UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKET NO. 10-1117

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KRIS A. SMITH,

Defendant - Appellant.

APPELLANT KRIS A. SMITH'S REPLY BRIEF

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* ORAL ARGUMENT REQUESTED *

On Appeal from the Judgment of the United States District Court
for the District of Colorado
D.C. No. 05-CR-00502-WDM; 08-CV-01721-WDM
(Honorable Walker D. Miller)

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TABLE OF CONTENTS

Page #:

TABLE OF AUTHORITIES iv

CERTIFICATE OF COMPLIANCE vii

I. MUELLER'S ADVICE AND FAILURE TO REVIEW DISCOVERY PRECLUDED SMITH FROM MAKING AN INFORMED CHOICE TO TESTIFY, PRODUCING PREJUDICIAL CROSS EXAMINATION TESTIMONY, CONSTITUTING INEFFECTIVE ASSISTANCE 1

A. SUMMARY OF SMITH'S ARGUMENT. 2

B. SUMMARY OF GOVERNMENT'S RESPONSE 4

C. SMITH'S REPLY. 6

1. The Government Incorrectly Applies The Clearly Erroneous Standard of Review to the District Court's Conclusion That Mueller's Performance Concerning Smith's Testimony Was Not Deficient, and to Findings That The District Court Did Not Make 6

2. Smith Had a Right to Effective Assistance of Counsel in Deciding Whether to Testify, Not Merely Whether to Waive Her Right. 9

3. In Arguing Mueller's Advice Was Not So Defective That it Precluded an Informed Decision to Testify the Government Minimizes One, and Wholly Ignores Two, Egregious Errors. 13

a. Cross Examination Was Squarely Within The Scope of Proper Cross Examination: Mueller's Contrary Advice Deprived Smith Of Her

Appellate Case: 10-1117 Document: 01018525290 Date Filed: 11/01/2010 Page: 3

Right To Make An Informed Choice To Testify. 14

b. The Government Ignores Two Critical Errors In Mueller's Advice That Smith's Direct Testimony Was Necessary. 15

4. The Claim That Mueller Adequately Prepared Smith For Cross Examination Is Frivolous 16

5. The Government Distorts The Record And Smith's Argument That Mueller's Failure To Identify Anderson's Confession And Marks' Undercover Transcript Contributed To Prejudicial Cross Examination. 17

II. MUELLER'S ERRORS RESULTED IN PREJUDICE. 19

A. THE DISTRICT COURT ERRED BY FAILING TO CONDUCT CUMULATIVE ERROR REVIEW. 20

B. TAX MAGIC MATERIALS AND MARKS' TRANSCRIPT WERE CRITICALLY EXCULPATORY BECAUSE THEY DEMONSTRATED SMITH WAS DEFRAUDED INTO BELIEVING HER DEDUCTIONS WERE LAWFUL 21

1. Tax Magic Materials. 22

2. Marks' Undercover Transcript. 25

C. ANDERSON'S CONFESSION. 26

D. FAILURE TO INTRODUCE EXPERT TESTIMONY 26

E. CHECK RECEIPTS AND ANDERSON VICTIM LISTS. . . . 27

III. DENIAL OF EVIDENTIARY HEARING IS REVERSIBLE ERROR 28

TABLE OF AUTHORITIES

CASE AUTHORITY **Page #:**

Alford v. U.S.,
282 U.S. 687 (1931). 15

Blackburn v. Foltz,
828 F.2d 1177 (6th Cir. 1987). 6, 10

Cannon v. Mullin,
383 F.3d 1152 (10th Cir. 2004). 10, 15

Foster v. Delo,
11 F.3d 1451 (8th Cir. 1993). 10

Frazer v. U.S.,
18 F.3d 778 (9th Cir. 1994). 29

Friedman v. U.S.,
588 F.2d 1010 (5th Cir. 1979). 29

Higgins v. Martin Marietta Corp.,
752 F.2d 492 (10th Cir. 1998). 14, 15

Leeper v. U.S.,
446 F.2d 281 (10th Cir. 1971). 15

Lindhorst v. U.S.,
585 F.2d 361 (8th Cir. 1978). 29

Machibroda v. U.S.,
368 U.S. 487 (1962). 30

Moore v. U.S.,
950 F.2d 656 (10th Cir. 1991). 30

Strickland v. Washington,
466 U.S. 668 (1984). . . . . Passim

U.S. v. Anderson, et al.,
Cr. No. 02-00423 (W.D. WA) 9,21,22

U.S. v. Aron,
291 F.3d 708 (11th Cir. 2002). 29

U.S. v. Burch,
153 F.3d 1140 (10th Cir. 1998). 15

U.S. v. Estrada,
849 F.2d 1304 (10th Cir. 1988). 29

U.S. v. Hinkle,
37 F.3d 576 (10th Cir. 1994) *14*

U.S. v. Holder,
410 F.3d 651 (10th cir. 2005) 30

U.S. v. Kennedy,
225 F.3d 1187 (10th Cir. 2000). 29

U.S. v. McVeigh,
119 F.3d 806 (10th Cir. 1977). 12

U.S. v. Ortiz,
125 F.3d 630 (8th Cir. 1997). 12

U.S. v. Teague,
953 F.2d 1525 (11th Cir. 1992). . . . . Passim

U.S. v. Troutman,
814 F.2d 1428 (10th Cir. 1987). 15

Wiley v. Wainwright,
793 F.2d 1190 (11th Cir. 1986). 6

STATUTES AND RULES **Page#:**

28 U.S.C. §2255 . . . . 1, 22, 30

Federal Rules of Evidence
611(b). 3, 8

801(d)(2)(A)(B)(D) 12

803(b). 10

803(6). 2, 10

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C)(1), F.R.A.P., and Circuit Rule 28(a)(11), I hereby certify that this Reply Brief is proportionately spaced with Times New Roman, 14 point typeface prepared on the following word processing system: Corel WordPerfect Office 12.

I certify that this Reply Brief contains no more than 6,978 words pursuant to Rule 32(a)(7)(B)(I), F.R.A.P., and Circuit rule 28.1(e)(2)(I).

Pursuant to Rule 32(a)(7)(C), F.R.A.P., and Circuit Rule 18.1(e)(3), I hereby certify that Defendant-Appellant Kris A. Smith's Opening Brief contains 7,000 words pursuant to Corel WordPerfect system's word count.

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I. MUELLER'S ADVICE AND FAILURE TO REVIEW DISCOVERY PRECLUDED SMITH FROM MAKING AN INFORMED CHOICE TO TESTIFY, PRODUCING PREJUDICIAL CROSS EXAMINATION TESTIMONY, CONSTITUTING INEFFECTIVE ASSISTANCE

The government, trial court, and 2255 court concur: Smith's testimony on cross examination was highly prejudicial (Br. 34-35).[1] The court found Smith's cross examination "may well have led to her conviction. . . ." (AP 1693). The government described Smith's cross examination as a "hammer" making Smith "her own worst enemy[,]" who "insisted on questioning the tax laws when cross examined" (AP 1017-1018). The §2255 court "agree[d] with the government that the prejudice resulting from the Defendant's testimony appears to have been the result of her continued belief [at the time of her trial testimony] in the tax protestor views promoted by AAA" (AP 1065-1066). Thus, the prejudice prong of this aspect of Smith's ineffective assistance claim is established.[2]

Nevertheless, the district court found "Mueller's decision to have Defendant testify on a singular issue" -- authenticating postal receipts -- "was an adequately informed strategic choice," i.e. Smith did not establish the deficient performance

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[1]Appellant's Opening Brief is cited as "Br." The Government's Brief is cited as "G. Br." The Appendix is cited as "AP," and the Addendum as "AD."

[2]*See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining deficient performance and prejudice requirements of ineffective assistance of counsel claim).

prong (AP 1065-66). The record demonstrates that the district court clearly erred in finding the choice "adequately informed" or "strategic" (Br. 32-38, 46-51).

A. SUMMARY OF SMITH'S ARGUMENT

The "decision to have Defendant testify on a singular issue" belonged to Smith, not Mueller (Br. 46). Smith had a fundamental right to make informed choices whether to: (1) testify to authenticate postal receipts; and (2) forego her right to provide substantive testimony concerning her knowledge, belief and intent (Br. 46-51). Smith's right to effective assistance in making these choices was violated by Mueller's catastrophic counsel concerning: (1) necessity for Smith's direct testimony: (a) inculpatory postal receipts damaged Smith's defense (AP 533, 906), serving no exculpatory purpose;[3] and (b) Smith's testimony was unnecessary to admit postal receipts (AP 906, 952, Br. 32-33, 48);[4] and (2) scope of cross examination: questions concerning documents mailed with the postal receipts were

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[3]Smith testified only to authenticate a certified mail receipt and postal service tracking form (Br. 32, AP 533, 952, 1052, 1065, 1812-1813), demonstrating Smith filed the return at issue in Count 4 just prior to trial -- more than two years late, (AP 1052) admitting two elements (duty to file and failure to file timely) essential to guilt on Count 4, charging willful failure to timely file the return (Br. 33, 48). Mueller elicited no explanation for untimely filing (AP 1812-1813), nor any evidence negating the willfulness element.

[4]Mueller admitted never advising Smith these postal records were admissible through a postal service custodian of records. Fed.R.Evid. 803(6) (AP 952, G. Br. 27, n.17).

proper cross examination (AP 954-956), following Fed.R.Evid. 611(b) and pertinent case law (Br. 33-34, 48-49).[5] Mueller's missteps precluded an informed choice by Smith whether to testify (Br. 47-51).[6]

Mueller admittedly failed to prepare Smith for predictable cross examination (Br. 33-34, 49-50, AP 953-956); and as a result of Mueller's failure to review discovery,[7] Mueller failed to review with Smith exculpatory evidence critical to her testimony (Br. 21-22, 36-40, 50): (a) transcript of undercover recording of "key

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[5]Cross examination concerning the document mailed was squarely within the scope of Fed.R.Evid. 611(b). It was germane to Smith's direct testimony, tended to explain it, and went directly to her credibility (Br. 34-36, 48-49), viz. the concededly damning testimony. (AP 1017-1018, 1065-66, 1813-1817, 1963).

[6]Mueller's errors concerning Fed.R.Evid. 611(b) and 803(6) epitomized his pervasive ineptitude, including unfamiliarity with the Federal Rules of Evidence and Fed.R.Crim.P. 16, which permeated his performance throughout trial, e.g.: (1) failing to (i) obtain self-authenticating certified copies of victim lists, or (ii) introduce them through a competent witness, (Br. 24-26, AP 1057-58); (2) failing to prepare defense witness Skillo or another witness sufficiently to introduce "Tax Magic materials [which the district court found] were central to the defense strategy" (Br. 22-24, AP 1063); and (3) failing to present expert testimony Mueller promised in opening, because Mueller proffered the wrong expert and violated Fed.R.Crim.P. 16 (Br. 30-32, AP 1063-64).

[7]The district court concluded: (1) Mueller's "failure to conduct a targeted review of the government's evidence could have been objectively unreasonable[;]" (2) "Mueller apparently did not review the areas of the [discovery] hard drive specifically identified by the government as pertaining to Defendant[;]" and (3) "a reasonably competent attorney would have reviewed at least some of the transcripts" of undercover tape recordings contained in the discovery, and Mueller's "failure to do so [was] not objectively reasonable" (Br. 16, AP 1061), satisfying deficient performance prong.

conversation" of AAA lead accountant Richard Marks admitting he and other AAA planners concealed their schemes from Smith and her supervisors, who were ultimately acquitted (Br. 14, 21, AP 614-617, 679-682, 1060); and (b) Keith Anderson's confession (AP 857-68), admitting fraud, cover-ups, conspiracy and theft (Br. 37-38, AP 862, 865).[8]

Mueller instructed Smith to limit her direct to authenticating postal receipts based on ignorance and incompetence (BR. 18-19, 21-22, 36-38, 50-51), precluding Smith from intelligently deciding whether to testify concerning her knowledge and intent. (Br. 36-38, 50-51).[9]

B. SUMMARY OF GOVERNMENT'S RESPONSE

The government contends: (1) Smith has not demonstrated the district court's conclusion that Mueller's decision to have Smith testify on the singular issue of authenticating postal receipts was clearly erroneous (G. Br. 26-28); (2) case law Smith cites supports the assertion that a defendant can be deprived of effective

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[8]The court and government agree prejudice from Smith's cross examination "appears to have been the result of her continued belief [at the time of Smith's trial testimony] in the tax protestor views promoted by AAA," and her "inability to suppress her tax protestor views" (Br. 50, AP 1066). The Anderson confession and Marks' admissions to concealment from Smith would have undermined Smith's "continued belief in the tax protestor views promoted by AAA" (AP 1066).

[9]Smith's argument on this point (Br. 50-51) incorrectly cites Section IV.B. instead of V.B Statement of Facts.

assistance when incorrect legal advice results in waiving the right to testify, not exercising that right (G. Br. 27-28, n.19); (3) "Mueller's belief regarding the permissible scope of cross examination may have turned out to be wrong in hindsight, but it was not so defective that it precluded defendant from making an informed decision to testify" (G. Br. 27, n.18); (4) Mueller adequately prepared Smith for cross examination by telling her not to testify about her tax protestor beliefs (G. Br. 28); (5) Mueller's failure to review Richard Marks' admissions and Anderson's confession[10] with Smith did not constitute deficient performance (G. Br. 29, n.20); nor (6) was it prejudicial because: (a) Smith's beliefs at the time of trial were not relevant (G. Br. 29-30); and (b) it is "pure speculation" that Smith's continued belief in views promoted by AAA would have been undermined had she seen confessions from AAA's leaders that AAA's programs were illegal and fraudulent. (G. Br. 29).

C. SMITH'S REPLY

1. The Government Incorrectly Applies the Clearly Erroneous Standard of Review to the District Court's Conclusion That Mueller's Performance Concerning Smith's Testimony Was Not Deficient, and to Findings That the District Court Did Not Make

[10]The government incorrectly describes the above-referenced confession as Richard Marks' written confession (compare G. Br. 29 with Br. 14, 37-40).

The government acknowledges: (1) ineffective assistance of counsel claims present mixed questions of law and fact, reviewed de novo; and (2) this Court reviews legal rulings de novo and findings of fact for clear error (G. Br. 20, Br. 45). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact[,]" *Strickland*, 466 U.S. at 698, "freely reviewable by the appellate court." *Blackburn v. Foltz,* 828 F.2d 1177, 1181 (6th Cir. 1987).[11]

The court concluded Mueller's performance was not deficient (AP 1066):

> The evidence indicates that Mr. Mueller's decision to have Defendant testify on a singular issue [authenticating postal receipts] and to minimize cross examination was an adequately informed strategic choice. . . . Accordingly, Defendant has not overcome the presumption that Mr. Mueller's conduct in this regard was objectively reasonable.

The government contends (G. Br. 26): "the district court's finding (AP 1066) that Mueller's decision to have defendant testify that she had mailed certain documents to the IRS was not improper [was] not clearly erroneous." However, the government incorrectly labels the legal conclusion as a factual "finding . . .that Mueller's decision was not improper."

The government also applies the clearly erroneous standard to findings that the

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[11]*See also U.S. v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992) (*en banc*) "We defer to the district court's findings of fact absent a clearly erroneous determination but apply our own judgment as to whether the conduct determined by these facts constitutes ineffective assistance of counsel." (*Quoting Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir.1986)).

district court did not make (G. Br. 26, 28):

> Specifically, defendant claims that Mueller incorrectly advised defendant that her direct testimony was necessary (Br. 48), that Mueller was ignorant of the scope of cross-examination that would be permitted based on her direct testimony (Br. 48), and that he failed to prepare her for clearly foreseeable cross examination (Br. 49). Contrary to defendant's claim, the district court's findings were not clearly erroneous.
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> . . .
>
> Defendant has not shown that the district court's finding that Mueller considered the advantages and disadvantages of defendant testifying is clearly erroneous.

The district court did not make factual "findings" concerning the correctness *vel non* of Mueller's advice that Smith's direct testimony was necessary (AP 1065-66). Consequently, the government's claim (G. Br. 26) that such "findings were not clearly erroneous" is misleading catachresis. Mueller admitted: (1) Smith's testimony was only to introduce postal receipts (AP 952, 1065); (2) he advised Smith: (a) the postal receipts were necessary to her defense; (b) Smith was the only witness who could authenticate them (AP 906, G. Br. 27, n.17); and (3) he failed to advise Smith the documents were admissible through a postal service custodian of records. Fed.R.Evid. 803(6) (AP 952, 1065, G. Br. 27, n.17).

The record establishes Mueller's advice was doubly deficient: (1) the postal receipts were inculpatory (Br. 33, 48 *see also* n.3*, supra*); and (2) Smith's testimony was unnecessary. The court recognized the receipts demonstrated Smith filed the

return at issue in Count 4 (failure to timely file return) after indictment (AP 1052), but nowhere considered that this fact was inculpatory, not exculpatory (AP 1065-66). Likewise, the court recognized Mueller believed postal receipts could only be introduced through Smith (AP 1066), but nowhere addressed the unreasonableness of Mueller's ignorance of Fed.R.Evid. 803(6). Moreover, even if the court had addressed these issues, they are reviewable de novo.

Furthermore, it is undisputed that: (1) Mueller advised Smith cross examination concerning the tax return mailed with the postal receipts was impermissible (AP 954-55, G. Br. 27, n.18); and (2) Mueller failed to prepare Smith for cross examination concerning that return (AP 955), producing the concededly prejudicial testimony (AP 1017-1018, 1052). The court overlooked these undisputed facts, eschewing any specific findings related to Smith's claim (AP 997-999, Br. 48-50) that this incorrect advice and failure to prepare Smith constituted deficient performance (AP 1065-66). Accordingly, the government's claim (G. Br. 26) that such "findings were not clearly erroneous" is specious.

Moreover, the government claims "that the district court[found] Mueller did consider the advantages and disadvantages of defendant testifying" (G. Br. 28). The court made no such finding, merely describing Mueller's testimony: "He and Defendant discussed the advantages and disadvantages of her testifying about her

entire experience with AAA," (AP 1065),[12] without determining (AP 1065-66) whether Mueller adequately considered -- and discussed with Smith -- the advantages and disadvantages of her testifying. Mueller clearly erred in advising Smith concerning advantages, i.e. postal receipts and Smith's authenticating testimony were "necessary" (Br. 32-33, 48); and he ignored disadvantages, including predictable cross examination (Br. 33-35, 48-50).

The court's conclusion (AP 1066) that Mueller's performance pertaining to Smith's testimony "was objectively reasonable" is subject to de novo review, and constitutes reversible error.

2. Smith Had a Right to Effective Assistance of Counsel in Deciding Whether to Testify, Not Merely Whether to Waive Her Right

An attorney's erroneous advice and deficient discovery review precludes a defendant from making an informed decision to testify. The government contends that two cases on which Smith relies, *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1993), and *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987), are distinguishable because they "involved a defendant's waiver of his right to testify on his own behalf, not his exercise of that right. Defendant did not waive her right to

[12] Actually, Mueller testified that he told Smith about the disadvantages he perceived (AP 907), not any advantages other than his mirage concerning postal receipts.

testify; rather, she chose to exercise that right" (G. Br. 27-28, n.19).[13] The distinction is untenable. *Foster* found counsel's performance deficient because it "impeded an informed decision whether to waive or invoke" the defendant's right to testify. 11 F.3d at 1457.

Moreover, the government ignores *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (*en banc*) (*cited with approval in Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004) and its exegesis concerning effective assistance in choosing whether to testify (953 F.2d at 1532-34):

> Under the Supreme Court's reasoning in *Rock* [*v. Arkansas*, 483 U.S. 44, 52 (1987)], the right to testify essentially guarantees the right to ultimately *choose* whether or not to testify. The Supreme Court stated that the right to testify is "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." [emphasis in *Teague*] . . .
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> . . . Defense counsel bears the primary responsibility for advising the defendant of [her] right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant herself to decide. This advice is crucial because there

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[13]The government further contends the cases are distinguishable because they "involve truly egregious errors of well-settled law" (G. Br. 27-28, n.19). Mueller's legal errors were truly egregious, e.g. misunderstanding Fed.R.Evid. 611(b) and ignoring F.R.Evid. 803(b) (Br. 32-38; 46-51). Where defendant cannot make an informed choice to testify because the attorney: (1) incorrectly advised defendant that clearly inculpatory evidence was necessary to her defense (*see* n.3, *supra*); and (2) failed to review the discovery (AP 1059-1061), this, too, can be considered. *See Teague,* 953 F.2d at 1534 (where action or inaction of attorney deprived defendant of ability to choose whether to testify, attorney's performance was deficient under *Strickland's* first prong).

> can be no effective waiver of a fundamental constitutional right unless there is an "an intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 . . . (1938) (emphasis added [by *Teague*]). Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice. . . [footnotes omitted].
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> . . .
>
> Where the defendant claims a violation of his right to testify by defense counsel, the **essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify** in his own behalf. In other words, by not protecting the defendant's right to testify, **defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test.** [emphasis added].

Moreover, Mueller's heinous misdirection precluded an informed decision whether to provide substantive direct testimony --particularly knowledge, belief and intent -- to rebut the charges. Smith declared under penalty of perjury (AP 296):

> From the outset, Ms. Smith told Mueller that she wanted to testify in her defense, and explain that she believed that her conduct was lawful and the basis for her belief. At minimum, Ms. Smith could have introduced the critical exculpatory Tax Magic [materials].[14]

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[14]The Tax Magic materials are described at Br. 22-24 and AP 1062-63. The court found (AP 1063):

> Because the Tax Magic materials were central to the defense strategy, Mr. Mueller's apparent failure to prepare Skillo or another witness sufficiently to introduce this evidence cannot be considered a strategic decision. Moreover, it could meet the *Strickland* first prong, since laying a proper foundation for the

According to IRS Special Agent Michelle Hagemann's memorandum of interview of Mueller (AP 749),[15] Mueller stated:

> Mueller had to constantly remind [Smith] not to mention [anti-tax jargon] to anyone else. Mueller told Smith that she was never going to convince him nor was she going to talk to the jury about it."

Mueller's belief that Smith "would be building her own coffin" (AP 747) unless she limited her direct to authenticating postal receipts, was based on his fatal failures to: (1) familiarize himself with discovery (Br. 13-16; AP 1061), (2) discuss critical aspects of the case with Smith (Br. 17-18), and (3) understand Smith's good faith defense (Br. 18-19), resulting in failure to present critical exculpatory evidence supporting it (Br. 21-22, 36-40).

As the *Teague* court stated (953 F.2d at 1533):

> When an individual stands accused of criminal conduct, the choice to tell [her] side of the story has ramifications far beyond the more immediate goal of obtaining an acquittal. It is, after all, the *defendant's* day in court. The decision to take the stand in [her] own defense, like

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> introduction of evidence is the minimum required of a reasonably competent attorney.

[15]Hagemann's report of Mueller's statements is inadmissible unsworn double hearsay if offered by the government against Smith (AP 809-813). *See e.g., U.S. v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997); *U.S. v. McVeigh*, 119 F.3d 806 (10th Cir. 1977). However, Hagemann's report is admissible against the government as a non-hearsay admission of a party opponent under Fed.R.Evid. 801(d)(2)(A), (B) and (D) (AP 813-815). It is a statement of a government representative, also adopted by prosecutor Larry Wszalek, Esq.

the decision to plead not guilty and proceed to trial, provides the defendant with an opportunity directly to meet the charges against [her].

Mueller's failures precluded Smith from making an informed decision whether to tell her story, despite her stated desire to do so (AP 296).[16]

3. In Arguing Mueller's Advice Was Not So Defective That it Precluded an Informed Decision to Testify the Government Minimizes One, and Wholly Ignores Two, Egregious Errors

The government contends (G. Br. 27, n.18) that "Mueller's belief regarding the permissible scope of cross examination may have turned out to be erroneous in hindsight, but it was not so defective that it precluded defendant from making an informed decision to testify." The government's argument fails because: (1) Mueller's failure to prepare Smith for cross examination constituted a breach of duty to advise Smith of the strategic implications of choosing to testify;[17] and (2) it ignores two other errors: (a) Smith's testimony was unnecessary; and (b) the postal receipts were inculpatory.

a. Cross Examination Was Squarely Within The Scope Of Proper Cross Examination; Mueller's Contrary Advice Deprived Smith Of Her Right To Make An Informed Choice To Testify

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[16] The denial of an evidentiary hearing left undetermined whether Mueller ever advised Smith it was her decision whether: (1) to limit her direct to authenticating postal receipts (AP 919), and (2) her testimony would include "telling [her] side of the story."

[17] *See Teague,* 953 F.2d at 1533.

The government contends that since the permissible scope of cross examination is a fact specific discretionary issue, "even an experienced attorney might misjudge what cross examination a trial court will permit" (G. Br. 27, n.18). This general proposition is irrrelevant here.[18]

It is well settled that:

> Cross examination "may embrace any matter germane to the direct examination, qualifying or destroying, or tending to elucidate, modify, explain, contradict, or rebut testimony given in chief by the witness."

U.S. v. Burch, 153 F.3d 1140, 1144 (10th Cir. 1998) (*quoting United States v. Troutman*, 814 F.2d 1428, 1450 (10th Cir. 1987)). *See also Leeper v. U.S.*, 446 F.2d 281, 288 (10th Cir. 1971) (*citing Alford v. U.S.*, 282 U.S. 687 (1931).

Cross examination concerning the NECO return was clearly germane and tended to elucidate and explain Smith's direct testimony, hence Mueller's admitted failure to

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[18] The government cites *U.S. v. Hinkle*, 37 F.3d 576, 579 (10th Cir. 1994) and *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 498 (10th Cir. 1998); both are distinguishable. In *Hinkle*, cross examination of a prosecution witness concerning the witness seeing a psychiatrist was prohibited after an *in camera* hearing where the court found nothing "that suggested that the witness' credibility or perceptive capabilities were impaired. The psychiatrist testified the witness had no tendency to hallucinate, perception of reality was not distorted, and the witness could distinguish between truth and falsehood." In *Higgins*, the court prohibited cross examination of defense witness Dr. Braun regarding results of his examination of other plaintiffs not parties in the suits before the jury.

prepare Smith (AP 954-55) was egregious error.[19]

b. The Government Ignores Two Critical Errors Concerning "Necessity" For Smith's Direct Testimony

The government's argument that Mueller's advice "was not so defective that it precluded defendant from making an informed decision to testify" (G. Br. 27, n.18), only addresses Mueller's ignorance regarding permissible scope of cross examination. Footnote 17 (G. Br. 27), acknowledges Mueller believed Smith's testimony was necessary to authenticate postal receipts, and "did not consider that a representative of the U.S. Postal Service could have authenticated those documents ([AP] 952)." However, the government ignores this aspect of Mueller's advice, its impact on an informed choice to testify, and eschews discussion of Mueller's advice that inculpatory postal receipts were "necessary" to Smith's defense.

Accordingly, the government's claim that Mueller's advice did not preclude Smith from making an informed choice to testify cannot be taken seriously.

4. The Claim That Mueller Adequately Prepared Smith For Cross Examination Is Frivolous

Mueller admitted he did not prepare Smith for clearly foreseeable cross examination (AP 954-56) directly relevant to Smith's direct testimony and credibility

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[19] *See Cannon v. Mullin,* 383 F.3d 1152, 1171 (10th Cir. 2004) (defense counsel should discuss with defendant strategic implications of choosing whether to testify); *Teague, supra,* 953 F.2d at 1533.

(Br. 34, 49-50, AP 835).

The government contends (G. Br. 28) Mueller adequately prepared Smith by repeatedly telling Smith not to testify about her tax protestor beliefs.[20] Mueller's admission that he did not prepare Smith for cross examination (AP 953-956) renders the government's contrary contention (G. Br. 28) frivolous.

5. The Government Distorts The Record And Smith's Argument That Mueller's Failure To Identify Anderson's Confession and Marks' Undercover Transcript Contributed To Prejudicial Cross Examination

As the court and government explained, the prejudicial nature of Smith's cross examination stemmed from "her continued belief in the tax protestor views promoted by AAA" (AP 1066); Smith "insisted on questioning the tax laws when cross examined," i.e. prejudice stemmed from Smith's beliefs at the time of trial. Mueller explained that he did not want Smith to testify she believed that AAA founder Keith Anderson was a good person who would be exonerated on appeal. (AP 908-909).

Smith's continued faith in Anderson and AAA resulted from Mueller's failure to read and discuss with Smith Anderson's written confession (Br. 37-40; AP 857-868, 998-999) and Marks' undercover transcript (Br. 21-22; AP 1060, 616-617, 679-682), wherein Anderson and Marks confess to fraud, theft, and concealment from

[20]The government cites AP 747, 749 (G. Br. 28) which are portions of IRS Special Agent Hagemann's Memorandum of Interview of Mueller -- inadmissible hearsay when offered by the government (*see* n. *15, supra*).

Smith and her AAA Supervisors on whom she relied -- the Morans, whom Anderson exonerated (AP 862), and who were ultimately acquitted (AP 614).

The government distorts the record by claiming Mueller's failure to identify Anderson's confession and Marks' undercover transcript did not constitute deficient performance (G. Br. 29, n.20) because the district court found the amount of hours Mueller devoted to Smith's case was not deficient (AP 1057),[21] despite recognizing the court found Mueller's failure to review discovery deficient (G. Br. 25; G. Br. 25; AP 1059-61), specifically citing Mueller's ignorance of Marks' "key conversation" (AP 1059-60) and failure to review relevant files (AP 1059), one of which included Anderson's confession (AP 469, 519, 857-68).

The government's claim (G. Br. 29-30) that Smith's beliefs at the time of trial were irrelevant contradicts the court's and the government's conclusion that Smith's testimony was prejudicial precisely because she expressed her continued beliefs at trial (AP 1017-18, 1066).

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[21]The government's claim (G. Br. 12), citing AP 890, that Mueller devoted at least 820 hours toward preparing defendant's case distorts the record. Mueller estimated he spent approximately 195 hours on preparation (AP 890). The government again distorts the record when it claims (G. Br. 29, n.20) Mueller testified he spent three times 274.3 hours on the case. That number is the total billed for all time including the four-day trial, travel time, and five pre-trial court appearances (AP 1056). Mueller never testified that he spent three times that number of hours on the case. Rather, Mueller's records reflect 65 hours billed for discovery review and other tasks, and Mueller testified he spent approximately three times that number on preparation (AP 890).

The government's claim that Anderson's confessions and Marks' admissions would have undermined Smith's continued belief in them is speculative (G. Br. 29), belies common sense; Smith herself was admittedly among their victims.

Finally, the government claims (G. Br. 29)"Defendant cites no authority for the novel proposition that a defense attorney should or may be held accountable for his client's purported personal or political beliefs." Mocking Smith's argument cannot conceal Mueller's breach of duty to review crucial evidence and prepare Smith to testify.

II. MUELLER'S ERRORS RESULTED IN PREJUDICE

The court found numerous errors by Mueller did or could constitute deficient performance causing failure to introduce: (1) Marks' transcript (Br. 21-22, AP 1059-60); (2) Tax Magic materials the district court found "material" and "central to the defense strategy" (Br. 22-24, AP 1062-1063, 1073); (3) *Anderson* victim lists (Br. 24-26, AP 1057-58); and (4) check receipts evidencing Smith's investment in the CBO Program supporting tax deductions at issue in Counts 1-3. (Br. 27-30, AP 1067). The court concluded that Mueller's failure to introduce this exculpatory evidence did not result in prejudice (AP 1073), which was reversible error because: (1) the court did not consider prejudice from Mueller's failures to: (a) introduce expert testimony, despite finding such failure could constitute deficient performance

(AP 1063-64); (b) use Anderson's confession (AP 469, 519, 833, 857-868, 932-936), despite concluding that Mueller's failure to review discovery constituted deficient performance (G. Br. 31, AP 1059); and (c) comprehend critical facts (Br. 18-19, AP 991-96) resulting from: (i) failing to review discovery (Br. 13-16); and (ii) failing to discuss critical evidence with Smith (Br. 17-18, 52); (2) the court did not consider cumulative error (Br. 52-54); (3) the court's assessment of Mueller's errors it did consider is flawed (Br. 54-55); and (4) the court erroneously considered Smith's cross examination testimony as evidence of willfulness (Br. 55, AP 1075) instead of *Strickland* prejudice, exponentially skewing the prejudice analysis.

A. THE DISTRICT COURT ERRED BY FAILING TO CONDUCT CUMULATIVE ERROR REVIEW

Citing AP 1073-1074, the government erroneously contends (G. Br. 37, n.24) the court considered cumulative error. Instead, the court's order measured only four individual errors against its assessment of the totality of prosecution evidence. Moreover, errors the court ignored, e.g. expert testimony, Anderson's confession, and Mueller's failure to comprehend critical facts -- were omitted from any cumulative error analysis, compounded by omitting Smith's cross examination as part of cumulative error, miscategorizing it as evidence of willfulness.

When considering the cumulative impact of Mueller's errors (Br. 53), the record establishes that Mueller failed to: (1) introduce nearly all of the evidence

Mueller planned to --and most of which he told the jury he would– present in support of Smith's good faith defense, i.e. Tax Magic materials, Anderson victim lists, check receipts, expert testimony (Br. 22-31, 40-41); (2) identify and make use of additional critical exculpatory evidence, i.e. Marks' admissions and Anderson's confession (Br. 21-22, 36-40); and (3) refute rebuttable aspects of the prosecution's case and argument as to willfulness (Br. 38-42). This constitutes *Strickland* prejudice (Br. 51-56).

B. TAX MAGIC MATERIALS AND MARKS' TRANSCRIPT WERE CRITICALLY EXCULPATORY BECAUSE THEY DEMONSTRATED SMITH WAS DEFRAUDED INTO BELIEVING HER DEDUCTIONS WERE LAWFUL

Smith's defense was she did not act willfully -- she was defrauded by Richard Marks into believing her CBO investment was legitimate, hence her tax deductions subject of Counts 1-3 were lawful. (Br. 7-11, 20-32).

Marks, Anderson and others were convicted of defrauding AAA members into believing that the CBO Program was a bona fide investment, *U.S. v. Keith Anderson, et al.*, Cr. No. 02-00423 (W.D. WA) (Br. 7-8), by offering a joint venture with an entity called Macro Media Advertising, LLC (aka Mason Advertising) which was creating and marketing tax reduction tapes and a 1-900 telephone line offering tax advice ("Tax Magic") (Br. 7-11). Mueller introduced evidence that the convicted Anderson defendants defrauded other AAA members viewed by the government as

victims of AAA's CBO Program fraud scheme -- but not Smith (AP 382-87, 396-400, AD 387-453).

However, despite its ready availability Mueller failed to introduce any evidence that Smith was defrauded. Smith was trained by, and relied on, the Morans. (Br. 11-12) Like Smith, the Morans' defense was they were deceived by Marks and other convicted *Anderson* defendants into believing the CBO Program was legitimate. In support of this defense, the Morans presented the Tax Magic materials and Marks' undercover transcript Mueller failed to introduce as a result of what the district court found did or could constitute deficient performance (AP 1061, 1063), and they were acquitted. The Morans' attorney, Peter Mair, Esq., submitted a Declaration supporting Smith's § 2255 petition, explaining he utilized the Tax Magic materials and Marks' undercover transcript as essential exculpatory evidence, and failure to do so would have constituted deficient performance prejudicial to the defense (AP 615-17).

1. <u>Tax Magic Materials</u>

The Tax Magic materials consist of an infomercial video, progress reports and revenue projections the district court found "portray[ed] an ongoing project to create an infomercial, set up 1-900 lines, and to have the Tax Magic package roll out soon" (AP 1063). Smith provided the materials to Mueller long before trial, explaining that

Marks had given her these materials to solicit her CBO investment, and these materials convinced Smith her CBO investment was bona fide (Br. 23-24). Mueller admitted knowing the materials were important because they substantiated Smith's belief her CBO was a legitimate investment (Br. 23-24). The court found the materials "were central to the defense strategy" (AP 1063), and "material" (AP 1073).

The court concluded, "Mueller's apparent failure . . . to introduce [it could not] be considered a strategic decision" and "could meet the *Strickland* first prong since laying a proper foundation for the introduction of evidence is the minimum required for a reasonably competent attorney" (AP 1063), but the prejudice resulting from the exclusion of the materials was "a little more difficult to determine" (AP 1072). The difficulty arose from what the court perceived was an unresolved factual dispute concerning the nexus between these materials and Smith's CBO investment (AP 1072), hence it was an abuse of discretion to deny Smith's request for an evidentiary hearing (Br. 55, n.15, 57-58).

The government contends (G. Br. 36) that any prejudice stemming from the exclusion of the materials was mitigated by testimony from Michael Skillo, Robert Haueisen and Kirby Clock, who all testified that the CBO investment appeared legitimate. However, those witnesses' beliefs were not probative of Smith's belief or

its basis, i.e. the Tax Magic materials (Br. 22-24).

Further, the government impeached Skillo and his CBO's legitimacy (AP 1758-1778) to the extent Skillo asked: "Judge, am I on trial here, sir?" (AP 1772). Clock and his CBO were similarly impeached (AP 1799-1810). Mueller's inadequate preparation (Br. 13-19) precluded rehabilitating Skillo (AP 1778-82) or Clock (AP 1810-12).

Government witnesses Haueisen and his wife certainly did not mitigate the prejudice from exclusion of the materials. Haueisen testified he never heard of anything called Tax Magic (AP 1534), did not recall any revenue projections (AP 1529-32), and Haueisen and his wife offered incriminating evidence (AP 1486-1523, 1541-45) Mueller was unprepared to rebut. (AP 1523-40, 1545-50). The government relied on Haueisen's testimony to argue Smith had criminal intent and knew the CBO program was fraudulent, (AP 1876-77, 1886-88) introducing prejudicial tapes through Haueisen containing Anderson's tax protestor speeches -- which the government replayed in closing (AP 1865-1871).

2. Marks' Undercover Transcript

The court found Mueller's performance deficient in failing to identify the Marks transcript, describing it as "a key conversation in which Richard Marks

admitted that he and the other planners at AAA did not tell the Morans or any of the IOs [including Smith] about the programs in detail and their illegality" (AP 1060).

The government contends Smith overstates the exculpatory value of the Marks transcript because an unknown male is the speaker (G. Br. 32). The government misrepresents the record again. On September 19, 2008, the government recognized the "unidentified male" reflected on the transcript is Richard Marks (AP 716).

The government concurs (G. Br. 33) with the court's conclusion that this transcript is cumulative of other evidence showing AAA's programs were fraudulent and the fraud was concealed from AAA members. However, Marks' transcript is far more exculpatory because it showed the concealment from Smith and the Morans, on whom Smith relied.

The government contends the Marks transcript is cumulative of the testimony of George Benoit and government witness Bill Hays. But Benoit admitted knowingly participating in the fraud scheme (AP 1840-42) and Hays implicated Smith in the fraud scheme. (AP 1287-88, 1297-98).

C. ANDERSON'S CONFESSION

The court never considered the prejudice from Mueller's failure to use Anderson's confession (AP 1071-75) despite concluding Mueller's failure to review the file containing it constituted deficient performance (G. Br. 31, AP 1059-61, 469,

519, 833, 857-68, 999) .

The government contends that Anderson's confession was not relevant, erroneously claiming it was limited to AAA's Loan 4 program (G. Br. 33). Anderson confessed he provided "incompetent and destructive leadership," "AAA ceased to exist" before Smith's introduction to AAA, and that since then there were lies and cover ups (Br. 37-39). Moreover, Anderson specifically exonerated the Morans (AP 862). Anderson's confession was material to Smith's trial testimony, and rebutted the government's argument that Smith was an expert on AAA (Br. 36-40).

D. FAILURE TO INTRODUCE EXPERT TESTIMONY

Despite concluding that Mueller's failure to introduce expert testimony he promised the jury could constitute deficient performance, the court ignored prejudice from this failure, reasoning Smith offered "no affidavit or other indication of the contents of the expert testimony that would have been introduced" (AP 1064).

Nevertheless, the record amply reflects the content of the proposed testimony (Br. 30-31), i.e. Mueller's opening statement (AP 1208), his proffer (AP 1690-91; 1719-21), and Memorandum of Interview (AP 748), the government's proffer (AP 1685-1690), and limited trial testimony attorney Alan Gavel gave (AP 1722-32). Gavel prepared tax returns for Smith reflecting deductions for money invested in her

CBO as casualty losses based on an investigation and report concluding that Smith was a fraud victim. The district court erred in failing to consider prejudice from this exclusion.[22]

E. CHECK RECEIPTS AND ANDERSON VICTIM LISTS

Mueller claimed other CBO investors were classified as victims and the government had no sound basis for treating Smith differently (Br. 24-30), telling the jury he would present evidence of: (1) Smith's $87,700 investment in her CBO, and (2) the government's lists classifying Smith as a victim of AAA's Loan 4 fraud but not the CBO fraud, while classifying others situated identically to Smith as victims of CBO fraud (AP 1208). Mueller failed to establish foundation and ignored readily available self-authenticating certified copies. (Br. 25-26) Mueller also inexplicably failed to offer any evidence of Smith's payment for her CBO, which the district court found could not "be considered strategic[,]" and "could satisfy the first prong of the *Strickland* test" (AP 1067).

Mueller's failure to introduce evidence of Smith's payment for her CBO investment, coupled with evidence that Smith did pay for her Loan 4 investment, undermined the defense and supported the government's theory for classifying Smith as a loan 4 victim but not a CBO victim. (Br. 27-30).

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[22]At minimum, the above-referenced record information was sufficient to warrant an evidentiary hearing.

The government contends (G. Br. 35, citing AP 1334, 1337, 1495, 1756) that evidence that undercover agents and witnesses Haueisen and Skillo, classified as CBO fraud victims, paid for their CBO investments supports an inference that Smith paid to participate. To the contrary, evidence that others paid for their CBO investments, coupled with the absence of any evidence that Smith did so, supports the government's classification of Skillo and Haueisen as CBO victims, but not Smith (Br. 24-30).

The cumulative effect of Mueller's errors undermines confidence in the jury's guilty verdicts and constitutes prejudice under *Strickland* (Br. 53-56).

III. DENIAL OF EVIDENTIARY HEARING IS REVERSIBLE ERROR.

It is well settled that: (1) the court must conduct an evidentiary hearing when it determines that the motion, files and records of the case do not conclusively show that the prisoner is entitled to no relief (28 U.S.C. §2255; *U.S. v. Kennedy,* 225 F.3d 1187, 1193 (10th Cir. 2000); *U.S. v. Aron,* 291 F.3d 708, 715 (11th Cir. 2002)); and (2) an evidentiary hearing is required when petitioner's allegations are based on facts outside the record. *U.S. v. Estrada,* 849 F.2d 1304, 1305 (10th Cir. 1988), *see also Frazer v. U.S.,* 18 F.3d 778, 781 (9th Cir. 1994) (evidentiary hearing required when petitioner's allegations are based on facts outside the record); *Friedman v. U.S.,* 588 F.2d 1010, 1015 (5th Cir. 1979) ("contested fact issues in §2255 cases cannot be

resolved on the basis of affidavits"); *Lindhorst v. U.S.,* 585 F.2d 361, 365 (8th Cir. 1978) (a district court cannot simply credit the government's affidavits and discredit the defendant's).

The government ignores the fact that at the conclusion of the bail hearing the district court found: "I have no difficulty concluding that there is a clear case on the merits on the habeas." (ER 981:4-5). Thus, the court found that Smith alleged facts that, if true, would entitle her to relief. Likewise, the government does not deny that: (1) factual disputes and inconsistencies beyond the record existed which the district court could not resolve without the benefit of an evidentiary hearing;[23] (2) Smith was unable to present expert testimony concerning Mueller's failure to challenge the willfulness evidence because of the abbreviated bail hearing, (AP 117-244, 556-607, 821-880); and (3) the district court halted Smith's cross of Mueller at two critical junctures, (i) Mueller's advice regarding Smith's trial testimony (AP 956:1-22) and (ii) exculpatory evidence of the joint venture CBO structure (AP 966:3-19) -- all involving disputed factual issues critical to the willfulness issue. As this Court held in *U.S. v. Holder,* 410 F.3d 651, 656 (10th Cir. 2005):

... We are convinced that the circumstances made critical the holding of an

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[23] See also ER 1056-57 (inadequate preparation); 1063-64 (failure to properly disclose expert testimony) 1064-65 (errors in opening statement); 1065-66 (defendant's testimony) 1066-67 (failure to present exculpatory evidence); 1068-69 (ineffective cross examination); and 1071-75 (prejudice).

> evidentiary hearing to develop the thoroughness of trial counsel's investigation, preparation, and the basis of the decision about calling Mr. Smith as a witness. All of these factors called for an evidentiary hearing which must result in reconsideration of the validity of both convictions.

It was an abuse of discretion to deny Smith's §2255 petition without an evidentiary hearing on the merits when: (1) the court found that there "was a clear case on the merits;" and (2) contested factual issues outside the record existed. *U.S. v. Holder, supra; Moore v. U.S.,* 950 F.2d 656, 661 (10th Cir. 1991) (hearing necessary when "factual disputes and inconsistencies beyond the record exist"); *see also, Machibroda v. U.S.,* 368 U.S. 487, 494-495 (1962):

> . This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the files and records in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection. * * * Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him opportunity to support them by evidence. On this record it is his right to be heard....

CONCLUSION

This Court's *de novo* review of the extensive record of egregious and prejudicial ineffective assistance should result in reversal. If this Court questions the

sufficiency of Smith's showing, an evidentiary hearing should be ordered.

Dated: November 1, 2010.

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DATED: November 1, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2010, I served a copy of APPELLANT KRIS SMITH'S REPLY BRIEF to:

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via the Court's ECF System.

An, further certify, regarding ***Certification of digital submission:***

(1) no privacy redactions were required; this Reply Brief was submitted in Digital Form and is an exact copy of the written document filed with the Clerk, and

(2) the digital submission has been scanned for viruses by way of a full system scan, with the most recent version of commercial virus scanning program (Kaspersky Internet Security). According to the Kaspersky full system scan program, this Reply Brief is free of viruses.

A copy of this Reply Brief in Digital Form (PDF) has been served *via e-mail* on this 1st day of November, 2010 to: Katie Bagley, Esq. at katie.s.gagley@usdoj.gov and Alan hechtkopf, Esq. at Alan.hechtkopf@usdoj.gov.

DATED: November 1, 2010 s/ *Lynn E. Panagakos*