10-288

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-288

UNITED STATES OF AMERICA,
Appellee,

-vs-

SAMUEL CARTER, JR.,
Defendant,

JASON SHOLA AKANDE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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SUPPLEMENTAL BRIEF FOR
THE UNITED STATES OF AMERICA

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Issues Presented for Review

I. (A) Whether the district court erred in denying motion to compel disclosure of a wire-tap that did not exist.
(B) Whether the court abused its discretion in precluding the defendant from arguing that a government witness was an informant when the defendant had no evidence to support his claim?
(C) Whether the court abused its discretion in precluding the admission of irrelevant evidence?
(D) Whether the district court destroyed evidence to cover-up an alleged conspiracy, where there is no evidence supporting this allegation?

II. Whether the district court violated the defendant's right to self representation where the defendant maintained control of his defense and presented his case in his own way?

III. Whether the prosecution introduced forged documents where the defendant cannot point to a single forged or fabricated record that was introduced by the government?

IV. Whether the district court erred by permitting the defendant's wife to testify against him when she testified voluntarily and when her testimony (and accompanying documents) did not reveal confidential marital communications?

V. Whether the defendant can meet his high burden to show that the government selectively prosecuted him

based merely on the allegation that it did not also charge Williams with making false statements to a government agency?

VI. Whether the district court erred in admitting the defendant's immigration file, which was relevant to the Count Three of the superseding indictment?

VII. Whether the Court should decline to decide the defendant's ineffective assistance of counsel claim where there is virtually no evidence in the record for the Court to properly address the issue?

United States Court of Appeals

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-vs-

SAMUEL CARTER, JR.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America respectfully submits this response to the supplemental brief filed by the defendant on October 25, 2011. This brief supplements the Brief for the United States of America, dated June 7, 2011 ("Govt. Br.").

The defendant has filed two briefs through counsel in this appeal: Brief for Defendant-Appellant, dated March 5, 2011 ("Def. Br."); and Reply Brief for Defendant-Appellant, dated June 15, 2011 ("Def. Reply Br."). The defendant also has filed a *pro se* supplemental brief, dated October 25, 2011 ("Def. Supp. Br.").

The claims asserted in the defendant's *pro se* supplemental brief have no merit. As discussed in detail below, each of the seven claims are unfounded. Accordingly, the defendant's jury conviction in the district court should be affirmed.

Summary of Argument

I. The district court properly rejected the defendant's requests to introduce evidence or ask questions to support his theory of a wide-ranging conspiracy against him. In response to his specific arguments:

(A) The district court did not err by refusing to compel production of wire-tap evidence because there were no wire-taps used in this case.

(B) The district court did not err by refusing to allow the defendant to prove that a government witness (Samuel Carter) was an informant because there was nothing – aside from the defendant's speculation – to suggest that Carter was an informant.

(C) The district court did not abuse its discretion by refusing to allow the defendant to argue that Carter was testifying under a stolen identity because there was no evidence to support this allegation.

(D) There was no evidence that the district court destroyed evidence as part of a conspiracy against the defendant.

II. The trial record firmly established that standby counsel did not infringe upon the defendant's right to self-representation. Indeed, the defendant controlled virtually every aspect of his defense, including organizing and conducting his defense, conducting jury selection, conducting cross examination of each of the government's

witnesses, re-crossing government witnesses, objecting to evidence, making legal arguments on the admissibility of evidence, entering into stipulations with the government, presenting the defendant's case, subpoenaing witnesses on behalf of the defense, examining witnesses on behalf of the defense and making closing arguments on behalf of the defense. The relatively minor role played by standby counsel neither undermined the defendant's control of the case nor created a perception in front of the jury that he was not representing himself.

III. The defendant's claim that the government used "forged" DMV records is completely unfounded. Putting aside that the defendant has absolutely *no evidence* that the DMV records were, in fact, altered, the district court properly found that any such alterations were completely irrelevant to the issues at trial. Likewise, the defendant has not offered a shred of evidence to support his claim that the government used fabricated grand jury subpoenas.

IV. The district court did not commit error or abuse its discretion by permitting the defendant's wife (Chastidy Williams) to testify or by admitting the defendant's handwritten letters to Williams. Williams did not invoke the adverse spousal testimony privilege and the defendant may not invoke it on her behalf. Moreover, Williams's testimony (and the letters from the defendant to her) did not violate the confidential marital communications privilege for several reasons. The marriage between the defendant and Williams was a sham, and in any event was "moribund" at the time of the challenged communications, the challenged communications were not "confidential,"

and the challenged communications were part of the defendant's fraudulent scheme.

V. The government's prosecutorial discretion not to charge Williams was not improper and did not amount to selective prosecution. Indeed, as the district court found, Williams was a vulnerable person, who was manipulated by the defendant. Moreover, although the defendant claims that it was impossible for him to be convicted on Count Three without also convicting Williams, this is not true. Count Three charged the defendant with making false statements to a government agency and there is nothing "impossible" about the defendant committing that crime.

VI. The district court did not abuse its discretion, much less commit plain error, in admitting the defendant's immigration file. The immigration file was relevant to the charges in the superseding indictment and did not unfairly prejudice the defendant. Moreover, even assuming *arguendo* that the immigration file was improperly admitted, the defendant cannot show that this rose to the level of plain error.

VII. The defendant's claim of ineffective assistance of counsel should not be addressed on direct appeal. There is virtually no evidence in the record for the Court to decide this issue. This claim should be appropriately presented to and addressed by the district court in a petition pursuant to 28 U.S.C. § 2255.

Argument

I. The district court did not commit error or abuse its discretion in denying any discovery motion or precluding any evidence.

The defendant argues that the district court violated his constitutional rights by failing to compel disclosure of certain evidence, by not allowing the defendant to introduce certain evidence, and by destroying evidence. *See* Def. Supp. Br. at 23-26. As set forth below, however, the defendant's arguments are meritless.

A. Relevant facts[1]

The defendant contends that he was not allowed to introduce evidence that he was framed. Putting aside the skeletal allegations made with no argument or support, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998) ("Issues not sufficiently argued in the briefs are considered

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[1] In his *pro se* supplemental brief, the defendant makes numerous spurious, outlandish and frivolous allegations as alleged support for his arguments. The defendant argues, for example, that "the Prosecution 'Planted Bribed Jurors' into his Jury Trial; Some of the Planted Bribed Jurors were Under-Cover 'Informants/Law Enforcement Officers.'" Def. Supp. Br. at 6. These allegations – like many other allegations in the defendant's *pro se* supplemental brief – are frivolous and utterly unsupported by any evidence. In this supplemental brief, however, the government will not attempt to address all of these frivolous and unfounded allegations, but instead will focus on the defendant's arguments.

waived and normally will not be addressed on appeal"), he complains (1) that the court erred by denying his motions to compel testimony on the wire-taps of certain phones, (2) that the court refused to allow him to prove that a government witness (Samuel Carter) was an informant, (3) that the court erred by refusing to allow evidence that Carter was testifying under a stolen identity, and (4) that the court removed fabricated records from the court record and destroyed them.

B. Governing law and standard of review

A district court has discretion to rule on discovery matters, *see United States v. Delia*, 944 F.2d 1010, 1018 (2d Cir. 1991), and the admissibility of evidence under the Federal Rules, *see United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1988). This Court will give the district court considerable deference and will reverse the ruling only if it finds that the district court abused its discretion. *See United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). A district court abuses its discretion when it "act[s] arbitrarily and irrationally," *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992), or its rulings are "manifestly erroneous," *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (internal quotation marks omitted).

Trial errors that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction. *See United States v. Colombo*, 909 F.2d 711, 713 (2d Cir. 1990); Fed. R. Crim. P. 52(a). An error is harmless if the reviewing court is convinced

that "'the error did not influence the jury's verdict.'" *Colombo*, 909 F.2d at 713 (quoting *United States v. Ruffin*, 575 F.2d 346, 359 (2d Cir. 1978) (quoting, in turn, *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)). In that determination, "[t]he strength of the government's case against the defendant is probably the most critical factor . . . ." *Id.* at 714 (citing 3A C. Wright, *Federal Practice and Procedure* § 854, at 305 (2d ed. 1982)). "Reversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003) (internal quotation marks omitted).

C. Discussion

1. There was no wire-tap in this case.

The defendant first argues that the government refused to disclose that it conducted a wire-tap of the defendant's telephone and the district court helped the government cover it up. *See* Def. Supp. Br. at 24. The defendant argues that the district court violated his constitutional rights by failing to compel Sprint and AT&T to produce the content of the intercepted wire communications. *See id.*

These allegations are without merit. There is no evidence whatsoever that the government intercepted wire communications over the defendant's telephone or any other telephone in this case.[2] The defendant's unfounded

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[2] In response to the defendant's motion for acquittal and/or a new trial, the government advised the district court, as

assertions to the contrary do not make it so. Accordingly, the district court did not abuse its discretion by declining to compel Sprint and AT&T to produce information that does not exist.

2. Carter was not an informant.

Next, the defendant argues that the district violated his constitutional rights by not allowing the defendant to prove that Samuel Carter "was an 'informant,' not just a co-conspirator." *See* Def. Supp. Br. at 25. The defendant argues that the government "coached" Carter to lie under oath that he was not an informant. *Id.* The defendant further argues that his various pre-trial motions would have shown that Carter was an informant. *See id.*

Once again, the defendant's allegations are unsupported by any evidence. As an initial matter, the defendant has not argued or identified any information that he claims the government failed to disclose during discovery. Well in advance of trial, the government disclosed to the defendant discovery regarding Carter, including Carter's criminal history, Carter's plea agreements with the government and Carter's cooperation agreement with the government. The defendant cannot contend otherwise. Indeed, Carter's plea agreements and cooperation agreement were admitted into evidence and Carter's criminal history was elicited during cross-

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it has done here, that there were no intercepted wire communications over the defendant's telephone or any other telephone in this case. *See* GA 32 (Doc. No. 371).

examination. *See* GA 466-70, GA 572. In addition, Carter testified regarding his conspiracy with the defendant to obtain a U.S. Passport with Carter's information, but the defendant's photograph. *See* GA 434-51. The defendant had a full and adequate opportunity to cross-examine Carter. *See* GA 470-570.

The defendant has not identified any evidence, because there is no evidence, that Carter was an informant for or working with law enforcement when he conspired with the defendant to submit a fraudulent passport application. To the contrary, Carter was prosecuted and convicted of making a false statement in a passport application. *See* GA 467-68. Likewise, the defendant has not set forth a single piece of evidence to support his frivolous allegation that the government "coached" Carter to lie under oath that he was not an informant. Lastly, the defendant has not – and indeed cannot – make any showing that the district court abused its discretion by denying any particular discovery motion that would have shown that Carter was an informant. *See id.*

3. The district court properly excluded Carter's driving records.

The defendant next argues that the district court violated his constitutional rights by not allowing him to introduce Carter's driver's license records. *See* Def. Supp. Br. at 25-26. During trial, the defendant argued that certain of the DMV photographs of Carter spanning the period June 1995 to March 2009 did not, in the defendant's estimation, look like Carter. *See* GA 853-56. The district

court found otherwise and, in any event, precluded the admission of these documents on relevancy grounds. *See* GA 849, 853-854.

The district court did not abuse its discretion in precluding the defendant from admitting Carter's DMV records. The defendant failed to demonstrate that these records had any relevance whatsoever to the offenses charged in the superseding indictment. As the district court appeared to recognize, the defendant has not shown how "a photograph dated June 16, 1995 of an individual with Samuel Carter's name and birthdate [that] does not appear to [the defendant] to be Samuel Carter" is relevant to the defendant's claim that he was "being set up." GA 853-54.

Morever, even assuming *arguendo* that Carter's driving records were somehow relevant to the instant case (and it is clear that they are not), the preclusion of these records was harmless. As set forth in the Government's Brief, the evidence against the defendant was extremely strong and there is every reason to believe that the defendant would have been convicted even if Carter's driving records were admitted into evidence. *See* Govt. Br. at 55-59.

4. Any claim that the district court destroyed evidence is frivolous.

Last, the defendant argues that the district court destroyed Carter's "Fake I.D." after the trial, in order to cover up this alleged conspiracy. *See* Def. Supp. Br. at 26. Once again, the defendant's allegations are completely unfounded. There is no evidence that the district court

improperly destroyed any alleged "Fake I.D." or any other evidence. Nor is there any evidence that the district court improperly denied any discovery motion that would have revealed an alleged conspiracy to set up the defendant.

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In sum, the defendant cannot show that the district court abused its discretion in denying any pre-trial motion filed by the defendant or precluding the admission of any particular piece of evidence. Nor can the defendant make any showing to support his claims of judicial or prosecutorial misconduct.

II. The district court did not violate the defendant's right to self representation.

A. Relevant facts

At the inception of this case, Sarah Russell, Esq., from the Federal Public Defender's Office, was appointed to represent the defendant. *See* GA 4. On May 15, 2006, the district court granted Attorney Russell's motion to withdraw and, on May 18, 2006, the court appointed Bruce Koffsky, Esq., to represent the defendant. *See* GA 10. On September 26, 2007, the district court appointed a third attorney, Alan Sobol, Esq., to represent the defendant. *See* GA 14. The defendant exercised his right to proceed *pro se* and Attorney Sobol was appointed as standby counsel.

From the outset, Attorney Sobol ensured that the defendant maintained actual control over his case. For

example, during a status conference on August 26, 2008, when the district court questioned Attorney Sobol regarding discovery matters, Attorney Sobol stated, in part, the following:

> [G]iven the fact that Mr. Akande is incarcerated and has difficulty with the telephones at times, I go up and visit him and then we talk about certain things. And then with his permission, I might communicate with the government just in terms of outstanding discovery, informal requests, such as the updated criminal record history, to avoid the necessity to file papers.
>
> Mr. Akande and I, without getting into client confidences, Mr. Akande, it's my understanding, fully understands that he is *pro se* and he has the prime responsibility in this case. He understands my role to stand by. He understands I'm not a highbred counsel. He doesn't have two counsels. He's counsel. We've helped in the process, procedure, things of that nature. That's under the case law appropriate for standby counsel. But I have at times tried to expedite the process. Especially like, for example, today when we had a court appearance, we met with Mr. Akande yesterday, and rather than have him try to handwrite these things and mail them, we took the liberty of filing them with the Court with his permission just to expedite the process.

> I just want to say one thing with respect to the motions he filed, the discovery ones. We initially drafted those when it was unclear, my office did, when it was unclear whether I would be lead counsel or standby. And because they had already been drafted, I reviewed those with Mr. Akande and told him that inasmuch as that work product was done when it was uncertain what my role was, I gave him the opportunity to review those, and with his permission we filed those.
>
> But he understands on an ongoing basis his responsibility is to take the lead on those and I'm just trying to expedite the process and be an aid to – both to the Court and to with regard to my obligations as standby counsel to Mr. Akande.

Government Supplemental Appendix ("GSA") 3-4.

Prior to the trial, the defendant maintained control of his defense. The defendant represented himself at evidentiary hearings, by examining witnesses and making oral argument to the court. *See, e.g.,* GSA 18. The defendant filed numerous pre-trial motions on his own behalf. *See* GA 14-17. In addition, to protect the defendant's interests, Attorney Sobol filed some motions in limine prior to trial. *See* GSA 12-14. Significantly, at the final pretrial conference, the defendant reviewed these motions and expressly adopted them. *See id.*

At trial, the defendant maintained complete control of his defense and handled all aspects of the trial, including

jury selection (*see* Def. Supp. Br. at 6), cross examination of each of the government's witnesses (*see* GA 113-137, 181-211, 235-236, 245-247, 260-263, 339-359, 389-403, 470-570, 612-637, 691-703), re-cross of government witnesses (*see* GA 363-364, 414-421, 587-595, 644-645), objecting to evidence offered by the government (*see, e.g.,* 655-658), making legal arguments to the district court regarding the admissibility of evidence (*see, e.g.*, 656-667), entering into stipulations with the government (*see* GA 665), presenting the defendant's case (*see* GA 707), subpoenaing witnesses on behalf of the defense (*see* GA 647-649), examining witnesses on behalf of the defense (*see* GA 708-729, 740-745, 759-770, 797-815, 833-842, 861-864) and making closing arguments on behalf of the defense (*see* JA 118-155). Other than occassionally consulting with the defendant as standby counsel, Attorney Sobol had virtually no role in the presentment of the defendant's case at trial. *See* GA 201-870.

B. Governing law and standard of review

Criminal defendants have a constitutional right to represent themselves. *See Faretta v. California*, 422 U.S. 806, 819 (1975). The right to proceed *pro se* is often referred to as the *Faretta* right. Although a *pro se* litigant's pleadings must be construed liberally, self-representation still requires compliance with "relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834 n.46. To insure such compliance, a court may appoint standby counsel, despite a defendant's objection, without violating the right to self-representation, as long as the actions of standby counsel do not "seriously undermin[e]" the

appearance of self-representation before the jury. *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984).

"In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *McKaskle*, 465 U.S. at 177. In order to achieve that goal, the Supreme Court established two limitations on the participation of standby counsel. First, a *pro se* defendant is "entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded." *Id.* at 178; *see also United States v. Mills*, 895 F.2d 897, 904-05 (2d Cir. 1990) (permitting standby counsel to make legal argument at suppression hearing was not "a substantial incursion into his right to control his own defense"). Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. *McKaskle*, 465 U.S. at 174.; *see also United States v. Dyman*, 739 F.2d 762, 771 (2d Cir. 1984) (standby counsel's minor role at trial did not undercut right to self-representation).

C. Discussion

Here, standby counsel did not come close to "eroding" defendant's *Faretta* right. The defendant clearly "preserve[d] actual control over the case" that he chose to present to the jury." *McKaskle*, 465 U.S. at 178. In addition, standby counsel did not come close to destroying the jury's perception that the defendant was representing himself. *See id.* Indeed, as described above, the trial transcript reveals that the defendant controlled the organization and conduct of his defense, including the following: jury selection, cross examination of each of the government's witnesses, re-cross of government witnesses, objecting to evidence offered by the government, making legal arguments to the district court regarding the admissibility of evidence, entering into stipulations with the government, presenting the defendant's case, subpoenaing witnesses on behalf of the defense, examining witnesses on behalf of the defense, and making closing arguments on behalf of the defense. *See McCaskle*, 465 U.S. at 174.

To be sure, standby counsel did more than just advise the defendant when requested. Before trial, standby counsel filed motions, hired a private investigator, and interviewed witnesses. None of these actions undermined the defendant's control over the case. And because all of these actions occurred pre-trial and outside the presence of the jury, they could not, by definition, "destroy" the jury's perception that the defendant was representing himself. *See McKaskle*, 465 U.S. at 174 (participation by standby counsel without the defendant's consent permissible so

long as participation does not destroy the jury's perception that the defendant is representing himself).

Finally, although the defendant claims that his standby counsel had a conflict of interest, this claim is misplaced. The defendant represented himself, and had no constitutional right to standby counsel. *Clark v. Perez*, 510 F.3d 382, 395 (2d Cir. 2008) "[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel." *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1988).

III. The defendant's claim that the prosecution used "forged" documents is completely unfounded.

A. Relevant facts

The government called a representative of the Connecticut Department of Motor Vehicles ("DMV") to introduce certified copies of records relating to the defendant and Williams. GA 659-679. The government introduced DMV records relating to the drivers license history of the defendant and Williams. GA 669-675. The defendant did not have any objection to these documents. GA 675.

The defendant objected to certain parts of DMV records relating to a black Mercedes four-door sedan that was registered to the defendant (*i.e.*, Government Exhibit 24). *See* GA 666-667, 676-679. The defendant claimed that the State Attorney's Office forged and fabricated certain of the defendant's DMV records and someone

placed these fabricated records in the DMV database. GA 658, 666-667. The court sought to avoid the controversy by suggesting that the government merely question the DMV witness about the *undisputed* facts reflected in those documents. GA 665. The government agreed not to seek to introduce the challenged records (*i.e.*, Government Exhibit 24) into evidence, but just to ask the DMV representative about undisputed portions of these records. GA 676. The defendant expressly agreed to this procedure. GA 676. The government followed this course, and questioned the DMV witness without objection from the defendant. GA 676-679. After the government completed its questioning of the DMV witness, the defendant chose not to cross-examine the witness. GA 679.

B. Governing law and standard of review

As noted above, a district court has "wide discretion in determining the admissibility of evidence under the Federal Rules," and this Court reviews the admission of evidence for abuse of that discretion. *Abel*, 469 U.S. at 54-55; *Garcia*, 413 F.3d at 210. Trial errors that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction. *See Colombo*, 909 F.2d at 713; Fed. R. Crim. P. 52(a).

If a defendant fails to object to an evidentiary ruling at trial, the standard of review is even more stringent, and the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Applying this standard, "an appellate court may, in its discretion, correct an error not

raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict

in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

A defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted). "The law is well established that if, 'as a tactical matter,' a party raises no objection to a purported error, such inaction 'constitutes a true "waiver" which will negate even plain error review.'" *Quinones*, 511 F.3d at 321 (quoting *Yu-Leung*, 51 F.3d at 1122) (footnote omitted).

C. Discussion

1. The defendant's claim about allegedly altered DMV records is meritless.

The defendant contends that the government used forged documents from the Connecticut DMV to prosecute him, but this argument rests on a misreading of the record. Putting aside that the defendant has absolutely *no evidence* that the DMV records were, in fact, altered, the district court properly found that any such alterations were completely irrelevant to the issues at trial.

The government sought to introduce various DMV records to prove facts that were undisputed. *See* GA 659-679. When the defendant objected to the introduction of these "forged" or "altered" documents, the court sought to avoid the controversy by suggesting that the government merely question the DMV witness about the *undisputed* facts reflected in those documents. GA 665. The defendant expressly agreed to this procedure. GA 665, 676. The government followed this course, and questioned the DMV witness without objection from the defendant. GA 676-679. Indeed, some of the prosecutor's questions were so unobjectionable to the defendant that when the court inquired whether the defendant had any objection to the introduction of some of the DMV exhibits, he said, "No, Your Honor." GA 675. After the government completed its questioning of the DMV witness, the defendant chose not to cross-examine the witness. GA 679.

On this record, the defendant's claims have no merit. He expressly waived any objection to the admission of certain DMV documents, and the other documents (to which he did not waive his objection) were not admitted. In other words, even assuming *arguendo* that portions of the DMV records were altered, there were no altered DMV documents admitted into evidence over the defendant's objection.

To be sure, the district court precluded the defendant from questioning the DMV witness about the alleged alterations to the documents, but as the district court noted, any such alterations were irrelevant to the issues at trial. The DMV records, introduced through the DMV witness, were used merely to prove undisputed facts. Accordingly, any questioning about alleged alterations to *other portions* of the DMV records was irrelevant and thus properly excluded from evidence.

2. The defendant's claims about allegedly forged grand jury subpoenas are meritless.

Although the defendant's claims are not entirely clear, he appears to believe that the government forged grand jury subpoenas that were served upon the defendant and Williams, and that his former lawyer, Bruce Koffsky, then destroyed these allegedly forged subpoenas. The defendant appears to believe that the allegedly forged subpoenas would have bolstered his claim that the government "set him up." Def. Supp. Br. at 20-21.

The defendant has provided no support for his claim that the government forged grand jury subpoenas or that Attorney Koffsky destroyed those subpoenas. There is no basis in the record for either of these claims – aside from the defendant's own speculative assertions. Nor has the defendant identified *any* conceivable reason why the government would forge or fabricate grand jury subpoenas that it serves on witnesses. Likewise, the defendant has not identified any conceivable reason why his then-appointed counsel would destroy the allegedly forged grand jury subpoenas.

IV. The district court did not commit error or abuse its discretion by permitting the defendant's wife to testify or admitting the defendant's letters.

A. Relevant facts

On October 13, 2009, the district court held an evidentiary hearing to determine whether Williams's testimony or two handwritten letters that the defendant sent to Williams should be precluded by the marital communications privilege or the adverse spousal privilege. During the hearing, Williams provided sworn testimony. GSA 19. Williams indicated that she was testifying voluntarily. GSA 23-24. Williams provided testimony regarding, *inter alia*, two handwritten letters from the defendant that were sent to Williams by the defendant's brother. GSA 20-22, 28.

At the end of the evidentiary hearing, the district court held that the two letters were admissible, ruling, in part, as follows:

> The issue is whether these letters may be used by the government. Notwithstanding the defendant's invocation of the confidential marital communications privilege, the burden is on the defendant as the party invoking the privilege to show that the requirements of the privilege are satisfied. In particular, the defendant has to show the letters were transmitted to Ms. Williams in confidence. Based on the evidence, it is clear that they were not transmitted in confidence. It is undisputed that they were submitted through the defendant's brother, Michael. And since they were shared with him, the privilege does not apply as to these letters.
>
> On the question whether the marriage was moribund by the date these letters were sent, I find it was. The testimony establishes that Ms. Williams regarded herself as single, at least as of the time she registered at the university in Tallahassee in 2001, and nothing happened to change that when these letters were received in or about the end of October 2005. So, for that reason as well I think that the privilege does not apply to these letters, or at least it hasn't been established that the privilege does apply to them. And accordingly, the government may use the letters and the defendant's motion in

> limine to preclude the government from using the letters is therefore denied.

GSA 29-30.

At trial, Williams testified during the government's case-in-chief. *See* GA 140-217. Williams testified regarding, *inter alia*, the two handwritten letters from the defendant that were sent to Williams in 2005 by the defendant's brother. *See* GA 167-70. One letter was previously offered into evidence by the defendant as Defense Exhibit 1 during the defendant's cross examination of Special Agent Kristin Bohardt Sullivan. *See* GA114-122. The defendant did not object at trial to the admission of either letter. *See* GA114-122, 167-170.

After trial, at the defendant's sentencing hearing, the district court found, in part, as follows: the defendant and Williams "never lived together. They never consummated their marriage. They lived entirely separate lives. She reported herself to others as a single person, and it's clear that this marriage was a sham." GSA 35.

B. Governing law and standard of review

1. Relevant law

Rule 501 of the Federal Rules of Evidence states that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted

by the courts of the United States in the light of reason and experience." Fed R. Evid. 501.

There are two distinct marital privileges recognized by the common law rules of testimonial privilege. First, there is the adverse spousal testimony privilege which "permits an individual to refuse to testify in a criminal proceeding against her or his spouse." *United States v. Premises Known as 281 Syosset Woodbury Road, Woodbury, N.Y.*, 71 F.3d 1067, 1070 (2d Cir. 1995). The adverse spousal testimony privilege operates to protect marital harmony by "ensuring that a husband and wife will not be forced to bear witness against each other." *Id.* In *Trammel v. United States*, 445 U.S. 40, 53 (1980), the Supreme Court modified the privilege "so that the *witness spouse alone* has a privilege to refuse to testify adversely." (emphasis added).

Second, there is the confidential marital communications privilege, which "is narrower than the adverse spousal testimony privilege." *271 Syosset Woodbury Road*, 71 F.3d at 1070. The confidential marital communications privilege seeks only "to protect the intimacy of private marital communications, but it can be invoked by either spouse to prevent the revelation of such communications." *Id.* (citation omitted). "[T]his privilege can be successfully asserted only when there exists a marriage valid at the time the communication is made." *In re Witness Before Grand Jury*, 791 F.2d 234, 237 (2d Cir. 1986). "The burden of showing the existence of such a valid marriage rests on the person seeking to invoke the privilege." *See id.*

When a relationship is "entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, ... the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule." *Lutwak v. United States*, 344 U.S. 604, 614-15 (1953); *see United States v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977) (since trial judge found marriage to be a sham and fraud, the judge could have ordered wife to testify); *United States v. Apodaca*, 522 F.2d 568 (10th Cir. 1975) (appellant not allowed to assert marital privilege because it was based upon a fraudulent, spurious marriage that was not entered into in good faith).

Neither privilege may apply when a particular marriage is "moribund." *In re Witness Before Grand Jury*, 791 F.2d at 238. In determining whether a marriage is "moribund," a district court rely primarily on the period of time that a couple has been physically estranged and "the longer the period of estrangement at the time of the subject 'communications', the easier it will be for the government to show that the couple, though still legally wed, had been in fact permanently separated and thus [can] not invoke the privilege." *Id.*

2. Standard of review

As noted above, this Court reviews the admission of evidence for abuse of that discretion. *Garcia*, 413 F.3d at 210. If a defendant objects to an evidentiary ruling at trial and the alleged error does not affect the substantial rights of the defendant, the error is subject to harmless error

analysis. *See Colombo*, 909 F.2d at 713; Fed. R. Crim. P. 52(a). On the other hand, if a defendant fails to object to an evidentiary ruling at trial, then the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See Morris*, 350 F.3d at 36. *See generally*, *supra* at III.B. (describing plain error review).

C. Discussion

As an initial matter, the defendant cannot invoke the adverse spousal testimony privilege. This privilege can only be invoked by the witness spouse. *See Trammel*, 445 U.S. at 53; *In re Witness Before the Grand Jury*, 791 F.2d at 237 (recognizing that the Supreme Court in *Trammel* "held the adverse testimony privilege could not be invoked by one spouse to block the voluntary testimony of another spouse"). Further, there is nothing to suggest that Williams's testimony was anything but voluntary. While the defendant alleges that the trial judge compelled Williams to testify, *see* Def. Supp. Br. at 17, the defendant has not identified – because he cannot identify – any facts suggesting that Williams was compelled to testify.

The defendant further argues that Williams's testimony violated the marital communications privilege. *See* Def. Supp. Br. at 17, 28. Aside from the two letters discussed below, the defendant has not identified any testimony by Williams that he maintains was improperly admitted. Indeed, the vast majority of Williams's testimony did not involve confidential communications between Williams and the defendant, but rather described their "actions that are not communicative." *In re Witness Before the Grand*

Jury, 791 F.2d at 239 (confidential marital communications privilege is not available where evidence does not involve "communications"). To the extent that Williams testified about any communications between Williams and the defendant, the communications were after the marriage was clearly "moribund" and the communications related to the defendant's on-going efforts to defraud CIS.

The defendant argues that the two letters that the defendant sent to his brother in 2005 to send to Williams should have been precluded. *See* Def. Supp. Br. at 17, 28. One letter was admitted as Defense Exhibit 1 and Government Exhibit 2,[3] and the other letter was admitted as Government Exhibit 3. The defendant did not object at trial to the admission of either letter. *See* GA114-122, 167-170.

These letters were properly admitted for several independent reasons. *First*, the *defendant* introduced one of the letters (*i.e.,* Defense Exhibit 1) into evidence, so he cannot be heard to complain about the introduction of that letter. *See* GA114-122. *Second*, as the district court found at the sentencing hearing, "it's clear that this marriage was a sham." GSA 35. *Third,* regardless of whether the defendant's marriage to Williams was a sham, by 2005, when the letters were sent, their marriage plainly was "moribund." *See* Govt. Br. at 7-8. The evidence adduced at trial established that between at least 2001 (if not much earlier) and the date of the trial, the defendant and

[3] Government Exhibit 2 is a redacted copy of Defense Exhibit 1. *See* GA117-118.

Williams lived completely separate lives. *See id. Fourth*, the challenged letters were not "confidential." To the contrary, as the district court ruled at the October 13, 2009 evidentiary hearing, "it is clear that [the letters] were not transmitted in confidence. It is undisputed that they were submitted through the defendant's brother, Michael," and as such, are not privileged communications. *See In re Witness Before the Grand Jury*, 791 F.2d at 239 (confidential marital communications privilege is only available where the communications between spouses are "confidential") (citing *Wolfle v. United States*, 291 U.S. 7, 14 (1934) (husband's letter to wife not "confidential" because it had been dictated to stenographer)). *Fifth*, the letters were part of the defendant's fraudulent scheme. *See United States v. Estes*, 793 F.2d 465, 467-68 (2d Cir. 1986) (indicating that joint crime exception may allow a willing witness to testify regarding marital communications that were made in furtherance of joint criminal activity). In the letters, the defendant advised Williams not to cooperate with law enforcement and advised Williams regarding the defendant's life. *See* Govt. Br. at 11-12. During trial, Williams testified that information in the Government Exhibit 3 was "not true" and she believed that the letter was "a summary of what he (the defendant) wanted me to say or if I was asked maybe." GA 173-174. In short, the admission of the letters did not violate the marital communications privilege.

In sum, neither Williams's testimony nor the admission of the letters from the defendant to Williams was improper under the adverse spousal testimony privilege or the marital communications privilege.

V. The prosecution did not selectively prosecute the defendant.

A. Relevant facts

The defendant was charged in Count Three of the superseding indictment with making a false statement to a government agency, in violation of 18 U.S.C. § 1001. *See* Joint Appendix ("JA") 39-43. The government did not charge Williams, who testified during the government's case-in-chief. *See* GA 141-82. On October 22, 2009, a jury returned guilty verdicts on all three counts of the superseding indictment. *See* GA 881.

At the sentencing hearing on January 15, 2010, the district court found that Williams was a vulnerable person, who was manipulated by the defendant. The district court found, in part, the following:

> The marriage fraud, however, appears to me to be atypical. I believe that typically in a case involving marriage fraud you have two consenting adults who agree that a marriage will be entered into, and they then go their separate ways.
>
> Here the defendant took advantage of a young person, Chastidy Williams, 20 years of age at the time, living alone. He manipulated her and used her in the most callous way to obtain his selfish objective. Ms. Williams appeared here and testified and she impressed me as a remarkably simple, naive person, the very type of person who would be

vulnerable to the manipulation of this defendant. . . .

Notably, as the government points out regarding the marriage fraud, the defendant's scheme was perpetrated over a seven-year period. During this time, unbeknownst to Ms. Williams, the defendant opened bank accounts and investment accounts in the name of the defendant and Chastidy Williams. He added her to his automobile insurance, renters insurance and healthcare insurance. He created a fraudulent document from Advent Capital Partners Limited purporting to show that Chastidy Williams worked there. He created a fraudulent document that purported to show residences over the prior five-year period in an effort to make it appear that they lived together. He prepared numerous fraudulent documents for her signature which were submitted to immigration authorities. He added her name to his phone bills and utility bills. He added her name to his lease paperwork. He made arrangements for and paid for her travel to Connecticut so that she could execute a roommate addendum and other lease paperwork relating to his apartment at 429 Farmington Avenue here in Hartford. In August 2003, he took her to the Connecticut Department of Motor Vehicles so that she could obtain a non-driver Connecticut identification card showing a residence at 429 Farmington Avenue in Hartford. The defendant later made arrangements for and paid for her to

> travel to Hartford in March 2004 to attend an interview with the immigration officer.
>
> In fact, they never lived together. They never consummated their marriage. They lived entirely separate lives. She reported herself to others as a single person, and it's clear that this marriage was a sham.
>
> To the extent that Ms. Williams said anything at the trial to suggest otherwise, I observed her testimony, and I'm convinced that any statement she made along that line were the product of the defendant's manipulations of her here in court.
>
> The marriage fraud therefore is far from typical, it is exceedingly serious. . . .

GSA 33-35.

B. Governing law and standard of review

Prosecutors enjoy broad discretion in deciding whether and against whom to bring charges, and the decision to prosecute generally is not subject to judicial review. *See Wayte v. United States*, 470 U.S. 598, 608 (1985). The decision to prosecute may not, however, be deliberately based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 608 (internal quotation marks and citations omitted).

A threshold "presumption of regularity" attaches to a prosecutor's actions. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted). In order to overcome this presumption and succeed on a selective prosecution claim, a defendant confronts a deliberately "rigorous standard." *Id.* at 468. A defendant must provide "clear evidence" that the prosecutorial decision or action in question had both "'a discriminatory effect and ... was motivated by a discriminatory purpose.'" *Id.* at 465; *see also Wayte*, 470 U.S. at 608 (defendant must show that "decision to prosecute" was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights") (internal quotation marks and citations omitted).

The discriminatory effect prong requires a showing that "similarly situated individuals of a different [classification] were not prosecuted." *Id.* A defendant seeking to show discriminatory purpose must show " 'that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' " *Wayte*, 470 U.S. at 610 (citation omitted).

C. Discussion

The defendant cannot establish that the prosecution against him was deliberately based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte*, 470 U.S. at 608. Indeed, the record contains nothing showing that the government acted

maliciously or in bad faith in charging the defendant with the counts in the superseding indictment.

In the absence of any record evidence, the defendant argues that he was selectively prosecuted because Williams was not charged. As set forth in the Statement of Facts in the Government's Brief, the defendant was the mastermind and the driving force behind the defendant's scheme, perpetrated over a seven-year period, to defraud CIS. *See* Govt. Br. at 4-12. As the district court found, Williams was susceptible to the defendant's control and manipulation. *See* GSA 33-35. There is nothing to suggest that the government improperly singled out the defendant based on impermissible considerations.

The defendant argues next that he was selectively prosecuted because "it is absolutely impossible for '1 person' (Defendant Only) to commit the alleged Marriage Fraud crime." *See* Def. Supp. Br. at 30. In Count Three of the superseding indictment, the defendant is charged with making a false statement to a government agency in violation of 18 U.S.C. § 1001. And although it takes two people to get married, it is not impossible for one person to make a false statement to the CIS, as charged in Count Three of the superseding indictment. Accordingly, the defendant's claim is without merit.

VI. The court did not commit error, much less plain error, in admitting the defendant's immigration file.

A. Relevant facts

Count Three of the superseding indictment charged the defendant with making a false statement to a government agency in violation of 18 U.S.C. § 1001. This Count alleged, in part, the following:

> Beginning on or about October 23, 1997 and continuing through at least April 16, 2004, in the District of Connecticut and elsewhere, defendant JASON SHOLA AKANDE devised a scheme to obtain lawful permanent resident status by false and fraudulent representations to the United States Department of Homeland Security, U.S. Citizenship and Immigration Services and the United States Immigration and Naturalization Service that his marriage to a certain United States citizen known to the Grand Jury (hereinafter, referred to as the "U.S. Citizen") was *bona fide*.

JA 41.

At trial, the government offered into evidence the defendant's immigration file, which contains all records submitted by the defendant to the Citizenship and Immigration Services ("CIS") in support of his application for lawful permanent residency. *See* GA 80-83. The

defendant did not object to the admission of this exhibit. *See* GA 83.

B. Governing law and standard of review

1. Rules of Evidence

All relevant evidence is generally admissible in court. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence is relevant, however, the district court has the discretion to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Federal Rule of Evidence 404(b) limits the admissibility of evidence of other crimes, wrongs, or acts. Rule 404(b), however, does not apply to evidence that is intertwined with the charged offense:

> [E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997)). Such "intrinsic evidence" falls outside the scope of Rule 404(b) and is admissible at trial where it tends to prove the existence of an element of the charged offense. *See United States v. Birbal*, 62 F.3d 456, 464 (2d Cir. 1995).

In short, Rule 404(b) applies to evidence of "other crimes, wrongs, or acts" – not to acts directly relating to the crime charged. *See Gonzalez*, 110 F.3d at 942.

2. Standard of review

As noted above, this Court reviews the admission of evidence for abuse of that discretion. *Garcia*, 413 F.3d at 210. If a defendant objects to an evidentiary ruling at trial and the alleged error does not affect the substantial rights of the defendant, the error is subject to harmless error analysis. *See Colombo*, 909 F.2d at 713; Fed. R. Crim. P. 52(a). On the other hand, if a defendant fails to object to an evidentiary ruling at trial, then the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See Morris*, 350 F.3d at 36. *See generally*, Part III.B., *supra* (describing plain error review).

C. Discussion

The district court did not commit any error, much less plain error, in admitting the defendant's immigration file. As an initial matter, the defendant's immigration file is highly relevant to charges in the superseding indictment

and, in particular, Count Three. The immigration file contains the defendant's application and all other records submitted by the defendant in support of his application for lawful permanent residency. *See* GA 80-82. Further, Wayne Segrave, the CIS officer who interviewed the defendant and Williams, testified that he reviewed and relied on the file in adjudicating applications. *See* GA 271-75. In short, there arguably is nothing more relevant to the allegation in Count Three that the defendant made false and fraudulent representations to the CIS between October 1997 and April 2004 than the defendant's immigration file. Further, the defendant has not shown that the admission of the immigration file unfairly prejudiced him or that this *unfair* prejudice substantially outweighed the probative value of this evidence.

Moreover, even assuming *arguendo* that the immigration file was improperly admitted, the defendant cannot, as he must, show that the error was "clear and obvious," that the error "affected the appellant's substantial rights" or that "the error seriously affected the fairness, integrity or public reputation" of the trial. *Marcus*, 130 S. Ct. at 2164.

VII. The defendant's ineffective assistance of counsel argument should not be addressed on direct appeal.

A. Relevant facts

The defendant argues, for the first time on appeal, that his then-counsel, Sarah Russell, Esq., presented the defendant with a proposed plea offer sometime in 2005, but that she failed to advise him of the immigration consequences of a jury trial. *See* Def. Supp. Br. at 31.

B. Governing law and standard of review

"This Court is generally disinclined to resolve ineffective assistance claims on direct review." *United States v. Gaskin*, 364 F.3d 438, 467 (2d Cir. 2004) (citation omitted); *see also United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("this Court has expressed a baseline aversion to resolving ineffectiveness claims on direct review") (citation omitted). "Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." *Khedr*, 343 F.3d at 100 (citing *Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance" because the district court is "best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S.

500, 504, 505 (2003). "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-505. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . . inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims "will be capable of resolution on direct appeal." *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that "[w]hen faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). "The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

C. Discussion

Here, the defendant raises only claims of ineffective assistance of counsel for which there is an inadequate factual record, and accordingly, this portion of the appeal should be dismissed so that such claims may be presented and addressed in a petition made pursuant to 28 U.S.C. § 2255.

The defendant argues that: he was ordered deported based on his criminal convictions in the instant case; in 2005, the defendant was offered a plea agreement which would have resulted in an effective sentence of five months in prison; if the defendant had pled guilty pursuant to the proposed plea agreement, the defendant would not have been deportable; and if the defendant's then-appointed counsel, Sarah Russell, Esq., had advised the defendant of the immigration consequences of proceeding to trial, then the defendant would have pled guilty. *See* Def. Supp. Br. at 31. There is virtually no evidence in the record for this Court to properly decide these issues. There is no evidence in the record regarding, among other pertinent facts: whether the defendant was ordered removed; what were the established bases for the removal; whether a proposed plea agreement was presented to the defendant in 2005; and what, if anything, Attorney Russell advised the defendant regarding the immigration consequences of proceeding to trial or resolving his case pursuant to a plea agreement.

On this record, the Court cannot meaningfully decide: (1) that counsel's performance was so unreasonable under

prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gaskin*, 364 F.3d at 468 (quoting *Strickland*, 466 U.S. at 694). Accordingly, in light of the sparse factual record, this claim should be dismissed so that it may be presented and addressed in a petition made pursuant to 28 U.S.C. § 2255.

Furthermore, as the defendant notes, the Supreme Court is currently considering a case involving the proper standards for claims of ineffective assistance of counsel during plea negotiations where, as here, the defendant ultimately is convicted at trial. *See Lafler v. Cooper*, No. 10-209 (argued Oct. 30, 2011). Accordingly, if the defendant's ineffective assistance claim is considered as part of a petition under § 2255, the district court would have the opportunity to consider any guidance from the Supreme Court in *Lafler*.

Conclusion

For the foregoing reasons, and for the reasons set forth in the Government's principal response brief, the judgment of the district court should be affirmed.

Dated: November 9, 2011

Respectfully submitted,

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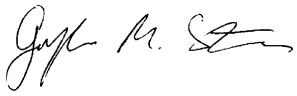

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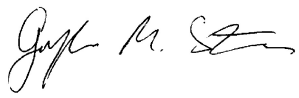
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,994 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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