses Against

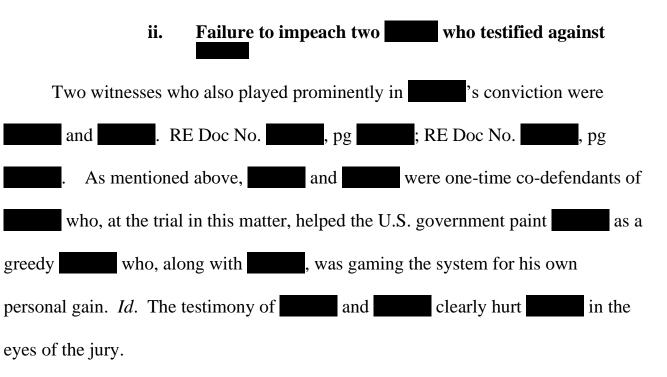
particularly where failed to impeach: (1) a failed against failed to impeach: (1) a failed against failed to impeach: (1) a failed against failed to testified against failed to the testified against failed to challenge the credibility of the prosecution's key witness. *Higgins v. Renico*, 470 F.3d 624, 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").

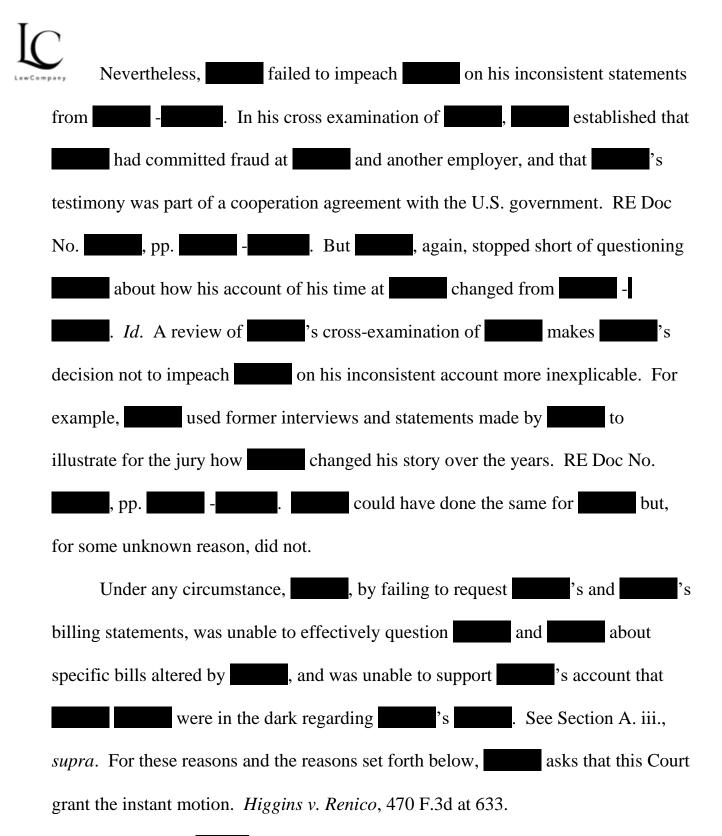
i. Failure to impeach an agent who testified against



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



As it relates to the conspiracy charge, was a star witness for the U.S. government. By testifying that was aware that was committing fraud related to was, was able to connect for the jury was 's actions with those of was. Knowing that was 's account of the interview was different from was and not impeaching was on that fact is professionally unreasonable. 



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

's performance at trial was unreasonable and prejudiced , particularly where failed to present the jury with evidence in the form of: (1) emails between and ; (2) corporate documents shared with ; (3) evidence of 's medical issues; and (4) evidence from other related cases involving . 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 and

Essential to solve is defense against the conspiracy charge is the notion that was unaware of what solve was doing regarding solve and that solve was actively misleading solve doctors that solve was acting ethically and according to solve regulations. Indeed, solve was originally enamored with after interviewing with solve and impressed by her promises that solve was an allegedly ethical organization. See Solve Affidavit, *supra*. To that end, policies, and even reported potential ethics violations to **sector** when he saw them. *Id*.

was charged in this matter he provided with many After emails between and , which , inexplicably, chose not to place in front of the jury. *Id.* These emails show that assured that was acting ethically. *Id.* Not only did fail to put these emails in front of the jury, he also failed to question about them when took the stand at trial. See generally, Testimony of **RE** Doc **,** pg. 's decisions here are unreasonable and prejudiced **control**. Critical to 's defense was getting the jury to understand that was not knowingly involved in any wrong-doing, and even more important, as it relates to the conspiracy charge, that any unethical behavior by was done behind his back and that was actively trying to keep its wrong-doing from . These emails would have gone a long way in showing the jury that was not a coconspirator with , but merely a pawn in 's scheme to defraud Keeping these emails away from the jury made it nearly impossible for the jury to disconnect 's behavior from 's.

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, **Course** asks this Court to grant the instant motion.

ii. Failure to present the jury with corporate documents shared with

As mentioned above, the Training Documents were exculpatory evidence that was actively mislead by regarding the 's and the company's compliance regarding **December**. See Section A. iv., *supra*. The Training Documents used false interpretations of regulations to encourage show that to unwittingly commit fraud. See Affidavit, *supra*; see also Training Documents, *supra*. That was actively misleading their , and in particular, goes directly to 's point that he did not conspire with 's decision not to put these documents in front of the jury, particularly where they clearly illustrate the absence of a conspiratorial connection between and , was strategically unreasonable and prejudiced . The point that was actively misleading into believing that he was complying with regulations should have been hammered home to the jury by

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

For these reasons and the reasons set forth below, 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 **manual**'s medical issues

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

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

It was unreasonable for **second** not to present **second**'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 **and a knew that and a was committing and a fraud**. Not raising that doubt prejudiced **and a set of a set a set**

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

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

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For these reasons and the reasons set forth below, **Sector** 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. Received Ineffective Assistance Of Counsel When Failed To Raise Relevant Claims On Appeal

's performance on appeal was unreasonable and , particularly failed to argue that the United States prosecuting attorneys violated a where proffer letter executed between their office and . 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 **set of set of set of set of branch** federal agents met with **set of question** him about his employment with **set of set of** Affidavit, *supra*. During one of these meetings **set of** was presented with a proffer agreement, where **set of set of the se** Exhibit . 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 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 , thereby violating the proffer agreement. See U.S. Government's Exhibt ; see also Proffer Agreement, *supra*.

'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.*

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, 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.





CERTIFICATE OF COMPLIANCE

I, 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.





CERTIFICATE OF SERVICE

I hereby certify that on **Example 1**. 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.

