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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

DUANE BIG EAGLE, Movant,

v

UNITED STATES OF AMERICA, Respondent.

Case No. 13-cv- 3015

MEMORANDUM OF LAW IN SUPPORT OF § 2255 MOTION TO VACATE, SET ASIDE CONVICTION OR CORRECT SENTENCE

COMES NOW, Duane Big Eagle, Movant herein, appearing pro se, who respectfully brings his Memorandum of Law before this Honorable Court.

Section 2255(a) provides that a prisoner, if he claims that he was convicted in violation of the Constitution or laws of the United States, "may move the court which imposed the sentence to vacate, set aside or correct the sentence." Movant herein alleges that his rights under the Fifth, Sixth, and Fourteenth Amendments; specifically, the Due Process Clause, the Compulsory Process Clause, and the right to effective assistance of counsel were violated.

As a threshold matter, Movant alleges that Mr. Dana L. Hanna, counsel of record pre- and post-trial and during trial, was, as he admitted after accepting $50,000 as a retainer, unqualified to represent Movant in Federal Court. About two weeks before trial, Hanna called Movant and asked him to drive to Rapid City to meet at his office. While there, Hanna urged Movant to allow him to withdraw for two reasons: (1) "You're too far away from Rapid City for me to give you the assistance you need; and (2) I haven't had sufficient experience in Federal Court, having only represented one client in Federal Court. Hanna didn't offer a refund of the money but said that he never should have taken the case. This was only two weeks prior to trial and Movant told him that it was too late for him to bring another attorney up to speed. Hanna's inexperience was evident throughout the trial and even the Eighth Circuit confirmed that counsel's failure to make adequate objections caused them to be "limit[ed] in [their] review ... to plain error." (Page 8 or decision.) "Because no objection was made, the district court was not called upon to exercise discretion." (Page 9) Counsel "declined the government's pretrial offer of a limiting instruction ... [he] waived his right to challenge the admission." (Page 11) And counsel "could have minimized [the] prejudice by objecting and requesting that the district court strike the allegedly improper testimony." (Page 11)

As for ineffective assistance, in violation of the Sixth Amendment, proof of this claim is determined by the Supreme Court's decision in Strickland v Washington, 466 U.S. 668, 687 (1984):

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result in reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
>
> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance.... Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.... Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. (Id., 466 U.S. at 692)
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> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Id., 466 U.S. at 694)

GROUND ONE: Denial of Movant's right to testify on his own behalf violated his right under the Due Process Clause, the Compulsory Process Clause and the Confrontation Clause, thus violating Movant's Sixth Amendment right to effective assistance of counsel.

In Clemons v Mississippi, 484 U.S. 738, 769 (1989), the Court said:

> "[T]his Court has attached constitutional significance to an individual's interest in presenting his case directly to the finder of fact. In Rock v Arkansas, 483 U.S. 44, 51 ... (1987), we noted that 'there is no longer any doubt that the right to be heard, which is essential to due process in an adversarial system of adjudication, can be vindicated only by affording a defendant an opportunity to testify before the factfinder.' We have recognized that the Confrontation Clause serves to afford a criminal defendant the privilege 'of compelling the witness to stand face to face with the jury in order that they may look at him, and judge his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.' Mattox v United States, 156 U.S. 237, 242-243 ... (1895)

In Frey v Schueltzle, 151 F.3d 893, 897-898 (8th Cir. 1998), the Court said:

> "A criminal defendant has a constitutional right to testify in his or her own defense. Rock v Arkansas, 489 U.S. 44, 49 ... (1987) .... This right is derived from the Fourteenth Amendment's due process clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's prohibition on compelled testimony... 'Because the right to testify is a fundamental consti-

> tutional guarantee, only the defendant is empowered to waive the right.' Bern-Loehr, 833 F.2d at 751. A defendant's waiver of this right must be made knowingly and voluntarily. Id. We have previously held that a knowing and voluntary waiver of the right may be based on a defendant's silence when counsel rests without calling him to testify. Id. at 751-52. We stressed that under such circumstances the defendant must act 'affirmatively' rather than apparently 'acquiescing in his counsel's advice that he not testify, and then later claiming that his will to testify was overcome.' Id.

As many decisions on this subject validate, the constitutional and statutory right (18 U.S.C. § 3481) an attorney for a criminal defendant cannot refuse to allow him to testify in his own behalf. Furthermore, as the Eighth Circuit said in Hines v United States, 282 F.3d 1002, 1005 (8th Cir. 2001):

> "Because it is primarily the responsibility of defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected, the appropriate vehicle for claims that the defendant's right to testify was violated by the defense counsel is a claim of ineffective assistance of counsel. United States v Teague, 953 F.2d 1525, 1526 (11th Cir. 1992)."

If this be so, then it is clear that the converse means that counsel rendered clear ineffective assistance. If counsel not only failed to advise Movant that he had the right, but told him specifically that he did not have the right—that he was not going to allow him to testify—every time Movant said that if he could testify he could clear up many of the false accusations and explain circumstances which were unclear and presumed damaging to Movant, then it cannot be said that ineffective assistance is absent.

As the Frey Court pointed out, even if counsel failed to advise a defendant of his right to testify—something the Hines Court opinion appears to nullify—acquiescence at the time of trial may work contrary to a defendant's claim of ineffective assistance. It is necessary to delve into the record to examine whether Movant acquiesced and remaied mute when he should have spoken up. At page 406 of the Trial Transcript ("TT" hereafter), a side-bar conference was held "out of the hearing of the audience" and Movant. In that side-bar, Hanna said" "I would like to rest in front of the jury tomorrow morning." The Court encouraged him to rest right there at side-bar. Just before that, at the side-bar, out of Movant's hearing, Hanna said that his "client is not going to testify."

The Court accepted this without any inquiry—although whether or not the Court has an obligation to ensure that a defendant knowingly waives his right to testify is a matter of some dispute among courts. Shortly after the side-bar, the Court called in the jury and dismissed them for the day, saying: "Ladies and gentlemen of the jury, the government has rested its case ... I'm going to send you home for the day." (TT at 408) Then after recess at 3:15 p.m. on that day, the Court said:

"In open court without defendant present ... We are outside the hearing of the jury in the case of United States of America v Duane Big Eagle, Criminal 10-30088. Government's counsel and defense counsel are present. The defendant is not personally present.

"Did he wish to be personally present, Mr. Hanna?

"Mr. Hanna: I waive his appearance, Judge. I didn't really inquire of him if wanted to be here." (TT at 409)

At TT, page 456, Hanna formally rests: "Your Honor, the defense rests." The Court accepted this without any suggestion that Movant had the right to testify if he so chose: "All right, Ladies and gentlemen of the jury, both sides have rested. All the evidence is now in. We will proceed to oral arguments." The prosecution made its closing argument, Hanna did not, then the prosecution made the remaining portion of its closing arguments. (It is another issue, but appropriate to point out here that Hanna waived an opportunity to make any closing arguments to point out holes in the Government's case; the transcript of the closing arguments is not in the TT Hanna provided Movant.)

It appears that suddenly, the Court recognized that nowhere had the court heard Movant decline the right to testify. **After closing argument by prosecution**, the Court asked Movant if he'd like to make a statement, which he did briefly. This in no possible way cured the constitutional violation: (1) To Movant's recollection, he was not sworn to tell the truth; (2) there was no adversarial contest, the Court refused the prosecutor's attempt to counter what Movant said; (3) after informing Hanna of his desire to testify, being told that he could not, it was the duty of counsel to prep Movant for said testimony; (4) the jury was not able to see how well Movant did when confronted by the prosecution; (5) the salient points Movant would have liked to make were left up in the air because he did not expect to be able to make any statement; (6) the jury was left to presume that this was a last minute attempt in desperation; and (7) Movant was not given the means to dispute the testimony of the Government's witnesses because Hanna had not provided him with the evidence needed.

Hanna arbitrarily made the decision to deny Movant the right guaranteed by the Constitution and the statute to testify in his own behalf. He told Movant specifically that he could not testify, that it wasn't allowed. He did nothing to prep Movant for this important right. The jury was left to presume that there was no evidence to counter the false claims made by the witnesses for the Government. This supports Movant's claim of a serious error, satisfying the first prong of Strickland. What remains is to demonstrate the prejudice thereform, even though the nature of the error ought to be presumed prejudicial, as are many other fundamental errors in the adversarial process.

There are a number of tests to determine prejudice with respect to ineffective assistance in denying a defendant the right to testify in his own behalf. In Washington v Kemna, 16 Fed. Appx. 528, 529-530 (8th Cir. 2001), the Court noted that this involved the knowledge or absence thereof of the right to testify. "[A]ttorneys should take care to see that the record clearly supports a knowing and voluntary waiver of the defendant's fundamental right to testify." In that case, it was clear that Washington knew of his right, had been counseled against testifying by his attorney, and did not make his claim that he wanted to testify until he was in habeas court. It ought to be noted, however, that the Court spoke of this right as a "**fundamental**" right.

In United States v Orr, 636 F.3d 944, 955 (8th Cir. 2011), the Court said that "Orr cannot and does not claim that he was unaware of his right to testify." His attorney had counseled against it, though, because if he testified his prior convictions would come before the jury. That knowledge meant there was no prejudice because Orr did not testify due to his counsel's advice and only raised the issue in his habeas case.

In Washington, above, the Court also noted that the defendant "has not, however, stated specifically what he would have testified to or how this testimony would have changed the outcome of his trial." These two cases make clear that both the absence of any knowledge that a defendant has the right to testify, chooses not to or remains mute when the defense closes and he was not called, and the need to specify what his testimony would have shown to demonstrate his innocence, are needed to show prejudice.

In United States v Ward, 598 F.3d 1054, 1059-1060 (8th Cir. 2009), a different situation existed. Ward was excluded from the trial after disruptive behavior. The Court held that "only the defendant may waive [the] right." Ward had challenged the video the state had used against him. Obviously, if he was excluded from the courtroom, and not able to see the video, he couldn't have knowingly waived his right to testify to facts he alone knew. The Court reversed the conviction on the ground that Ward ought to have been allowed back in the courtroom if he promised to refrain from further outbursts, and due to denial of "a **fundamental constitutional right**."

In the instant case, Hanna had specifically told Movant that he could not testify, that he had no right to do so, that counsel was not going to call him. The reason he paid Hanna $50,000 was for Hanna to advise him, not for him to challenge the advice. Movant believed when told by Hanna that he would not be allowed to testify, that that's what the law required. It was no surprise to hear after the

Court called for the jury to come in, that Hanna said: "Your Honor, the defense rests." (TT, page 456) In fact, he was surprised only when this Court told him at the end of closing arguments that he could make a statement. That was contrary to everything Hanna had told him.

It is clear that the indictment and the trial only alleged that Movant had accepted a check for $5,000 from Mr. Baumann on or about September 21, 2008. Counsel offered nothing to demonstrate the facts surrounding that gift. Only Movant would have been able to demonstrate to the jury the fact that the entire theory of the prosecution as to that check was false. The Court, absent the jury, said:

> "It does appear that the check is close to some of these other checks. The defense has proffered the explanation that Mr. Baumann gave the check, or Mr. Big Eagle received the check from Mr. Baumann, and Mr. Big Eagle was there because he was short on cash at the time, and that may render some of these relevant under a different--for a different reason, given that they are payments of cash, close in time to September 21, 2008, which seems to be relevant on the--on whether the explanation that Mr. Big Eagle was short on cash was genuine." (TT, page 59)

However, the jury didn't hear this. They were left to presume that Movant came to a meeting of Baumann and several others—at a time he was not even on the council —and demanded money from the contractor (Baumann).

Had Movant been able to testify, he would have explained that his son, Cory, had killed himself in an auto accident and that he left five kids to care for with the woman he was living with at the time. Cory had worked for Mr. Baumann for several years and Mr. Baumann was very pleased with his work. When Cory died, Baumann came to Movant and told him how sorry he was about Cory's death and he wanted to help with the funeral expense. Baumann then gave Movant money for that expense. Baumann then told Movant that if there was anything else he could ever do, anything else, not to be afraid to ask.

Not long after Cory's death, the woman he lived with abandoned the five kids and Social Services called upon Movant to take care of them. He was not working and had no means to provide food and medical care for them. This is what prompted Movant to go to the meeting where Baumann and several others were present—the only one of 35 meetings between the parties—at Baumann's construction office in Ft. Pierre, South Dakota. He came soley to tell Baumann of the problem and ask if he could help, as he had earlier offered. Cory and the children and his woman were living in Pierre at the time, not on the reservation. This is why the Social Services was involved.

It was Baumann's idea that he give Movant $5,000—Movant hadn't suggested any specific amount—and then cash it and give $1,000 each to four others present at

that meeting. At the time, Movant was not involved as chairman of the tribe, nor was he on the council. He had no reason to try to influence anyone, nor was there any reason for Baumann to try to influence him for Baumann's benefit.

The jury needed to hear these facts. No one else brought them to the attention of the Court or the jury. Baumann testified that he lent the tribe $200,000 and that Movant signed the loan agreement. (TT, page 169) No allegation of wrongdoing on Movant's part was made respecting this loan and Baumann admitted that in 2006 Lester Thompson became chairman. (TT, page 171) He said that in 2008, Brandon Sazue was elected chairman. (Id.) Baumann testified that at a meeting on or about October 21, 2008, he and several tribal members were meeting, arguing about repayment of large loans Baumann had made to the tribe. He testified that the need they had for some assistance was brought up:

> "Some of these guys are--you know, they are--they don't have any money. They were--they couldn't meet payrolls. And some of it--I know they use to, you know just live on. And so some of it was that, and also the fact that you are trying to influence them to continue to see you in a good light, and hopefully, when money did come, if it ever did, that you would be the first in line to get paid." (TT, pages 183-184)

Bauman went on to explain that he decided that to help them he'd give Movant some money to split between them. He didn't explain during that testimony why Movant suddenly appeared at that meeting when he was not on the council and had no involvement in any of the tribe's business at the time. Baumann testified that he had given Movant numerous checks during the time Movant was running for reelection. (TT, pages 189-191) He said that at times he paid Movant for jobs that he did for him, "helped me with the politics of other reservations, just understanding what they were thinking,... He knew people I didn't know. Perhaps he could give me an insight on what they did and didn't do or what they thought." (TT, page 191)

Campaign contributions have been held by the Supreme Court not to be bribes; so there was no suggestion of illegal activity with respect to these checks, as long as it was pertaining to his attemt to be reelected. Nor was there anything illegal about Baumann paying Movant for work he did on his behalf. (I.e., a check for $5,000 "when I asked Duane to go down, I believe, to Pine Ridge to talk to them about a project, etc.; TT, page 196) The Court reminded the prosecution——outside the hearing of the jury——that due to the charges in the indictment, many of these checks were irrelevant. (TT, pages 197-202) The jury was left in the dark completely as to the reason Movant went to see Baumann on October 21, 2008. In fact, the prosecution objected when Hanna attempted to bring out the fact that "a couple of months before this [October 21, 2008] meeting, his son Corey died." The Court sustained the objection and the jury was kept unaware of the nature of Movant's reason.

Only by Movant's testimony would the jury have a reason to see the alleged conduct as innocent. Hanna convinced Movant that he did not have the right to testify and that he was not going to allow it. Yet, the above is only one of the things that Movant needed to be able to convey to the jury in his own defense. The Constitution requires "adequate **assistance** of counsel." Counsel is not the one on trial; he only assists the defendant to make a defense. In Rock v Arkansas, 483 U.S. 44, 52 (1987) the Court clearly said: "the Sixth Amendment 'grants to the accused **personally** the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' ... [and] to present his own version of events in his own words."

When, it appears, the Court finally recognized that there was no clear indication in the record that Movant had knowingly waived his right to testify, it allowed him to make a statement following closing arguments. This is unheard of! In this facility there are numerous former attorneys and even a former Federal Prosecutor. None of them have ever heard of such a procedure. The reason this attempt was inadequate to erase the prejudice is that the court allowed neither examination nor cross-examination. This tool is designed to enable the jury to gage the credibility of the witness. (See, e.g., Yanez v Minnesota, 562 F.3d 958, 963 (8th Cir. 2009) (ability to remind the jury of infirmities in testimony); Salermo v United States, 61 F.2d 419,423 (8th Cir. 1932) ("primary purpose of cross-examination in the federal courts is to test the truth of the testimony.")

Without any means to an adversarial testing, the jury was left to believe that the last minute statement of Movant was self-serving and they could and did ignore it. Hanna prevented Movant from making a factual and believable testiment as to the facts at issue. Having been informed by Movant that he wanted to testify, he was required to prepare his client for such testimony, just as he would do for any other defense witness. What to draw attention to, what exhibits would confirm the veracity of the statements, what the truth was—that is, to present the defendant's theory of the defense—what not to say, etc. The fact that Hanna failed to investigate and prep the witness in the case of Movant is no less serious than would be true if counsel called a witness he knew nothing about and had no idea whether he would be favorable, unfavorable, or neither favorable nor unfavorable. Following direct examination, not allowing the prosecution to cross-examine Movant left the jury no means of testing the truth of the statement.

There are other vital things Movant would have testified to and which he alone could have testified to. One of these is the incredible statements of McClatchkey.

Due to the fact that the attorney has so far refused or failed to provide copies of the investigative reports requested. So, whether Hanna ever investigated McClatchky? Movant knows that he was aware of him because he asked who the man was, having seen him on the Government's witness list; however, Movant had never heard his name and knew nothing about him. As it turned out, he testified against Movant, saying that he had been hired by the tribe to "start working on ... a school gymnasium to replace the one" then in existance." (TT, page 233)

What kind of deal Scott Raue—the superintendent of the tribal school Stephan-Ind. Mission—made, Movant does not know. What he would have testified to was that Scott had no authority to contract with anyone regarding building or architectual plans for the school. The Bureau of Indian Affairs ("BIA") retained complete control over building projects for all tribes. The school was attempting to obtain an $85 million Indian school. They contracted with Broaz Engineering in Pierre, South Dakota to develop plans. The BIA rejected everthing Broaz did and they put out a bid request for a new school and gym design and that was awarded to Krauss Anderson Construction in Minnesota.

If Scott Raue contracted with—or appeared to contract with McClatchky—it was for his own private purposes and without knowledge of Movant. Movant had nothing to do with the school as that was handled by the BIA, appears to him that the funds Raue used to obtain kickbacks from McClatchky were from a $1.8 million payment the school received from a South Dakota association with a name similar to Associated School Boards, or something like that. But, Raue knew that the BIA was the only one who had authority to build the school and gym. In hindsight, it could well be that Raue simply set up McClatchey to enable him to draw kickbacks. The sailent point is that Movant was uninvolved and knew nothing about McClatchey.

McClatchey was asked to identify Movant. (TT, page 240) The reasons he was able to identify Movant was that the Court had provided a detailed description to the Capitol Journal editor, Mr. Hipple—Hipple wondered why the Court went into such detail—and due to the fact that, contrary to the general practice, pursuant to Fed. R. Evid, 615, of sequestering witnesses, neither Hanna nor the Court ordered the witnesses to remain out of the courtroom until called to testify. McClatchey, Lester Thompson, Jr., Brandon Sazue, and Kiity Well, were all allowed to sit in the courtroom until called, although the Court later asked them to sit outside, but not before McClatchky had ample time to recognize Movant.

Movant would have testified that he had never received notice of nor had he attended any meeting in which Movant had met McClatchey in Pierre or at any other place. Movant would have only concluded, and would have testified to that conclusion, that

McClatchky was conjuring up this whole story in order to receive some benefit for his testimony. (McClatchky had already entered a plea of guilty for involvement in shakedowns and this was never revealed at trial by either the prosecution or Hanna; at least, that is what counsel informed Movant of sometime during or before trial. If this be so, then it was error for neither the Court or Hanna to raise the fact and see that a proper instruction was given the jury about the inherent unreliability of snitch's testimony.)

Movant avers that if his statements were tested through cross-examination and if Hanna had properly prepped him for testimony, and if Hanna had done adequate investigation to provide details to aid in his testimony, the jury would have drawn the conclusion that Movant was more credible than the witnesses who had testified against him, given the fact that all of them admitted complicity in schemes and to a conspiracy. In Perry v New Hampshire, 132 S. Ct. 716, 723 (2011), the Court noted that "cross-examination ... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses." In the instant case, **there were no competing witnesses!** Not only did Hanna provide no witnesses in the defense, and misled Movant into believing that he did not have the right to testify in his own behalf, he didn't even make a closing argument or statement. He left the jury to believe that there was nothing which disproved the prosecution's case.

In Strickland, the Court noted that when claiming ineffective assistance, the standard is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Id., 466 U.S., at 694) Applying this test to the Ground at issue here, it is obvious that the result would have been different. Movant would have been able to make his statement before the jury, raising facts that the jury was unaware of, and the jury would have been able to make a decision about the credibility of Movant had he testified and been exposed to examination and cross-examination.

However, even aside from all that, the right to testify in one's own behalf is fundamental constitutional right which can only be waived by the defendant. Failure to allow a defendant to testify violates the Fifth Amendment's Due Process Clause, it's a "corollary to the Fifth Amendment's guarantee against compelled testimony," (Rock, 483 U.S. at 52), it's a Sixth Amendment violation of the Compulsory Process Clause and its Confrontation Clause. And, as in the instant case, it violated Movant's Sixth Amendment right to effective assistance of counsel. As such, even from a cumulative standpoint, the errors are so pronounced that they require reversal of conviction. (See, e.g. Darden v Wainright, 477 U.S. 168, 193 (1986) ("cumulative effect.")

GROUND TWO: Ineffective assistance of counsel for suggesting to the jury that Movant actually had ever met Craig McClatchey and that the conversation alleged took place at the restuarant in Pierre, South Dakota.

During a conversation with Movant several months prior to trial, Hanna asked what he knew of a Craig McClatchey. Movant told him he had no idea who he was and had never even heard his name. In Florida v Nixon, 543 U.S. 175, 178 (2004), the Court said:

> "Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant...
>
> "[543 U.S. at 185>] New counsel argued that Corin had rendered ineffective assistance by conceding Nixon's guilt without obtaining Nixon's express consent. ...
>
> "[543 U.S. at 187>] An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. Strickland, 466 U.S. at 688.... A defendant, this Court affirmed, has the 'ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal.' Jones v Barnes, 463 U.S. 745, 751 ... (1983)."

Substantial weight was thus given McClatchey's claim that the meeting and the statement actually took place. Movant expressly told Hanna that he had no idea who Mcclatchey was, had never met him. When Hanna cross-examined McClatchey, he said: "And the only time you ever saw or heard Duane Big Eagle speak any word to you was this luncheon at a place here in Pierre, or near here?" (TT, page 248) And as far as you are aware, he was standing there for, what, 30 seconds, a minute?" (Id. at 249-250) "And he - your recollection is that he said, 'Hi. Nice to meet you. Are you going to play ball with us, Scott - Craig,' excuse me." (TT page 249) "Are you sure he didn't say, 'You're going to work with us, aren't you, Craig?' Or 'You're going to do some work for us'?" (TT, page 249) "And the conversation that you are relating about Duane Big Eagle took place six years ago?" (TT, page 251) "Okay. Now, at no time did Duane Big Eagle ever ask you for any money, did he?" (TT, page 257)

The jury was persuaded that the meeting took place. Just as the Government had hoped, the claimed meeting between Movant and McClatchey actually took place and this contributed to Movant's conviction. In its Appellee's Brief, AUSAs stated:

> "Like Kutz, McClatchey also paid the kickbacks to the counsel and Big Eagle through Raue. **As Big Eagle elicited at trial, McClatchey ...**
>
> "Big Eagle however attempted to get McClatchey to continue with the bribes. At a resturant in Pierre, Big Eagle approached McClachey and asked 'you're going to play ball with us, aren't you, Craig?'" (Brief at 14)

But, Movant never knew, never met, never even heard of Craig McClatchey. He specifically told Hanna that. For Hanna to affirmatively presume that the meeting took place, prejudiced Movant. Added to counsel's refusal to allow Movant to testify as set forth in Ground One, the cumulative effect of Hanna's admission of a key part

of the Government's case in chief, meets the test for ineffective assistance, both prongs of the Strickland test having been met—serious error and prejudice. Counts I and II both involved circumstances supported by the bogus McClatchey claims. And, Movant was found guilty of both Counts! While it is true that absent a "complete denial of counsel or denial of counsel at a critical stage," (Malcom v Houston, 518 F.3d 624, 627 (8th Cir. 2007), it is obvious that the Government's reliance upon this fictitious meeting with McClatchey in support of their case—which was the sole support for the conviction in Counts I and II.

Count I was based upon alleged agreement between Movant and Scott Raue and Royal Kutz. But, in his testimony, Kutz specifically stated that he had never been asked by Movant for anything: "Did Duane Big Eagle ever ask you for money, Mr. Kutz - A. No..., he's never asked for anything." (TT, page 81) As for Scott Raue, he **claimed** that Movant had been paid money by him, for example, at his home. But, Raue never gave Movant any money save for one occasion, that being when he came to Movant's mobile home and gave him $1,500. Movant asked what it was for and Raue told him that it was for a campaign contribution. Again, counsel's ineffective assistance in refusing to allow Movant to testify contributed to the error as Movant would have disputed Raue's claim. Raue's other meetings with Movant had to do with matters pertaining to the school, day-to-day operations, getting a new gym, etc. None were with respect to money except for the campaign contribution.

Raue's testimony—his bogus claims regarding Movant meeting with him and McClatchey (TT, pages 100-101)—were made more believable for the jury because Hanna didn't raise a claim with McClatchey that the meeting never took place. The facts are contrary to McClatchkey's testimony and that of Raue. Movant had no involvement in any decisions respecting the construction or archetectual work McClatchkey did. The decisions were solely made by the BIA. Neither Raue nor any member of the school board or the tribal counsel had any say in what kind of structure would be built or by whom the archetectual drawing would be made or who would do the construction. The BIA made all the decisions. The perverted efforts of the AUSAs to finegle guilt by persuading witnesses who had received substantial benefits for their testimony to claim Movant was involved with McClatchey either at Pierre or any place else, was supported by Hanna's admission that the meeting took place—when it never did and which Movant clearly informed Hanna was the truth.

As to the two-prong test of Strickland, the serious error was in Hanna's allowing the jury to believe credible McClatchey's claim and that of Raue. Had counsel at the very least planted doubt as to the veracity of McClatchey's claims, and those of Raue, then allowed Movant to testify to the truth, there is a far more than rea-

sonable probability that the result of the proceeding would have been different. (Strickland, 466 U.S. at 694; Close v United States, 679 F.3d 714, 716 (8th Cir. 2012)) (See, also, Ground One hereof.)

When Hanna first informed Movant that the Government intended to call McClatchey to testify that Movant had met briefly with McClatchey and some others at a resturant—incorrectly referred to as "the old Bunkhouse here in Pierre," (TT, page 101) as the place hadn't been called by that name since the 1970s—Movant told Hanna that he wasn't there, that he couldn't have been there because every Monday morning he left Pierre and drove to Ft. Thompson, 60 miles away, where he took care of tribal business. (Movant's secretary, Rozelle Lockwood, could have confirmed that.) Why Hanna would have conceded the bogus claim as being factual after Movant expressly told him that no such meeting ever took place and that he had never knew of, never heard of, and never met anyone named Craig McClatchey, is a mystery. But, the point is that this facilitated the jury's acceptance of the government's false claims, and there is a strong probability that but for that unprofessional error, the result of the proceeding would have been different.

GROUND THREE: **Ineffective assistance of counsel for failure to seek a jury instruction respecting Movant's not testifying.**

In this context, Movant reiterates the fact that he was told by Hanna that he couldn't testify. When Hanna told the Court that Movant was not going to testify, this only confirmed what Movant believed to be true—the fact that he did not hesitate to speak after closing arguments lends credibility to this fact, that is that he was not unwilling to testify, just as set forth in Ground One.

However, given the fact that Movant did not testify, it was another example of ineffective assistance for Hanna not to ask for a jury instruction which informed the jury that"the jury could not consider in any way or discuss the fact that the defendant did not testify." (Eighth Circuit Model Jury Instruction No. 3.05 (2005); United States v Cazares, 465 F.3d 327, 332 (8th Cir. 2006) ("although the defendant's proposed instruction would have been permissible, the actual instruction correctly characterized the law, adequately informed the jury of the defendant's right to remain silent, and explained the impropriety of making adverse inferences based on that fact.")

The consequence of this serious error cannot be known for certain. Yet, it is critical that the Fifth Amendment's provision that no one can be forced to implicate himself be put before the jury. In the absence of that, the jury is left to presume that the defendant was afraid to testify. Movant was certainly not afraid to testify, but counsel's waiver of his right to testify without even asking if he wanted to do so,

violated Movant's constitutional right to testify. This constitutional error was exacerbated by counsel's failure to ask for a jury instruction stating that no adverse implication may be made of the fact that the defendant did not testify. In James v Kentucky, 80 L. Ed. 2d 346, 354 (1984), the Court said: "The Constitution obliges the trial judge to tell the jury, in an effective manner, not to draw the inference if the defendant so requests." In "Matthew Bender & Company, Inc.'s" Model Jury Instructions for criminal trials, Instruction 5-21 says:

> "The defendant chose not to testify in this case. Under our constitution, a defendant has not obligation to testify or to present any evidence, because it is the Government's burden to prove the defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he or she is innocent.
>
> "Therefore, you must not attach any significance to the fact that a given defendant did not testify. No adverse inference against a defendant may be drawn by you because he or she did not take the witness stand, and you may not consider it in any way in your deliberations in the jury room."

There is no way at this juncture to determine the effect that the failure of the Court to so admonish the jury had on their verdict. However, unquestionably, Movant had a right to such an instruction and, had he known that he had such right, after Hanna informed the Court that he was not going to testify—presuming that he believed Hanna when he said that he was not allowed to testify (which he had no knowledgeable reason not to believe)—he surely would have insisted that the instruction be provided. In United States v Anthony, 565 F.2d 533, 538 (8th Cir. 1977), the Court said:

> "It is possible that uninstructed jurors could erroneously infer that defendants who are unwilling to testify are masking their guilt.... This danger does not exist solely in multiple-defendant trials; it may also be present in the trial of a single defendant. Any danger ... was obviated when the trial court carefully instructed the jury that the failure of some defendants to take the stand raised no inference of guilt."

Movant avers that the cumulative effect of: (1) denying him the right to testify; (2) Hanna's admission of a denied meeting between Movant and McClatchey; (3) the failure of Hanna to request a jury instruction that would show that it was improper to attach any adverse significance to Movant's not testifying; together with the other errors set forth below, demonstrate ineffective assistance. In Middleton v Roper, 455 F.3d 838, 851 (8th Cir. 2005) the Court discussed the "cumulative effect" defense. It did not rule out that the cumulative effect of counsels' errors was a nonissue; rather, it stated that "Errors that are not unconstitutional individually cannot be added together to create a constitutional violation." In the instant case, each Ground set forth herein stands on its own' however, the cumulative effect of all of them exacerbates the Sixth Amedment violation asserted.

GROUND FOUR: **Sixth Amendment violation for failure to adequately investigate the facts, witnesses and claims set forth by the Government.**

In Strickland, 466 U.S. at 690-691, the Court said:

> "These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations or make a reasonable decision that makes a particular investigation unnecessary."

In Bobby v Van Hook, 175 L. Ed. 2d 255, 258 (2009), the Court affirmed that standard:

> "The Sixth Amendment entitles criminal defendants to 'effective assistance of counsel' - that is, representation that does not fall 'below an objective standard or reasonableness' in light of 'prevailing professional norms.' Strickland ... 466 U.S. 668, 686."

In Hanna's cross-examination of Craig McClatchey (TT, pages 243-259) he very clearly based his questions on what McClatchey told Special Agent Hoben. (TT, page 243) In his cross-examination he admitted that the meeting at issue actually took place, as set forth in Ground Two hereof. However, nowhere did he give any evidence that the $10,000 Movant paid Hanna for P.I. Ryan One Feather and the other P.I. was used either to investigate witnesses who could have proved and/or testified to the fact that such a meeting never took place.*

Movant requested of Hanna that he provide all investigative reports from the P.I.s Movant paid him to hire. Hanna provided zilch! Hanna told Movant that he had hired Mr. One Feather at a cost of $5,000, then needed another $5,000 to hire a different P.I.—whose name Movant cannot recall. Mr. One Feather never even spoke to Movant, never asked anything about the defenses, potential witnesses, etc., who he could follow up on. The only thing the other P.I. said to Movant was less than two months prior to trial was that "you have nothing to worry about; they don't have anything on you to convict you. You're going to walk." This second P.I. also did not ask about any prospective witnesses; he didn't appear to have any grasp of what the issues were and who could support Movant's claim of innocence.

For a fact, the alleged meeting at which Movant was said to have met McClatchey couldn't have happened. Movant at the time alleged had a temporary mobile home in Ft. Pierre. He traveled to Ft. Thompson on each Monday morning where his office as tribal chairman was located. If either P.I. had investigated, they would have found Movant's secretary, Rozelle Lockwood, able to testify that Movant was in Ft. Thompson when the alleged meeting took place. In fact, Ms. Lockwood repeat-

* No date was ever revealed

ly complained that the other tribal council members were always missing and didn't do their job, but Movant was always there when he was supposed to be.

Vice Chairman Loren Allis is another witness who ought to have been investigated. He would have been able to testify that Movant was always at the tribal office in Ft. Thompson. Raymond Hawk, a security employee of the reservation is another witness who could have offered favorable testimony. He typically met with Movant each morning at the tribal office. He too often complained that Movant seemed to be the only one who was faithful as to his duties and was always there where he was supposed to be handling tribal affairs.

A prime need from an investigatory standpoint was with respect to the alleged meeting with McClatchey. No one, certainly not the two investigators allegedly hired by Hanna——at $5,000 each——ever did any investigation of him, or his daughter. What was his incentive to lie? Careful investigation would have enabled one of the investigators to poke holes in his testimony. Yet, there is no evidence in Hanna's cross-examination that he obtained any information regarding the daughter, far less McClatchey himself, save for what the SA report found.

Further evidence of the fact that no meaningful investigation was made is in the fact that when Hanna forwarded the documents Movant asked him for, and which this Court ordered him to provide, Hanna said that the documents sent represent all of the documents "from our case file," and that "there are no longer any copies of these documents" left in his office.

Considering the complexity of the case, it was hardly reasonable for Hanna to not do any meaningful investigation. He presented no testimony, no defense whatsoever! He wouldn't even allow Movant to testify in his own behalf, although Movant told him that he wanted to do so. Hanna simply said that it wasn't allowed. In Ortiz v United States, 664 F.3d 1151, 1169 (8th Cir. 2011), the Court said:

> "In evaluating Ortiz's charge that counsel failed in its duty to 'conduct a thorough investigation of Ortiz's background,' ... our focus is on whether the investigation was reasonable.... This is an objective review, measured against the prevailing professional norms at the time of the investigation.... It is a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time without the distorting effects of hindsight....
>
> "This is not a case where counsel 'sat idly by.' Counsel actively investigated Ortiz's history, trying to locate his family in another country despite Ortiz's command to the contrary....
>
> "This is not a situation, like Wiggins, where 'counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources' despite becoming aware of troubling circumstances in the petitioner's history. Wiggins, 539 U.S. at 524-25.

The Wiggins Court said that doing just a cursory investigation was not reasonable.

Hanna's investigation of Scott Raue appears to be limited to the information provided by the Government in discovery. During his cross-examination of Raue, he asked about conflicts in his testimony, information from the proffers and from meetings with the prosecutors and agents of the Government. Hanna, or his two alleged paid investigators—at a cost of $10,000 to Movant—ought to have interviewed a woman at a convenience store in Pierre who offered to provide information on the extent of Raue's gambling and who would have provided information to exonerate Movant, who she knew was innocent. Her name is Vicki Orriz.

There were many employees of various casinos who would have provided information to validate the fact that Raue's gambling habits and losses far exceeded the money he admitted he took as bribes. Even Movant's family could have testified that Movant did not posses and had never given any indication that he had received funds from other than legitimate sources. But, **NOTHING!** Was that reasonable in light of the circumstances? That is the test according to Strickland. Movant posits that it is far more than reasonable to conclude that the result of the proceeding would have been different, "but for counsel's unprofessional errors." (Id., 466 U.S. at 694) It would have been easy to document—especially with $10,000 to work with—that Raue was losing so much he would never have had anything left over to try to pass on bribes to Movant.

Another area of investigation which Movant pleaded with Hanna to examine was the fact that there was nothing in it for Raue to try to influence Movant. Raue was not beholden to Movant. He worked for the school and Movant had nothing to do with that. Movant was not involved in any decisions regarding the grant of construction or architectual plans for building projects. That was all under the control of the BIA. Not only did Hanna refuse to investigate this very sound defense, he never even suggested during trial that there was nothing in it for Raue to bribe Movant. Added to the fact that Raue had all he could handle—and more—to try to stay afloat due to his uncontrolled gambling, without giving Movant anything when Movant could do nothing for him.

In Sinisterra v United States, 600 F.3d 900, 906 (8th Cir. 2009), the Court said:

> "To establish prejudice, Sinisterra must establish a 'reasonable probability that a competent attorney, aware of the available mitigating evidence would have introduced it at sentencing, and that the jury confronted with this mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.' Wong v Belmontes, 130 s. Ct. 383, 386 (2009)."

In that case, the Court remanded the case back to the lower court to consider facts.

There appears absolutely nothing in the conduct of Hanna's defense which demonstrates that he used the $10,000 he demanded for investigators to actually develope a strategy to support Movant's innocence. Yes, he challenged the credibility of the Government's witnesses, but no, he didn't provide any positive testimony as a result of the information Movant provided him as to witnesses who could have given favorable testimony, who could have demonstrated the implausibility of the claims Movant accepted bribes.

A man by the name of Don Parisian was very familiar with Movant's income and sources. He could have testified that the income Movant had given no evidence that sources included anything other than legitimate income from the bait shop and the hunting and fishing guidework Movant did, other than his income as tribal chairman, while he occupied that position. If the alleged P.I.s had bothered to query Movant about witnesses he wanted to have testify, Movant would have informed them of Parisian and the others, along with their anticipated evidence and/or testimony. It simply was not reasonable for counsel to forgo a thorough investigation of the prospective witnesses and facts in this case. This is especially true given the fact that Hanna requested and received $5,000 to hire Ryan One Feather and another $5,000 to hire a second investigator; added to this is the fact that in spite of the expenditure, Hanna has no evidence in the way of any investigative report. It is ludicrous to believe that a criminal defense attorney would pay $10,000 to private investigators and not have a shred of evidence to show what they did for this money! It is completely unreasonable and this failure satisfies the two-prong test in Strickland as relates to investigations.

GROUND FIVE: Attorney Dana Hanna rendered ineffective assistance for failing to ensure that McClatchey made no reference which could be construed as a threat to his daughter; said failure also resulted in a different, more stringent assessment of the error on direct appeal.

In Movant's direct appeal (United States v Big Eagle, 2013 U.S. App. LEXIS 603 (Case No. 11-3754, January 10, 2013, 8th Circuit) the court noted that Hanna had not preserved the issue for appeal:

> "The district court's tentative ruling on the admissibility of uncharged crimes evidence was not final, and not sufficient to preserve Big Eagle's objections on appeal. The district court explicitly stated the ruling was 'preliminary,' noted the court had not heard the evidence the government intended to present, and emphasized the court would 'make further rulings on objections as the case progresses.' ...
>
> Testimony concerning Big Eagle's statements in the presence of McClatchey's young daughter presents a closer question... On cross-examination, Big Eagle['s attorney] **revisited the same testimony**, giving McClatchey **a second opportunity to relate the conversation.**"

In his Appellant's Brief, Hanna admitted the prejudicial effect any reference to Movant's placing his hands on McClatchey's daughter's shoulders had:

> "In addition to the fact that it was so ambiguous under the circumstances as to have little or no probative value, it was also used in the Government's final rebuttal summation to subtly but effectively convey the very conclusion of an intent by Big Eagle to threaten Mcclatchey's child that the Court had prohibited:
>
> "'I tell you, ladies and gentlement, when the chairman put his hands on his daughter's shoulders and looked him in the eye and said, "You are going to play ball with us, aren't you Craig?" that's something that would stick with you.'"

In United States v Jongewaard, 567 F.3d 336, 340 (8th Cir. 2008), the Court put into perspective the prejudice evident in McClatchey's statement:

> "Jongewaard also relies on a controversial decision in which the Sixth Circuit held that 'a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is conveyed for the purpose of furthering some goal through the use of intimidation.' United States v Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) ... For the reasons above, we reject the premise that a communication qualifies as a threat ... only if it is a means to an end other than intimidation for its own sake."

With the prevelance of violance to children, child abuse by any name, it surely must have angered the jurors to even contemplate the prospect that Movant would potentially use this unstated—at least verbally—suggestion that Movant would resort to violence to persuade McClatchey to kick money back to anyone. Hanna was right in what he said in his Appellant's Brief. But, he failed to preserve the issue, just as the Eighth Circuit confirmed. The difference in looking at an error under the plain error standard the Eighth Circuit used in rejecting Hanna's argument can be well illustrated in a case in the 7th Circuit. In United States v Martinez, 289 F.3d 1023, 1027 (7th Cir. 2001), that Court said:

> "Martinez admitted to selling approximately 90 kilograms of marijuana, yielding a statutory maximum of 20 years on both counts... The court, however, sentenced him to 292 months for the conspiracy count, **52 months beyond the statutory maximum.**
>
> "Because Martinez did not raise this Apprendi issue in the district court, we review his challenge for plain error.... Under this standard, Martinez must establish (1) there was error; (2) the error was plain; (3) the error affected a substantial right; and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. ... Here, Martinez cannot prevail under the fourth prong."

Can you imagine that? The Court exceeded the statutory maximum by four and one-years and the integrity and public reputation of the court was unaffected! (See, also, United States v Roundtree, 534 F.3d 876, 878 (8th Cir. 2008) (same four-part test.)

The Strickland two-prong test is met in several ways in this respect. First, even the Eighth Circuit admitted it was a serious error. The Court said:

> "Big Eagle['s attorney] could have minimized his prejudice by objecting and requesting that the district court strike the allegedly improper testimony and also issue a cautionary instruction. Big Eagle did not move for a mistrial on the basis of this evidence. we prefer not to order a new trial where the defendant failed to raise the issue of a mistrial before the district court."

This would appear to validate the presumption that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Clearly, there was a serious error. Clearly even the Eighth Circuit suggested the result of the proceeding would have been different had Hanna done his constitutionally mandated job of providing effective assistance. The standard of review would also have been different. There can be no question about that. So, even in this respect, "the result of the proceeding would have been different.

But, there's a far more serious error evident. This is in not only allowing the comment to come up in testimony—and not asking for a mistrial or a cautionary instruction—but in the perception in the minds of the jury that this strong suggestion of a threat to a twelve-year-old girl had. Ignoring for a moment the fact that the meeting with McClatchey never took place, and that adequate investigation would have supported that fact, Hanna not only didn't object, he brought it up again himself, "giving McClatchey a second opportunity to relate the conversation." (Big Eagle, (page 11 of the opinion).)

This puts this error in the realm of issues properly raised in a § 2255 Motion. Obviously, the Court was not likely to decide ineffective assistance as it didn't have that issue before it; Hanna didn't raise it at all and it would be preposterous for any attorney to accuse himself of ineffective assistance. In Massaro v United States, 538 U.S. 500, 504-505 (2003), the Court said:

> "In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance....
>
> "Under Strickland v Washington, 466 U.S. 668 ... (1984), a defendant claiming ineffective assistance of counsel must show that counsel's actions were not supported by reasonable strategy and that the error was prejudicial."

Reexamining Hanna's errors with respect to McClatchey's testimony, it is obvious from the record that he made serious errors. The only question remaining is whether these serious errors prejudiced Movant. Even the Eighth Circuit sug- the result of the proceeding would likely have been different but for Hanna's errors. Both prongs as to this ground for relief have met the Strickland tests.

Relief Requested

The numerous examples of ineffective assistance of counsel, the "serious errors," coupled with the prejudice set forth herein, allows only one means of correction. The conviction must be reversed. In addition to, and contributed to by the unprofessional errors, the violations of Movant's Fifth and Fourteenth Amendments, cannot be resolved by anything other than reversal.

Movant is innocent. His retained attorney was seriously and grossly ineffective. He never even determined or questioned as to the date of the alleged meeting with Mr. McClatchey. He admitted over Movant's objection that the meeting actually took place. It couldn't have. If Movant had been prepped for and allowed to testify, he could have given the jurors a basis for reasonable doubt.

There may be other grounds for relief; however, counsel's failure to provide investigative reports, along with his inability—absent this Court's permission—to provide copies of discovery, limits Movant's Grounds to those set forth above. In the event that the Respondent challenges these grounds on the basis of discovery which Movant was not provided, he respectfully asks the Court to order that the relevant documents be made available to him.

In the event that the Court does not see the issues strong enough to justify its grant sua sponte of a reversal, Movant respectfully requests an evidentiary hearing to further document the grounds. In the end, Movant requests the Court grant the relief requested in the form of a complete reversal of the conviction.

By executing this Memorandum of Law and the Motion it accompanies, Movant declares under penalty of perjury that the statements herein are true pursuant to 28 U.S.C. § 1746. executed this 11th day of March, 2013.

WHEREFORE, Movant respectfully prays the Court will reverse his conviction.

Duane Big Eagle, Movant.