THE UNITED STATES DISTRICT COURT
THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. JAMES MICHAEL POTERBIN, Defendant.	)	No. 2:19-cr-20079-JAR-7 2:26-cv-02671-JAR

MOTION TO COMPEL COUNSEL TO PROVIDE AFFIDAVIT

COMES NOW the Plaintiff, United States of America, by and through undersigned counsel, moves this Court to issue an order compelling Defendant's former counsel, Robert Calbi ("Counsel"), to provide an affidavit addressing the claims raised by Defendant in his Motion to Vacate Under 28 U.S.C. § 2255 and accompanying memorandum. Docs. 521, 522. The government seeks the affidavit for the purpose of supplementing the record, as permitted by Rule 7(a)-(b) of The Rules Governing § 2255 Proceedings for the United States District Courts, providing that this Court "may direct the parties to expand the record by submitting additional materials relating to the motion," and that "[a]ffidavits may . . . be submitted and considered as part of the record." Expansion of the record in this

case is warranted in this case based on the allegations made by Defendant, and this Court should compel Counsel to provide an affidavit addressing those allegations.

A. Overview

On February 14, 2023, a jury convicted Defendant on numerous charges, including conspiracy to possess with intent to distribute and distribute 50 grams or more of methamphetamine, kidnapping, and possession of a firearm in furtherance of a drug crime. Doc. 335. On July 7, 2023, this Court sentenced Defendant to serve a total term of 360 months' imprisonment for these offenses. Doc. 388. Defendant appealed to the Tenth Circuit, which affirmed his convictions and sentences on December 31, 2025. On October 26, 2026, Defendant filed the instant motion under 28 U.S.C. § 2255, asking this Court to vacate his convictions and sentences due to constitutionally ineffective assistance of counsel. Docs. 521, 522.

B. Defendant's Claims Asserting Deficiencies by Counsel

Defendant claims that Counsel's representation was constitutionally deficient in several respects. Defendant alleges that Counsel:

- failed to advise him of the evidence against him, Doc. 521 at 1;
- failed to advise him of the elements of the charged offenses; *id.*;
- failed to advise him of "the aiding-and-abetting" theory, *id.*;

- failed to advise him of "the kidnapping evidence," *id*.;
- failed to provide him discovery between May 24, 2021, and January 27, 2023, despite his repeated requests for the discovery, *id*.; as a result, he claims that he "went to trial in 2023 without ever receiving my discovery," Doc. 522 at 2; and
- "never informed [him] of the evidence, theories, or risks," *id*. at 1.

Defendant claims that these failures prejudiced him because he "went to trial in 2023 without ever receiving [his] discovery," and "was unable to make an informed decision regarding plea options, trial strategy, or the risks of trial," *id*. at 2. Defendant alleges that Counsel's "failure[s] prevented [him] from reviewing the evidence, preparing a defense, understanding the government's case, or making informed decisions regarding trial strategy." Doc. 521 at 1.

C. Basis for Motion to Compel under *Strickland*'s Standards

Defendant's claims call into question whether Counsel provided deficient advice to Defendant regarding the charges, trial strategies, information about the discovery, litigation decisions, and defenses to the charges.

To succeed on his claim of ineffective assistance of counsel, Defendant must satisfy the standards of *Strickland v. Washington* by showing that counsel's performance was both deficient and prejudicial. 466 U.S. 668, 687 (1984). Counsel's performance is "deficient" when it falls "outside the wide range of professionally competent assistance." *Id*. at 690. The performance is prejudicial

when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "*Strickland* . . . presumes that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002) (quoting *Strickland*, 466 U.S. at 690)). And this "'virtually unchallengeable' presumption of reasonableness operates . . . where it is shown (1) that counsel made a strategic decision and (2) that decision was adequately informed." *Id*. (citing *Strickland*, 466 U.S. at 690-91). "[C]onversely, it is also possible on rare occasions to conclude that counsel's fully-informed strategic choices were unreasonable if the choice was so patently unreasonable that no competent attorney would have made it." *Id*. at 1047 (internal quotation marks omitted). In any event, "the *Strickland* decision places upon the defendant the burden of showing that counsel's action or inaction was not based on a valid strategic choice." *Id*. at 1046 (internal quotation marks omitted).

In assessing the reasonableness of counsel's actions, courts may inquire into counsel's conversations with the defendant regarding any such decisions:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland, 466 U.S. at 691.

The merits of Defendant's ineffective-assistance claims cannot be adequately assessed without more information, which is in the exclusive possession of Counsel. This Court cannot meaningfully evaluate Defendant's claims and allegations, and the government cannot defend against those claims and allegations, unless Counsel discloses both his reasons for acting or not acting with respect to Defendant's aforementioned claims, and his conversations with Defendant regarding matters relevant to those claims. To the extent that Counsel's advice and reasons for giving such advice involve or are based on conversations counsel had with Defendant, those conversations are also relevant to Defendant's claims. *See Strickland*, 466 U.S. at 691 ("[I]nquiry into counsel's conversations with defendant may be critical to a proper assessment of counsel's . . . litigation decisions.").

D. Waiver of Attorney-Client Privilege With Respect To Communications Relevant to Defendant's Claims

Because the contents of the communications between Counsel and Defendant might be relevant and necessary to prove or disprove Defendant's ineffective-assistance claims, Defendant has waived the attorney-client privilege with respect to any communications with respect to these claims and allegations. *See United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009) ("[W]hen a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-

client privilege with respect to communications with his attorney necessary to prove or disprove his claim."); *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001) ("By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, [§ 2255 movant] put at issue—and thereby waived—any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices."); *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) ("It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waived the attorney-client privilege as to all communications with his allegedly ineffective lawyer."); *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997) (waiver extends to communications at issue in ineffective assistance claims); *Tasby v. United States*, 504 F .2d 332, 336 (8th Cir. 1974) (client expressly or impliedly waives attorney-client privilege when "attack by the client upon his attorney's conduct . . . calls into question the substance of their communications"). Such waiver, however, must be "no broader than needed to ensure the fairness of the proceedings before it." *Pinson*, 584 F.3d at 978 (quotation marks omitted).

Although a lawyer is required under the Kansas Rules of Professional Conduct (KRPC) to protect confidential information obtained during representation, *see* KRPC 1.9(c)(1), a lawyer is allowed to reveal previously

confidential information to the extent the lawyer believes necessary to respond to allegations in any proceeding concerning a lawyer's representation of the client or to comply with a court order, *see* KRPC 1.6(b)(3)-(4).

E. Request for Affidavit

Because Defendant has waived the attorney-client privilege with respect to any communications or the content of any advice provided with respect to the claims and allegations presented, this Court should compel Counsel to provide an affidavit addressing the claims raised by Defendant in his motion for purposes of supplementing the record, as permitted by Rule 7(a)-(b) of The Rules Governing § 2255 Proceedings for the United States District Courts.

Particularly, this Court should order Counsel to answer the following questions in such an affidavit:

1. Did you provide Defendant with physical or digital copies of the discovery? Did Defendant confirm with you in any way that he had received the discovery? If yes, how did he so confirm?

2. Did you discuss the discovery with Defendant? If so, when did these conversations take place? What was the content of such conversations? On how many occasions and for how long did you review the discovery with him? Did you discuss the kidnapping evidence? If you specifically discussed the kidnapping evidence, what were the contents of that discussion?

3. Did you discuss the charges with Defendant? Did you discuss the elements of each charge with Defendant? Did you discuss aiding-and-abetting theory with Defendant?

4. Did you tell Defendant that the government did not have the elements to convict, as Defendant claims? *See* Doc. 522 at 12? If so, what was your basis for making this claim?

5. Defendant claims you did not allow him to take the stand even though he wanted to. Doc. 522 at 12. Is this true? What conversations, if any, did you have with Defendant about whether he should testify in his own defense? Did you advised Defendant not to testify in his own defense? If yes, why did you so advise him?

6. Defendant claims that you asked him to sign a waiver "to not use David Carr's negative impacting evidence, in exchange for not using negative impacting evidence against [Defendant]." Doc. 522 at 12? In your opinion, what is Defendant referring to? Did you request that Defendant sign such a waiver? What was the purpose of asking him to sign such a waiver?

7. Did you discuss the evidence against Defendant with respect to each charge? As to each charge, please disclose the contents of your conversations with Defendant as to the evidence against him?

8. Before going to trial, did you discuss trial strategies with Defendant? What strategies did you discuss? Did you make Defendant aware of the trial strategies that you used at trial? What were those strategies? How did you make Defendant aware of those strategies? Did you discuss with Defendant how witnesses should be cross-examined? Please disclose the contents of those discussions?

9. Did you discuss with Defendant whether he should go to trial or enter a plea? Did you discuss the risks of going to trial as opposed to the benefits of entering a plea? If yes, what risks did you identify for Defendant if he went to trial and what benefits did you identify for Defendant if he accepted a plea? Did Defendant directly tell you whether he wanted to go to trial? If yes, what reasons did he give you for wanting to go to trial? Did Defendant acknowledge the risks of going to trial? If yes, how did he communicate that acknowledgement to you?

10. Defendant claims that he was experiencing "substantial mental health issues" around the time of your representation. Doc. 522 at 12. Were you aware of these issues? From your interactions with Defendant, did you think that these issues affected his ability to make an informed and intelligent decision to go to trial? From your interactions with Defendant, did you think that these issues affected his ability to understand the charges and the evidence against him?

11. Had you discussed the contents of all of the discovery with Defendant before trial began? Are you satisfied that Defendant understood the charges and the evidence against him before he made the decision to go to trial? If yes, on what basis do you claim that you are so satisfied?

12. In general terms, describe you trial strategy? Did you discuss this strategy with Defendant before the trial? If yes, did Defendant express agreement with that strategy? If yes, please reveal the content of any conversations you had with Defendant about trial strategy, including conversations that occurred before and during trial?

WHEREFORE, the government moves that this Court ORDER Counsel, Robert Calbi, to provide an affidavit answering each of the questions enumerated above for purposes of supplementing the record.

Respectfully submitted,

RYAN A. KRIEGSHAUSER
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed on October 28, 2026, I filed the foregoing with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to the defendant's last counsel of record or to Defendant if he is on ECF. The undersigned also mailed a filed copy of the foregoing to:

James Michael Poterbin
30137-031
EL RENO - FCI
Federal Correctional Institution
Inmate Mail/Parcels
PO Box 1500
El Reno, OK 73036

s/ Duston J. Slinkard
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Assistant U.S. Attorney