

No. 10-1117

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KRIS A. SMITH,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO (MILLER, J.)

BRIEF FOR THE APPELLEE

Oral Argument Not Requested

JOHN A. DiCICCO
Acting Assistant Attorney General

FRANK P. CIHLAR (202) 514-5396
GREGORY VICTOR DAVIS (202) 514-5396
KATIE BAGLEY (202) 514-5396

*Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044*

Of Counsel:

JOHN F. WALSH, ESQ.
United States Attorney

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STATEMENT OF PRIOR OR RELATED APPEALS

This Court previously affirmed defendant's convictions by an unpublished order. *United States v. Smith*, No. 07-1044, 2008 WL 55996 (10th Cir. Jan. 4, 2008).

There are no related cases.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 10-1117

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KRIS A. SMITH,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

1. Defendant appeals from an order of the district court (Hon. Walker D. Miller) denying her motion under 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence. April 22, 2010, the district court granted defendant's motion for a certificate of appealability from this denial, and this Court has jurisdiction under 28 U.S.C. § 2255.

2. Defendant also appeals from an order of the district court denying her conditional request for an evidentiary hearing. The district court denied a certificate of appealability as to this issue in its order of April 22, 2010. Under 28 U.S.C. § 2253(c), this Court lacks jurisdiction as to this issue unless it grants defendant's request for a certificate.

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STATEMENT OF THE ISSUES

1. Did the trial court err by denying defendant's motion for relief under 28 U.S.C. § 2255, where defendant failed to establish that she had been denied effective assistance of counsel?
2. Did the trial court abuse its discretion by refusing to hold an evidentiary hearing on defendant's motion under 28 U.S.C. § 2255, where the trial court found that it had sufficient information from which to make a decision?

STATEMENT OF THE CASE

On August 4, 2006, a jury in the District of Colorado convicted defendant of three counts of willfully filing false federal income tax returns, in violation of 26 U.S.C. § 7206(1), and one count of willful failure to file a federal income tax return, in violation of 26 U.S.C. § 7203.¹ (R. 90; ER 1932-1933.)²

On January 23, 2007, the district court sentenced defendant to 28 months' imprisonment followed by one year of supervised release. (R. 139; ER 1997-1998.) The court ordered defendant to make restitution to the IRS in the amount of \$186,953. (R. 139; ER 1999.) Defendant timely appealed.

¹ A fifth count was dismissed on government motion prior to trial. (R. 76, 83.)

² "R." references are to the record of the Clerk of the District Court. "ER" references are to the excerpts of record filed by defendant. "G.Ex." references are to the government's trial exhibits. "D.Ex." references are to defendant's trial exhibits.

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This Court affirmed defendant's convictions by an unpublished order. *United States v. Smith*, No. 07-1044, 2008 WL 55996 (10th Cir. Jan. 4, 2008). On August 13, 2008, defendant filed a motion in the district court under 28 U.S.C. § 2255, alleging that she had been deprived of her Sixth Amendment right to effective assistance of counsel.³ (ER 256.) On November 10, 2008, defendant filed a conditional request for an evidentiary hearing on her motion. (ER 1006.) The court denied defendant's Section 2255 motion and her conditional request for an evidentiary hearing in a written order entered on March 16, 2010. (ER 1039-1075.) Although the court found that the performance of defendant's trial counsel was or might have been deficient in some of the respects alleged by defendant (see ER 1057-1064, 1066-1067),⁴ the court determined that any errors did not result in prejudice to defendant (ER 1071-1075).

On April 22, 2010, the district court granted a certificate of appealability as to the merits of defendant's ineffective assistance claim, but denied a certificate as to defendant's conditional request for an evidentiary hearing. (ER 1095.)

Defendant is currently released on bond.

³ On June 22, 2007, defendant's case was reassigned from District Judge Phillip S. Figa (now deceased) to Senior District Judge Walker D. Miller.

⁴ The court rejected several of defendant's claims of deficient performance by her trial counsel. (See ER 1056-1059, 1064-1071.)

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STATEMENT OF FACTS

Defendant's Involvement in the AAA Scheme

Defendant Kris Smith was a successful Grand Junction, Colorado, business owner who had worked as a bookkeeper, accountant, and paid tax return preparer. (ER 1231, 1246-1247, 1293, 1396-1397, 1457, 1494, 1570-1571, 1641; G.Exs. 24, 116, 117, 186.) Defendant had prepared individual, corporate, and partnership tax returns for clients. (ER 1571-1574, 1641.)

During 1997, defendant earned substantial capital gains from the sale of stock. (ER 1558-1561.) For 1997, defendant and her husband, Wilbur Smith, paid income taxes totaling \$50,284. (ER 1214-1215; G.Ex. 4.)

In 1999, unhappy with her high tax burden, defendant became a client of Anderson's Ark and Associates ("AAA"), which was marketed as a group of tax professionals that could reduce or eliminate an individual's tax liability. (ER 1279, 1287-1288, 1291, 1311, 1395; G.Ex. 61.) In fact, the tax tools sold by AAA were not legitimate. (ER 1458.) Principals in AAA included Keith Anderson and Richard Marks. (ER 1279, 1284, 1309.) Defendant's participation in AAA resulted in a tax loss to the government of \$203,881. (ER 1664, 1667-1669, 1673; G.Ex. 119.)

Four days before completing the preliminary information form that was a prerequisite for membership in AAA, defendant sold another

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large block of stock, earning capital gains of more than \$375,000. (ER 1397-1398, 1564-1565, 1657.) Defendant sought to avoid paying capital gains tax. (ER 1291, 1294.) In the preliminary profile that she completed as part of her application to join AAA, defendant stated that her primary goal was reduction of her tax burden. (ER 1290, 1396, 1472; G.Exs. 47, 62.) Defendant's ultimate goal was to no longer pay taxes. (ER 1296.)

In August 2000, defendant invited CPA Samuel Baldwin to accompany her to an AAA seminar. (ER 1570, 1581.) Baldwin told defendant he was very skeptical of the claims made by AAA. (ER 1582-1583.) Despite this, defendant became an "information officer" for AAA that same month. (ER 1287, 1297, 1474, 1492, 1796.) Information officers were basically AAA's sales force, speaking at AAA-sponsored recruitment seminars, advising new AAA members, introducing members to AAA-related accountants, and promoting the sale of AAA products. (ER 1298-1301, 1320, 1376.) Information officers, including defendant, received commissions from AAA. (ER 1443-1444, 1495.) According to Bill Hayes, the information officer who initially recruited defendant into AAA, defendant's understanding of AAA was better than that of most people. (ER 1288.)

Defendant, who held herself out as an expert in tax and financial matters, gave presentations at various AAA-sponsored seminars, during which she represented that the AAA program worked and that

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she had been able to use products sold by AAA to obtain refunds of taxes she had previously paid. (ER 1382, 1463, 1543-1544, 1546.) Defendant made similar claims to her individual AAA clients. (ER 1492-1493.) Defendant assured her clients that the AAA program was legal, claiming she had done research into the program. (ER 1493, 1525, 1535.)

Upon joining AAA, defendant purchased a Complex Business Organization (“CBO”) package. (ER 1288.) The CBO package purported to take advantage of certain tax laws to reduce or eliminate a person’s tax burden. (ER 1294.) The CBO package comprised two programs, called the “Look Back” program and the “Look Forward” program. (ER 1334, 1360-1361, 1404.)⁵ The Look Back program was designed to eliminate taxes for the current year and to “recover” taxes paid for the two prior years. (ER 1322, 1334, 1353, 1380-1381.) Under the Look Back program, the AAA client purported to enter into a partnership agreement with an AAA-related entity known alternatively as Macro Media and Mason Advertising. (ER 1334, 1398, 1471, 1511, 1750.)

Defendant’s partnership was named Rocky Ventures. (ER 1390; G.Ex. 50.) Defendant and her husband were 95 percent partners in Rocky Ventures, and Macro Media was a five percent partner. (ER 1351, 1391.) Although Rocky Ventures was supposed to commence

⁵ Only the “Look Back” program is relevant to this appeal.

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business on September 1, 1999, the partnership agreement was not signed until October 13, 1999. (ER 1391-1392.) Rocky Ventures was supposedly engaged in marketing of various services, but there was no indication it actually conducted any business. (ER 1391.) Rocky Ventures had no depreciable assets such as computers, fax machines or telephones. (ER 1395.) There was no evidence that Rocky Ventures maintained any books of account. (ER 1392.) There was no evidence that Rocky Ventures opened a bank account. (ER 1392.) Moreover, although a provision of the partnership agreement required the partners to make capital contributions in proportion to their partnership interests, there was no indication that Macro Media made any capital contribution to Rocky Ventures. (ER 1391.) Despite a provision in the partnership agreement requiring annual audits of Rocky Ventures, there was no evidence that any audits occurred. (ER 1392.)

The Look Back program created ostensible losses in a joint venture through a “guaranteed payment” to Macro Media for marketing and consulting services that Macro Media would supposedly perform. (ER 1219, 1334, 1340, 1344-1345.) The amount of the guaranteed payment was not based on the actual amount of marketing or consulting services that Macro Media performed for the partnership (ER 1340), but was based solely on the amount of taxes to which the individual partner was exposed. (ER 1340, 1366, 1508.)

Here, the guaranteed payment was supposed to be \$1,000,000.

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(G.Ex. 11.) An addendum to the Rocky Venture partnership agreement stated that Macro Media would receive the guaranteed payment for marketing and other services to be performed by December 31, 1998, even though that was nine months before Rocky Ventures was supposed to have commenced business and ten-and-one-half months before the partnership agreement was signed. (ER 1392-1393.) In fact, there was no evidence that \$1,000,000 was ever transferred to Macro Media or that Macro Media spent \$1,000,000 on marketing and consulting services by December 31, 1998— or even by December 31, 1999. (ER 1394, 1470.)

The guaranteed payment was theoretically funded by a loan from La Maquina Blanca, an AAA-affiliated financial institution based in Costa Rica, and was supposed to be paid directly to Macro Media without first being disbursed to the partnership. (ER 1343, 1398-1399, 1472, 1484, 1514, 1769.) Rocky Ventures purportedly sought a \$1,000,000 loan from La Maquina Blanca. (ER 1398-1399.) Defendant was aware that to be able to deduct the guaranteed payment on her individual tax return, she had to be personally liable for the loan from which the guaranteed payment was to be paid. (ER 1589.)

On October 13, 1999, defendant and her husband signed a promissory note for \$1,000,000 with a due date of “September 1, 2099.” (ER 1399; G.Ex. 53.) The only security provided for the loan was defendant’s interest in the partnerships; no other collateral was

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required, even though Rocky Ventures was a new business with no assets. (ER 1348, 1400, 1515, 1770; G.Ex. 52.) When she sought to refinance her home in November 2000, defendant did not list this promissory note as a liability. (ER 1622; G.Ex. 82.) Indeed, individual borrowers were assured that the loans would never have to be repaid. (ER 1346-1347, 1368, 1399, 1492, 1515-1516.) Defendant assured her own clients that the loans would never have to be repaid. (ER 1492-1493, 1532, 1544, 1549.)

Under the Look Back program, the purported payout of the guaranteed payment to the minority partner resulted in the partnership's reporting a net loss on its tax return. (ER 1219; G.Ex. 11.) The reported loss flowed to a partner in proportion to his or her interest in the partnership, and was reported on the individual partner's income tax return, effectively reducing reported income to zero.⁶ (ER 1334, 1336-1337, 1344-1345, 1350.) The amount of the reported loss in excess of the individual partner's income was carried back to the two prior years' returns as a net operating loss.⁷ (ER 1353-1355.) Using this net operating loss, the AAA client filed returns for tentative refund, seeking the refund of the taxes paid for the two prior years. (ER 1354-1355.)

⁶ As noted above, the amount of the guaranteed payment was based on the amount of pass-through loss required to eliminate the minority partner's taxes by zeroing out reported income.

⁷ Under the Internal Revenue Code as in effect at the time, a valid net operating loss could be carried back two years. (ER 1461.)

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In theory, Macro Media was supposed to develop a 1-900 phone number to market tax information services; place advertisements in nationwide publications; develop tax-related websites; and assist in selling a tape series called “Gateway to Financial Freedom,” developed by Keith Anderson.⁸ (ER 1279, 1341-1342, 1394, 1751.) In fact, there was little evidence that Macro Media placed any advertisements or engaged in any website development. (ER 1342-1343, 1512.) The only sales of the Gateway tape series were to AAA clients; there was no evidence that Rocky Ventures marketed or sold Gateway tapes or any other product. (ER 1394.)

Defendant also participated in AAA’s Loan 4 program. This program involved an AAA client’s purportedly lending funds to a business in Costa Rica, where the funds supposedly could be invested for high returns. (ER 1290-1291, 1466.) In fact, the funds were not so invested but were commingled with other AAA funds in a manner similar to that of a Ponzi scheme. (D.Ex. Q.) Defendant, who invested more than \$200,000 in the Loan 4 program, was identified as a victim of that program in the restitution order filed in connection with the conviction of Keith Anderson in the Western District of Washington (*United States v. Anderson, et al.*, No. 02-423). (ER 1466.)

After joining AAA, defendant filed a Form 1045, an application for

⁸ In these tapes, Anderson sets forth the concept of “sovereignty,” the idea that a person can transition out of the federal system and cease paying income taxes. (ER 1048.)

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a tentative refund, for 1997 and 1998, seeking a refund of all income taxes she had paid for those years based on the claimed partnership losses generated by using the Look Back scheme. (ER 1234-1235; G.Ex. 14.) Defendant obtained a refund of \$50,284 for 1997 and of \$21,149 for 1998.⁹ (ER 1383-1384; G.Ex. 87.) Defendant also filed tax returns for 1999 and 2000 which, as result of the claimed partnership losses, reported negative adjusted gross income. (ER 1225-1229; G.Exs. 10, 15.)

Rocky Ventures filed partnership tax returns for the period from 1999 through 2000. (G.Exs. 11, 16, 21, 25, 115.) Although Rocky Ventures identified its type of business as marketing, it reported no gross receipts, no profits, and no tangible assets, and claimed no deductions for rent, office supplies, or telephone bills. (ER 1218-1222, 1239-1242, 1394-1395; G.Exs. 11, 16, 21, 25, 115, 119.) Rocky Venture's 1999 return reported a guaranteed payment to partner of \$1,000,000, in addition to various fees, which resulted in a loss on the return of \$1,031,034. (ER 1219; G.Ex. 11.) This loss was carried onto the partners' individual tax returns.¹⁰ (ER 1220.)

Defendant was the tax partner for Neco & Associates, a limited liability company ("LLC") that she had established. (ER 1251, 1417,

⁹ Defendant also obtained refunds of Colorado state income taxes for 1997 and 1998. (ER 1384-1386; G.Ex. 133.)

¹⁰ Neither Macro Media nor Mason Advertising filed tax returns for the period between 1994 and 2003. (ER 1231-1233; G.Exs, 28, 29.)

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1814.) During 2003, Neco was actively engaged in business, and funds were deposited into and disbursed from its bank account. (ER 1433-1435, 1477, 1677, 1814.) Although an LLC is required to file a tax return for any year in which it has income or expenses, no timely 2003 federal tax return was filed by Neco & Associates. (ER 1236, 1639, 1676, 1814; G.Ex. 120.) Neco did, however, file a 2004 return. (ER 1249-1250; G.Ex. 118.)

Performance of Defendant's Trial Counsel

Defendant was represented at trial by attorney Gregory Mueller. Mueller billed defendant for 274.3 hours of his time, as well as for 87.1 hours an investigator had spent working on defendant's case. (ER 1056.) Mueller's billing records, however, significantly understated the actual amount of time he spent on the case; in fact, Mueller devoted at least 820 hours toward preparing defendant's case. (ER 890.) According to Mueller, he did not bill defendant for all of the hours he worked because he did not believe it was fair to bill her for time he spent educating himself, and also because he was aware that she had financial difficulties. (ER 892.)

As part of his preparation, Mueller consulted with attorneys familiar with both tax law in general and the AAA program in particular. (ER 894-895.) Defendant herself was "very knowledgeable about tax, taxation, and the program of Anderson Ark." (ER 896.) As a result, defendant provided significant assistance to Mueller by

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explaining the organization, the program, and her involvement. (ER 895-896.) In general, defendant was very involved in the preparation for trial, and was aware of every step taken in the case. (ER 910.)

Mueller's trial strategy, developed in consultation with defendant, was to demonstrate that defendant did not act willfully, and was therefore not guilty, because she relied on representations made by others in AAA and believed in good faith that her actions were legal. (ER 905-906, 1071, 1073.) Mueller introduced evidence in support of this theory of defense. On cross-examination, Mueller elicited testimony from a government witness that AAA did not tell information officers or clients that its programs were illegal or fraudulent. (ER 1316-1317.) Mueller also elicited testimony on cross-examination that clients believed that the CBO program was legitimate. (ER 1525-1526.) Mueller presented witnesses on defendant's behalf who made the same claims. (ER 1781-1782, 1811, 1834-1836.) Mueller also introduced evidence that in 2005, defendant disclosed on a loan application that she had personally guaranteed business loans. (ER 1788.)

On cross-examination, Mueller challenged several important government witnesses. IRS Special Agent Michael Priess testified that he had investigated AAA in an undercover capacity. (ER 1228-1329.) Mueller established on cross-examination that Agent Priess had never spoken to defendant, and did not recognize her. Special Agent Michelle Hagemann admitted under Mueller's cross-examination that there was

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nothing inherently illegal about the use of Forms 1045 or net operating loss deductions. (ER 1460-1461.) Agent Hagemann also agreed that when defendant withdrew money from her IRA or sold stock, she reported those taxable events on her tax returns. (ER 1473.)

Defendant transferred certain properties out of her name using general warranty deeds, which Agent Hagemann, under Mueller's questioning, admitted was not illegal. (ER 1476.) Mueller also adduced testimony from Hagemann that defendant and her husband continued to hold business property and their residence in their own names. (ER 1476.) Agent Hagemann testified that she believed defendant was seeking to become a "sovereign person" as described on the "Gateway to Financial Freedom" tapes, but admitted to Mueller that defendant continued to hold property in her own name, file her tax returns, and hold a social security card and state driver's license in her name, and had not, in fact, ever become a "sovereign person." (ER 1477.)

Mueller's questioning also led Agent Hagemann to admit that she had seen a copy of the Loan 4 victim list on which defendant was named as a victim who had lost more than \$200,000. (ER 1466.) Hagemann also admitted that she had not seen any emails from AAA leadership telling the information officers or clients that the CBO program was a fraud. (ER 1467.)

Mueller introduced, as evidence supporting defendant's claim that

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she was a victim of criminal fraud, a copy of the Second Superseding Indictment in the *Anderson* case, as well as the verdict form, judgment, government's opening statements and closing arguments, government's sentencing memorandum, and a portion of the sentencing transcript from that case. (ER 1734-1743; D.Exs. Q-V.) These documents explained the fraud perpetrated by the leaders of AAA, and included discussions of the CBO program.¹¹

Mueller called George Benoit, an enrolled agent who prepared tax returns for defendant and other AAA clients, as an expert witness. (ER 1823, 1825.) Benoit testified that he believed that the CBO program generated legitimate operating loss deductions. (ER 1831-1832.) Benoit also testified that he intended that defendant rely on the tax returns he prepared. (ER 1837.)

Mueller and defendant discussed whether she would testify at trial, and the potential scope of her testimony. Mueller advised defendant not to testify about the entire course of her involvement with AAA, because doing so would open the door for the government to present a large amount of extremely damaging material on cross-examination. (ER 907.) However, he thought "that the jury needed to at least hear her voice and see her demeanor on the stand," and he wanted defendant to introduce a few documents. (ER 950.) Mueller believed that it would be best to keep the scope of defendant's

¹¹ Defendant was not mentioned by name in the Second Superseding Indictment.

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testimony very narrow, and Mueller and defendant worked out a script for her testimony. (ER 917, 919.) Immediately before defendant went on the stand, Mueller again asked her if she wanted to testify, and she reaffirmed that she did. (ER 919.)

Mueller was concerned by defendant's continued claim that she believed in the concept of sovereignty as espoused by Keith Anderson, notwithstanding the fact that Anderson had been convicted. (ER 901, 909.) Mueller found these ideas "radical" and believed that if defendant spoke about these ideas at trial, the jury would be prejudiced against her. (ER 902, 908.) Mueller repeatedly told defendant not to discuss her claimed tax protestor beliefs, informing her that testimony regarding those beliefs could be very damaging to her. (ER 747, 749.)

Defendant's testimony was very brief. On direct examination, she authenticated Exhibit H, the postal receipts for the 2003 and 2005 Neco tax returns that she had mailed to the IRS on July 11, 2006. (ER 1813-1814; ER 7.) On cross-examination, she admitted that the 2003 tax return was not timely filed.¹² (ER 1814.) She also authenticated Exhibit G, the 2003 tax return, which she had signed "under duress." (ER 1815-1816.) Asked what that meant, she stated that she could not "file this tax return without it being under the penalty of perjury. I am

¹² That fact was previously established by Government's Exhibit 120, the official certification that no timely tax return had been filed for Neco for 2003 (ER 1236-1237; G.Ex. 120), and by the testimony of Susan Kosta that defendant had told her that she had not timely filed the 2003 return (ER 1639).

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concerned about the tax laws, that . . . they are so complex that I am not able to follow the tax laws. I don't have a problem filing my tax returns." (ER 1816.) Mueller objected to some of the government's questions on cross-examination on the grounds that they were outside the scope of direct examination. The court overruled some objections and sustained others, substantially limiting the scope of the government's cross-examination. (ER 1814-1816.) For example, government counsel was not permitted to ask defendant about the nature of Neco's business or whether the tax return was accurate. (ER 1815-1816.)

After the trial, Mueller submitted an affidavit in support of defendant's motion for a new trial based on ineffective assistance of counsel. (ER 115.) The affidavit, which Mueller testified was intentionally vague (ER 928), described his view of possible defenses as "myopic," and claimed that he had failed to recognize "pertinent facts." (ER 115.) The affidavit did not detail any of these facts, however; rather, it referred to an affidavit previously prepared by William Cohan. Mueller testified that he signed the affidavit because he "felt very bad" for defendant, and he believed that if he stated that his representation was inadequate, "she would have another opportunity to come back and try this again." (ER 921-922.) He stated that another attorney told him that "there's always someone who might be able to do it better." (ER 922.)

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At the hearing on defendant's motion for a new trial based on ineffective assistance of counsel, the district court stated that defendant, through counsel, had presented her good-faith defense to the jury. (ER 1962.) The court found that this was a "reasonable approach, and certainly well presented to the Court." (ER 1963.) The trial court noted that "Mr. Mueller did present himself as a capable adversary" of the government at trial. (ER 1963.)

SUMMARY OF ARGUMENT

1. Defendant's trial counsel was effective. Defendant has failed to show that her attorney's performance fell below an objective standard of reasonableness or that a reasonable probability exists that but for the alleged deficiencies in counsel's performance, the result of her trial would have been different.

Mueller's decision to have defendant testify that she had mailed certain documents to the IRS was not improper. Mueller and defendant discussed whether she should testify and what the scope of her testimony should be, and defendant indicated that she wished to testify. Mueller repeatedly told defendant not to discuss her purported tax protestor beliefs because testimony regarding those beliefs could be very damaging to her. The district court found that Mueller considered the advantages and disadvantages of defendant testifying, and that his decision to have defendant testify "on a singular issue and to minimize cross-examination was an adequately informed strategic choice" and

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therefore not deficient. Any prejudice stemming from defendant's testimony was the result of her continuing assertion of the tax protestor views promoted by AAA, rather than the strategic decision of her counsel.

Any errors made by defendant's counsel, Gregory Mueller, with respect to the introduction of evidence were not prejudicial. Mueller did not introduce the victim lists from the *Anderson* case, but the lists were of minimal exculpatory value and cumulative of other evidence that Mueller introduced. Defendant was unable to show prejudice from Mueller's failure to conduct a targeted review of discovery. Neither the undercover conversation in which defendant claims that Richard Marks admits that AAA leaders concealed the illegality of their scheme, nor the so-called "confession" of Keith Anderson were relevant to the issue of defendant's intent at the time that she committed her crimes. Defendant also fails to show prejudice from Mueller's failure to have Alan Gavel qualified as an expert witness by demonstrating which expert and what testimony would have been admitted absent Mueller's error. Mueller also failed to introduced check receipts showing defendant's payments to AAA for the CBO program and the videos and other materials for the Tax Magic program. The district court found that, while these materials were potentially probative, they were outweighed by the overwhelming evidence of defendant's willfulness.

Furthermore, the district court properly concluded that,

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considering the case as a whole and the strength of the government's evidence of defendant's willfulness, any error Mueller made was not prejudicial to defendant.

2. This Court should not consider defendant's claim that the district court abused its discretion by denying defendant's conditional motion for a hearing. In any event, there was no error. At the October 8, 2008, hearing on defendant's motion for release on bond pending appeal, the district court took evidence in the form of Mueller's live testimony. Defendant also submitted several affidavits with her motion, which the district court read and considered. The district court made a finding that, after having reviewed the motion, briefs, exhibits, trial record, and hearing evidence, no additional argument or evidence was needed. (ER 1040.)

ARGUMENT

I. *Defendant Received Effective Assistance of Counsel*

A. *Standard of Review*

This Court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. See *United States v. Cervini*, 379 F.3d 987, 990 (10th Cir. 2004); *English v. Cody*, 241 F.3d 1279, 1282 (10th Cir. 2001); *United States v. Pearce*, 146 F.3d 771, 774 (10th Cir. 1998). The claim of ineffective assistance of counsel presents a mixed question of fact and law, which the Court reviews *de novo*. *United States v. Holder*, 410 F.3d 651, 654 (10th Cir. 2005).

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B. *Argument*

Defendant argues (Br. 45-56) that the district court erred by denying her motion to vacate her convictions. She claims (Br. 46-51) that the district court clearly erred in determining that Mueller's performance relating to defendant's trial testimony was not deficient. She also asserts (Br. 51-56) that the district court erred in determining that six errors that did or might constitute deficient performance did not result in any prejudice to defendant.¹³ Her contentions lack merit.

When considering a claim that defense counsel was ineffective, this Court must determine whether the defendant has shown (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's performance prejudiced her such that a reasonable probability exists that, but for the deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant must demonstrate both *Strickland* prongs to establish her

¹³ Defendant seems to be attempting to make various other arguments in her statement of facts, apparently attempting to challenge the district court's factual findings; however, as she fails to sufficiently develop those claims, this Court may not review them. *See United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) ("[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (citation omitted); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."); *Watts v. United States*, 220 F.2d 483, 485 (10th Cir. 1955).

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claim, *id.* at 692; a failure to prove either one is dispositive. *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000) (quoting *Strickland*, 466 U.S. at 697); *see also Romano v. Gibson*, 239 F.3d 1156, 1181 (10th Cir. 2001) (“This court can affirm the denial of habeas relief on whichever *Strickland* prong is the easier to resolve.”).

“Judicial scrutiny of counsel’s performance must be highly deferential,’ and courts are instructed to ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *McLuckie v. Abbott*, 337 F.3d 1193, 1198 (10th Cir. 2003) (quoting *Strickland*, 466 U.S. at 689). “There are countless ways to provide effective assistance in any given case” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 687. Performance of defendant’s counsel must also be considered in light of the strength of the government’s case. *United States v. Clonts*, 966 F.2d 1366, 1370 (10th Cir. 1992); *United States v. Miller*, 907 F.2d 994, 997 (10th Cir. 1990); *United States v. Rivera*, 900 F.2d 1462, 1474 (10th Cir. 1990).

In evaluating a claim of ineffective assistance, a court should look not to the ideal defense for a client, but only at whether counsel met the minimum standard required by the Sixth Amendment. *See United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984). That an attorney lacks a particular depth or quality of experience, while not irrelevant, does not warrant a presumption of ineffectiveness. *See id.* at 665. After all,

“[e]very experienced criminal defense attorney once tried his first case.”
Id.

For an alleged error by trial counsel to become prejudicial, a litigant must show that adequate representation “likely would have changed the outcome of the trial.” *Miller v. Champion*, 262 F.3d 1066, 1074-75 (10th Cir. 2001) (internal quotation omitted). In evaluating whether alleged errors were prejudicial, this Court must consider the totality of the evidence, not merely the evidence favorable to the defendant. *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

Defendant initially raised her claim of ineffective assistance of counsel in a motion for a new trial filed in the district court prior to sentencing.¹⁴ (R. 118.) The district court rejected defendant’s claim, finding it untimely and rejecting it on the merits. The court stated: “And certainly I don’t think the presentation made by [defendant’s] counsel, Mr. Mueller, was deficient at trial.” (ER 1963.) The district court also concluded that Mueller “present[ed] himself as a capable adversary of [the prosecutors] at trial.” (ER 1963.)

After this Court affirmed defendant’s convictions, defendant again raised her claim of ineffective assistance of counsel in the district court. In its March 16, 2010, Order denying defendant’s motion under Section 2255, the district court found that some, but not all, of Mueller’s actions as trial counsel, did or could constitute deficient performance. (R. 208;

¹⁴ At that time, the late District Judge Phillip S. Figa was assigned to the case.

ER 1039.)

Indeed, the district court determined that many of Mueller's actions that defendant pointed to in support of her claim that Mueller was ineffective were in fact examples of sound lawyering. For example, the court found that Mueller's decision not to move to dismiss Counts 1-3 on collateral estoppel grounds was not deficient because such a motion would have been unsuccessful. (ER 1058.) Similarly, the court determined that Mueller's decision not to object to certain testimony of Bill Hays, Michael Priess, and Sam Baldwin was correct because the testimony was admissible (ER 1068) and that Mueller's opening statement was not deficient because it was made in the good faith belief that the evidence referred to would be admitted at trial and was therefore part of a sound trial strategy (ER 1065). The court also concluded that Mueller's cross-examination of government witnesses was competent (ER 1069) and that his decision not to propose a particular jury instruction was not deficient where the instructions given by the trial court were legally correct and were consistent with the central theme of the theory of defense (ER 1070-1071).¹⁵ Defendant

¹⁵ Defendant submitted several affidavits in support of her motion for a new trial. Mueller, in his affidavit, claims, without explanation, that his view of possible defenses was "myopic." But the district court effectively rejected this claim when it concluded that "the strategic choice" to emphasize that defendant "relied in good faith on the individuals associated with AAA" was "objectively reasonable." (ER 1071.)

Additionally, the affidavit deserves little evidentiary weight. Mueller designed it to be intentionally "vague" (ER 928), and signed it

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does not assign error to these findings, let alone establish that they were clearly erroneous. Accordingly, defendant essentially concedes that these aspects of Mueller's performance were effective, and are not to be considered when determining whether Mueller's alleged errors prejudiced defendant.¹⁶

The court did find that some aspects of Mueller's performance were or could be considered deficient. Specifically, the court found that Mueller erred by failing to authenticate and introduce the *Anderson* victim lists, which showed that the government deemed defendant a victim of the Loan 4 scheme (ER 1058); that Mueller improperly failed to conduct a targeted review of the government's evidence (ER 1061); that Mueller may have erred by failing to lay a proper foundation for the introduction of the Tax Magic materials (ER 1063); that Mueller may have acted improperly by failing to timely disclose the proposed expert testimony of Alan Gavel (ER 1063-1064); and that Mueller may have erred by failing to introduce evidence of the payments defendant made to AAA (ER 1067). However, the district court found that none of these errors were "so serious as to deprive Defendant of a fair trial." (ER 1075.) The court concluded that, "in light of the government's

because he "felt very bad" for defendant and believed that if he stated that his representation was inadequate, "she would have another opportunity to come back and try this again." (ER 921-922.)

¹⁶ The district court also found Mueller's performance in connection with defendant's direct testimony to be reasonable and to reflect "an adequately informed strategic choice." (ER 1066.) Defendant does challenge this finding on appeal. *See infra*.

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significant evidence of willfulness, Defendant has not established a reasonable probability that, but for the failure to introduce the potentially exculpatory evidence, the result would have been different.” (ER 1073-1074) (citing *Boltz v. Mullin*, 415 F.3d 1215, 1224-1225 (10th Cir. 2005)). This conclusion was correct.

1. *Mueller’s performance in relation to defendant’s trial testimony was not deficient and did not prejudice defendant.*

Defendant assigns error (Br. 46) to the district court’s finding (ER 1066) that Mueller’s decision to have defendant testify that she had mailed certain documents to the IRS was not improper. 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 foreseeable cross-examination (Br. 49). Contrary to defendant’s claim, the district court’s findings are not clearly erroneous.

The district court found that Mueller’s decision to have defendant testify “on a singular issue and to minimize cross-examination was an adequately informed strategic choice” and therefore not deficient. (ER 1066.) Mueller and defendant had discussed whether or not she should testify and what the scope of her testimony should be. (ER 906-907.) Immediately before defendant took the stand, they again discussed these issues, and defendant elected to testify. (ER 919.)

As one reason for having defendant testify, Muller explained that

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he believed it was important for the jury to “hear [defendant’s] voice and see her demeanor on the stand.”¹⁷ (ER 950.) This is an entirely valid tactical decision. *See Cannon v. Mullin*, 383 F.3d 1152, 1172 (10th Cir. 2004) (discussing potential importance to jury of defendant’s demeanor when testifying in reaching verdict). Mueller and defendant scripted her direct examination and Mueller sought to limit the scope of her testimony because he was concerned that testimony about becoming a sovereign citizen and defendant’s involvement with people holding “radical views” would damage her case. (ER 907-909.) Mueller’s careful sculpting of defendant’s testimony demonstrates his understanding of Rule 611(b) of the Federal Rules of Evidence, which generally limits cross-examination to those questions within the scope of the direct testimony.¹⁸ *See Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 498 (10th Cir. 1985) (trial court properly barred cross-examination that exceeded the scope of the direct testimony).¹⁹

¹⁷ He also stated that defendant’s testimony was necessary to introduce the postal receipts. (ER 950.) He did not consider that a representative of the U.S. Postal Service could have authenticated those documents. (ER 952.)

¹⁸ The determination of the permissible scope of cross-examination is a fact-specific evidentiary ruling committed to the sound discretion of the trial court. *United States v. Hinkle*, 37 F.3d 576, 579 (10th Cir. 1994). As a result, even an experienced attorney might misjudge what cross-examination a trial court will permit. 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.

¹⁹ Defendant claims (Br. 47-48) that because her decision to testify was based on incorrect advice from Mueller, she was deprived of her right to

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And contrary to defendant's claim that Mueller failed to prepare her for cross-examination (Br. 49-50), Mueller repeatedly told defendant not to discuss her tax protestor beliefs, informing her that testimony regarding those beliefs could be very damaging to her. (ER 747, 749.) Indeed, Mueller wisely advised defendant not to testify more broadly about her involvement in AAA because such testimony would open the door for cross-examination about her tax protestor views and her association with people who held radical protestor views, which the jury was likely to view negatively. (ER 901-902, 907-908; 1066.)

Defendant has not shown that the district court's finding that Mueller did consider the advantages and disadvantages of defendant testifying is clearly erroneous. *See United States v. Orange*, 447 F.3d 792, 796 (10th Cir. 2006) (defendant bears burden of showing clear error). Moreover, the district court properly found that any prejudice resulting from defendant's cross-examination was the result her continuing assertion of the tax protestor views promoted by AAA, "not the strategic decision of her counsel." (ER 1066.)

effective assistance of counsel. But the cases upon which she relies 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 testify; rather she chose to exercise that right. Further, the cases defendant cites involve truly egregious errors of well-settled law by defense counsel. *See Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (defendant's attorney wrongly advised his client that, if he took the stand, the prosecution would be able to impeach him with all of his prior convictions); *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1993) (defense counsel failed to advise defendant that he also had the right to testify at the penalty phase).

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Defendant asserts (Br. 50) that because Mueller failed to review discovery and show her transcripts of undercover conversations and a so-called “confession” written by Richard Marks, it is Mueller’s fault that she held these claimed beliefs.²⁰ This claim is frivolous.

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. Furthermore, the assertion that defendant would have stopped espousing tax protester beliefs upon seeing these documents is pure speculation for which defendant cites no evidentiary support. In fact, the evidence suggests the contrary, since defendant continued to assert these beliefs even after Richard Marks, Keith Anderson, and other creators of AAA were convicted of tax fraud. (ER 909.)

In any event, the relevant issue in this case was defendant’s beliefs at the time she committed the offense conduct, not her beliefs at

²⁰ Defendant does not specifically assign error to the trial court’s finding (ER 1057) that she failed to establish that Mueller’s pretrial preparation was inadequate. However, she claims (Br. 50) that her prejudicial cross-examination was the result of Mueller’s inadequate preparation. According to defendant, Mueller’s billing records show that he spent 274.3 hours on defendant’s case, while an investigator spent an additional 87.1 hours. (ER 1056.) Mueller testified, however, that he spent at least three times that number of hours on the case. (ER 890.) Mueller consulted with attorneys familiar with tax law and AAA. (ER 894-895.) The district court also found that defendant’s expertise could have reduced the time necessary to understand the case and prepare a defense. (ER 1057.) The court found that defendant failed to establish that the amount of time Mueller spent on trial preparation, standing alone, fell below an objective standard of reasonableness. (ER 1057.) Defendant fails to demonstrate that this finding was clearly erroneous.

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the time of trial. *See United States v. Blanchard*, No. 09-1284, 2010 WL 3384979, at *10 (6th Cir. Aug. 30, 2010). Defendant admits (Br. 50) that she had not seen the transcripts or the “confession”; therefore, they could not be relevant to the issue of what she believed at the time she was participating in the CBO scheme.

2. *Mueller’s actual or possible errors did not prejudice defendant*

The district court found that certain errors by Mueller did or could constitute deficient performance, but that those errors did not result in prejudice to defendant.

Anderson victim lists

The district court found that Mueller improperly failed to obtain self-authenticating copies of the victim lists filed by the government in the *Anderson* case or to otherwise properly authenticate the lists. (ER 1057-1058.) But as the court also found, the exculpatory value of this evidence was minimal. (ER 1071.) Defendant was not listed as a victim of the CBO/Look Back scheme, which was the basis of the criminal charges against her. (ER 452-455.) Instead, defendant was listed as victim of the Loan 4 scheme (ER 450), a scheme unrelated to the charges against defendant. The government argued that defendant knowingly engaged in tax fraud, and then was duped by AAA into investing the proceeds of that fraud into the Loan 4 investment plan.²¹

²¹ Not only were the lists tangential to the issues in the instant case, their introduction would have opened the door to damaging rebuttal

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(ER 708.)

Furthermore, any prejudice that defendant might have suffered was significantly mitigated by other evidence before the jury. Mueller elicited testimony from Agent Hagemann on cross-examination that Hagemann had seen a copy of the Loan 4 victim list from the *Anderson* case, and that defendant was shown on the list as having lost more than \$200,000. (ER 1466.) *See Medina v. Barnes*, 71 F.3d 363, 367 (10th Cir. 1995) (counsel's failure to offer evidence not prejudicial where it was cumulative of other evidence admitted). Mueller also introduced several documents from the *Anderson* case, including a copy of the Second Superseding Indictment, the verdict form, judgment, the government's opening statements and closing arguments, the government's sentencing memorandum, and a portion of the sentencing transcript. (ER 1734-1743; D.Exs. Q-V.) These documents explained the fraud perpetrated by AAA and its leaders through the various programs and packages AAA sold, and reasonably could have formed a basis for a jury finding that defendant was a victim of criminal fraud.

Targeted review of government's evidence

The trial court found that it was not objectively reasonable for Mueller to fail to review the evidentiary materials specifically identified by the government as relevant to defendant's case. (ER 1059-

testimony. The government was prepared to call Krista Tongring, a prosecutor in the *Anderson* case, as a rebuttal witness to explain why defendant was not considered a victim of the CBO scheme. (ER 1820, 733.)

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1061.) Defendant claims that Mueller's failure to review and introduce into evidence two specific items from those materials caused her prejudice. Defendant first points to the transcript of an undercover conversation that occurred on October 25, 2000, which she claims (Br. 21) includes a statement by Richard Marks that he concealed the substance of various AAA programs from information officers. (ER 751.) But defendant makes too much of the exculpatory value of this conversation. Indeed, the conversation did not even reference the CBO program: the supposedly incriminating statements followed a question by the undercover officer about what was "next on the horizon for Triple A" -- that is, about future programs rather than existing ones, such as the CBO/Look Back program that defendant used. (ER 801.) An unknown male (not Marks) responded that information officers were not told about what "we're working on in detail because those things get spoken about." (ER 680, 802.) Later, an unknown male explained that at a prior conference, several people had overheard conversations about potential programs, and "some of the stuff we say in there shouldn't be published because it's illegal, but we still discuss the illegal and how do we make it legal." (ER 682, 804.) The same speaker then stated that conversations about potential programs are kept private "until we walk out there and tell them." (ER 682, 804.) That conversation demonstrates only that AAA kept information about possible future programs private until the product was in finished form;

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it does little to support defendant's claim that the AAA principals concealed information about the CBO/Look Back program from information officers.

The district court found that this conversation could have been relevant, but that it was "cumulative of other evidence showing that the AAA programs were fraudulent and that the fraud was concealed from AAA members." (ER 1073.) That evidence included the testimony of Bill Hays, the information officer who recruited defendant, that no one associated with AAA told him the program was a fraud (ER 1316), and the testimony of George Benoit, an accountant who prepared tax returns for AAA clients, that he relied on Marks for information about the program and that Marks did not tell him that the CBO program was illegal. (ER 1833-1837.) Thus, contrary to defendant's claim (Br. 53), there was ample evidence before the jury to support defendant's claimed good faith defense. Any error from excluding the transcript was minimal. *See Medina*, 71 F.3d at 367.

Defendant also asserts (Br. 39) that Mueller was deficient in failing to find a statement by Keith Anderson in which Anderson described his leadership as "incompetent and destructive" and the Loan 4 program as a "loser" that involved lies and the theft of member funds. Defendant does not explain how this "confession," which specifically referred only to the Loan 4 program (ER 857), would be relevant to her defense that, at the time she was participating in the CBO program,

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she believed it was legitimate. Defendant speculates that if she had heard it, she might have testified differently on cross-examination. But such speculation is insufficient to establish prejudice. *See Boyle v. McKune*, 544 F.3d 1132, 1140 (10th Cir. 2008).

Expert testimony of Alan Gavel

Mueller was unable to present expert testimony from Alan Gavel that defendant was a victim of the CBO/Look Back program because Gavel was not the proper expert to offer such testimony and because Mueller had failed to timely disclose the testimony under Rule 16.²² (ER 1063.) The district court found that the failure to timely disclose Gavel's proposed expert testimony may have been improper. (ER 1063-1064) However, the district court concluded that defendant failed to demonstrate prejudice by failing to offer any affidavit or other evidence identifying a qualified expert witness who would have been able to testify that defendant was a victim of the Look Back program, or what that expert testimony would have been. (ER 1064.) Because defendant bears the burden of establishing prejudice, which she has not even attempted to do, she cannot show that the court's conclusion was erroneous. *See Strickland*, 466 U.S. at 687; *United States v. Gray*, 182

²² Gavel testified that defendant was "a victim of one of the investment frauds." (ER 1725.) The court sustained the government's objection to the answer, but did not strike it from the record and the jury was not instructed to disregard Gavel's statement. Gavel further testified that defendant was on a list of victims of fraud that his office had received from the *Anderson* court. (ER 1725-1729.) However, as discussed above, that list was not admitted as evidence at trial.

F.3d 762, 768 (10th Cir. 1999).

Receipts showing defendant's payments to AAA

Mueller failed to introduce check receipts demonstrating that defendant paid \$50,000 to participate in the CBO/Look Back program, in addition to the money she invested in the Loan 4 program. (ER 1067.) The district court found that this failure might have been deficient and fallen below an objective standard of reasonableness because “the amount[] of money invested by Defendant in . . . the CBO . . . could help in establishing her alleged good faith belief that the program[] [was] genuine.” (ER 1067, 1072.) However, the court determined that this failure was not prejudicial because there was other evidence showing that defendant paid money to participate in AAA programs, and because other evidence before the jury could have supported a finding that defendant had a good faith belief that she was not violating the tax law (ER 1072), *see Medina*, 71 F.3d at 367. Other witnesses also testified they “purchased” the CBO/Look Back program, supporting an inference that defendant also paid to participate. (ER 1334, 1337, 1495, 1756.) Additionally, the court found there was no prejudice to defendant because of the strength of the evidence that defendant acted willfully in violating the tax laws (ER 1073-1075).

Tax Magic program materials

Mueller also failed to introduce materials, including a video, correspondence, progress reports, and revenue projections, relating to

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the Tax Magic program purportedly marketed as part of the CBO scheme. (ER 1062-1063.) The district court found that these failures may have been deficient and fallen below an objective standard of reasonableness. (ER 1063.)

Mueller attempted to have witness Michael Skillo authenticate these materials, but Skillo was unable to do so.²³ (ER 1752-1754.) The court found that although the materials may have been relevant and probative of defendant's state of mind, given the overwhelming evidence of defendant's guilt, Mueller's failure to introduce them was not prejudicial. (ER 1072-1073.) Any damage from Mueller's failure to introduce the materials was mitigated by the testimony of other witnesses, including Skillo, Robert Haueisen, and Kirby Clock, that the CBO program appeared to be legitimate. (ER 1312, 1525, 1811.) *See Medina*, 71 F.3d at 367. Furthermore, precisely which tapes were supposed to be marketed was not central to the case, because no tapes were actually marketed. The district court found that there was no evidence that "Rocky Venture had *any* ongoing business (regardless of whether the tapes to be sold were Tax Magic or Gateway)." (ER 1074 (emphasis added.))

After addressing each of the alleged errors individually, the district court proceeded to consider all of the alleged errors together to

²³ On the stand, Skillo stated that he had not slept for 30 hours, and that lack of sleep was affecting his ability to answer questions. (ER 1755, 1765.) Mueller was unable to authenticate the materials through any other witness.

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determine whether Mueller's trial performance prejudiced defendant. See *Strickland*, 466 U.S. at 687-88.²⁴ Referencing the trial record, the district court found that defendant suffered no prejudice from Mueller's errors because the government presented "significant evidence of willfulness." (ER 1073.) The court also determined that defendant failed to establish "a reasonable probability that, but for the failure to introduce this potentially exculpatory evidence, the result would have been different." (ER 1073-1074.)

The court found that defendant entered into the CBO program and formed the related business entities "with no apparent use other than as tax havens." (ER 1074.) Indeed, as the trial testimony demonstrated, defendant sought out AAA four days after the sale of

²⁴ Defendant erroneously asserts (Br. 53) that the district court failed to consider Mueller's errors in aggregate in assessing prejudice. In fact, it is plain from the court's written order that it considered the potentially exculpatory items that Mueller failed to introduce into evidence in toto in determining whether defendant had suffered prejudice. (See ER 1073-1074.) Furthermore, one of the cases upon which defendant relies (Br. 53-54) to support her claim that individual errors, in the aggregate, may result in prejudice, is factually distinguishable, and the other actually supports the finding that extensive evidence of guilt may eliminate the possibility of prejudice from trial counsel's errors.

In *Blackburn v. Foltz*, 828 F.2d 1777 (6th Cir. 1987), defense counsel in a capital murder case prevented the jury from hearing the testimony of defendant's alibi witness and the prior inconsistent statements of a crucial eyewitness, where no physical evidence linked the defendant to the crime. 828 F.2d at 1186. The facts here are entirely different. And in *Hooper v. Mullin*, this Court found that, even when defense counsel's errors were aggregated, there was no prejudice to the defendant because "extensive evidence supported the jury's finding of guilt." 314 F.3d 1162, 1178 (10th Cir. 2002). This is precisely the situation in this case; there was more than sufficient evidence that defendant knew that the Look Back program was a sham.

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stock that generated \$400,000 in taxable capital gains. (ER 1397-1398.) And the jury could easily have found that defendant knew that the CBO program was not legitimate. Her accountant, Sam Baldwin, told her he was very skeptical of the claims that AAA made. (ER 1583.) Nevertheless, defendant ignored his advice and participated in the program. (ER 1297, 1474.) Indeed, she even became an information officer for AAA, which required her to become familiar with its programs and philosophy. (ER 1474.) She took an exam in May 2000, in which she demonstrated her understanding of “sovereignty,” a key concept of the AAA program, which, for AAA purposes, involved taking steps to escape the federal tax system. (ER 1403-1405.) Defendant was interested in the idea of becoming a sovereign citizen and transitioning out of the tax system. (ER 1295.) Defendant knew that AAA advocated titling real property in the name of a fictitious entity. (ER 1407.) And the government introduced evidence that defendant did, in fact, transfer title of real property into the names of various third parties. (ER 1409-1411, 1413, 1417, 1419-1422, 1476.)

Additionally, the paperwork that defendant signed to enter into the CBO program was patently bogus. The Rocky Ventures partnership agreement was backdated. (ER 1391-1393.) Indeed, defendant did not even fill out AAA’s preliminary information form until September 27, 1999, despite the fact that Rocky Ventures was supposed to have commenced business on September 1, 1999. (ER

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1391-1392, 1395.) Further, an addendum to the partnership agreement promised a guaranteed payment to Macro Media for services to be performed before the partnership agreement was signed, and even before defendant filled out her preliminary information form. (ER 1392-1393.) The \$1,000,000 dollar promissory note, signed on October 13, 1999, had a due date of September 1, 2099, and required no collateral to secure it. (ER 1399-1400.)

Defendant was an experienced businesswoman, and had owned and operated a successful bookkeeping and tax preparation business. (ER 1074.) She was relatively sophisticated in tax matters and familiar with what it took to operate a business. The court found that, regardless of whether Rocky Ventures was supposed to sell Tax Magic tapes or Gateway to Freedom tapes, there was no evidence that it sold anything or even had any business assets, books and records, bank accounts, or capital. (ER 1074; ER 1217-1220.) Defendant did not treat the \$1,000,000 promissory note as valid; when she sought to refinance her home in November 2000, defendant did not list it as a liability. (ER 1622; G.Ex. 82.) Defendant assured her clients that the loans would never have to be repaid. (ER 1492-1493, 1532, 1544, 1549.)

The court's factual findings regarding the strength of the evidence establishing defendant's guilt are not clearly erroneous, and are well-supported by the trial record. Defendant has not established that her counsel's performance fell below an objective standard of

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reasonableness or that counsel's performance prejudiced her such that a reasonable probability exists that, but for Mueller's deficient performance, the result of the trial would have been different.

Accordingly, her claim must be rejected. *See Strickland*, 466 U.S. at 687-88.

II. *The District Court Did Not Abuse its Discretion by Denying Defendant's Conditional Motion for a Hearing*

The district court did not grant a certificate of appealability on the question whether the court erred in refusing to hold another evidentiary hearing on defendant's Section 2255 motion.²⁵ (ER 1097-1098.) The court concluded that defendant failed to show that its denial of her conditional request for an evidentiary hearing amounted to a denial of a constitutional right. (ER 1097.) The court specifically noted that the conditional motion requested a hearing to present the live testimony of William Cohan, who had already filed an affidavit in support of defendant's claim that her trial counsel had been ineffective (ER 567-607), and to allow further cross-examination of Mueller. (ER 1007, 1097.) Defendant did not state her intention to present her own testimony; nor did she identify how the evidence she wished to present would have affected the court's analysis. (ER 1097.)

This court should not grant defendant's request for a certificate of

²⁵ At the October 8, 2008, hearing on defendant's motion for release on bond pending appeal, the district court took evidence in the form of Mueller's live testimony, including cross-examination by defense counsel.

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appealability on this issue. Defendant fails to establish that the district court's denial of her conditional request for an evidentiary hearing constituted a denial of her constitutional rights. 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right"); *United States v. Kennedy*, 225 F.3d 1187, 1193 (10th Cir. 2000) ("petitioner must show a substantial denial of a constitutional right by demonstrating 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)) (internal quotation omitted)). In any case, defendant's claim fails on the merits.

Defendant acknowledges (Br. 56) that the district court's denial of an evidentiary hearing will be reversed only for abuse of discretion, *United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir. 1999), but she fails to establish any such abuse here.

At the October 8, 2008, hearing on defendant's motion for release on bond pending appeal, the district court took evidence in the form of Mueller's live testimony, including cross-examination by defense counsel. (ER 881-982.) Defendant also submitted numerous supporting documents with her motion, including the affidavit from Cohan, which the district court read and considered. (ER 1040.)

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Indeed, the court referred to some of the affidavits in its order (ER 1056-1057), demonstrating that the court had, in fact, read and considered the evidence defendant submitted.²⁶ The district court made a finding that, after having reviewed the motion, briefs, exhibits, and trial record, and having heard evidence, it needed no additional argument or evidence in order to reach a decision. (ER 1040.) There was no abuse of discretion. *See* 28 U.S.C. § 2255(b) (no hearing required where “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief”); *Kennedy*, 225 F.3d at 1193.

²⁶ Defendant complains (Br. 59) that “seemingly little or no weight was given the expert witness declarations,” but the weight given to evidence is solely the province of the finder of fact. *United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007).

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CONCLUSION

For the reasons stated above, this Court should affirm defendant's convictions.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 28.2(C)(4) of the Rules of this Court, the United States, appellee herein, respectfully submits that oral argument is unnecessary to this Court in resolving this case.

Respectfully submitted,

JOHN A. DiCICCO
Acting Assistant Attorney General

/s/ Frank P. Cihlar
FRANK P. CIHLAR (202) 514-5396
GREGORY VICTOR DAVIS (202) 514-5396
KATIE BAGLEY (202) 514-5396
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

JOHN F. WALSH, ESQ.
United States Attorney

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 10,115 words.

I relied on my word processor, WordPerfect X3, to obtain the count.

/s/ Katie Bagley
KATIE BAGLEY
Attorney

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CERTIFICATE OF COMPLIANCE FOR ECF PLEADINGS

I hereby certify that all privacy redactions have been made.

I hereby certify that the paper copies of this brief filed with the Court are identical to the version of this brief electronically filed on September 27, 2010.

I hereby certify that the version of this brief electronically filed on September 27, 2010, was scanned for viruses using Trend Micro OfficeScan version 8.0, updated September 27, 2010, and according to the program, is free of viruses.

/s/ Katie Bagley
KATIE BAGLEY
Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2010, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Katie Bagley
KATIE BAGLEY
Attorney