

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.

---

**OPENING BRIEF OF APPELLANT KRIS A. SMITH**

-----  
**\*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)

---

LYNN E. PANAGAKOS, Esq.  
HI Bar No. 7696  
345 Queen Street, 2<sup>nd</sup> Floor  
Honolulu, HI 96813  
(808) 521-3336  
E-mail: [lynnpanagakos@yahoo.com](mailto:lynnpanagakos@yahoo.com)

WILLIAM A. COHAN, Esq.  
WILLIAM A. COHAN, P.C.  
Colo. Bar No. 7426; Calif Bar No. 141804  
P.O. Box 3448  
Rancho Santa Fe, CA 92067  
(858) 832-1632; (858) 832-1845 (FAX)  
E-mail: [bill@williamacohan.com](mailto:bill@williamacohan.com)

Attorneys for Defendant Appellant  
KRIS A. SMITH

**TABLE OF CONTENTS**

	<b><u>PAGE:</u></b>
TABLE OF AUTHORITIES .....	xi
STATEMENT OF RELATED CASES .....	xv
CERTIFICATE OF COMPLIANCE .....	xvi
STATEMENT OF JURISDICTION .....	1
BAIL STATUS .....	1
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF THE FACTS .....	7
I. CBO LOOK BACK TAX MAGIC PROGRAM: THE BASIS FOR THE TAX DEDUCTIONS GIVING RISE TO SMITH'S FALSE TAX RETURNS .....	7
II. SMITH'S OTHER INVOLVEMENT WITH AAA .....	11
III. ATTORNEY MUELLER'S DEFICIENT PRETRIAL INVESTIGATION .....	12
A. Failure To Review Discovery .....	13
B. Mueller Heavily Relied On Smith To Educate Him On The Facts Of The Case, But Refused To Listen To Smith's Information About Evidence Which Mueller Deemed To Be The "Biggest Concern" .....	17

C. Because Mueller Failed To Review Discovery And Listen To Smith, Mueller Lacked A Basic Understanding Of Critical Operative Facts Necessary to Defend Smith . . . . . 18

D. Mueller Failed To Take Steps Necessary To Lay Foundation For Admission Of Material Exculpatory Evidence . . . . . 19

IV. MUELLER’S DEFICIENT PERFORMANCE RESULTED IN FAILING TO PRESENT SMITH’S DEFENSE THEORY – LACK OF GUILTY KNOWLEDGE AND WILLFULNESS . . 20

A. Mueller’s Admitted Failure To Review Any Undercover Tape Transcripts Resulted In Failure To Identify What District Court Described As “Key Conversation” Of Lead AAA Accountant Richard Marks . . . . . 21

B. Mueller’s Failure To Establish Foundation For Admission Of Evidence District Court Found Was “Material” And “Central To The Defense Strategy” . . . . . 22

C. Mueller Failed To Establish Foundation For Evidence He Argued Was Important, Won A Motion In Limine To Present, And Told The Jury In Opening They Would See . . . . . 24

D. Mueller Undermined His Defense Strategy And Instead Supported Government’s Theory By Failing To Introduce Evidence Of Smith’s Payments For Her CBO After Telling Jury In Opening That He Would . . . . . 27

E. Mueller’s Deficient Performance Resulting In Failure To Present Expert Testimony He Told Jury He Would Present . . 30

V. SMITH’S TRIAL TESTIMONY . . . . . 32

A. Mueller’s Incorrect Legal Advice To Smith Concerning Necessity For Her Direct Testimony And Permissible Scope Of Cross Examination . . . . . 32

B. Mueller’s Breach Of His Duty To Investigate Resulted In Uninformed Advice To Smith Regarding Need To Limit Scope Of Cross Examination . . . . .	36
VI. MUELLER’S DEFICIENT PERFORMANCE CAUSED HIS FAILURE TO REBUT THE GOVERNMENT’S EVIDENCE OF WILLFULNESS . . . . .	38
A. Mueller’s Failure To Rebut The Government’s Argument That Smith’s Association With Anderson, Marks, And Their Tax Protestor Ideology Demonstrated Willfulness . . . . .	39
B. Mueller’s Failure To Rebut Government’s Evidence That Smith Knew The CBO Was A Sham . . . . .	40
SUMMARY OF THE ARGUMENT . . . . .	43
ARGUMENT . . . . .	45
I. THE DISTRICT COURT ERRED BY DENYING SMITH’S §2255 MOTION . . . . .	45
Standard of Review . . . . .	45
A. The District Court Erred In Concluding That Mueller’s Performance Related To Smith’s Trial Testimony Was Not Deficient . . . . .	46
1. Mueller Incorrectly Advised Smith That Her Direct Testimony Was Necessary . . . . .	48
2. Mueller’s Advice To Smith Was Based On His Ignorance Of The Scope Of Cross Examination . . . . .	48
3. Mueller Failed To Prepare Smith For Clearly Foreseeable Cross Examination . . . . .	49

B. The District Court Erred In Concluding That Mueller’s Deficient Performance Did Not Result In Prejudice . . . . . 51

II. FAILING TO HOLD AN EVIDENTIARY HEARING ON THE MERITS WAS AN ABUSE OF DISCRETION . . . 56

CONCLUSION . . . . . 60

ORAL ARGUMENT STATEMENT . . . . . 60

CERTIFICATE OF SERVICE . . . . . 62

**APPENDIX TO OPENING BRIEF**

**Volume 1 of 7:** . . . . . **1-255**

Docket Sheet . . . . . 1

Indictment (CR #1) . . . . . 22

Defendant’s Motion In Limine To Admit Party Admissions Under FRE 801 (CR #34-1) . . . . . 27

Government’s Response to Defendant’s Motion In Limine To Admit Party Admissions Under Rule 801 (CR #37) . . . . . 80

Government’s Motion In Limine # 3 Amended (CR #41) . . . . . 90

Superseding Indictment (CR #54) . . . . . 95

Defendant’s Motion For Declaration Of Complexity For A Finding Under 3161(h)(8)(b)(iv) That The Interests Of Justice Require That The Case Be Set For Trial Outside The Normal Limits Provided For Under The Speedy Trial Act (CR #44) . . . . . 101

Response to Government’s Motion In Limine #3 (Documents 40-1 and 41) (CR #62) . . . . .	105
Defendant’s Reply Re: Motion In Limine (Document 37) (CR #66) . . . . .	107
Defendant Kris Smith’s Motion For New Trial (CR #118) . .	109
Declaration of Gregory J. Mueller In Support Of Motion For New Trial (CR #118-3) . . . . .	115
Declaration Of William A. Cohan, Esq. In Support Of Motion For New Trial (CR #118-4) . . . . .	117
Cohan Declaration Attachment: <i>Anderson SSI</i> (CR #118-5 & 118-6) . . . . .	158
Amended Judgment in a Criminal Case (CR #139) . . . . .	245
<b><u>Volume 2 of 7:</u></b> . . . . .	<b>256-555</b>
Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171) . . . . .	256
Memorandum of Law In Support Of Movant Kris Smith’s Motion To Vacate, Set Aside, Or Correct A Sentence By A Person In Federal Custody (CR #171-6) . . . . .	312
Exhibits to Attachment A To Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-3 & 4) . . . . .	341
<b><u>Volume 3 of 7:</u></b> . . . . .	<b>556-880</b>
Declaration of William A. Cohan In Support Of Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-2) . . . . .	556

Declaration Of Melody Evans, Esq. In Support Of Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-5) . . . .	608
Declaration Of Michael Skillo In Support Of Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-7) . . . . .	611
Declaration Of Peter Mair, Esq. In Support Of Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-8) . . .	613
Declaration Of Sandy K. Schnack In Support of Motion Under 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (CR #171-9) . . .	683
Government’s Response To Defendant’s Motion Under 28 U.S.C. §2255 (CR #177) . . . . .	688
Minute Order Setting Evidentiary Hearing On Motion For Immediate Release (CR #180) . . . . .	806
Order For Writ Of Habeas Corpus Ad Testificandum (CR #184) 807 Defendant Kris Smith’s Reply To The Government’s Opposition To Her Motions Under 28 U.S.C. §2255 And For Bail (CR #183) . . . . .	808
Declaration Of William A. Cohan In Support Of Defendant Kris Smith’s Reply To The Government’s Opposition To Her Motion Under §2255 And For Bail (CR #183-2) And Exhibits (CR #183-3 through #183-8) . . . . .	821
<b><u>Volume 4 of 7:</u></b> . . . . .	<b>881 - 1177</b>
Reporter’s Transcript (Evidentiary Hearing On Motion For Immediate Release), Volume 1 (CR #190) . . . . .	881

Reporter’s Transcript (Evidentiary Hearing On Motion For Immediate Release), Volume 2 (CR #191) . . . . .	959
Order Granting Defendant’s Motion For Immediate Release (CR #188) . . . . .	984
Movant Kris Smith’s Supplemental Memorandum In Support Of Motion To Vacate, Set Aside, Or Correct Sentence (28 U.S.C. §2255) (Post Hearing Brief) (CR #192) . . . . .	989
Movant Kris Smith’s Conditional Request For Evidentiary Hearing (CR #193) . . . . .	1006
Government’s Post Hearing Brief On Defendant’s §2255 Motion (CR #194) . . . . .	1009
Defendant Kris Smith’s Post-October 8, 2008 - Hearing Reply Brief On Her §2255 Motion (CR #195) . . . . .	1025
Government’s Post Hearing Reply Brief On Defendant’s §2255 Motion (CR #196) . . . . .	1032
Order On Motion Under 28 U.S.C. §2255 (CR #208) . . . . .	1039
Defendant Kris Smith’s Application For A Certificate\ Of Appealability (CR #209) . . . . .	1076
Defendant Kris Smith’s Notice Of Appeal (CR #211) . . . . .	1093
1/11/06 Transcript (Motions Hearing) (CR #110) . . . . .	1101
1/27/06 Transcript (Pretrial Conference) (CR #111) . . . . .	1124
7/20/06 Transcript (Final Pretrial Conference) (CR #113) . . . . .	1138
<b><u>Volume 5 of 7:</u></b> . . . . .	<b>1178 - 1451</b>

7/31/06 Transcript (Jury Trial - Day 1) (CR #114) . . . . .	1178
8/1/06 Transcript (Jury Trial - Day 2) (CR #97) . . . . .	1188
<b><u>Volume 6 of 7:</u></b> . . . . .	<b>1452 - 1702</b>
8/2/06 Transcript (Jury Trial - Day 3) (CR #98) . . . . .	1452
<b><u>Volume 7 of 7:</u></b> . . . . .	<b>1703 - 2008</b>
8/3/06 Transcript (Jury Trial - Day 4) (CR #99) . . . . .	1703
8/4/06 Transcript (Jury Trial - Day 5) (CR #100) . . . . .	1855
1/23/07 Transcript (Sentencing Hearing) (CR #143) . . . . .	1938

**ADDENDUM OF TRIAL EXHIBITS TO OPENING BRIEF**

<b><u>Addendum Volume 1 of 2:</u></b> . . . . .	<b>1 - 249</b>
---	----------------

**Government Trial Exhibits:**

Exhibit # 10 . . . . .	1
Exhibit #11 . . . . .	27
Exhibit #14 . . . . .	42
Exhibit #15 . . . . .	60
Exhibit #16 . . . . .	81
Exhibit #48 . . . . .	95
Exhibit #49 . . . . .	96
Exhibit #50 . . . . .	97

Exhibit #51 .....	104
Exhibit #52 .....	107
Exhibit #53 .....	109
Exhibit #54 .....	110
Exhibit #55 .....	111
<i>* Admitted @ §2255 Bail Hearing on 10/08/08</i>	
Exhibit #90 .....	249
<b><u>Addendum Volume 2 of 2:</u></b> .....	<b>250 - 453</b>
Exhibit #91 .....	250
Exhibit #92 .....	254
Exhibit #93 .....	261
Exhibit #94 .....	264
Exhibit #95 .....	266
Exhibit #96 .....	268
Exhibit #97 .....	269
Exhibit #98 .....	270
Exhibit #99 .....	285
Exhibit #100 .....	300
Exhibit #104 .....	301

Exhibit #152 ..... 332  
Exhibit #153 ..... 339  
Exhibit #154 ..... 354  
Exhibit #156 ..... 372

**Defendant’s Exhibits** **Page:**

Exhibit #G ..... 374  
Exhibit #H ..... \*  
    \* *Attached to §2255 Motion as Exhibit 19 (CR#171-4, AP 533)*  
Exhibit #J ..... 383  
Exhibit #M ..... \*  
    \* *Attached to §2255 Motion as Exhibit 21 (CR #171-4, AP 536)*  
Exhibit #N ..... \*  
    \* *Attached to §2255 Motion as Exhibit 20 (CR #171-4, AP 534)*  
Exhibit #O ..... \*  
    \* *Attached to §2255 Motion as Exhibit 5 (CR #171-4, AP 457)*  
Exhibit #P ..... \*  
    \* *Attached to §2255 Motion as Exhibit 18 (CR #171-4, AP 522)*  
Exhibit #Q ..... \*  
    \* *Attached to §2255 Motion as Exhibit 1 (CR #171-3, AP 343)*  
Exhibit #R ..... 387  
Exhibit #S ..... 419  
Exhibit #T ..... 424

Exhibit #U ..... 429

Exhibit #V ..... 440

Exhibit #W ..... 451

**TABLE OF AUTHORITIES**

<b><u>CASE AUTHORITY</u></b>	<b><u>PAGE:</u></b>
<i>Alford v. United States</i> , 282 U.S. 687 (1931) .....	49
<i>Blackburn v. Foltz</i> , 828 F.2d 1177 (6 <sup>th</sup> Cir. 1987), <i>cert. denied</i> , 485 U.S. 970 (1988) .....	47,51,53
<i>Boltz v. Mullin</i> , 415 F.3d 1215 (10 <sup>th</sup> Cir. 2005) .....	45
<i>Cannon v. Mullin</i> , 383 F.3d 1152 (10 <sup>th</sup> Cir. 2004) .....	46,53
<i>Cargle v. Mullin</i> , 317 F.3d 1196 (10 <sup>th</sup> Cir. 2003) .....	53
<i>Fisher v. Gibson</i> , 282 F.3d 1283 (10 <sup>th</sup> Cir. 2002) .....	53,55
<i>Foster v. Delo</i> , 11 F.3d 1451 (8 <sup>th</sup> Cir. 1993) .....	47
<i>Hooper v. Mullin</i> , 314 F.3d 1162 (10 <sup>th</sup> Cir. 2002) .....	54,57
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983) .....	46

<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938) .....	47
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986) .....	51
<i>Leeper v. United States</i> , 446 F.2d 281 (10 <sup>th</sup> Cir. 1971) .....	49
<i>Lema v. United States</i> , 987 F.2d 48 (1 <sup>st</sup> Cir. 1993) .....	47
<i>Moore v. United States</i> , 950 F.2d 656 (10 <sup>th</sup> Cir. 1991) .....	59
<i>Murtishaw v. Woodford</i> , 255 F.3d 926 (9 <sup>th</sup> Cir. 2001) .....	59-60
<i>Pfaff v. Wells</i> , 648 F.2d 689 (10 <sup>th</sup> Cir. 1981) .....	5
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987) .....	46
<i>Sanders v. United States</i> , 373 U.S. 1 (1963) .....	58-59
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	PASSIM
<i>United States v. Burch</i> , 153 F.3d 1140 (10 <sup>th</sup> Cir. 1998) .....	49
<i>United States v. Crocket</i> , 435 F.3d 1305 (10 <sup>th</sup> Cir. 2006) .....	49
<i>United States v. Folkers</i> , Cr. No. 04-20124-KHV (D. KS) .....	15-16, 17

<i>United States v. Keith Anderson, et al.</i> , Cr. No. 02-00423 (W.D. WA) . . . . .	PASSIM
<i>United States v. Kennedy</i> , 225 F.3d 1187 (10 <sup>th</sup> Cir. 2000) . . . . .	56
<i>United States v. Moran</i> , 493 F.3d 1002 (9 <sup>th</sup> Cir. 2007) . . . . .	19
<i>United States v. Nichols</i> , 169 F.3d 1255 (10 <sup>th</sup> Cir.), <i>cert. denied</i> , 528 U.S. 934 (1999) . . . . .	56
<i>United States v. Orange</i> , 447 F.3d 792 (10 <sup>th</sup> Cir. 2006) . . . . .	45
<i>United States v. Pearce</i> , 146 F.3d 771 (10 <sup>th</sup> Cir. 1998) . . . . .	45
<i>United States v. Poe</i> , 352 F.2d 639 (D.C. Cir. 1965) . . . . .	47
<i>United States v. Teague</i> , 953 F.2d 1525 (11 <sup>th</sup> Cir. 1992) (en banc) . . . . .	46
<i>United States v. Wolf</i> , 561 F.2d 1376 (10 <sup>th</sup> Cir. 1977) . . . . .	49

**UNITED STATES CONSTITUTION** **PAGE:**

Fifth Amendment . . . . .	46
Sixth Amendment . . . . .	3,51

**STATUTES AND RULES** **PAGE:**

26 U.S.C. §165 . . . . .	30
--------------------------	----

26 U.S.C. §7206(1) .....	1
28 U.S.C. §2255 .....	PASSIM
28 U.S.C. §2253(a) .....	1
<b>Federal Rules of Evidence</b>	
Rule 611(b) .....	49
Rule 803(6) .....	48

**STATEMENT OF RELATED CASES**

The instant appeal is related to: (1) *U.S. v. Kris Smith*, Docket No. 07-1044, 311 F.ed. Appx. 82, 2008 WL 55996 (Tenth Cir. 2008); (2) *U.S. v. Anderson, et al.*, Case No. 02-CR-00423, in the United States District Court for the Western District of Washington; (3) *U.S. v. Keith Anderson*, 472 F.3d 622 (9<sup>th</sup> Cir. 2006); (4) *U.S. v. Jim and Pamela Moran*, 493 F.3d 1002 (9<sup>th</sup> Cir. 2007); and (5) *U.S. v. Richard Marks*, 530 F.3d 799 (9<sup>th</sup> Cir. 2008).

DATED: JUNE 2, 2010

By: /s/ Lynn E. Panagakos  
LYNN E. PANAGAKOS, Esq.

WILLIAM A. COHAN, P.C.

By: /s/ William A. Cohan  
WILLIAM A. COHAN, Esq.

Attorneys for Defendant-Appellant  
KRIS A. SMITH

**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 Opening 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 Opening Brief contains no more than 14,000 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 28.1(e)(3), I hereby certify that Defendant-Appellant Kris A. Smith's Opening Brief contains 13,590 words pursuant to Corel WordPerfect system's word count.

DATED: JUNE 2, 2010

By: s/ Lynn E. Panagakos  
LYNN E. PANAGAKOS, Esq.

WILLIAM A. COHAN, P.C.

By: s/ William A. Cohan  
WILLIAM A. COHAN, Esq.

Attorneys for Defendant-Appellant  
KRIS A. SMITH

## **STATEMENT OF JURISDICTION**

28 U.S.C. §2255 conferred jurisdiction on the district court. 28 U.S.C. §2253(a), the denial of Appellant Kris Smith's ("Smith") §2255 Motion (AP 1039), Smith's timely filed Notice of Appeal (AP 1093), and the district court's issuance of a Certificate of Appealability ("COA")( AP 1095) confers jurisdiction on this Court.

## **BAIL STATUS**

On April 22, 2010, Smith was released on bail pending appeal. AP 1098-1100.

## **STATEMENT OF THE ISSUES**

- I. Whether the district court erred in denying Smith's §2255 motion;
- II. Whether the district court abused its discretion in denying Smith's evidentiary hearing request.

## **STATEMENT OF THE CASE**

Following a five day jury trial, Smith was found guilty of willfully: (1) filing a false Form 1040 individual income tax return for 1999 and 2000 (Counts 1 and 3, 26 U.S.C. 7206(1)); (2) filing a false Form 1045 application for a tentative refund for 1997 and 1998 (Count 2, 26 U.S.C. 7206(1)); and (3) failing to file a Form 1065 partnership income tax return for NECO Associates, LLC for 2003

(Count 4).<sup>1</sup> AP 245.

On December 22, 2006, Smith filed a Motion for New Trial based on ineffective assistance of her trial counsel, Gregory J. Mueller (“Mueller”). AP 109. In support of this motion, Mueller declared under penalty of perjury that: (1) “this was the first Federal felony, or tax case, that [he] ever handled[;]” (2) “[his] view of possible defenses was myopic, and [his] failure to recognize pertinent facts and expose them to the jury caused a grave injustice to Kris Smith[;]” and (3) “[his] specific oversights and errors . . . rise to the level of ineffective assistance of counsel and prejudiced [Smith’s] Sixth Amendment right.” (AP 115) The motion was further supported by a Declaration of Smith’s new counsel, William A. Cohan (“Cohan”), an attorney with extensive experience defending criminal tax cases, who identified some aspects of Mueller’s deficient performance and concluded that these errors constituted a Sixth Amendment violation (AP 117).

On January 23, 2007, the district court denied Smith’s Motion for a New Trial and sentenced Smith to: (1) 28 month terms of imprisonment on Counts 1-3 and 12 month term of imprisonment on Count 4, all to be served concurrently; and (2) \$186,953.00 in restitution. AP 245, 1962.

---

<sup>1</sup>The district court dismissed Count 5 pursuant to government motion. CR 76, 83.

On June 22, 2007, Smith's case was reassigned to Senior U.S. District Judge Walker D. Miller. CR #147. Smith's trial judge is deceased.

On January 4, 2008, this Court affirmed Smith's convictions on direct appeal, holding that its decision was without prejudice to raising Smith's ineffective assistance of counsel claim pursuant to 28 U.S.C. §2255 (No. 07-1044) (AP 308-311). On March 23, 2008, Smith self surrendered to FPC Victorville and began serving her sentence.

On August 13, 2008, Smith, represented by attorney Lynn Panagakos, filed a Motion under 28 U.S.C. §2255, alleging deprivation of her Sixth Amendment right to effective assistance of counsel. AP 256. This motion analyzed substantial deficiencies in Mueller's performance in addition to those identified in the Motion for New Trial, and is supported by: (1) documentary and video evidence that was not part of the trial record (AP 341-555); and (2) Declarations of: (a) Smith (AP 256-307); (b) attorneys Peter Mair ((“Mair”) AP 613) and Melody Evans ((“Evans”) AP 608) and Evans' legal assistant Sandy Schnack ((“Schnack”) AP 683), who represented defendants on charges arising from the same nucleus of operative facts involved instanter and who are familiar with the discovery herein; (4) expert witness Cohan who reviewed the additional materials and concluded that Mueller's additional errors constituted Sixth Amendment violations (AP 556);

and (5) defense trial witness Michael Skillo (“Skillo”) AP 611). Smith requested an evidentiary hearing on the merits (AP 268).

In opposition, the government submitted a Memorandum of Interview (“MOI”) of Mueller (AP 743-750). Cohan reviewed this MOI and submitted a Declaration identifying additional admissions by Mueller substantiating Smith’s ineffective assistance claim (AP 821-880).

On August 29, 2008, Smith filed a Motion for Immediate Release on Bond pending resolution of her 2255 motion (CR #175). On September 29, 2008, the court scheduled a limited three-hour evidentiary hearing on Smith’s motion for immediate release for October 8, 2008 (AP 806). Smith filed an Application for Writ of Habeas Corpus Ad Testificandum the same day, requesting that the U.S. Marshal Service (“Marshals”) transport Smith to her bail hearing. CR #181. The district court issued the writ on October 2, 2008 (AP 807), but the Marshals failed to transport Smith to the hearing. AP 882-883. Consequently, Smith waived her presence at the bail hearing.

Mueller testified as a government witness at the bail hearing. AP 885-924, 960-966. Mueller: (1) authenticated his Declaration supporting Smith’s Motion for New Trial where he admitted rendering ineffective assistance; (2) admitted drafting it; and (3) testified that it is true and correct (AP 924-925). Since this was

not a full evidentiary hearing on the merits, the district court: (1) limited the scope of Smith's cross examination of Mueller; (2) entirely precluded re-cross (AP 956, 966); and (3) did not address all issues raised in Smith's §2255 motion (AP 956, 990, n.1).<sup>2</sup>

The court ordered Smith's immediate release on bond (AP 984-85), applying the standard in *Pfaff v. Wells*, 648 F.2d 689, 693 (10<sup>th</sup> Cir. 1981), which authorizes release of a defendant on bond pending determination of a §2255 motion when a defendant makes a "demonstration of a clear case on the merits of the habeas petition."<sup>3</sup> "After consideration of the pleadings, declarations, exhibits and testimony," the district court concluded that Smith "clearly demonstrated that there is merit to her habeas motion." AP 984-985.

The parties filed post-hearing briefs (AP 989, 1009, 1025, 1032), and Smith filed a Conditional Request for Evidentiary Hearing. AP 1006. Smith argued that Mueller's hearing testimony provided additional evidence of his ineffective

---

<sup>2</sup>Smith requested an opportunity to present the testimony of expert witness Cohan. The court stated that Smith could request that if she wished, but ordered that the parties first submit supplemental briefing incorporating the evidence presented at the bail hearing (AP 960, 982). The government stipulated to the authenticity of Cohan's Declarations (AP 960).

<sup>3</sup>*Pfaff* also authorizes release pending a §2255 motion based on "exceptional circumstances." *Id.* This part of the bail standard was not argued or applied here.

assistance, and that the current state of the record demonstrates her right to relief on the merits. However, in the event the district court determined that the current state of the record was not sufficient to grant Smith's motion on the merits, Smith further requested "a full evidentiary hearing, with an opportunity to fully cross examine Mueller, to be present, and to present witnesses." AP 1007.

On March 16, 2010, the court issued its Order denying Smith's: (1) request for an evidentiary hearing; and (2) §2255 motion. The court found that Mueller's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984) in numerous respects, resulting in the exclusion of exculpatory evidence (AP 1057-1064, 1066-1067), including "material" evidence "central to the defense strategy" (AP 1063, 1073), and an undercover tape transcript of a "key conversation" (AP 1059-1060). Nevertheless, the court found that these errors did not result in prejudice (AP 1071-1075). The court further found that other aspects of Mueller's performance cited in Smith's §2255 motion did not constitute deficient performance (AP 1056-59, 1064-71).

On April 22, 2010, the court granted a COA on the merits of Smith's ineffective assistance claim, and continued her release on bond pending appeal. AP 1095, 1097-1100. The court denied a COA on Smith's evidentiary hearing request. AP 1097-98, 1100.

## STATEMENT OF FACTS

### I. CBO LOOK BACK TAX MAGIC PROGRAM: THE BASIS FOR THE TAX DEDUCTIONS GIVING RISE TO SMITH'S FALSE TAX RETURNS

Counts 1-3 are based on false tax deductions on Smith's 1999 and 2000 individual tax returns, and her application for a refund on her 1997 and 1998 returns. These deductions arose from Smith's investment in the "Look Back Program" component of a Complex Business Organization (CBO) promoted by Anderson's Ark and Associates (AAA). AP 27-32, 82-83, 942, 1110-11, 1382-85, 1388-95, 1398-1400, 1463, 1467-68, 1830, 1874; AD 1-249.

AAA promoted the CBO Look Back Program as a lawful means for eliminating tax liabilities for current and two prior years (AP 351-52 ¶35). Had the CBO Look Back Program actually operated as AAA represented, it would have been a legal business model. AP 1458-60. Unbeknownst to Smith and other CBO investors, the program was a sham (AP 452-455). Smith's defense was that she lacked the requisite knowledge and willfulness because she, like other CBO investors, was defrauded by AAA's lead accountant Richard Marks ("Marks") into believing that the CBO Look Back Program was bona fide and, accordingly, her tax deductions were lawful. *See* Section IV, *infra*.

In *U. S. v. Keith Anderson, et al.*, Cr. No. 02-00423 (W.D. WA), Marks and

others were prosecuted and convicted of conspiring to and defrauding CBO Look Back investors by lying to and concealing material facts from them, thereby deceiving them into believing that the program was legitimate (AP 382-388, 396-400, 434-456; AD 387-395, 430, 436-437). Marks and others were also convicted of conspiracy to defraud the IRS based in part on the CBO Look Back tax fraud scheme (AP 343-382; AD 429-30), and aiding and assisting the filing of false tax returns by unwitting CBO investors (AP 388-95; AD 431-435).

The *Anderson* Second Superseding Indictment (“*Anderson SSI*”) describes how the CBO Look Back program was structured (AP 345-49 (¶¶13, 21-24, 26), AP 351-353 (¶¶ 5-39), AP 382-387, 396-400).<sup>4</sup> The *Anderson* defendants prepared paperwork to form a partnership between the CBO Look Back investor (95% partner) and Macro Media Advertising, LLC, aka Mason Advertising (5% partner) (AP 352, 384 (¶¶36, 383)).<sup>5</sup> The *Anderson* defendants represented to CBO investors that: (1) La Maquina Blanca would loan funds to the partnership; and (2) “loan proceeds would be forwarded directly to Macromedia (or Mason

---

<sup>4</sup>The *Anderson SSI* was introduced in evidence at Smith’s trial as Defense Exhibit (DEX) O and attached to Smith’s §2255 Motion as EX 1 (AP 343).

<sup>5</sup>Macro Media was a name the *Anderson* defendants used interchangeably with Mason Advertising (AP 348 (¶24)). The two entities shared the same taxpayer identification number. *Id.* The *Anderson* defendants operated this entity and controlled its bank account. *Id.*, at ¶23.

Advertising) which would use the funds to create and market a series of tax reduction books and tapes called Tax Magic, as well as establish a '1-900' phone number which would offer tax advice" (hereinafter collectively "Tax Magic") (AP 352 (¶36)). *Anderson* defendants charged CBO investors a "loan commitment fee" of 5-7% of the loan, one-half of which was due and payable before the loan was executed (AP 352 ¶37). CBO investors were given "a series of projections [indicating] that once the Tax Magic program was on the market, within 3-5 years, profits would be sufficient to pay back these 'investment loans.'" (AP 384 (¶386)). *Anderson* defendants told Look Back investors their loans had a ten year balloon payment "set up to be paid out of the profit earned from the Tax Magic venture, and that if these profits proved insufficient, their 5% partner, Macromedia (or Mason), would repay the loan for them." (AP 353 (¶38)). AAA accountants/planners prepared tax returns for unwitting CBO investors on which the loan amounts were taken as deductions for current years, and "[t]he remaining loan amounts, reported as guaranteed payments which resulted in net operating losses, were carried back on ... Form 1045 to offset [investors'] tax liabilities for the previous two years." (AP 353 ¶39).

Smith invested in the CBO Look Back Tax Magic Program described in the *Anderson* indictment (AP 27-32, 82-83, 942, 1110-11, 1196-1200, 1382-85, 1388-

95, 1398-1400, 1463, 1467-78, 1830, 1874; AD 1-249). Smith's tax returns and partnership documents were exactly the same as other CBO Look Back Tax Magic investors (AD 1-373). Smith's partnership with Macro Media (aka Mason) was Rocky Venture. La Maquina Blanca purportedly loaned Rocky Venture \$1,000,000 (AD 107-09). Smith was told that: (1) the loan proceeds would be provided directly to Macro Media to be used for the 1-900 number joint venture marketing services; (AD 102-03, 113, 129-A, 136, 165); (2) Macro Media promised to double the loan amount within three years (AD 136); (3) 75% of these revenues were expected to come from 1-900 Number commission checks that Macro Media would pay to Rocky Venture as a participating joint venture (along with other CBO investors) in the 1-900 number ("joint venture number"), which was owned and operated by Macro Media (aka Mason) (AD 131-132, 145, 154-55); (4) Rocky Venture authorized Macro Media to forward a portion of its share of the 1-900 proceeds directly to La Maquina Blanca to repay the loan (AD 102, 104); and (5) if Macro Media did not substantially perform at projected levels in three years, then Macro Media agreed to make additional contributions to Rocky Venture sufficient to repay any outstanding loan balance to La Maquina Blanca when the loan became due (AD 102, 129-A). Smith was given the revenue projections described in the *Anderson SSI* (AP 384 ¶386; AD 143-147). Smith

agreed to make a capital contribution of \$87,700 to cover loan commitment, processing and origination fees (AD 138, 150).

La Maquina Blanca's loan to Rocky Venture was reported as a guaranteed payment to partners on Rocky Venture's 1999 partnership tax return, which resulted in a corresponding loss (AP 1219; AD 28). The loss flowed through to Smith and was deducted on her 1999 and 2000 tax returns (AP 1224-28; AD 1-26, 60-80) and 1997-98 refund application (AP 1234-36; AD 42-59). These deductions form the basis for the false tax return charges instanter (AP 95).

## **II. SMITH'S OTHER INVOLVEMENT WITH AAA**

AAA offered other products and investment opportunities. Smith purchased audio tapes entitled "Gateway to Financial Freedom," containing AAA founder Keith Anderson's tax protestor speeches ("Gateway Tapes") (AP 351 (¶32), 1279-1282, 1288).

Smith also invested in AAA's "Loan 4" program, which was another scheme to defraud investors. The government identified Smith as a Loan 4 victim, and obtained a judgment ordering Keith Anderson to pay Smith \$250,000 restitution (AP 450).

AAA's sales force was comprised of Information Officers (IO), who were prospective AAA clients' first point of contact with AAA (AP 345 (¶12), 614 (¶5)).

Pamela Moran was Smith's designated IO in connection with Smith's investment in the CBO Look Back Tax Magic Program (AD 129). Pamela and James Moran ("the Morans") explained the CBO Look Back Tax Magic Program to Smith (AD 112).

The Morans were AAA's Executive Education Officers and Chief IOs (AP 344-45 (¶7), 614 (¶5)). They trained AAA's IOs, including Smith, who became an IO (AP 614 (¶5), 1287, 1402).

The Morans were charged in *Anderson* with: (1) conspiracy to defraud the IRS and aid the filing of false tax returns by CBO investors (AP 343-382 ); (2) conspiracy to defraud CBO Look Back Tax Magic investors (AP 382-387); (3) aiding false tax returns (AP 392-393); (4) defrauding CBO Look Back Tax Magic investors (AP 396-400); and (5) forfeiture of proceeds derived from defrauding CBO Look Back Tax Magic investors (AP 400-401).

Like Smith, the Morans contended that they believed the CBO Look Back Tax Magic Program was bona fide, and that they were lied to by Marks and other convicted *Anderson* defendants (AP 615-616 ¶7, 12). In December 2007, the Morans were acquitted of all charges against them (AP 614).

### **III. ATTORNEY MUELLER'S DEFICIENT PRETRIAL INVESTIGATION**

**A. Failure To Review Discovery**

The government's discovery in this case was voluminous. It included: (1) a hard drive with 170 gigabytes of material containing all of the *Anderson* prosecution evidence, including transcripts of undercover tapes, documents used in undercover conversations, documents and computers seized *via* search warrants, and bank records spreadsheets (AP 469, 489-518, 1110-14); (2) at least 5,414 pages of documents subpoenaed by Smith's indicting grand jury (AP 470-71); (3) documents subpoenaed by grand juries in related investigations in other districts (AP 469 n.1); (4) additional bank records; (5) "boxes and boxes of documents" outlined in two inventories (AP 286, 474-481, 1156); (6) audiotapes (AP 483-86); (7) grand jury transcripts and interview reports (AP 472-73, 482, 487); (8) search warrant affidavits and applications (AP 472); (9) *Anderson* trial transcript (AP 102, 1110-12).

Mueller obtained a trial continuance based on his estimate that it would "take several months, even with the help of a paralegal, and investigator to begin to master the discovery and prepare an adequate defense." (AP 102 ¶3). However, Mueller chose not to review the discovery nor hire a paralegal. (AP 285-88, 417-33, 897-99, 930-36, 994-97).

"[Mueller] made the decision that ... it would have taken a lot of time to

obtain any kind of good information out of [the hard drive]” (AP 931:1-4), and ceased reviewing it because (AP 899:11-19):

The documents that [Mueller and Smith] downloaded from there, [Mueller’s] recollection is that they’re mostly – she was e-mailed updates and so her name appeared in the top of e-mail as an e-mail addressee. And so they were just updates to information officers and just status reports to the people inside the organization. They didn’t indicate from what [Mueller] saw, any knowledge of wrongdoing or something that would be a smoking gun to say that she should have known this was a scam all along.

Thus, Mueller admitted review of the hard drive revealed exculpatory documents supporting Smith’s good faith defense, i.e. --documents reflecting *Anderson* defendants conducting apparently bona fide business. Despite this, Mueller ceased review because he was unlikely to find inculpatory evidence.

Mueller knew he had transcripts of undercover tape recordings of *Anderson* defendants, including Marks. ( AP 469, 473, 483, 486, 489, 514-18, 934). Despite his defense theory that Smith was duped by Marks, Mueller chose not to review any such transcripts (AP 934:15-25) (*see* Section IV.A., *infra*).

Mueller never saw the confession of lead *Anderson* defendant Keith Anderson, located in the Montrose search documents which the government specifically identified for Mueller as relevant (AP 469, 519, 833 ¶21, 857-68, 932-33, 935-36, 997)(*see* Sections V.B, VI.A, *infra*).

Mueller did not even review discovery he stipulated was admissible. More than six months before trial, the government sought a stipulation concerning the authenticity, not relevancy, of certain documentary and computer evidence on the hard drive. Mueller admitted he never reviewed these documents. Nevertheless, Mueller stipulated not only to their authenticity, but also to their admissibility (AP 519, 1388-89, 1401-02, 1448).

Mueller testified that Smith did the initial review of the hard drive, printed out a table of contents (AP 489-518), did a search for her name and printed all the documents where her name appeared (AP 897:24--898:21). Mueller “chose not to delve into” the technological expertise required to effectively review the hard drive (AP 931:25 - 932:3), and therefore did not know: (1) “if the entire drive was searchable” (AP 931:19-20); (2) whether all documents were text searchable (AP 932:10-12); (3) what technology Smith used to search the hard drive (AP 932:8-9); nor (4) whether Smith was able to search all files on the hard drive (AP 932:4-12).

Smith submitted Schnack’s Declaration (AP 683), paralegal to Assistant Federal Public Defender Evans, who represented Chris Folkers, another CBO investor who, like Smith, was charged with three counts of false tax returns stemming from his Look Back Joint Venture investment, (AP 608-09;. *U.S. v.*

*Folkers*, Cr. No. 04-20124-KHV (D. KS). Like Smith, Folkers' discovery included a hard drive containing voluminous *Anderson* investigation evidence (AP 609 ¶5). Schnack described the necessity for specialized software to effectively review the hard drive (AP 684-85).

The court found AP 1061):

I agree that the failure to conduct a targeted review of the government's evidence could have been objectively unreasonable. It is well established that effective assistance means that defense counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. *Williamson v. Ward*, 110 F.3d 1508, 1517 (10<sup>th</sup> Cir. 1997) (quoting *Strickland*). While the initial review of the hard drive might have given some basis to conclude that much of the contents of the drive were irrelevant to Defendant and did not merit a complete review, certain aspects of Mr. Mueller's decision appear to have been uninformed. By his own admission, Mr. Mueller was not proficient in computer technology and relied on his own client to electronically file documents in this case. He relied on Defendant for nearly all of the electronic searches and does not appear to have been informed about what such searches entailed or his duty to search for exculpatory, not just inculpatory, evidence. Mr. Mueller apparently did not review the areas of the hard drive specifically identified by the government as pertaining to Defendant and did not review any of the transcripts of undercover recordings of the *Anderson* defendants.<sup>6</sup>

---

<sup>6</sup>Mueller's billing records reflect entries totaling 54.3 hours for review of discovery, evidence, transcripts, documents, and new information, pulling and marking exhibits, and other tasks (AP 417-428, entries dated 12/15/05, 1/2/06, 1/8/06, 1/13/06, 2/27/06, 4/11/06, 4/12/06, 5/5/06, 7/17/06, 7/19/06, 7/26/06,

**B. Mueller Heavily Relied On Smith To Educate Him On The Facts Of The Case, But Refused To Listen To Smith's Information About Evidence Which Mueller Deemed To Be The "Biggest Concern"**

The court found that Mueller "relied heavily on Defendant's considerable knowledge of the [AAA] organization and the players," and that Smith's "broad and detailed knowledge of AAA and the programs that she promoted may have reduced the time [Mueller] needed to understand the circumstances of her case and prepare an adequate defense." (AP 1056-1057). However, Mueller admitted deliberately avoiding discussing what he deemed to be important evidence with Smith (AP 900-905).

Mueller believed the Gateway tapes containing Keith Anderson's tax protestor speeches were the key component of Smith's CBO (CR #190, AP 900). Mueller's "biggest concern" about the government's case was that Smith had not

---

7/27/06). Mueller's investigator's billing records reflect entries totaling 10.6 hours for discovery review and other tasks (AP 429, entries dated 4/19/06, 4/20/06, 6/20/06, 7/13/06). Mueller testified that he did not bill for all of his time, estimating that he spent approximately 195 hours on the case prior to trial, which included "a lot of things . . . beyond just reviewing discovery," (AP 890) such as "educating [him]self," for which he "didn't think [he] could justify" billing Smith (AP 892:11-13), "talking to other attorneys, going through the books, looking at the legal standards, looking at the allegations." (AP 890).

By contrast, the pre-trial time the *Folkers* defense team devoted is: (1) Evans and another attorney in her office: approximately 550 hours; (2) Schnack: approximately 1,200 hours reviewing the discovery hard drive; and (3) investigator: approximately 650 hours (AP 609-610).

given Mueller any information indicating that she had received or was selling these tapes (AP 905). However, despite Mueller's perception of the critical nature of the Gateway tapes, the content of the tapes was "not something that [Mueller] paid a lot of attention to[;]" ... and "that's one of the things that [Mueller] had mentioned to [Smith], that it's not something that [he] wanted to discuss with her" (AP 902:3-6).

Thus, by his own admission, Mueller deliberately closed his eyes and ears to evidence he deemed to be the "biggest concern."

**C. Because Mueller Failed To Review Discovery And Listen To Smith, Mueller Lacked A Basic Understanding Of Critical Operative Facts Necessary To Defend Smith**

Mueller's testimony that: (1) the Gateway tapes were the product that Smith's CBO, Rocky Venture, was supposed to sell; and (2) Smith's lack of clients and failure to make any attempts to sell Gateway tapes through Rocky Venture was his biggest concern (AP 900, 904-05), reveals his fundamental misunderstanding of essential facts. As a result of Mueller's failure to review discovery and listen to Smith, Mueller did not understand that Rocky Venture's revenues were supposed to come from its share of the Tax Magic and 1-900 Tax

Talk joint venture proceeds (AD 132, 145, 145-A).<sup>7</sup> Mueller's misunderstanding was crucial because, as the district court found, "the Gateway tapes . . . do not have the veneer of legality that the Tax Magic materials convey." (AP 1072).

Mueller also failed to understand that Smith's failure to have clients or make any attempts to sell the CBO's product was not an inculpatory fact.

Macromedia was supposed to create and market the product -- not joint venture partners (AP352 ¶¶36, 851-853 ¶¶52-55; AD 129A-132,136).<sup>8</sup>

As a result of Mueller's misunderstanding of critical facts stemming from his failure to review discovery and listen to Smith, Mueller failed to rebut the government's evidence of willfulness. *See* Section VI, *infra*

**D. Mueller Failed To Take Steps Necessary To Lay Foundation For Admission Of Material Exculpatory Evidence**

As explained in Sections IV.B,C,E *infra*, Mueller's deficient pretrial

---

<sup>7</sup> The government admitted that Smith's CBO is in fact part of the Look Back program described in *Anderson SSI* (AP 82, 1111). There was no ambiguity in *Anderson*: Tax Magic and the 1-900 number was what the CBO Look Back Program was going to create and market (AP 351-353 (¶¶35-39), 382-387, 396-400). *See also Moran*, 493 F.3d at 1007. The Gateway tapes were a product separate and apart from the CBO Look Back Program (AP 351 (¶32)).

<sup>8</sup>The 1-900 number was owned by Macro Media (aka Mason Advertising) and Rocky Venture was a participating joint venturer, along with all other CBO Look Back investors, in this joint venture number (AD 131).

preparation included his failures to: (1) prepare witnesses (AP 1062-63), (2) obtain self-authenticating certified copies of documents filed in Smith's own case and in *Anderson* (AP 1057-58), and (3) comply with Fed.R.Crim.P. 16 (AP 1063-64), resulting in his failure to lay "a proper foundation for the introduction of evidence," which the district court found "... is the minimum required of a reasonably competent attorney." (AP 1063).

#### **IV. MUELLER'S DEFICIENT PERFORMANCE RESULTED IN FAILING TO PRESENT SMITH'S DEFENSE THEORY – LACK OF GUILTY KNOWLEDGE AND WILLFULNESS**

As explained in the *Anderson SSI* and demonstrated by the convictions, CBO Look Back investors were deceived into believing that the Tax Magic program was *bona fide*. (AP 382-87). The government listed 145 CBO investors as fraud victims (AP 452-455). The government's theory instanter is directly contradictory to its theory in *Anderson* – charging that Smith, a CBO investor, was a knowing participant in the fraud.

From the outset, Smith told Mueller she lacked knowledge the tax deductions stemming from her CBO Look Back Tax Magic investment were false (AP 277, 906). Mueller testified that Smith "believed in [the Look Back] program totally" (AP 946). However, as set forth below, as a result of Mueller's deficient performance, critical exculpatory evidence substantiating Smith's belief was not

presented.

**A. Mueller’s Admitted Failure To Review Any Undercover Tape Transcripts Resulted In Failure To Identify What District Court Described As “Key Conversation” Of Lead AAA Accountant Richard Marks**

Mueller testified that within a few weeks of Smith’s indictment, Mueller decided the defense theory would be that Smith lacked the requisite knowledge and willfulness because she was lied to and duped by Marks (AP 27-79, 906, 928, 934). As stated *supra*, Section III.A, Mueller chose not to review any Marks undercover transcripts. The court found (AP 1061):

In light of the defense strategy, which was to show that Defendant had been lied to and duped by the architects of the AAA program, I conclude that a reasonably competent attorney would have reviewed at least some of the transcripts to determine the nature of the information discussed by Marks and others. Mr. Mueller’s failure to do so is not objectively reasonable.

Consequently, Mueller did not utilize what the court found was a “key conversation” where Marks admitted “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 616-17 ¶13, 679-82, 1060).

The Morans, who were directly above Smith in the AAA hierarchy, had the same defense theory as Smith, i.e.– they were lied to by Marks and therefore deceived into believing the CBO Look Back Tax Magic Joint Venture was bona

fide (AP 613-16, ¶¶7, 12). The Morans' trial attorney declared that in support of the Morans' good faith defense, he and his co-counsel presented and relied on the Marks undercover transcript (AP 616, ¶13) as critical exculpatory evidence, and that failure to do so would have constituted prejudicial deficient performance (AP 617).

**B. Mueller's Failure To Establish Foundation For Admission Of Evidence District Court Found Was "Material" And "Central To The Defense Strategy"**

To deceive investors into believing the Tax Magic venture was bona fide *Anderson* defendants provided them: (1) Tax Magic infomercial video; and (2) 1-900 Tax Talk/Tax Magic progress reports and revenue projections (AP 297-300, 534-55, 611-12 ¶7, 615-16 ¶¶8-11). The video depicts a man identified as Roosevelt Drummer, formerly an IRS revenue agent for six years, describing his own business, RLD Enterprises, through which Tax Magic was being produced and marketed. This video described the Tax Magic program to include: (1) diagram of 50 highly effective tax reduction strategies; (2) workbook; and (3) audio CDs, all of which were displayed on the video. Drummer explained the diagram and the many tax reduction strategies. The video also introduced "Tax Talk," the name for the 1-900 number, and represented that a team of tax professionals had been assembled to be available by telephone to purchasers of the

Tax Magic Program ( AP 298, 534, 615 ¶9).

The progress reports and revenue projections included correspondence from Drummer to “joint venture partners” concerning the status of Tax Magic, and directing any questions to Carl Charlot, Coordinator of 1-900 Tax Talk and Tax Magic. (AP 536-37) Charlot wrote detailed progress reports and emphasized to the “joint venture partners” that: “*This program [Tax Magic], combined with the 1-900 Tax Talk program, will produce tremendous results for you when offered to the nation.*” (AP 537, 539). The court found these documents “portray 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 foregoing video and documents to Mueller well in advance of trial, explaining that: (1) Marks had given her these materials in connection with her CBO investment, and (2) this evidence convinced her of the bona fides of the Tax Magic program (AP 297). In his MOI, Mueller stated:

“Smith thought Tax Magic and Roosevelt Drummer were great. Smith thought Tax Magic product would pull everyone to success.” (AP 748 (¶12), 943).

Mueller testified: (1) Smith “bought into the whole package, the 900 number, the money-making opportunities, yes”; (2) the infomercial video substantiated Smith’s belief; (3) “she was very happy with the appearance of the presenter . . . Roosevelt

Drummer” (AP 946); (4) Mueller believed this video is part of what induced Smith to invest in the CBO (AP 943-44).

Mueller admitted he knew prior to trial that the Tax Magic/1-900 Tax Talk infomercial video, progress reports and revenue projections were important to Smith’s good faith defense (AP 948). However, Mueller’s only attempt to introduce this evidence was through defense witness Skillo, whom Mueller failed to prepare. AP 611 ¶¶3-5, 948-49. Consequently, the evidence was not admitted (AP 1749-1754). The court found (AP 1063):

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

The Morans relied on this critical exculpatory evidence for their good faith defense (AP 615-616 ¶¶ 7-11). Their attorney declared that the failure to do so would have constituted prejudicial deficient performance (AP 617 ¶15).

**C. Mueller Failed To Establish Foundation For Evidence He Argued Was Important, Won A Motion In Limine To Present, And Told The Jury In Opening They Would See**

Part of Mueller’s defense strategy was to show that: (1) Smith was “identically situated” to other AAA Loan 4 Program and CBO Look Back Tax Magic Program investors who were defrauded by AAA out of both investments;

and (2) the government acted inconsistently by identifying the other investors as victims of both schemes for purposes of restitution, whereas the government identified Smith only as a Loan 4 victim (AP 105-06, 279-283). Both sides filed motions in limine (AP 27-94, 105-08). Mueller argued (AP 1144:2-19):

What the government did in Seattle [*Anderson*] was to paint everyone as victims, and they didn't delineate between who was a victim of the CBO and who was a victim of the Loan 4 program. A victim was a victim in Seattle, and they lumped Ms. Smith in with everyone else.

It wasn't until months after the jury came back with a verdict that the document that you have with that list was submitted to the Court, to our understanding, that outlined who the victims were and what the amount of restitution each was owed.

When they were talking about the victims in two areas, they did not tell the jury up in Seattle that Ms. Smith was a victim in one type of scam and a target of an investigation in another.

So what we look at is that the people in Seattle made references to her as a victim. And they did not classify her as a victim of one or another or both and, therefore, those things are, we believe, relevant.

Mueller further explained the victim lists' relevancy (AP 105-106):

... to show the government's double standard for determining who will be a victim, their willful misguidance of the jury in the Seattle trial against the leaders of AAA, and the violation of the Defendant's status as a "victim" as argued by the Federal Government.

...

It is necessary to submit evidence to the jury that the

government randomly selects victims to meet their theories of criminality rather than accurately listing victims for purposes of restitution. The inconsistent statements of the government, and ultimately the illegitimate motives in determining who is a “victim” is an issue that **must be disclosed to the jury**, because it is factually relevant. **The Loan 4 victim list, as well as the CBO victim list are important pieces of evidence** to show the government’s misrepresentations to the Seattle jury. [Emphasis added].

The trial court ruled that the *Anderson* CBO and Loan 4 victim lists were admissible ( AP 1145, 1152-1153).

Mueller told the jury in opening that he would present these victim lists (AP 1208). However, they were not admitted because Mueller never established foundation (AP 1727-28, 1730, 1743-44). Not only were self-authenticating certified copies readily available from the *Anderson* court (AP 444-455), the government filed the CBO victim list instanter (AP 82, 86-89). Mueller admitted his failure to obtain certified copies was clear error (AP 940:1-7). The government agrees (AP 708). The court found (AP1057-58):

The failure to proffer this evidence to the jury was clearly not a matter of strategy, since Mueller won a motion in limine to ensure their admission, referred to them in his opening statement, and attempted to admit the evidence at trial. Mueller, however, failed to properly authenticate the documents through a witness or by obtaining self-authenticating copies. This omission can fairly be considered to meet the first prong of the *Strickland* test as unreasonably falling below the prevailing standards of competent representation.

**D. Mueller Undermined His Defense Strategy And Instead Supported Government's Theory By Failing To Introduce Evidence Of Smith's Payments For Her CBO After Telling Jury In Opening That He Would**

Prior to trial, Mueller made clear that in order to show Smith was a victim of AAA's CBO Look Back Tax Magic Joint Venture fraud scheme, Mueller planned to introduce evidence that Smith paid money for her CBO investment. Mueller stated (AP105):

The facts will show that Defendant . . . submitted funds for both the "Loan 4" and "CBO" programs and [was] ultimately scammed out of [her] entire amount of money.

In opening, Mueller told the jury (AP 1205):

Now, there are two things, two programs that Ms. Smith got involved with. The first one you heard about, this [CBO]. The facts will show that Ms. Smith got into that organization and she was victimized by [AAA ] because she gave them her money in the amount of \$87,700. That is what they stole from her. That was one.

However, Mueller failed to offer any evidence of Smith's CBO payments, including check receipts totaling \$50,000 in Mueller's possession (AP 293, 520-21). The court found (AP 1067):

The evidence of the check receipts was readily available and Mr. Mueller provides no explanation for why he did not introduce this evidence. Moreover, since he referred to it in opening statement, it was clearly part of the defense strategy and so the failure to present this evidence cannot be considered strategic. That Defendant had paid \$50,000 for her CBO and

invested significantly more in the Loan 4 program could have been evidence of her good faith that the programs were bona fide. I conclude that the failure to introduce the check receipts could satisfy the first prong of the *Strickland* test.

Additionally, as a result of Mueller's deficient performance in failing to review the government's discovery, Mueller mistakenly believed that Smith invested \$275,000 in the Loan 4 program when in fact she had invested \$250,000 (compare AP 1205, 1208 with AP 450). Accordingly, when IRS case agent Hagemann testified that the government: (1) identified Smith as a Loan 4 victim (AP 1466) and (2) found one check from Smith for \$277,700 (AP 1471),<sup>9</sup> Mueller did not understand, and therefore failed to elicit, that: (1) only \$250,000 of this check represented Smith's investment in Loan 4 (AP 450), and (2) \$27,700 represented Smith's payment of the "loan commitment fee" for the CBO Look Back Tax Magic Joint Venture (AD 138), as described in the *Anderson SSI* (AP 352 ¶37). Instead, Mueller told the jury that Smith invested \$275,000 in Loan 4 (AP 1205, 1208). Consequently, Mueller led the jury to believe that this entire check was for Smith's Loan 4 investment.

Hagemann testified that Smith's CBO documents stated that Smith was

---

<sup>9</sup>Mueller marked the above-referenced check as DEX J (AD 383-386), but never introduced them. He introduced a different document as DEX J (AP 1785-1787).

required to pay \$87,700, but Hagemann never testified that she saw any evidence of any such payments (AP 1471):

Q. So do you know if Smith upheld her end of the loan agreement by paying \$87,700?

A. That was the points she was required to pay.

Hagemann further testified that many other requirements set forth in Smith's CBO's documents were not satisfied, including the requirement that Macro Media make a capital contribution of \$4,616.00 (AP 1391-92). Thus, evidence that Smith's CBO documents stated that she was required to pay \$87,700, by itself, was not probative evidence that she in fact paid it.<sup>10</sup>

As explained in Section IV.C, *supra*, Mueller's strategy was to show that the government had no reasoned basis for classifying Smith as a Loan 4 victim but not CBO victim, and by doing so, the government: (1) applied a "double standard"; (2) "violat[ed] . . . Defendant's status as a 'victim' as argued by the

---

<sup>10</sup>Hagemann testified she saw documents reflecting Smith's transfer of \$60,000.00 from her Loan 4 account to pay points on her CBO loan (AP 1471). However, as a result of Mueller's deficient failure to introduce the \$50,000 check receipts and his misunderstanding of the \$27,700 portion of the one check about which Hagemann testified, Mueller never showed the jury that Smith actually paid any additional funds for her CBO investment over and above her Loan 4 investment. Hagemann's testimony that Smith made a paper transfer from her Loan 4 account to be applied to her CBO points does not demonstrate that Smith was scammed out of any money on her CBO investment.

Federal Government”; (3) made “inconsistent statements” ; (4) had “illegitimate motives”; and (5) engaged in “willful misguidance of the [*Anderson*] jury” (AP 105). However, Mueller’s production of evidence that Smith paid money for her Loan 4 investment and that the government deemed her to be a Loan 4 fraud victim, coupled with Mueller’s failure to produce any evidence that Smith paid any money for her CBO investment, suggests that the government had a reasoned basis for its failure to classify Smith as a CBO fraud victim. Consequently, this evidence supported the government’s argument that Smith was a Loan 4 victim but not the CBO victim. Accordingly, Mueller undermined his defense strategy and instead elicited evidence supporting the government’s theory. In doing so, Mueller once again damaged his and Smith’s credibility with the jury by failing to deliver on his opening statement (AP 1205, 1208), just like he did with the *Anderson* victim lists.

**E. Mueller’s Deficient Performance Resulting In Failure To Present Expert Testimony He Told Jury He Would Present**

Pursuant to Mueller’s strategy to demonstrate Smith was both a Loan 4 and CBO victim, Mueller intended to introduce expert testimony of Alan Gavel. Prior to trial Smith retained Gavel, who prepared amended returns for Smith claiming her CBO and Loan 4 investments as casualty losses pursuant to IRC §165 (AP 748, 1208-09, 1685, 1690, 1718-26, 1730-31).

Mueller told the jury (AP 1208-1209):

The next person we will hear from is somebody named Alan Gavel. He is a tax employer [sic] from Florida who basically works for a law firm who investigates the situations that Ms. Smith puts herself into. Their investigation will show you that she was a victim of fraud in both the [CBO] and the Loan 4 programs. They used this investigation and these results to actually prepare other tax returns so she could write off the fraudulent losses that she had. He will tell you from their investigation that she was a victim.

The government raised two objections to Gavel's testimony: (1) Mueller's nondisclosure of the requisite summary under Fed.R.Crim.P. 16(b)(1)(C); (2) Mueller planned to have Gavel opine based on someone else's report (AP 1685-92, 1718-22). Mueller gave a proffer of Gavel's testimony (AP 1690-91, 1718-21).

The trial court disallowed the testimony based on Mueller's noncompliance with Rule 16 (AP 1692, 1720-21). Concerning the part of Gavel's proffered testimony based on someone else's report, the court held: "given the indices so far there, there is no basis to allow [Gavel] to testify as an expert, even if it had been timely submitted" (AP 1692, 1720-21).

Mueller called Gavel to the witness stand notwithstanding the trial court's ruling (AP 1722-1732), not for any strategic reason, but because Gavel had already traveled from Florida to Colorado, and Mueller knew how much money

Smith had paid him (AP 748). As a result of Mueller's noncompliance with Rule 16, Mueller was unable to elicit the testimony he had promised the jury (AP 1208-09, 1718-32).

The court "agreed with Defendant" that Mueller's failures *vis-a-vis* Gavel "could amount to deficient performance under *Strickland*." (AP 1063-64). However, notwithstanding Mueller's opening statement (AP 1208-09), proffer to the trial court (AP 1690-91; 1719-21), MOI (AP 748), the government's proffer to the trial court (AP 1685-1690) and Gavel's testimony (AP 1722-1732), the court concluded that it had no indication of the contents of the proposed expert testimony and therefore could not examine whether this caused prejudice (AP 1064).

## **V. SMITH'S TRIAL TESTIMONY**

### **A. Mueller's Incorrect Legal Advice To Smith Concerning Necessity For Her Direct Testimony And Permissible Scope Of Cross Examination**

At trial, Smith testified for the sole purpose of authenticating a United States Postal Service Track and Confirm document and Certified Mail Receipt (AP 295-97, 533, 952:6-8, 1065, 1812-13).

Mueller admitted he specifically advised Smith that: (1) these documents were needed and (2) Smith was the only witness who could introduce them ( AP

906, 950). Mueller admitted he never considered, and therefore never advised Smith, that these documents could have been authenticated by a postal service custodian (AP 952).

Mueller testified that he specifically told Smith the reason the postal documents were needed, but Mueller did not state what that reason was (AP 906). No sound reason for these documents can be discerned from the record. To the contrary, the documents were harmful. The postal documents constitute evidence that Smith filed the 2003 NECO partnership tax return at issue in Count 4 (willful failure to timely file this return) just weeks prior to trial -- 26 months after it was due. Thus, they constituted an admission by Smith of her failure to timely file this return. Mueller did not elicit any testimony explaining why Smith filed this return so late, nor did he contend that the late filing somehow negated the essential willfulness element. Accordingly, Smith's direct testimony established her failure to timely file this return as charged in Count 4. The government relied on this admission in its closing (AP 1884)

Mueller admitted that he advised Smith to limit her direct testimony to the sole issue of authenticating the postal receipts, in order to limit the scope of cross. (AP 907, 953-55). Moreover, Mueller admitted it was his assessment that the government would not be permitted to cross examine Smith concerning the

content of the document mailed with the postal receipts, because such cross would be beyond the scope of direct (AP 953-54). Mueller admitted the advice he provided Smith was based on this assessment (954:1-5), and that he did not prepare Smith for the government's cross examination concerning the content of the document mailed with the postal receipts (AP 955).<sup>11</sup>

Of course, the trial court permitted the government to introduce and cross examine Smith concerning the 2003 NECO partnership return mailed with the certified mail receipt (AP 1813-17; AD 374). Contrary to Mueller's assessment, this line of inquiry was squarely within the scope of Smith's direct testimony, and it also went directly to her credibility.

The trial court found that Smith's cross examination testimony concerning the NECO return, for which Mueller had left her totally unprepared, was critically prejudicial (AP 1963:3-8):

[F]rom the court's standpoint, it appeared that it was the cross-examination of the defendant that may well have led to her conviction as to her thoughts about paying taxes, that may well have caused the

---

<sup>11</sup>At this point in Mueller's testimony, the district court ruled that since this was a bail hearing and not a full evidentiary hearing on Smith's §2255 motion, any further cross examination of Mueller would be "very limited," (AP 956). The district court also precluded any re-cross (AP 966).

jury to have considered her guilty.<sup>12</sup>

The government agrees with the trial court's assessment of the overwhelming prejudice Smith suffered from this cross examination. (AP 1017-18). The government described its cross examination of Smith as a "hammer," and Smith as "her own worst enemy." (AP 1017-18).

The §2255 court also agrees that Smith's cross examination was damaging (AP 1065-66). However, the court concluded that Mueller's decision to have Smith testify was an adequately informed strategic choice and therefore did not constitute deficient performance (AP 1066). As explained in Section IV, *supra*, the court did find that other errors by Mueller constituted deficient performance resulting in exclusion of a number of items of exculpatory evidence, including

---

<sup>12</sup>Smith signed the 2003 NECO return "under duress." On cross, the government published this signature to the jury (AP 1815) and questioned Smith as follows (AP 1816):

- Q. . . . What does "Under duress" mean?
- A. I had to file this tax return, is that right? I am required to file it. Am I required to file this tax return?
- Q. I get to ask the questions, you get to answer.
- A. "Under duress," in my opinion, which I read for through some different publications and stuff, that I cannot file this tax return without it being under penalty of perjury. I am concerned about the tax laws, that I'm not – they are so complex that I am not able to follow the tax laws. I don't have a problem filing my tax returns.

“material” evidence “central to the defense strategy,” (AP 1063, 1073), and the “key” Marks undercover transcript (AP 1060). However, the court found that, “in light of the government’s significant evidence of willfulness,” the failure to introduce this exculpatory evidence did not result in prejudice (AP 1073). The “significant evidence of willfulness” on which the court relied included Smith’s damaging cross examination testimony (AP 1074).

**B. Mueller’s Breach Of His Duty To Investigate Resulted In Uninformed Advice To Smith Regarding Need To Limit Scope Of Cross Examination**

As explained in Sections III.B,C, *supra*, Mueller mistakenly believed that: (1) the Gateway tapes were the key component of Smith’s CBO, the product which was supposed to generate the revenue to repay the loan from La Maquina Blanca (AP 900:2-11); and (2) Smith’s failure to sell any Gateway tapes through Rocky Venture was cause for the “biggest concern” (AP 905:1-16). Despite Mueller’s perception of the importance of the Gateway tapes, Mueller chose not to pay attention to the tapes’ contents, and he told Smith he did not want to discuss the contents with her (AP 901-902).

Nevertheless, Mueller relied on these tapes as the basis for his advice to Smith to limit the scope of her direct examination to the authentication of the postal receipts. Mueller testified that he advised Smith to limit her testimony to

the authentication of the postal documents because he “didn’t want Miss Smith to start talking about those types of ideas” espoused by Keith Anderson on the Gateway tapes (AP 901:23-24). Mueller testified that Smith continued to believe that Anderson was a good person who would be exonerated on appeal (AP 908-909), and that Mueller did not want Smith to testify about this belief (AP 908), which influenced Mueller’s advice to Smith to limit her direct testimony to authenticating postal receipts (AP 935).

Mueller admitted he never saw Keith Anderson’s confession (AP 932), despite its location within discovery that the government specifically identified as relevant and about which the government had sought authenticity stipulations (AP 469, 519) (*see* Section III.A, *supra*). Obviously, Mueller never considered Anderson’s confession when he formulated his strategy and advised Smith to limit her direct testimony to authenticating postal receipts (AP 935-36). Had Mueller shown the confession to Smith, it would have been material to her view of Anderson and the improbability of his exoneration on appeal. Even Mueller conceded it’s possible materiality (AP 935:15-936:2).

In his September 2001 confession, Anderson admits he provided “incompetent and destructive leadership” (AP 865), and the Loan 4 program had been a “loser” since early 1997 (AP 862), more than two years before Smith was

introduced to AAA (AD 112). Anderson states (AP 865):

AAA ceased to exist long ago when JC and I opened the door for members to participate in LN4 destructive evil greedy unrealistic concepts. Since then there has been one lie after another, one cover up after another and greed has infected the hearts of many and the shame of revealing these sins has led to more lies, more cover up and now theft because funds are being taken carelessly and without regard for those members who own these funds.

Anderson further admits that by at least early 2000 –before Smith filed any of the false tax returns at issue herein– Anderson conspired to cover up the fraud. (AP 862).<sup>13</sup>

Thus, Mueller’s strategy and advice to Smith to limit her direct examination to authenticating postal receipts was based on materially incorrect and incomplete information stemming from Mueller’s deficient pretrial investigation.

**VI. MUELLER’S DEFICIENT PERFORMANCE CAUSED HIS FAILURE TO REBUT THE GOVERNMENT’S EVIDENCE OF WILLFULNESS**

As explained below, as a result of Mueller’s deficient failures to understand critical operative facts and introduce material exculpatory evidence (*see* Sections III.C, IV, *supra*), Mueller failed to rebut easily rebuttable aspects of the government’s evidence of willfulness (*see* AP 991-94, 1028-30).

---

<sup>13</sup>Anderson also made clear that the Morans had no part in the fraud (AP 862).

**A. Mueller's Failure to Rebut The Government's Argument That Smith's Association With Anderson, Marks, and Their Tax Protestor Ideology Demonstrated Willfulness**

In closing, the government relied heavily on Keith Anderson's speeches on the Gateway tapes (AP 1860, 1865-1871), including re-playing excerpts played during Haueisen's testimony (AP 1499-1507), arguing these tapes demonstrated AAA's "absolute commitment ... to skirting the tax laws" (AP 1865), and that (AP 1871):

This is what Kris Smith joined. How did she join it? She became an information officer ... she needed to become an expert on AAA. She needed to become an expert on their products, and she needed to become an expert on their message.

As a result of Mueller's deficient failure to review the discovery in his possession, he failed to identify and make use of the following evidence to refute the government's evidence and argument: (1) the key undercover recording of Marks' admission that he and the other AAA planners did not tell any of the IOs or their supervisors (the Morans) about the programs in detail and their illegality (*see* Section IV. A., *supra*); and (2) Keith Anderson's confession: (a) admitting his "incompetent and destructive leadership" and that "AAA ceased to exist" when they started the loan 4 program (AP 865), which had been a "loser" since 1997 (AP 862), and "[s]ince then there has been one lie after another, one cover up after another . . . more lies, more cover up and now theft" of members' funds (AP 865);

and (b) exonerating the Morans (AP 862). *See* Section V. B., *supra*. Since Mueller was unaware of this evidence, he did not use it to demonstrate that: (1) Smith was deceived by AAA and therefore was no expert on their products; and (2) the illegal nature of AAA's products was specifically concealed from Smith and her supervisors.

**B. Mueller's Failure to Rebut Government's Evidence That Smith Knew The CBO Was A Sham**

1. The government argued that Smith's CBO had no business purpose (AP 1874). As a result of Mueller's deficient failure to lay foundation for admission of the Tax Magic/1-900 Tax Talk infomercial video, progress reports and revenue projections, this evidence was unavailable to rebut the government's argument (*see* Section IV.B, *supra*). This evidence would have demonstrated a basis for Smith's good faith belief that her CBO did in fact have a business purpose. As the court found, this evidence was "material" (AP 1073), "central to the defense strategy," and "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).

2. Smith's Partnership Agreement identifies Macro Media as her partner (AD 97). However, the La Maquina Blanca invoice states that the loan proceeds will be paid to Mason Advertising (AD 95). The government relied on this to demonstrate that Smith knew her CBO was a sham (AP 1874), arguing that:

Macro Media is the partner.

What does the invoice say as to who is going to get the loan proceeds? The loan proceeds on the invoice say that La Maquina Blanca is authorized to pay the loan proceeds directly to Mason Advertising. Now, what the heck does Mason Advertising have to do with Rocky Venture? Absolutely nothing.

Mueller failed to raise the obvious response to this argument: Macro Media and Mason Advertising are one and the same entity with the same taxpayer identification number, and it was standard AAA practice to use the names interchangeably (AP 348 ¶24).

3. Based on Hagemann's testimony (AP 1391-95), the government argued (AP 1879-80):

[T]here was no capital contribution. No capital contribution made by Macro Media. If you recall by the terms of the partnership, Macro Media was supposed to fund this partnership with 5 percent or 4,616 on the tax return. There is absolutely no capital contribution by the minority partner.

Again, no assets of this business. No cash. No inventory. No other current assets. And no depreciable assets. There is nothing to this business.

As a result of Mueller's deficient performance described in Section IV.D, *supra*, documentary evidence of \$77,700 of Smith's capital contribution pursuant to the terms of the partnership was not presented to rebut this argument and evidence.

4. The government argued that the absence of evidence of banking activity, books of account and an annual audit for Rocky Venture, and of Smith's participation in the control and management of Rocky Venture, demonstrated a failure to operate in accord with the partnership agreement and therefore that Smith's CBO was a sham (AP 1879). Since Mueller failed to understand critical facts because he breached his duty to investigate, Mueller failed to rebut this argument with the innocent explanation that these terms of the partnership agreement were simply inapplicable until Rocky Venture began receiving proceeds from the Tax Magic/1-900 Tax Talk joint venture. (AP 102-04, 129A-132). Since Rocky Venture had not yet received any proceeds, there were no "funds of the partnership" to be deposited into a partnership account, there was no need for any accounting records, and no books to be audited (AD 99).

5. The government relied on Haueisen's testimony that Smith told Haueisen that the loan from La Maquina Blanca did not have to be repaid (AP 1876) and Baldwin's testimony that there was some "side agreement" (AP 1877). If Mueller had understood the basic terms of the CBO, he would elicited from witnesses and explained to the jury by reference to documentary evidence, the innocent explanation for this testimony (AP 853 ¶55). The loan was to be repaid from Rocky Venture's share of the net proceeds of the 1-900 joint venture number

(AD 130-132), a portion of which was to be forwarded directly from Macro Media aka Mason to La Maquina Blanca (AD 102, 130). Macro Media also agreed that if after three years it had not substantially performed at the levels specified in the projection report, then Macro Media would pay off the loan when it became due (AP 353 (¶38), AD 102, 129A).

### **SUMMARY OF THE ARGUMENT**

Mueller's decisions not to review the government's discovery in his possession and discuss material evidence with Smith constituted deficient performance resulting in his failure to: (1) identify and use two items of critical exculpatory evidence: (a) Marks undercover transcript of what the district court found was a "key conversation;" and (b) Keith Anderson's confession; and (2) understand critical operative facts necessary to defend Smith.

As a result of what the court found did or could constitute deficient performance, Mueller failed to establish foundation for admission of nearly all material exculpatory evidence he planned to present, including evidence the court found was "material" and "central to the defense strategy." The cumulative effect of these errors was to totally gut Smith's good faith defense. Moreover, Mueller promised much of this evidence to the jury in opening statement and then failed to deliver in a manner which served to support the government's theory of its case

and undermine the defense, thus exacerbating the prejudice resulting from Mueller's deficient performance. In concluding that Mueller's deficient performance did not result in prejudice, the court failed to aggregate Mueller's errors and assess the cumulative prejudice.

As a result of Mueller's failure to: (1) identify critical exculpatory evidence in the government's discovery; (2) introduce material exculpatory evidence he planned to present; and (3) understand the basic facts of the case, Mueller not only failed to present Smith's good faith defense, he also failed to rebut the government's evidence of willfulness, at least some of which was easily rebuttable.

Finally, Mueller incorrectly advised Smith concerning the necessity for her direct testimony and the permissible scope of cross examination. As a result of Mueller's ignorance of well established law on the scope of cross examination, Mueller failed to anticipate and prepare Smith for the government's clearly foreseeable cross examination which resulted in indisputably prejudicial testimony. This prejudice was caused not only by Mueller's clear mistake of law as to the scope of cross, but also by his failure to identify and discuss critical exculpatory evidence with Smith in preparation for her testimony, i.e. the Anderson confession and Marks undercover transcript. As a result of Mueller's

incorrect legal advice and deficient preparation, Smith was deprived of her right to make an informed choice whether to testify.

Mueller's combined errors wholly deprived Smith of any meaningful defense and further caused his failure to subject the government's case to any adversarial testing, thus rendering the adversarial process and Smith's resulting conviction unreliable.

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY DENYING SMITH'S §2255 MOTION

**Standard of Review:** “A claim for ineffective assistance of counsel presents a mixed question of fact and law, which [this Court] review[s] de novo.” *U.S. v. Orange*, 447 F.3d 792, 796 (10<sup>th</sup> Cir. 2006) (citing *Boltz v. Mullin*, 415 F.3d 1215, 1221 (10<sup>th</sup> Cir. 2005). “This Court reviews the district court’s legal rulings on a §2255 motion de novo and its findings of fact for clear error.” *Id.* (citing *U.S. v. Pearce*, 146 F.3d 771, 774 (10<sup>th</sup> Cir. 1998).

To prevail on a claim of ineffective assistance of counsel, Smith must show: (1) counsel’s performance was deficient; and (2) counsel’s deficient performance prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

**A. The District Court Erred In Concluding That Mueller's Performance Related To Smith's Trial Testimony Was Not Deficient**

The trial court, §2255 court, and government all agree that Smith's trial testimony was highly prejudicial, thus satisfying *Strickland's* second prong (*see* Section V.A., *supra*). However, the court concluded that Mueller's performance in relation to Smith's trial testimony was not deficient under *Strickland's* first prong, reasoning that "Mueller's decision to have Defendant testify on a singular issue [authentication of postal receipts] and to minimize cross examination was an adequately informed strategic choice" (AP 1066).

The district court erred. The "decision to have Defendant testify" belonged solely to Smith, not Mueller. *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10<sup>th</sup> Cir. 2004) (*citing Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Smith's right to testify was her constitutional right, *Id.* (*citing Rock v. Arkansas*, 483 U.S. 44, 49-52 (1987)), and she had the right to effective assistance of counsel in deciding whether to waive or invoke this right. *Id.*, at 1170 (*citing U.S. v. Teague*, 953 F.2d 1525, 1534 (11<sup>th</sup> Cir. 1992) (*en banc*)). The right to testify is a necessary corollary to the Fifth Amendment's guarantee against compelled self incrimination, *Rock*, 483 U.S. at 52, and therefore "guarantees the right to ultimately *choose* whether or not to testify." *Teague*, 953 F.2d at 1532. The defendant has the right to make this

choice with the advice of competent counsel. *Id.*, at 1533. “Defense counsel bears the primary responsibility for advising the defendant of . . . the strategic implications of each choice. . . . This advice is crucial because there can be no effective waiver of a fundamental constitutional right” unless it is knowing, intentional and voluntary. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Where, as here, the defendant’s decision is based on counsel’s incorrect legal advice and deficient pretrial investigation, she is deprived of her right to effective assistance of counsel. *See Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 970 (1988) (counsel provided ineffective assistance by misinforming defendant about government’s use of prior convictions if defendant took the stand, thereby depriving defendant of meaningful opportunity to decide whether to testify); *Foster v. Delo*, 11 F.3d 1451, 1457 (8<sup>th</sup> Cir. 1993) (counsel provided ineffective assistance by misinforming defendant of risks and failing to inform defendant of benefits of testifying at penalty phase of capital murder trial, thereby “imped[ing] an informed decision whether to waive or invoke a fundamental constitutional guarantee” ); *Lema v. U.S.*, 987 F.2d 48, 53 (1<sup>st</sup> Cir. 1993) (citing *U.S. v. Poe*, 352 F.2d 639, 640-41 (D.C. Cir. 1965) (finding deprivation of fair trial where counsel misinformed defendant of consequences of

taking the stand). Here, Mueller incorrectly advised Smith concerning the necessity for her direct testimony and permissible scope of cross examination.

**1. Mueller Incorrectly Advised Smith That Her Direct Testimony Was Necessary**

Mueller incorrectly believed and advised Smith that her testimony was necessary to authenticate the postal receipts (AP 906, 950), when in fact they could have been authenticated by a postal service custodian of records pursuant to Fed.R.Evid. 803(6) (*see* Section V.A, *supra*). Moreover, it is highly likely that the government would have stipulated to the admission of the postal receipts, since, as the government argued in closing (AP 1884), they constituted an admission of guilt as to Count 4, i.e. – that she failed to file her 2003 NECO partnership return until just weeks prior to trial, more than two years after it was due. Indeed, given the inculpatory nature of the documents Smith authenticated, Mueller’s advice to Smith that the documents were necessary is inherently flawed.<sup>14</sup>

**2. Mueller’s Advice To Smith Was Based On His Ignorance Of The Scope Of Cross Examination**

Mueller’s advice to Smith was based on his incorrect assessment that cross examination about the content of the document mailed with the postal receipts

---

<sup>14</sup>At minimum, the district court should have granted Smith an evidentiary hearing to permit her to examine Mueller and to testify as to Mueller’s advice concerning the necessity for the postal receipts (*see* Section II, *infra*).

would be beyond the scope of direct and therefore not permitted (AP 953-55).

This “assessment” flies in the face of Fed.R.Evid. 611(b), because the content of the document mailed was: (1) directly germane to the subject matter of direct; and (2) a matter affecting Smith’s credibility. It is well settled that:

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

*Leeper v. U.S.*, 446 F.2d 281, 288 (10<sup>th</sup> Cir. 1971) (*citing Alford v. U.S.*, 282 U.S. 687 (1931) and additional cases). *See also U.S. v. Burch*, 153 F.3d 1140, 1144 (10<sup>th</sup> Cir. 1998); *U.S. v. Crockett*, 435 F.3d 1305, 1312-13 (10<sup>th</sup> Cir. 2006); *U.S. v. Wolf*, 561 F.2d 1376, 1381 (10<sup>th</sup> Cir. 1977). Clearly, the content of the document mailed with the postal receipts was germane and tended to elucidate and explain Smith’s direct testimony. Moreover, the document mailed was Smith’s 2003 NECO partnership return at issue in Count 4, and the government’s cross examination centered on Smith’s notation “under duress” next to her signature, which went directly to a matter affecting her credibility (AP 1816, AD 374). Thus, Mueller flagrantly erred in his “assessment” that cross examination concerning the content of the document mailed would not be permitted.

**3. Mueller Failed To Prepare Smith For Clearly Foreseeable Cross Examination**

As a result of Mueller's clear mistake of law, he failed to anticipate and prepare Smith for the government's clearly foreseeable cross examination concerning the content of the document mailed (AP 954-56), which is what elicited Smith's indisputably prejudicial testimony. The district court found "that the prejudice resulting from the Defendant's testimony appears to have been the result of her continued belief in the tax protestor views promoted by AAA . . . ." (AP 1066). Notably, this was the subject that Mueller refused to analyze or discuss with Smith (*see* Section III.B, *supra*). Moreover, had Mueller reviewed the discovery, he would have identified, and shown to Smith, the Marks undercover transcript and Anderson confession discussed *supra* at IV.A. and V.B. If Smith had seen Marks' and Anderson's own statements confessing that they lied to her and committed crimes, this would have undermined "her continued belief in the tax protestor views promoted by AAA." Thus, Smith's prejudicial cross examination testimony was the direct result not only of Mueller's failure to anticipate clearly foreseeable cross, but also his failure to review discovery and discuss crucial evidence with Smith.

By: (1) giving Smith incorrect legal advice concerning: (a) the necessity of her direct testimony; and (b) permissible scope of cross examination; (2) failing to prepare Smith for clearly foreseeable cross examination; and (3) as explained in

Section IV.B, *supra*, making an uninformed assessment concerning the need to limit the scope of Smith's cross examination, Mueller deprived Smith of her right to make an informed choice whether to testify.

Mueller's "legal advice to [Smith] was based, not on strategy, but on mistaken beliefs and 'a startling ignorance of the law[,]'" thus constituting deficient performance under *Strickland*'s first prong. *Blackburn*, 828 F.2d at 1182 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)). Accordingly, since *Strickland* prong two prejudice is clear, Smith was deprived of her Sixth Amendment right to effective assistance of counsel.

**B. The District Court Erred In Concluding That Mueller's Deficient Performance Did Not Result In Prejudice**

The court found that the following errors by Mueller did or could constitute deficient performance under *Strickland*'s first prong: (1) failure to conduct targeted review of government's discovery (*see* Section III.A, *supra*); (2) failure to review any undercover transcripts, resulting in failure to identify transcript of key Marks conversation admitting that AAA defendants concealed illegality of AAA programs from IOs (i.e. Smith) and their supervisors; (*see* Section IV.A, *supra*); (3) failure to lay foundation for admission of Tax Magic/1-900 Tax Talk infomercial video, progress reports and revenue projections which portrayed an ongoing bona fide business endeavor for Smith's CBO ("Tax Magic materials")

(*see* Section IV.B, *supra*); (4) failure to obtain readily available self-authenticating certified copies of *Anderson* victim lists after winning his motion in limine and telling the jury he was going to introduce the lists (*see* Section IV.C, *supra*); (5) failure to introduce check receipts evidencing Smith's payment for her CBO investment after telling the jury he would (*see* Section IV.D, *supra*); (6) failure to comply with Rule 16 and proffer the expert report's author, resulting in exclusion of expert testimony after telling the jury he would be presenting it (*see* Section IV.E, *supra*).

The court evaluated the following items of excluded evidence individually, and concluded that none resulted in prejudice: (1) Marks undercover transcript; (2) Tax Magic materials; (3) *Anderson* victim lists; and (4) check receipts. The court did not consider the cumulative prejudice stemming from these errors. In addition, the court did not consider the prejudice stemming from Mueller's inexcusable failures to: (1) understand operative facts as a result of his refusal to: (a) review discovery (*see* Section III.C, *supra*); and (b) hear Smith – his only source in lieu of discovery review -- explain evidence Mueller believed was the "biggest concern" (*see* Section III.B, *supra*); (2) identify and use Keith Anderson's confession (*see* Section V.B, *supra*); and (3) satisfy prerequisites for introduction of expert testimony (*see* Sections IV.E, *supra*, and II, *infra*).

To show prejudice, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, . . . the [jury] would have had a reasonable doubt respecting guilt.” [*Strickland*, 466 U.S.] at 694-95, 104 S. Ct. 1052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S. Ct. 2052.

*Cannon v. Mullin*, 383 F.3d at 1159. Where, as here, counsel committed numerous egregious errors constituting deficient performance, *Strickland* requires the court to aggregate counsel’s errors in assessing prejudice. *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10<sup>th</sup> Cir. 2003); *see also Fisher v. Gibson*, 282 F.3d 1283, 1307-11 (10<sup>th</sup> Cir. 2002); *Blackburn*, 828 F.2d at 1184-86. Here, the district court erred by failing to do so.

As a result of Mueller’s combined errors: (1) nearly all evidence Mueller planned to present to support Smith’s claim of good faith was excluded (*see* Section IV, *supra*); (2) the prejudice from the excluded evidence was exacerbated by Mueller’s empty promises in opening statement, affirmatively undermining Smith’s defense (*see* Sections IV.C,D,E, *supra*); and (3) Mueller failed to rebut the government’s evidence of willfulness (*see* Section VI, *supra*).

Here, as in *Blackburn*, 828 F.2d at 1186:

We cannot escape the conclusion that counsel’s errors, in combination, effectively deprived [Smith] of a meaningful defense. . . . Due to the combined errors of counsel, [Smith] was unable to subject the prosecution’s case to “the crucible of meaningful

adversarial testing’ -the essence of the right to effective assistance of counsel.” *Martin v. Rose*, 744 F.2d 1245, 1250 (6<sup>th</sup> Cir. 1984) (citing [*U.S.*] *v. Cronin*, 466 U.S. 648, 656 . . . (1984)). The errors rendered the adversarial process and resulting conviction unreliable. *See Strickland*, 466 U.S. at 700. . . .

*See also Hooper v. Mullin*, 314 F.3d 1162, 1169-71 (10<sup>th</sup> Cir. 2002) (discussing prejudice resulting from counsel’s “patently unreasonable” decision to proceed to trial unprepared and ill-informed).

Even the court’s individualized consideration of the prejudicial impact of specific items of excluded evidence is flawed, *viz.* the Marks undercover transcript appeared “to be cumulative of other evidence showing that the AAA programs were fraudulent and that the fraud was concealed from AAA members and so . . . the prejudice from this omission was not great” (AP 1073). However, this transcript showed that Marks and the other convicted AAA defendants concealed the illegality of their programs not just from AAA members but from its own IOs, including Smith, as well as Smith’s supervisors, the Morans, on whom Smith relied.

Likewise, the court erroneously concluded that any prejudice stemming from Mueller’s failure to introduce the check receipts evidencing Smith’s payment for her CBO was mitigated by evidence that she invested money in the Loan 4 program (AP 1072). However, as explained in Section IV.D, *supra*, evidence that

Smith paid for her Loan 4 investment, coupled with the lack of evidence that she paid for her CBO investment, supported the government's classification of Smith as a Loan 4 victim but not a CBO victim and substantially undermined Smith's defense. *See Fisher*, 282 F.3d at 1294-95 (granting habeas relief where defense counsel's ill-prepared examination of witnesses essentially undermined defense).<sup>15</sup>

Finally, in balancing the individual items of excluded exculpatory evidence against the totality of the government's evidence of willfulness, the court failed to consider the impact that the totality of excluded exculpatory evidence and a basic understanding of the critical facts would have had on rebutting the government's evidence (AP 1073-1075) (*see* Section VI, *supra*). Moreover, the court considered Smith's prejudicial trial testimony as part of the government's evidence of willfulness (AP 1075), instead of the direct result of Mueller's deficient performance (*see* Section V.A, *supra*).

For the foregoing reasons, the district court's conclusion that Smith did not

---

<sup>15</sup>In addition, the court understated the exculpatory nature of the Tax Magic materials as a result of what it found was a factual dispute as to the nexus between these materials and Smith's CBO (AP 1072). This nexus, and Smith's good faith belief about this nexus, is described *supra*, at Sections I, III.C, IV.B. In light of the court's assessment that this nexus constituted an unresolved factual dispute, the court abused its discretion by failing to hold an evidentiary hearing (*see* Section II, *infra*).

demonstrate prejudice is reversible error.

**II. FAILING TO HOLD AN EVIDENTIARY HEARING ON THE MERITS WAS AN ABUSE OF DISCRETION .**

**Standard of Review:** This Court reviews the district court's denial of an evidentiary hearing in a §2255 proceeding for abuse of discretion. *U.S. v. Nichols*, 169 F.3d 1255, 1263 (10<sup>th</sup> Cir.), *cert. denied*, 528 U.S. 934 (1999).

Under 28 U.S.C. §2255, the district court is required to conduct an evidentiary hearing “unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.” *U.S. v. Kennedy*, 225 F.3d 1187, 1193 (10<sup>th</sup> Cir. 2000) (alteration and citation omitted). The court held a limited evidentiary hearing to determine whether to grant bail. ( AP 806). Smith's appearance was waived for the bail hearing because the Marshals failed to transport her. (AP 807, 882-883). Following the bail hearing Smith requested an evidentiary hearing:

if the Court determines that the current state of the record is not sufficient to grant Smith's motion, then Smith respectfully requests a full evidentiary hearing, with an opportunity to fully cross examine Mueller, to be present and to present witnesses. [Noting that Mueller's credibility [was] questionable and basis therefor (AP 1007 & n.1)]

The court denied Smith's conditional request for an evidentiary hearing as moot in the COA. (AP1100).

The court halted Smith's cross of Mueller at two critical junctures: (1)

prejudice resulting from Smith's trial testimony (AP 956:1-22); and (2) the critically exculpatory evidence of the joint venture CBO structure (AP 966:3-19) – all of which involved factual issues in dispute essential to the willfulness issue.

Although the court found that Smith's trial testimony was prejudicial it held that Mueller's decision to have Smith testify was an "adequately informed strategic choice" (AP 1066) – without the benefit of testimony from Smith nor adequate cross examination of Mueller. *Hooper v. Mullin*, 314 F.3d 1162, 1169 (10<sup>th</sup> Cir. 2002) (OCCA's application of *Strickland* objectively unreasonable when it denied relief and "denied Petitioner's request for an evidentiary hearing during which Petitioner could have explored and challenged trial counsel's reasons for the prejudicial acts and omissions.").

Mueller testified he told Smith the reason that the postal receipts were necessary, but did not testify as to what that reason was (AP 906, 952). No sound reason for these receipts can be discerned from the record. To the contrary, as the government argued in closing, the documents constitute an admission of guilt as to Count 4 since, as explained above, they demonstrate her failure to timely file the return. However, as a result of the court's limits on Smith's cross examination of Mueller (*see* n.11, *supra*), Smith did not question Mueller about the advice he gave Smith concerning the necessity for the postal receipts. The court's failure to

grant a full evidentiary hearing to develop this issue was an abuse of discretion (*see* Section V.A., *supra*).

Smith disputed the government's factual assertions concerning the "Look Back" plan and that Rocky Venture did no business: (1) as contrary to the government's proof in *Anderson* (AP 347-49 ¶¶21-27); (2) never contemplated by Smith nor any other CBO investor to set up an independent office nor independently market the 1-900/Tax Magic product; and (3) as instead an investment vehicle. See e.g. AP 851 ¶¶52-54, 993. Notwithstanding factual disputes, abbreviation of Mueller's cross, and lack of any testimony from Smith or her expert witness, the court held:

I conclude that, in light of the government's significant evidence of willfulness, Defendant has not established a reasonable probability that, but for the failure to introduce this potentially exculpatory evidence, the result would have been different.

Smith's testimony concerning: (1) Mueller's advice with respect to (A) filing the NECO return following indictment (Count 4) and (B) why the documentary evidence and her testimony were necessary and concomitant lack of preparation; (2) her understanding and belief that the CBO/Tax Magic partnership program was legitimate and her investment therein; and (3) her credibility, would have been material to an evaluation of the willfulness evidence and determination on prejudice. *Sanders v. U.S.*, 373 U.S. 1, 20 (1963)(§2255 movant cannot be

prevented from testifying in support of a substantial claim where his/her testimony would be material).

The court agreed that Mueller's failure to comply with Rule 16 and proffering the wrong expert could constitute deficient performance under *Strickland's* first prong but concluded that it could not examine whether Mueller's performance caused prejudice because defendant offered no indication of the contents of proposed expert testimony (AP 1063-1064). Mueller's proffers to the trial court and the jury, his MOI, Gavel's testimony, and the government's proffer to the trial court provided sufficient indication of the contents of the proposed expert testimony to warrant an evidentiary hearing. *See* AP 291, 294, 748, 1208-1209, 1685-90, 1690-1691, 1719-21, 1722-32.

The court held that Mueller's cross examination of government witnesses appeared to have been competent (AP 1069), yet Smith was unable to present expert witness testimony as to Mueller's failure to challenge the willfulness evidence because of the abbreviated hearing. Seemingly little or no weight was given the expert witness declarations (AP 117-244, 556-607, 821-880). *Moore v. U.S.*, 950 F.2d 656, 661 (10<sup>th</sup> Cir. 1991) (hearing necessary when "factual disputes and inconsistencies beyond the record exist."); *See, also Murtishaw v. Woodford*, 255 F.3d 926, 940 (9<sup>th</sup> Cir. 2001):

[I]n order to determine whether counsel's errors prejudiced the outcome of the trial, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." [citation omitted].

Smith had the burden of showing that Mueller's deficient performance prejudiced her defense, but the court aborted Smith's ability to do so by declining to hold an evidentiary hearing on the merits after finding that "I have no difficulty concluding that there is a clear case on the merits." AP 981:4-6.

### **CONCLUSION**

Based on the foregoing, Appellant Smith respectfully requests that this Honorable Court grant her §2255 motion or alternatively remand for an evidentiary hearing on the merits.

### **ORAL ARGUMENT STATEMENT**

Undersigned counsel respectfully submit that based on the complex issues of law and fact, voluminous record, related cases and *de novo* standard of review, oral argument will assist the panel in the resolution of the issues herein.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of June, 2010.

By: /s/ Lynn E. Panagakos  
LYNN E. PANAGAKOS  
345 Queen Street, 2<sup>nd</sup> Floor  
Honolulu, HI 96813  
(808) 521-3336  
Email: lynnpanagakos@yahoo.com

WILLIAM A. COHAN, P.C.

By: /s/ William A. Cohan

WILLIAM A. COHAN

P.O. Box 3448

Rancho Santa Fe, CA 92067

(858) 832-1632

Email: [bill@williamacohan.com](mailto:bill@williamacohan.com)

Attorneys for Defendant-Appellant

KRIS A. SMITH

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of June, 2010, I served a copy of the APPELLANT KRIS SMITH'S OPENING BRIEF to:

KATIE BAGLEY, ESQ.  
ALAN HECHTKOPF, ESQ.  
Criminal Appeals and Tax Enforcement Policy Section  
Department of Justice - Tax Division  
P.O. Box 502  
Washington, DC 20044  
Email: [katie.s.bagley@usdoj.gov](mailto:katie.s.bagley@usdoj.gov)  
[Alan.hechtkopf@usdoj.gov](mailto:Alan.hechtkopf@usdoj.gov)

via the Court's ECF filing system. I also on this same day mailed by U.S. mail to the above addressees a copy of APPELLANT KRIS SMITH'S OPENING BRIEF along with a copy of APPELLANT KRIS SMITH'S ADDENDUM OF EXHIBITS TO THE BRIEF and a copy OF APPELLANT KRIS SMITH'S APPENDIX TO THE OPENING BRIEF, to their last known address.

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

(1) no privacy redactions were required; this Opening 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 Opening Brief is free of viruses.

A copy of this Opening Brief in Digital Form (PDF) has been served *via e-mail* on this 2<sup>nd</sup> day of June 2010: Katie Bagley, Esq. at [katie.s.bagley@usdoj.gov](mailto:katie.s.bagley@usdoj.gov) and Alan Hechtkopf, Esq., at [Alan.hechtkopf@usdoj.gov](mailto:Alan.hechtkopf@usdoj.gov).

Dated: June 2, 2010

s/ William A. Cohan  
William A. Cohan  
P.O. Box 3448  
Rancho Santa Fe, CA 92067  
(858) 832-1632  
Email: [bill@williamacohan.com](mailto:bill@williamacohan.com)