AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District	
Name *(under which you were convicted)*: Samuel Mullet, Sr.		Docket or Case No.: 5:11-cr-00594
Place of Confinement: Elkton FCI	Prisoner No.: 57560-060	
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)*: Samuel Mullet, Sr.	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

   United States District Court for the Northern District of Ohio

   (b) Criminal docket or case number (if you know): 5:11-cr-00594

2. (a) Date of the judgment of conviction (if you know): 9/20/2012

   (b) Date of sentencing: 2/14/2013

3. Length of sentence: initially 15 years custody with credit for time-served; resentenced to 129 months custody

4. Nature of crime (all counts):

   Counts that remain: conspiracy to obstruct in violation of 18 U.S.C. § 371 (Count 1); obstruction of justice in violation of 18 U.S.C. § § 1519 and 2 (Count 8); making a false statement to law enforcement in violation of 18 U.S.C. § 1001 (Count 10).

5. (a) What was your plea? (Check one)

   (1) Not guilty ☑ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the Sixth Circuit

(b) Docket or case number (if you know): 13-3205

(c) Result: HCPA Counts 2, 4, 5, 6, 7 convictions vacated on direct appeal

(d) Date of result (if you know): 8/27/2014

(e) Citation to the case (if you know): United States v. Miller, 767 F.3d 585 (6th Cir. 2014)

(f) Grounds raised:

1. Whether the HCPA is an unconsitutional exerise of commerce power.
2. Whether the HCPA's term "because of" is unconsitutionally vague and overbroad, and was erroneously defined by the district court.
3. Whether the district court erroneously identified "kidnapping" under the HCPA
4. Whether the district court erroneously admitted prejudicial evidence of irrelevant sexual conduct under Fed. R. Evid. 404(b).
5. Whether the evidence is insufficient to support Mr. Mullet's cnvictions under the HCPA.
6. Whether Mr. Mullet's 15-year sentence is procedurally and substantively unreasonable.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): 16-6133

(2) Result: Petition for certiorari denied.

(3) Date of result (if you know): 2/21/2017

(4) Citation to the case (if you know): Mullet v. United States, 137 S.Ct. 1065 (Feb. 21, 2017)

(5) Grounds raised:

1. As a defense to federal obstruction and false statement charges, may a defendant challenge the unconstitutional investigation of a non-federal matter?

2. Is the federal kidnapping sentencing guideline, U.S.S.G. § 2A4.1, limited in application to conduct analogous to federal kidnapping or does the guideline apply broadly to even de minimis restraint conduct inherent to assault, as the Sixth Circuit is the first to now hold?

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☑ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: U.S. Court of Appeals for the Sixth Circuit

(2) Docket or case number (if you know): 15-3212

(3) Date of filing (if you know): 6/3/2015

(4) Nature of the proceeding: Appeal of district court resentencing

(5) Grounds raised:

1. Whether the district court erred in denying Mr. Mullet's motion to dismiss, where the investigation allegedly being obstructed was not a federal matter because the Hate Crime Prevention Act is an unconstitutional exercise of commerce power.
2. Whether the district court erred in applying the federal kidnapping Guideline, U.S.S.G. § 2A4.1, where there is no underlying verdict of kidnapping or evidence of an offense analogous to federal kidnapping.
3. Whether Mr. Mullet's 129-month sentence, based on an arbitrary mathematical formula, rather than a correctly calculated Guideline range and consideration of § 3553(a) factors, is procedurally and substantively unreasonable.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☑

(7) Result: Affirmed sentence on Counts 1, 8 and 10, United States v. Mullet, 822 F.3d 842 (6th Cir. 2016)

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Ineffective assistance of appellate counsel for failing to raise in the second appeal the admission of unfairly prejudicial evidence of coercive sexual misconduct

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The district court improperly permitted the introduction of evidence at trial that Mr. Mullet engaged in coercive sex with his daughter-in-law, Nancy Mullet, which allegedly occurred three years before the beard and hair cuttings. The district court also permitted evidence of a sexual relationship with Lovina Miller, the wife of Mr. Mullet's nephew. This evidence was impermissible under Rule 404(b), and it infected the entire trial against Mr. Mullet as to all the charged offenses. In light of Judge Griffin's statements at oral argument, including his observation that "if it's not reversible error, it's awfully close to being reversible error," appellate counsel was ineffective for failing to raise this issue in the second appeal.

For additional factual detail and legal argument, see the attached Memorandum in Support of Motion to Vacate and Set Aside Judgment of Conviction or Sentence Under 28 U.S.C. § 2255 ("2255 Memorandum").

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☑ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Counsel was ineffective at trial and on appeal for failing to object to inflammatory "Amish expert" testimony that exceeded the scope of the expert's permissible testimony.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

This Court was very definitive about the limitations on Dr. Kraybill's expert witness testimony, stating in the final pretrial that he was to "testify to general Amish practice, culture, and belief, and with specific reference to beards and haircutting. "This court further stated that Dr. Kraybill "is not going to be characterizing any of the defendants, giving his opinion on them." The government also represented to this court at the final pretrial that "in terms of specific opinions as to, for example, whether or not the Bergholz community is a cult and so forth, it is not the Govnerment's intention to elicit that kind of opinion." Yet despite this Court's explicit pretrial ruling limiting Dr. Kraybill's testimony, Dr. Kraybill impermissibly identified the Bergholz community as a cult with Mr. Mullet as its "autocratic leader" who governs by "coercion and force and threats and intimidation." Despite not being qualified as an expert on cults, Dr. Kraybill further opined that cults "develop novel or unusual rituals or practices," and that in such groups "sexual impropriety, sexual misconduct" is "very typical." Mr. Mullet's counsel was ineffective at trial for failing to object to the admission of this testimony and ineffective on appeal for failing to argue that this testimony infected the entire trial.

For additional factual detail and legal support, see the attached 2255 Memorandum.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☑ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: Counsel was ineffective at trial and on appeal for failing to object to the admission of an Associated Press article at trial through an FBI agent, which constituted a violation of Mr. Mullet's Confrontation Clause rights.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The government heavily relied on the AP article in opening and closing statements, treating it as a confession by Mr. Mullet. Specifically, four times in opening argument the government took Mr. Mullet's alleged statement in the AP article that "we know what we did and why we did it" out of context, and it did the same again twice in its closing arguments. However, Mr. Mullet's counsel did not object at trial to the government introducing these statements through Special Agent Michael Sirohman in violation of the Confrontation Clause, nor did he demand that the government call the AP reporter, Andrew Welsh-Higgins, to the stand. Counsel's failure to object at trial and to raise this issue on direct appeal constituted ineffective assistance of counsel.

For additional factual detail and legal support, see the attached 2255 Memorandum.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

In effective assistance of counsel.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: Failure to appeal Counts 1 and 8 for insufficiency of the evidence constitutes ineffective assistance of appellate counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The evidence at trial was insufficient to show Mr. Mullet's involvement in concealing the camera used by Daniel Shrock to photograph the hair and beard-cuttings. After the incidents, the camera was kept in a drawer in Eli Miller's room at Emmanuel Shrock's home. On October 9, 2011, the Jefferson County jail recorded several telephone calls, including one between Mr. Mullet and Lester Mullet, discussing the camera. During the call, Lester Mullet asked Mr. Mullet to "get rid of" the camera. Mr. Mullet replied "no, I won't throw that away, that might be everything we need." The testimony at trial confirms that -- after the jail recording discussion where Mr. Mullet specifically said not to get rid of the camera -- Mr. Mullet had no involvement with the camera. Indeed, Johnny Mast, Mr. Mullet's grandson, turned over the camera to authorities of his own volition after he was subpoenaed before a grand jury. Significantly, Mr. Mast testified at trial that: (1) he took possession of the camera from Daniel Shrock; (2) he alone made the decision to bury the camera; (3) he did not tell anyone -- including Mr. Mullet -- where the camera was hidden; and (4) no one told him to lie about the camera's location.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective assistance of counsel

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Grounds 3 and 4 were not raised on direct appeal or the second appeal. The reason for not presenting them was ineffective assistance of counsel.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:

(c) At the trial:
Edward Bryan, Esq.

(d) At sentencing:

(e) On appeal:
Edward Bryan, Esq.

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Because the U.S. Supreme Court denied Mr. Mullet's petition for a writ of certiorari on February 21, 2017 -- less than one year ago -- this motion is timely filed. (See Dkt. 746.)

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Vacate and set aside the conviction on Counts 1, 8 and 10

or any other relief to which movant may be entitled.

s/ Richard H. Blake
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____.
(month, date, year)

Executed (signed) on _____ (date)

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 5:11-cr-00594
	)	
Plaintiff,	)	JUDGE POLSTER
	)	
vs.	)	
	)	
	)	
SAMUEL MULLET, SR.,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT OF CONVICTION OR SENTENCE UNDER 28 U.S.C. § 2255

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. § 2255, Defendant Samuel Mullet, Sr. ("Mr. Mullet") respectfully requests that this Court vacate and set aside his judgment of conviction sentence based on ineffective assistance of counsel at trial and on appeal. This Memorandum and the attached Declaration of Edward Bryan, Esq. ("Bryan Declaration"), Mr. Mullet's trial and appellate counsel, make clear that counsel was ineffective when he: (1) failed to raise in the second appeal the admission of unfairly prejudicial evidence of coercive sexual misconduct with one of his daughters-in-law that allegedly took place more than three years before the beard and hair-cuttings – as well as evidence of a sexual relationship with another female relative – which infected the entire trial on all counts; (2) failed to object during trial and on the second appeal to inflammatory "Amish expert" testimony that exceeded the scope of the expert's permissible testimony, pursuant to this Court's explicit limiting instructions at the final pretrial; (3) failed to object at trial to the admission of an AP article introduced through an FBI agent, despite the fact that the article's admission was a clear violation of Mr. Mullet's Confrontation Clause rights; and (4) failed to appeal Counts 1 and 8 on sufficiency of the evidence grounds.[1] Mr. Bryan admits he was deficient in raising these issues, and this failure was not attributable to any trial or appellate strategy. Declaration of Edward G. Bryan, Esq. ("Bryan Decl." ¶¶ 27-35, attached hereto was **Exhibit 1**.)

Absent these errors, there is a reasonable probability that the result at trial would have been different. These claims also could have prevailed on appeal and were so compelling that

[1] As this Memorandum makes clear, Mr. Mullet is entitled to habeas relief on Counts 1, 8 and 10 under the cumulative-effect theory. While Mr. Mullet does not directly challenge his § 1001 conviction on Count 10, the maximum penalty for this offense – and the sentence he received on this count – is five years. (*See* 18 U.S.C. § 1001(a), stating an individual shall be "imprisoned not more than 5 years" under this title). If, however, this Court elects to grant habeas relief on only Counts 1 and 8, Mr. Mullet is still entitled to release on Count 10 for time-served because Mr. Mullet has been confined for over five years.

the failure to raise them amounted to ineffective assistance of appellate counsel. Moreover, even if this Court concludes that not one of these identified errors warrants relief on its own, habeas relief should be granted because the cumulative effect theory applies here inasmuch as the combined errors produced a trial setting that was fundamentally unfair.

Mr. Mullet also requests an evidentiary hearing on his 2255 Motion. Mr. Mullet meets his light burden for entitlement to an evidentiary hearing because the motion and the records of this case do not conclusively show that he is not entitled to relief. It is also necessary for this Court to hear the testimony of Mr. Bryan at the evidentiary hearing to fully evaluate the strength of the ineffective assistance claims.

II. STATEMENT OF THE CASE

A. Trial

Mr. Mullet is an Amish farmer and the 71-year-old Bishop of the Bergholz Amish community in Bergholz, Ohio. From September 2011 to November 2011, members of the Bergholz Amish community cut the hair or beards of other Amish persons in five different incidents. *United States v. Miller*, 767 F.3d 585, 589-600 (6th Cir. 2014) (detailing incidents and vacating hate crime convictions), *reh'g en banc denied* (Nov. 20, 2014). Mr. Mullet was not present at any of these incidents. *Id.*

The Government introduced highly inflammatory testimony at trial under a Rule 404(b) theory from Nancy Mullet, one of Mr. Mullet's daughters-in-law. Nancy Mullet and her husband, Eli Mullet – one of Mr. Mullet's sons – left the Bergholz community in 2008 and have not returned since then. (Dkt. 529, Trial Tr., PageID # 5685, 5698.) Nancy Mullet testified that Mr. Mullet coerced her to engage in sexual relations with him in 2008, ***three years before the beard and hair-cutting incidents***. (Dkt. 529, Trial Tr., PageID # 5677-5685.) The Government

further introduced testimony of a sexual relationship Mr. Mullet had in 2011 with his nephew's wife, Lovina Miller. (Dkt. 540, PageID # 6828, 6742-43.)

The admission of Mr. Mullet's improper sexual conduct bolstered the testimony of the Government's "Amish cultural expert," Dr. Kraybill. Dr. Kraybill testified that the Bergholz community was a cult, stating that "sexual impropriety, sexual misconduct" is "very typical in groups like this." (R. 541, PageID # 2981-2982.) Dr. Kraybill also repeatedly characterized the Bergholz community as a "lone ranger group" outside the norms of the Amish. (*Id.* at PageID # 7010.) Mr. Mullet's counsel did not object to this testimony, despite the fact that Dr. Kraybill had no expertise in cults and his testimony went far beyond the scope of this Court's explicit testimonial limiting instructions at the final pretrial. After testifying at trial, Dr. Kraybill released a book ("*Renegade Amish: Beard Cuttings, Hate Crimes and the Trial of the Bergholz Barbers*") that was highly critical of Mr. Mullett and the Bergholz community.

In their opening and closing arguments, the Government also heavily relied on statements – which the government characterized as a confession – that Mr. Mullet allegedly made to an Associated Press reporter that subsequently appeared in an AP article. (Dkt. 529, Trial Tr., PageID # 5101, 5102, 5106; Dkt. 542, Trial Tr., PageID # 7269, 7473.) The AP article was introduced through a case agent. Despite the fact that the admission of this evidence was a clear violation of the Confrontation Clause, Mr. Mullet's counsel did not object at trial or on appeal to either the admission of the AP article or the manner it was introduced.

The jury found that four of the five incidents amounted to hate crimes, convicting all sixteen defendants under the HCPA. (Dkt. 230, Jury Verdict Forms). Mr. Mullet was also convicted on Count 1 under 18 U.S.C. § 371 for (1) conspiracy to commit hate crimes and (2) conspiracy to obstruct by concealment of a disposable camera containing pictures of some

incidents. (*Id.*) The jury further convicted Mr. Mullet of obstruction for concealing a camera used to photograph two of the incidents under 18 U.S.C. § 1519 (Count 8) and making a false statement regarding his prior knowledge of one incident to the arresting FBI agent under 18 U.S.C. § 1001 (Count 10). (*Id.*) The jury acquitted all of the defendants charged in Count 3 (Levi Miller, Eli Miller, Emanuel Shrock and Mr. Mullet), which involving an alleged assault on David Wengerd. It further acquitted Mr. Mullet on the Count 7 obstruction charge of concealing a bag of hair. (*Id.*)

The government sought a life sentence for Mr. Mullet. (Dkt. 358, Gov't Sent. Mem., PageID # 4234-50.) At sentencing, Mr. Mullet offered to accept the criminal responsibility for all his co-defendants, asking the Court to "let these dads and moms go home to their families, raise their children, and I'll take the punishment for everybody." (Dkt. 545, Sent. Tr., PageID # 7663-64.) On February 14, 2013, this Court imposed a 15-year sentence on Mr. Mullet, concurrent on all counts. (Dkt. 389, Judgment.)

B. Direct Appeal

On February 15, 2013, Mr. Mullet and the other defendants filed a direct appeal of this Court's denial of the pretrial motions, post-trial motions, and the sentencing. (Dkt. 425, Notice of Appeal.) Mr. Mullet raised the following issues:

(1) whether the HCPA is an unconstitutional exercise of commerce power;

(2) whether the HCPA's term "because of" is unconstitutionally vague and overbroad, and was erroneously defined by the district court;

(3) whether the district court erroneously defined "kidnapping" under the HCPA;

(4) whether the district court erroneously admitted prejudicial evidence of irrelevant sexual conduct under Fed. R. Evid. 404(b);

(5) whether the evidence is insufficient to support Mr. Mullet's convictions under the HCPA;

> (6) whether Mr. Mullet's 15-year sentence, the highest sentence to date for a HCPA violation, is procedurally and substantively unreasonable.

(Sixth Cir. Case No. 13-3205, Dkt. 67, Samuel Mullet, Sr., Appellant Br.) Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, Mr. Mullet's counsel incorporated by reference the argument of his co-defendants (6th Cir. Case No. 13-3205, Dkt. 67, PageID # 24), including co-defendant Anna Miller's argument that Dr. Kraybill's testimony rendered the trial fundamentally unfair. (6th Cir. Case No. 13-3183, Anna Miller Appellant Br., PageID # 62-68.)

Mr. Mullet's counsel did not challenge on appeal Mr. Mullet's convictions for conspiring to obstruct justice, obstructing justice, and making false statements. *United States v. Miller,* 767 F.3d 585, 591-92 (6th Cir. 2014); *see also* Dkt. No. 639, Order, PageID # 8883 ("And it is undisputed that counsel for Mullet conceded at oral argument before the Sixth Circuit that he was not challenging the non hate crime-related convictions.") Mr. Mullet also did not argue on appeal that the AP article violated Mr. Mullet's Confrontation Clause rights.

At oral argument in the first appeal, Judge Griffin expressed grave concerns regarding the admission of the evidence about Mr. Mullet's coercive sexual relationship with Nancy Mullet, pursuant to Fed. R. Evid. 404(b). Specifically, Judge Griffin said the testimony was "overwhelmingly prejudicial," that it should have been excluded under the balancing test, and "strongly encourage[d] the government not to bring it up" at any re-trial because "if it's not reversible error, it's awfully close to being reversible error." (6th Cir. Case No. 13-3177, June 26, 2014 Oral Argument at 1:05:53 – 1:06:41.)

On August 27, 2014, the Sixth Circuit reversed the hate crime convictions (counts 2, 4, 5, 6, 7) because the government had not been required to prove that the victims' actual or perceived religious beliefs were the cause of the incidents. *Miller*, 767 F.3d at 591-94 (citing *Burrage v.*

United States, 131 S. Ct. 881, 889 (2014) (criminal statutes using the term "because of' require a showing of "but-for causality")). Referring to the other challenges raised, including the evidence of sexual misconduct under Rule 404(b), the Sixth Circuit stated that "[w]hile these other arguments present not-inconsequential issues, we need not address them given our conclusion that the erroneous jury instructions require a new trial." *Miller*, 767 F.3d at 602.

C. Second Appeal

Following the Sixth Circuit's reversal of the hate crime convictions, the government elected not to re-try the hate crime charges. (Dkt. 645, Gov't Notice.) On March 9, 2015, this Court ultimately resentenced Mr. Mullet to 129 months of imprisonment – five years on Count 1; five years on Count 10; and 129 months on Count 8, all to run concurrently. (Dkt. 663, Am. Judgment in Crim. Case.)

Mr. Mullet subsequently filed a second appeal presenting the following issues for review:

> 1. Whether the district court erred in denying Mullet's motion to dismiss, where the investigation allegedly being obstructed was not a federal matter because the Hate Crime Prevention Act is an unconstitutional exercise of commerce power.
>
> 2. Whether the district court erred in applying the federal kidnapping Guideline, U.S.S.G. § 2A4.1, where there is no underlying verdict of kidnapping or evidence of an offense analogous to federal kidnapping.
>
> 3. Whether Mullet's 129-month sentence, based on an arbitrary mathematical formula, rather than a correctly calculated Guideline range and consideration of § 3553(a) factors, is procedurally and substantively unreasonable.

(6th Cir. Case No. 15-3212, Dkt. No. 15, Appellant Br at PageID # 12.) Despite the fact that Judge Griffin had previously indicated at oral argument in the direct appeal that the sexual misconduct evidence could have been reversible error, Mr. Mullet's counsel failed to argue this evidence deprived Mr. Mullet of his Due Process rights in the second appeal. (Bryan Decl. ¶

32.) Mr. Mullet's counsel also did not argue in the second appeal that Dr. Kraybill's testimony likewise constituted a deprivation of Mr. Mullet's Due Process rights. (*Id.* ¶ 27-29.)

The Sixth Circuit denied the second appeal on June 28, 2016. *United States v. Mullet,* 822 F.3d 842 (6th Cir. 2016). The Sixth Circuit noted that Mr. Mullet did not challenge their extant convictions on the first appeal "and that makes all the difference," explaining that "[i]n criminal case after criminal case, we have declined to allow a criminal defendant who fails to challenge part of a conviction in an earlier appeal to raise it in a later appeal." *Id.* at 846-47 (collecting cases).

Mr. Mullet and two of his co-defendants, Lester Miller and Kathryn Miller, subsequently filed a petition for certiorari to the United States Supreme Court. The Supreme Court denied Mr. Mullet's petition on February 21, 2017. *United States v. Mullet,* 137 S.Ct. 1065 (2017). Mr. Mullet now timely files his 2255 Motion.

III. GROUNDS FOR RELIEF

A. Statutory Framework

Federal law provides an individual the right to vacate his conviction or sentence under 28 U.S.C. § 2255 based upon "an error of constitutional magnitude." *Short v. United States,* 471 F.3d 686, 689 (6th Cir. 2006); *see also Valentine v. United States,* 488 F.3d 325, 331 (6th Cir. 2007) ("[a] prisoner who proves that the process leading to his conviction was tainted by an 'error of constitutional magnitude' is entitled to relief under § 2255"). Because assistance of counsel is guaranteed by the Sixth Amendment, ineffective assistance of counsel is such an error of constitutional magnitude. *See id.* (citing *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970)). To establish constitutionally ineffective assistance of counsel, a petitioner must show that (1) his "counsel's representation fell below an objective standard of reasonableness,"

Strickland v. Washington, 466 U.S. 668, 688, (1984), and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Valentine,* 488 F.3d at 338. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

When an error could have been raised at trial or on direct appeal, a petitioner's failure to do so is excused by a showing that there is cause for the default, and that actual prejudice resulted from the error. *United States v. Frady*, 456 U.S. 152, 167-68 (1982). A petitioner is excused when the default is the result of ineffective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Under these circumstances, counsel's deficient performance is "cause." *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993) ("The ineffective assistance of counsel constitutes cause."). And the showing of prejudice necessary to establish ineffective assistance establishes actual prejudice. *Payne v. United States*, No. 93-6129, 1995 WL 6060, at *1 (6th Cir. Jan. 6, 1995) ("If prejudice is demonstrated in the ineffective assistance analysis, the 'actual prejudice' prong of § 2255 will be satisfied.").

Significantly, a defendant asserting ineffective assistance of counsel need not establish that counsel's error more likely than not affected the outcome of his trial. Rather, he need only present a sufficient probability to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 693-94. In the appellate context, the court must first assess the strength of the claim appellate counsel failed to raise. *Id.* "If there is a reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, [the court] can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel." *Id.*

B. Errors of Constitutional Magnitude Affected Mr. Mullet's Trial and Appeal

As set forth below and in Mr. Bryan's Declaration, Mr. Mullet was prejudiced by the deficient performance of counsel when he: (1) failed to raise in the second appeal the admission of unfairly prejudicial evidence of coercive sexual misconduct with one of his daughters-in-law, as well as evidence of a sexual relationship with another female relative, which infected the entire trial; (2) failed to object during trial and on the second appeal to expert statements that exceeded the scope of the expert's testimony pursuant to this Court's explicit limiting instructions at the final pretrial; (3) failed to object at trial to the admission of the AP article introduced through an FBI agent, despite the fact that the article's admission was a clear violation of Mr. Mullet's Confrontation Clause rights; and (4) failed to appeal Counts 1 and 8 on sufficiency of the evidence grounds. (Bryan Decl. ¶ ¶ 27-35.)

The failure of counsel to raise these errors constitutes cause for the default under § 2255. Because prejudice is demonstrated in the ineffective assistance analysis set forth below, the "actual prejudice" prong of § 2255 is also satisfied.

C. Ground for Relief # 1: Admission of Mr. Mullet's Alleged Sexual Misconduct Was Unfairly Prejudicial, Not Probative, And Infected the Entire Trial

This Court improperly permitted the introduction of evidence at trial that Mr. Mullet engaged in coercive sex with his daughter-in-law, Nancy Mullet, which allegedly occurred ***three years before the beard and hair cuttings.*** This Court also permitted additional evidence of Mr. Mullet's sexual relationship with Lovina Miller, the wife of Mr. Mullet's nephew. This evidence was not permissible under Rule 404(b), and it infected the entire trial against Mr. Mullet as to all the charged offenses. In light of Judge Griffin's statement at oral argument and the majority opinion in the first appeal, there is a reasonable probability that this argument could have prevailed on the second appeal. Because the claim was so compelling, counsel's failure to raise it on the second appeal amounted to ineffective assistance of appellate counsel.

Nancy Mullet testified that Mr. Mullet initially started counseling her about her marriage after Eli Mullet, her husband and Mr. Mullet's son, was hospitalized for a mental health breakdown. (Dkt. 529, Trial Tr., PageID 5676-5677.) Nancy Mullet testified that Mr. Mullet told her that Eli Mullet's illness was caused by his dissatisfaction with their marriage, and he urged Nancy to sit on his lap and hug and kiss him so that "Eli can get better." (*Id.*, PageID 5678.) Nancy described escalating physical contact — hugging to sitting on his lap to kissing — culminating in Nancy becoming sexually intimate with Sam because she "was afraid not to." (*Id.*, PageID 5678-5679, 5682.) Nancy testified that after she decided to stop having sex with Mr. Mullet, he castigated her in front of four other couples who agreed that his sexual intimacy with the women helped their marriages. (*Id.*, PageID 5683.) Nancy Mullet also testified that she had one more conversation with Mr. Mullet about their sexual relationship, at which time he took back a book he had given to Nancy "about the intimate things he was doing with the ladies" and called Nancy a "whore." (*Id.*, PageID 5684.) Nancy Mullet said this episode ultimately drove Nancy and Eli from Bergholz in 2008. (*Id.*, PageID 5685, 5698.)

In addition to Nancy Mullet's inflammatory testimony that allegedly occurred three years before the beard and hair-cuttings, this Court improperly allowed irrelevant evidence about Samuel Mullet's sexual relationship with Lovina Miller. FBI Special Agent Michael Sirohman testified that during the execution of arrest and search warrants at Samuel Mullet's house around 6:00 a.m. on November 23, 2011, agents knocked on Samuel Mullet's bedroom door, and he responded that he was getting dressed or needed to put on clothes. (Dkt. No. 540, Trial Tr., PageID 6742-6743.) One or two minutes later, Samuel Mullet and Lovina Miller — Eli Miller's wife who was about nine months pregnant — exited the bedroom. (R. 540, PageID 6742-6743, 6828.) These details had nothing to do with the charges against Mr. Mullet. Moreover, the

admission of this salacious evidence bolstered Dr. Kraybill's characterization of the Bergholz Amish as a cult, as he testified that "sexual impropriety, sexual misconduct" is "very typical in groups like this." (R. 541, PageID 2981-2982.)

This evidence of Mr. Mullet's sexual misconduct was irrelevant, and its prejudicial effect substantially outweighed its probative value, serving only to inflame and confuse the jury. Prior bad acts can be admitted under Rule 404(b) only when: "(1) use of the evidence is for a proper purpose (that is, other than as character or propensity evidence), (2) relevance, (3) the evidence not be substantially more unfairly prejudicial than probative pursuant to Rule 403, and (4) the court give a limiting instruction, if requested, such that the jury will only consider the evidence for the proper purpose rather than as character or propensity evidence." *United States v. Stout,* 509 F.3d 796 (citing *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988)). Nancy Mullet's testimony was not relevant because she was not a member of the charged conspiracy or a victim in this case. The evidence was substantially more unfairly prejudicial than probative, especially in light of the fact that it was unnecessary because other witnesses spoke about Mr. Mullet's leadership role in the community. *See United States v. Adams,* 722 F.3d 788, 831 (6th Cir. 2013) (holding the evidence was unfairly prejudicial, in part because of the availability of other evidence with the same probative value); *United States v. Merriweather,* 78 F.3d 1070 (6th Cir. 1996) (same).

Judge Griffin, one of the judges on the first Sixth Circuit panel, stated at oral argument that he was "disturbed" about the sexual misconduct evidence that was introduced at trial, characterizing it as "a very troubling issue." (6th Cir. Case No. 13-3177, June 26, 2014 Oral

Argument at 1:05:53-56.)[2] Judge Griffin stated he didn't "see much probative value in it" given the fact that Mr. Mullet's role in the community had been established by other testimony, and he saw "the prejudicial value of the coercive sex with the daughter-in-law to be overwhelmingly prejudicial." (*Id.* at 1:06:01-24.) Judge Griffin said this evidence "under the balancing test should have been excluded." (*Id.* at 1:06:24-30.) He further told the Government:

> I want to caution you, if we do have a re-trial, I would strongly encourage you not to bring it up because I think if it's not reversible error, it's awfully close to being reversible error.

(*Id.* at 1:06:24-31-43.) Judge Griffin also expressed incredulity with the government's position that Mr. Mullet's control over the community could be established by the fact that he "had sex with his daughter-in-law." (*Id.* at 1:08:53-1:09:01.)

A review of Sixth Circuit case law also confirms that this type of sexual evidence, which is wholly unrelated to the charged offense, is improper under Rule 404(b). For example, in *United States v. Stout,* 509 F.3d 796 (6th Cir. 2007), the defendant stood trial in federal court for receipt and possession of sexually explicit visual depictions of minors. The Sixth Circuit held that evidence that the defendant had pleaded guilty in state court to surreptitiously videotaping a 14-year-old female neighbor while she showered was not admissible under 404(b). The *Stout* majority found that:

> The prior bad acts evidence is potentially prejudicial because it is both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct. As a consequence, the jury is likely to pay undue attention to it.... [T]here is a strong possibility that the jury will be improperly distracted from the primary evidence at hand.

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[2] Counsel attempted to obtain a written transcript of the first Sixth Circuit oral argument but was told it was only available on the Sixth's Circuit website in an audio version at http://www.opn.ca6.uscourts.gov/internet/court_audio/audSearch.html. Accordingly, quotations include the approximate time at the oral argument when the statements were made.

Id. at 801 (quoting district court). The Sixth Circuit majority also recognized that "[t]he public regards sexually-based offenses as particularly heinous," and a limiting instruction would not mitigate any danger of unfair prejudice. *Id.* at 802. Similarly, the Sixth Circuit held in another case that testimony that a defendant charged with mail and wire fraud was a prostitute "was wholly unrelated to the charges against her . . . and served only to cater to the passions of the jury," which "tended to put her on trial for conduct not in the indictment, and prejudiced her chance for a fair trial." *United States v. McFadyen-Snider*, 552 F.2d 1178, 1182 (6th Cir. 1977).

Here, as in *Stout,* evidence of Mr. Mullet's sexual misconduct was "lurid," and it is likely that the jury was "more alarmed and disgusted by the prior acts than the actual charged conduct." *See Stout,* 509 F.3d at 801. And admission of this evidence tended to put Mr. Mullet on trial for uncharged conduct, prejudicing his chance for a fair trial. *See McFadyen-Snider,* 552 F.2d at 1182. Despite Judge Griffin's critical comments of the admission regarding the sexual misconduct evidence under Rule 404(b), the Sixth Circuit never reached this issue in the first appeal because the hate crime convictions were vacated. In light of Judge Griffin's comments – and the majority opinion's recognition that the introduction of Mr. Mullet's sexual relationship with his daughter-in-law was a "not-inconsequential issue," *Miller*, 767 F.3d at 602 – there is a reasonable probability that Mr. Mullet would have prevailed on the second appeal. Counsel should have argued that admission of such evidence violated Mr. Mullet's Due Process Rights and, in fact, infected all counts and the entire trial. Because the claim was so compelling, the failure of Mr. Mullet's counsel to raise it on the second appeal – by itself or as part of a cumulative error theory – amounts to ineffective assistance of appellate counsel under *Strickland.* Indeed, Mr. Bryan admits that his representation of Mr. Mullet was deficient in this

regard, and that his failure to raise the issue in the second appeal was not done for any strategic reason. (Bryan Decl. ¶ ¶ 33, 35.)

D. Ground for Relief # 2: Admission of Inflammatory "Amish Expert" Testimony Infected The Entire Trial

The failure of Mr. Mullet's counsel to object at trial to the admission of inflammatory testimony by the government's "Amish expert," Dr. Kraybill – testimony that flouted this Court's instructions regarding permissible scope – also constituted ineffective assistance trial.[3] Indeed, there is a reasonable probability that, but for this error, the result of the trial would have been different. Moreover, there is a reasonable probability that this argument could have prevailed on the second appeal.[4] Because the claim was so compelling, counsel's failure to raise it on the second appeal constituted ineffective assistance of appellate counsel.

This Court was very definitive about the limitations on Dr. Kraybill's testimony, stating in the final pretrial that:

> He is going to be limited to matters of his expertise, which is the general Amish practice, and the significance of beards for men and long hair for women. ***He is not going to be characterizing any of the defendants, giving his opinion on them.***

(Dkt. 314, Final Pretrial Hearing, PageID # 3543) (emphasis added). This Court further reiterated that Dr. Kraybill would only be allowed "to testify to general Amish practice, culture, and belief, and with specific reference to beards and haircutting." (*Id.* at 3546-3547.) Moreover, the government affirmatively stated at the final pretrial that "[i]n terms of specific opinions as to,

[3] On August 19, 2014, Dr. Kraybill published a book that was highly critical of Mr. Mullet titled *Renegade Amish: Beard Cuttings, Hate Crimes, and the Trial of the Bergholz Barbers.*

[4] Mr. Mullet's co-defendant, Lovina Miller, raised this issue on direct appeal. Mr. Mullet incorporated this argument by reference in his own direct appellate brief pursuant to Rule 28 of the Federal Rules of Appellate Procdure.

for example, whether or not the Bergholz community is a cult and so forth, it is not the Government's intention to elicit that kind of opinion." (*Id.* at 3543.)

Dr. Kraybill had never been to Bergholz, nor had he ever even talked with a member of the Bergholz community. (Dkt.541, Trial Tr., PageID # 7048, 7052, 7072). Despite this critical fact, this Court's pretrial explicit ruling limiting Dr. Kraybill's testimony, and the government's representations to this Court regarding the limited scope of Dr. Kraybill's testimony, Dr. Kraybill impermissibly:

- in response to a request by the government to opine on characteristics of "a cult," (Dkt. 541, PageID # 6980), identified the Bergholz community as a cult with Mr. Mullet as its "autocratic leader" who governs by "coercion and force and threats and intimidation" (Dkt. 541, Trial Tr., PageID # 6980);

- despite not being qualified as an expert on cults, opining that cults "develop novel or unusual rituals or practices," and that in such groups "sexual impropriety, sexual misconduct" is "very typical." (*Id*);

- described the Bergholz Amish community as "a lone ranger group" separate and apart from all other Amish in the United States (*Id.*);

- called the Bergholz practices "out of the Amish world," and testified, as an expert in Amish culture, that he "did not understand them" (*id.* at PageID# 7010);

- marginalized the Bergholz community's beliefs and practices by asserting that "they don't seem very Amish to me." (*Id*).

Significantly, Mr. Mullet's counsel did not object at trial to the admission of this testimony "characterizing the defendants, giving his opinion on them," despite this Court's definitive ruling that such testimony was barred. (Dkt. 314, Final Pretrial Hearing, PageID # 3543.) Nor did Mr. Mullet's counsel reiterate an argument in the second appeal that the testimony infected the entire trial. Mr. Bryan admits in his Declaration that he should have objected to this testimony at trial and in the second appeal, but failed to do so. (Bryan Decl. ¶ 30-31.) Mr. Bryan also confirms that this failure was not attributable to any strategic reasons. (*Id.*)

The Sixth Circuit has held that if the government is permitted "to paint an unfair picture of defendants and offer direct prejudicial evidence that should have been excluded," a new trial is required. *United States v. Adams*, 722 F.3d 788, 832-833 (6th Cir. 2013) (reversing conviction based on unfair trial where court admitted prejudicial testimony unconnected to the charged crime or any conduct by the defendants); s*ee United States v. McFadyen-Snider*, 552 F.2d 1178, 1182 (6th Cir. 1977) (testimony that defendant was a prostitute "was wholly unrelated to the charges against her . . . and served only to cater to the passions of the jury," which "tended to put her on trial for conduct not in the indictment, and prejudiced her chance for a fair trial"); *United States v. Ostrowsky*, 501 F.2d 318, 323-324 (7th Cir. 1974) (admission of details of murder in Dyer Act prosecution served only to create "prejudice among the jurors by subjecting them to a preoccupation with the defendants' involvement in a vicious act of violence").

Dr. Kraybill's testimony was not relevant, nor does it make any fact of consequence more or less probable than it would be without the evidence. *See* Fed. R. Evid. 401. Like the improper admission of inflammatory evidence of sexual misconduct, Dr. Kaybill's testimony infected the trial and deprived Mr. Mullet of his due process right to a fair trial. It was ineffective assistance of counsel to object to this evidence at trial, and this failure prejudiced Mr. Mullet. *See White v. McAninch,* 235 F.3d 988 (6th Cir. 2000) (affirming writ of habeas corpus relief based on ineffective assistance of counsel for failing to object when the prosecutor elicited testimony regarding an uncharged act of sexual intercourse).

Even if some relevance existed, the danger of unfair prejudice of this evidence substantially outweighs its probative value. *See* Fed. R. Evid. 403. The extent of prejudice is even more pronounced regarding Dr. Kraybill's testimony because "jurors may assign more weight to expert testimony than it deserves." *United States v. Pires*, 642 F.3d 1, 12 (1st Cir.

2011) (holding that "[b]ecause such testimony can carry with it an unwarranted 'aura of special reliability and trustworthiness,' courts must guard against letting it intrude in areas that jurors, by dint of common experience, are uniquely competent to judge without the aid of experts"); *see also United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977) ("the trial court clearly abused its discretion by allowing the Government to introduce extensive expert testimony of both dubious relevance and cumulative prejudicial impact"). Dr. Kraybill's characterizations of the Bergholz Amish community as outsiders, non-conforming, and as a cult were not harmless and could not have been disregarded by the jury. The failure to object therefore constituted ineffective assistance at trial. And because the claim was so compelling, the failure of Mr. Mullet's counsel to raise it on the second appeal – by itself or as part of a cumulative error theory – amounts to ineffective assistance of appellate counsel under *Strickland.*

E. Ground for Relief #3: Admission of the AP Article Violated Mr. Mullet's Confrontation Clause Rights And Infected the Entire Trial

Mr. Mullet's counsel was also ineffective for failing to object at trial that the admission of the AP article violated Mr. Mullet's rights under the Sixth Amendment Confrontation Clause and infected the entire trial. There is also a reasonable probability that, but for this error, the result of the trial would have been different. Moreover, because there is a reasonable probability that this compelling argument could have prevailed on the second appeal, counsel's failure to raise the argument constituted ineffective appellate assistance.

The government heavily relied on the AP article in opening and closing statements, treating it as a confession by Mr. Mullet to the crimes charged in the Superseding Indictment. Specifically, four times in opening argument the government took Mr. Mullet's alleged statement in the AP article that "we know what we did and why we did it" out of context, and it did the same again twice in its closing arguments. Moreover, Mr. Mullet's counsel did not object to the

government introducing these statements through Special Agent Michael Sirohman in violation of the Confrontation Clause, nor did he demand that the government call the AP reporter, Andrew Welsh-Huggins, to the stand. (Dkt. 293, Opinion and Order, PageID # 2803, citing 9/12/12 Tr. at 133-34.) "In fact, at trial, when the Court asked if there was any objection to the Associated Press report, defense counsel was silent."

(*Id.*, citing at 302.)[5]

After trial, Mr. Mullet filed a Rule 29 motion arguing in part that the admission of the AP article violated the Confrontation Clause, but the Motion did not assert that Mr. Mullet's alleged statements were testimonial.[6] In denying the motion with respect to the challenge to the admission of the AP article, this Court incorrectly stated that Mr. Mullet "could have taken the witness stand and clarified what he meant." (*Id.* at PageID # 2804). This Court also incorrectly stated that "[a]lternatively, if he did not want to take the stand, he could have called the reporter to testify in the defense case." *Id.*

The introduction of the AP article violated the Sixth Amendment Confrontation Clause. The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. "The main and essential purpose of confrontation is to secure for the opponent the

[5] The record indicates Mr. Mullet's counsel did attempt to lodge an objection at trial to the AP article. (*See* Dkt. 540, Trial Tr., PageID # 6772) ("We want to make an objection for the record. It's a video clip, and they are going to have a media report as well.") Counsel, however, did not specify any basis for the objection, let alone identify the admission of the AP article as a violation of Mr. Mullet's Confrontation Clause rights or point out that it was incumbent upon the Government to call the AP reporter to the stand. As this Court noted in its Opinion and Order, the burden is squarely on the party to "object with a reasonable degree of specificity to apprise the court of the true basis for his objection." *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004).

[6] Mr. Mullet's counsel filed a motion in limine prior to trial to exclude all reference to Mr. Mullet's statements to the media. This Court found that Mr. Mullet's counsel "never replied, either in writing or at the final pretrial conference at which the Court denied his motion, to clarify that he was objecting, not only to his statements, but also to the article itself." (Dkt. 293, Order denying Rule 29 Motion, PageID # 2803.)

opportunity of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974). The Confrontation Clause was implemented to eliminate "the principal evil" of using "ex parte examinations as evidence against the accused." *Michigan v. Bryant,* 562 U.S. 344, 353 (2011) (quoting *Crawford v. Washington,* 541 U.S. 36, 50 (2004)). Specifically, confrontation "impress[es] [the witness] with the seriousness of the matter and guard[s] against the lie by the possibility of a penalty for perjury" as well as "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Maryland v. Craig,* 497 U.S. 836, 845-46 (1990). Significantly, the Supreme Court has noted that cross examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis,* 415 U.S. at 316.

The Supreme Court recently confirmed that because a defendant has the right to be confronted with his accusers, the prosecution has the burden to produce the witness. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 324 (2009). This requires that the prosecution put the accusing witness on the stand and that the witness actually testify. *Id.* The Supreme Court in *Melendez-Diaz* recognized that, while the defendant had the ability to subpoena the affiant, "that power … is no substitute for the right of confrontation." *Id.* at 324. This rationale is premised on the Supreme Court's finding that:

> Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those witnesses into courts.

Id.

The Confrontation Clause applies to "testimonial" statements. In defining the parameters of a "testimonial" statement, the Supreme Court has recognized that:

> Various formulations of this core class of testimonial statements exist: *ex parte* in court-testimony or its functional equivalent – that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or ***confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.***

Crawford, 541 U.S. at 51-52 (emphasis added). The Supreme Court has held that where "testimonial evidence is at issue, … the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68 (2004). If the prosecution cannot establish these two requirements, "a witness's testimony against a defendant is thus inadmissible." *Melendez-Diaz,* 557 U.S. at 309.

The Second Circuit case of *United States v. Treacey,* 639 F.3d 32 (2d Cir. 2011) compels the conclusion that Mr. Mullet's Sixth Amendment Confrontation Clause rights were violated by the admission of the AP article. Prior to Mr. Mullet's trial, the Second Circuit recognized that a defendant's statements made to a Wall Street Journal reporter regarding his stock options – the subject of the securities fraud trial – were subject to the Confrontation Clause. In *Treacey,* the government -- unlike the government in this case -- subpoenaed the reporter to testify to the statements attributed to the defendant in the newspaper article, presumably in recognition of the fact that it was required to do so under controlling Supreme Court precedent. *Id.* at 39. The reporter sought to quash the subpoena, invoking the journalist's privilege. In response, the government argued that the defendant's statements to the reporter "were made in furtherance of the conspiracy, showed his consciousness of guilt, and demonstrated his knowledge of the stock options process." *Id.* The government also argued that the reporter's testimony was "the only means by which the statements could be authenticated." *Id.* The district court denied the reporter's motion to quash but "tightly limited" cross-examination of the reporter, noting that the

defendant "had not argued that the statements had not been made or misreported, but only that they were taken out of context." *Id.* at 40.

On appeal, the Second Circuit found that ***"[b]ecause [the defendant] possessed an absolute Fifth Amendment right not to testify against himself, [the reporter] was the only potential witness who could confirm that [the defendant] made the statements quoted in the article***." *Id.* at 43 (emphasis added). The defendant then argued that "the strict limitations the district court placed on his cross-examination of [the reporter] violated his rights under the Confrontation Clause." The Second Circuit agreed, holding that "the trial court may not, consistent with the Sixth Amendment's Confrontation Clause, thereafter employ the [journalist] privilege to restrict the defendant's cross-examination of the reporter to a greater degree than it would restrict such cross-examination in a case where no privilege was at issue." *Id.* at 44. The Second Circuit's rationale was based on the fact that "the Confrontation Clause guarantees a criminal defendant the right 'to delve into the witness' story to test the witness' perceptions and memory' and 'to impeach, i.e., discredit the witness." *Id.* (quoting *Davis v. Alaska,* 415 U.S. 308, 316 (1974)).

Similarly, like the defendant in *Treacey,* Mr. Mullet did not argue at trial that he had not made the statements to the AP reporter or that his statements were misreported. Rather, he maintained that they were taken out of context. Under the same circumstances, the government in the *Treacey* case called the Wall Street Journal reporter because it recognized – and the Second Circuit agreed – that the reporter's testimony was the only means by which the defendant's alleged statements could be authenticated in light of the Confrontation Clause and defendant's absolute Fifth Amendment right not to testify against himself. The government here could have – and should have – done the same because it was the government's burden to do so,

not defense counsel's. *Melendez-Diaz,* 557 U.S. at 324 (recognizing that, while the defendant had the ability to subpoena the affiant, "that power … is no substitute for the right of confrontation.")

Like the statements to the reporter in *Treacey,* the alleged statements to the AP reporter were testimonial in nature because the government repeatedly argued they were in the nature of a confession, and the "statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 51-52. Mr. Mullet's counsel was ineffective at trial because he should have objected to the admission of the AP article on the basis of the Confrontation Clause in light of *Treacey* and applicable Supreme Court precedent. And because the claim was so compelling, the failure of Mr. Mullet's counsel to raise it on appeal – by itself or as part of a cumulative error theory – amounts to ineffective assistance of appellate counsel under *Strickland.* Indeed, Mr. Bryan admits that he should have – but failed to raise this issue, and his failure to do so was not attributable to any legal strategy. (Bryan Decl. ¶ ¶ 27-29.)

F. Ground For Relief #4: Failure to Appeal Counts 1 and 8 for Insufficiency of the Evidence Constituted Ineffective Assistance of Counsel

The failure of Mr. Mullet's counsel to argue on direct appeal that the evidence against Mr. Mullet on Counts 1 and 8 was insufficient constituted ineffective appellate assistance. Indeed, it is undisputed that Mr. Mullet's counsel conceded at oral argument on the first appeal that Mr. Mullet was not challenging his convictions for conspiracy to obstruct justice, obstruction of justice, and making false statements to the FBI. (Dkt. No. 639, Order, PageID # 8883) ("And it is undisputed that counsel for Mullet conceded at oral argument before the Sixth Circuit that he was not challenging the non hate crime-related convictions.") After this Court re-sentenced Mr. Mullet and the other defendants, all defendants filed a second appeal to the Sixth

Circuit. The primary basis for the second appeal was that this Court lacked jurisdiction to convict or sentence Mr. Mullet and the other defendants for Count 1, 8 and 10 – conspiracy to obstruct hate crimes, or for false statements and obstruction in regard to a hate crime investigation – because the HCPA is unconstitutional on its face or applied in this case.[7] The Sixth Circuit soundly rejected these claims. As a threshold matter, the Sixth Circuit pointed out that the defendants "did not challenge those convictions in their first appeal, and that makes all the difference." *United States v. Mullet,* 822 F.3d 842, 846 (6th Cir. 2016). The Sixth Circuit further observed that "[i]n criminal case after criminal case, we have declined to allow a criminal defendant who fails to challenge part of a conviction to raise it in a later appeal." *Id.* at 847 (collecting cases). The Sixth Circuit thus held that:

> Seeing no fair reason to give full review to these arguments now, especially as no defendant has explained the omissions from the earlier appeal, we decline to break from this consistent practice. The defendants' belated challenges to their convictions—mainly to the sufficiency of the evidence for concealing evidence, for conspiring to do so, and for making a false statement to the FBI—thus fail.

Id. The Sixth Circuit also held that "[p]lain as day, the district court had subject matter jurisdiction over each of the charged federal crimes at issue today." (*Id.*)

Based on the Sixth Circuit's second opinion and the controlling precedent upon which it relied, it is clear that Mr. Mullet's counsel provided ineffective assistance by failing to timely appeal Counts 1 and 8 on grounds of sufficiency of the evidence. Specifically, the belief of Mr.

[7] Prior to filing the second appeal, Mr. Mullet's counsel made this same argument in its Motion to Dismiss Counts 1, 8, and 10. (Dkt. No. 609.) This Court denied the Motion, dismissing it as untimely under Rule 12(b)(2) and Rule 12(b)(3). (Dkt. No. 639, Order, PageID # 8884-85.) This Court also found that "[e]ven if the challenge had not been waived and the motion had been timely filed, the motion would fail on the merits" because "Section 249(a)(2) of the Hate Crimes statute is not unconstitutional and has never been held unconstitutional." (*Id.*) Moreover, this Court held that "[e]ven if 249(a)(2) if the Hate Crimes statute is held to be unconstitutional at some future date, it would still be a crime for defendants to obstruct the federal investigation that was undertaken pursuant to this statute." (*Id.*)

Mullet's counsel that obtaining a reversal on the hate crime offenses would excuse criminal liability for the obstruction of evidence charges was untethered to Sixth Circuit case law.

The test for sufficiency of the evidence is whether, "viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Parkes*, 668 F.3d 295, 301 (6th Cir. 2012) (reversing bank fraud conviction for insufficient evidence). The court will reverse a conviction if the "judgment is not supported by substantial and competent evidence upon the record as a whole." *United States v. Barnett*, 398 F.3d 516, 522 (6th Cir. 2005). "Although the sufficiency-of-the-evidence standard is highly deferential to the jury, we cannot let this deference blind us on review to the government's burden to prove guilt beyond a reasonable doubt." *United States v. Bailey*, 553 F.3d 940, 947 (6th Cir. 2009) (reversing the district court's denial of defendant's motion of acquittal based on insufficiency of the evidence).

As set forth below, there is insufficient evidence in the record upon which a rational jury could rely in finding that Mr. Mullet was guilty of conspiring to obstruct or obstructing evidence by concealing a disposable camera. Count 8 of the Superseding Indictment charges that:

> From in or about September 2011, through in or about March 2012 … defendants Samuel Mullet, Sr., Levi Miller, Eli M. Miller, Lester S. Mullet, J.M. (not charged herein), and others known and unknown to the Grand Jury, did knowingly alter, conceal, and cover up any tangible object with the intent to impede, obstruct, and influence the investigation and proper administration of any matter within the jurisdiction of any department and agency of the United States, and in relation to and in any contemplation of any such matter, to wit, the Fuji disposable camera which was used, in part, to memorialize the appearance of certain victims. All in violation of Title 18, United States Code, Sections 1519 and 2.

(Dkt. 87, Superceding Indictment, PageID # 1203.) Section 1519 penalizes:

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct,

> or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ... or in relation to or contemplation of any such matter or case....

United States v. Schmeltz, 667 F.3d 685, 687 (6th Cir. 2011) (citing 18 U.S.C. § 1519).

Here, the evidence was insufficient to show Mr. Mullet's involvement in concealing the camera. The camera was used by Daniel Shrock to photograph Raymond Hershberger during the hair and beard cutting on October 4, 2011. (Dkt. 540, Trial Tr., PageID # 6766). After the incident, the camera was kept in a drawer in Eli Miller's room at Emmanuel Shrock's home. (Dkt. 537, Trial. Tr., PageID 6012-13.) On October 9, 2011, the Jefferson County Jail recorded several telephone calls, including one between Mr. Mullet and Lester Mullet discussing the camera. (Dkt. 539, Trial. Tr. PageID # 6436; Dkt. 540, Trial. Tr., PageID # 6731.) During the call, Lester Mullet asked Mr. Mullet to "get rid of" the camera. (Dkt. 540, Trial. Tr. PageID # 6731.) Mr. Mullet replied "they're not going to get a hold of the camera because Eli is going to tell them he threw it away so he can keep it here. ***No I won't throw that away, that might be everything we need.***" (*Id.*) (emphasis added). Significantly, Eli Miller did not tell agents he threw the camera away, and this conversation took place before the FBI officially opened the federal investigation of these incidents on October 24, 2011. (*Id.* at PageID # 6729.)

The testimony at trial confirms that – after the jailhouse recording discussion where Mr. Mullet specifically said *not* to get rid of the camera – Mr. Mullet had no involvement with the camera. Eli Miller kept the camera in a drawer at Emanuel Shrock's home after the incident. (R. 537, Trial. Tr., PageID # 6012-13.) On November 23, 2011, authorities searched the Bergholz community and were aware that Eli Miller had the camera. (Dkt. 540, Trial Tr., PageID # 6881.) Inexplicably, after arresting Eli Miller from his bedroom, the FBI did not search Eli's room for the camera. (Dkt. 540, Trial Tr. PageID # 6881; Dkt. 537, Trial Tr., PageID # 6047.) After the

arrests, Eli Miller called his wife, Lovina Miller, and Lovina told Linda Shrock to tell Daniel Shrock to hide the camera. (Dkt. 537, Trial Tr., PageID # 6014.) Daniel Shrock gave the camera to Johnny Mast, telling him to hide or get rid of it. (Dkt. 537, Trial Tr., PageID# 6015-17; Dkt. 539, Trial Tr., PageID # 6430.)

Johnny Mast – a community member who was not charged – buried the camera after the indictment and arrests in this case. Three months later, on March 14, 2012, Johnny Mast turned over the camera to authorities of his own volition, after he was subpoenaed before a grand jury. (R. 540, Trial Tr., pp. 6764-6766). The FBI developed the pictures, and the government used some of the photographs at trial. Significantly, Johnny Mast testified at trial that: (1) he took possession of the camera from Daniel Schrock; (2) he alone made the decision to bury the camera; (3) he did not tell anyone – including Mr. Mullet – where the camera was hidden; and (4) no one told him to lie about the camera's location. (R. 539, Trial Tr., PageID # 6429-32, 6538).

Mr. Mullet's counsel was ineffective in failing to argue on direct appeal that Counts 1 and 8 regarding conspiracy to obstruct and obstruction of evidence regarding the camera were not "supported by substantial and competent evidence upon the record as a whole." In *Bailey,* the Sixth Circuit reversed the felon-in-possession count on the grounds of sufficiency of the evidence, holding that the mere fact that the government produced evidence that the gun was discovered under the driver's seat of the defendant car when he was driving alone was insufficient to "satisfy the [prosecution's] burden of producing sufficient evidence to convict." *Bailey,* 553 F.3d at 947-49. The Sixth Circuit noted that were they to hold otherwise then "we would thereby institute an untenable strict-liability regime for constructive possession." *Id.* at 948. Similarly, the mere fact that Mr. Mullet was recorded saying *not* to get rid of the camera,

and then weeks later Johnny Mast alone decided to bury the camera – telling no one, including Mr. Mullet, where it was – is insufficient as a matter of law for the government to meet its burden of establishing that Mr. Mullet conspired to or obstructed justice with respect to the camera. There is simply no sufficient evidence upon which a reasonable jury could have convicted Mr. Mullet of conspiring to obstruct or obstructing evidence of the camera as charged in Counts 1 and 8. Accordingly, counsel was ineffective for raising it at trial and on appeal. Indeed, Mr. Bryan admits that he failed to raise this issue, and this failure was not attributable to any legal strategy. (Bryan Decl. ¶ 34.)

G. The Cumulative Effect of the Ineffective Assistance of Counsel Errors Rendered the Proceedings Fundamentally Unfair and Violated Mr. Mullet's Due Process Rights

The Sixth Circuit has recognized that the "cumulative-effect theory" applies where "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Bankston*, 820 F.3d 215, 233 (6th Cir. 2016). Stated differently, "the cumulative effect of errors that are harmless by themselves can be so prejudicial as to warrant a new trial." *United States v. Adams,* 722 F.3d 788, 833 (6th Cir. 2013)

Numerous courts have applied the cumulative error analysis to grant habeas relief. *See Simpson v. Warren*, 475 F3d. App'x 51, 65 (6th Cir. 2012) (granting petitioner a writ of habeas corpus because "[t]he cumulative effect of the prosecutor's improper and flagrant questioning regarding the armed robbery and shootout and his prejudicial comments during closing arguments deprived Petitioner of a fair trial in violation of his due process rights."); *Adams,* 722 F.3d at 832 (vacating defendants' convictions on all counts and remanding for a new trial because "[a]lthough no one of the six identified errors may warrant reversal on its own, the cumulative effect of these errors rendered defendants' trial fundamentally unfair in violation of

their rights to due processs); *Mackey v. Russell*, 148 Fed. App'x 355 (6th Cir. 2005) (holding the cumulative damage of counsel's ineffective assistance "leads us to find that [counsel's] errors sufficiently prejudiced [defendant's] case such that a new trial is warranted."); *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir. 1983) ("We need not determine whether each of the alleged errors would, alone, require that we find a deprivation of due process. It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness.").

Here, even if this Court concludes that not one of the four identified errors warrants relief on its own, the cumulative effect of these errors at the trial and appellate level deprived Mr. Mullet of a fair trial in violation of his due process rights. This Court should therefore vacate his sentence.

IV. MR. MULLET IS ENTITLED TO AN EVIDENTIARY HEARING

The Sixth Circuit has recognized that "a petitioner is due some form of hearing suited to the circumstances, 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *Christopher v. United States,* 605 Fed. App'x 533, 537 (6th Cir. 2015) (citing 28 U.S.C. 2255(b)). Significantly, "[t]he burden on the petitioner in a habeas case for establishing an entitlement to a hearing is relatively light." *Valentine v. United States,* 488 F.3d 325, 333 (6th Cir. 2007) (reversing district court's denial of evidentiary hearing). And "[t]he defendant's burden to show his right to a hearing is significantly lower than his burden to show he is entitled to § 2255 relief." *Id.*

Here, Mr. Mullet meets his light burden to obtain an evidentiary hearing because the record does not "conclusively show" that he is not entitled to relief. In fact, it suggests the

opposite. Moreover, the testimony of Mr. Bryan at an evidentiary hearing is necessary for this Court to fully evaluate the strength of the ineffective assistance claims.

V. CONCLUSION

For the foregoing reasons, Mr. Mullet respectfully requests that this Court vacate his sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum In Support Of Motion To Vacate And Set Aside Judgment Of Conviction or Sentence Under 28 U.S.C. § 2255** was filed electronically on January 12, 2018 . Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Richard H. Blake
RICHARD H. BLAKE (0083374)
Counsel for Petitioner Samuel Mullet, Sr.

EXHIBIT "1"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 5:11-cr-00594
	)	
Plaintiff,	)	JUDGE POLSTER
	)	
vs.	)	
	)	
	)	
SAMUEL MULLET, SR.,	)	
	)	
Respondent.	)	

DECLARATION OF EDWARD G. BRYAN, ESQ.

I, Edward G. Bryan, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I have been employed as an Assistant Federal Public Defender for the Northern District of Ohio since December of 1997. Prior to this time, I was employed as an Assistant Lake County, Ohio Public Defender for approximately 6 years.

2. Just before Thanksgiving in 2011, I met Samuel Mullet, Sr. in the Marshal's lockup in the Federal Courthouse in Youngstown, Ohio. On that day, my office was appointed to represent Samuel Mullet, the Amish Bishop for the Amish community near Bergholz, Ohio. The case, which was at the Criminal Complaint stage, was assigned to me by the Federal Public Defender.

3. The government moved for pretrial detention for Samuel Mullet and 6 other male co-defendants. The seven Amish men were charged with violations of the Federal Hate Crimes Law following a series of forced beard and hair cuttings that took place between September and November of 2011. Samuel Mullet was not present during any of the beard/hair cutting incidents.

4. All seven men availed themselves of their rights to a preliminary and detention hearing. At the conclusion of which, the men, all of whom had no prior criminal record, were ordered detained by the Magistrate Judge.

5. A Federal Indictment was returned on December 20, 2011, and several more members of the Bergholtz Amish community were charged as well, bringing to 12 the number of Berholz Amish community members charged in the case. In addition to Federal Hate Crimes charges, Samuel Mullet and others were charged with Obstruction of Justice for concealing a disposable camera that was used to take photographs of the individuals whose beards and hair had been cut.

6. The government returned a Superseding Indictment on March 28, 2012, adding more members of the Bergholz Amish community as defendants and additional charges. The total number of Bergholz Amish community members named in the Hate Crimes case was 16.

7. Following the arrest on the Criminal Complaint in November of 2011, the government continued to investigate the case through a Federal Grand Jury through the Indictment and Superseding Indictment stages. During this investigation, multiple members of the Bergholz Amish community were subpoenaed to testify before the Federal Grand Jury, including Samuel Mullet's relatives. Mr. Mullet's daughter, Barbara, and his grandson, Johnny Mast, were eventually used as government witnesses against the Bergholz Amish community members who were charged in the federal case.

8. Since I was lead counsel for Samuel Mullet, I engaged in multiple witness interviews with members of the Bergholz Amish community. Since the community members knew me as Samuel Mullet's attorney, some of them contacted me when they were subpoenaed to testify before the Grand Jury. When I was contacted by subpoenaed witnesses, I always admonished them to appear on time and to answer the questions truthfully.

9. One grand jury witness who contacted me when he was subpoenaed to testify was Samuel Mullet's grandson Johnny Mast.

10. When Mast advised me that he had been subpoenaed, I informed him that he had to testify truthfully. Mast then told me that he was concerned because he was afraid they may ask him questions about the disposable camera. Based upon his stated concern, I recognized that I could not advise him on the matter. Accordingly, I instructed Mast to request legal counsel when he appeared in front of the Grand Jury.

11. I later learned that Johnny Mast was, in fact, appointed an attorney before he was scheduled to testify before the Grand Jury. With the assistance of counsel, Johnny Mast was given an immunity agreement in return for his cooperation with the government. After, Mast led the FBI to a location beside a marked tree in the woods in Bergholz where he had hidden the disposable camera.

12. Johnny Mast testified at trial that he was given the camera by his cousin Samuel Mullet's other grandson, Daniel Schrock. Mast then took the camera to the woods where he placed it in a plastic bag and buried it next to a tree that he marked so that he would be able to locate the camera later. Johnny Mast denied that Samuel Mullet instructed him to hide the camera.

13. Trial against Samuel Mullet and the other Bergholz Amish community members began in September of 2012. I acted as Samuel Mullet's lead trial counsel. I was assisted by Wendi Overmyer, who at the time, was employed as a Research and Writing Attorney for the Federal Public Defender's Office.

14. At the conclusion of the trial, the trial jury returned verdicts against Samuel Mullet and his co-defendants on most of the counts listed in the Indictment.

15. When Samuel Mullet and the others were sentenced following Pre-Sentence investigations, the government argued that the Hate Crime convictions should be enhanced for Sentencing purposes using the Federal Kidnapping Guideline. Based upon the use of the Federal Kidnapping Guideline, all of the defendants were facing extremely lengthy sentences. However, the government sought significant variances from the calculated guideline ranges for every defendant except for Samuel Mullet. The government sought a life prison sentence for Samuel Mullet.

16. On Samuel Mullet's behalf, we argued that the Kidnapping Guideline should not be applied to the facts of the case. We argued that Samuel Mullet should receive a sentence pursuant to the Hate Crime Guideline without the use of the Kidnapping enhancement. The Court applied the Kidnapping enhancement, but disagreed that Samuel Mullet deserved a life prison sentence. Instead, the Court imposed a Sentence of 15-years incarceration for the elderly first-time offender.

17. I continued to represent Samuel Mullet as Appellate Counsel along with Ms. Overmyer. Ms. Overmyer was lead counsel on Mr. Mullet's appeal and was the primary writer of the appellate briefs. She also argued the appeal before the Sixth Circuit Court of Appeals. I participated in the Appeal by helping edit the final drafts of the briefs and discussing with Ms. Overmyer appellate strategy and the issues to be raised.

18. We raised multiple issues in Mr. Mullet's first appeal. Ultimately, the Sixth Circuit determined that one issue was dispositive of the appeal and chose not to address the other issues we raised in the first appeal. The Sixth Circuit ruled that the trial court erred in the jury instruction it used regarding one of the elements of the Hate Crime law and on this basis reversed and vacated the hate crimes convictions.

19. We did not address Samuel Mullet's obstruction of justice convictions on direct appeal.

20. On remand the government requested the District Court to resentence the defendants on the remaining obstruction of justice counts. The government also advised the Court that its decision to retry or not to retry the hate crimes counts would be based upon the length of the sentences the defendants received on the obstruction counts.

21. The Court agreed and the United States Probation Department was instructed to prepare Pre-Sentence Investigation Reports for the defendants addressing the counts of conviction not reversed by the Circuit Court on appeal.

22. The Probation Department and the government argued that the Obstruction of Justice Guideline required the District Court to cross reference the crime being obstructed, which the Probation Department and government argued was the vacated Hate Crimes convictions. In turn, the Probation Department and the government argued that the Hate Crimes Guideline instructed the District Court to cross reference to the Federal Kidnapping Guideline.

23. The Defense argued the Court should apply the Obstruction of Justice Guideline, or cross reference to simple assault, or at most, cross reference to the Federal Hate Crime Guideline. The Defense argued the Court should not cross reference to the Federal Kidnapping Guideline.

24. The Trial Court sided with the government and calculated the Sentencing Guideline using the formula outlined by the Probation Department and government. The government argued that pursuant to this Guideline the Court should re-impose the 15-year sentence Samuel Mullet received following the Hate Crime convictions. Stating such a sentence could be construed as a snub to the Circuit Court opinion, the District Court calculated a reduction in every defendants' sentence based upon the fact that two defendants who had been originally sentenced to 7 years of incarceration could not be sentenced beyond 5 years because such was the maximum penalty these two defendants could receive based upon the surviving conviction for these two defendants, Conspiracy to Obstruct Justice. Based on this calculation, Samuel Mullet's sentence was reduced to 129 months.

25. We appealed Samuel Mullet's case a second time. Although we raised a few issues on Mr. Mullet's second appeal, the primary focus was his 129-month sentence. Ms. Overmyer again acted as lead counsel on Mr. Mullet's second appeal. I was also counsel of record on Mr. Mullet's second appeal.

26. Although we diligently represented Mr. Mullet at trial and on appeal, we did not represent Mr. Mullet error free.

27. During Samuel Mullet's trial, the government sought to introduce a newspaper article written by Associate Press reporter Andrew Welsh-Huggins, wherein the government alleged Samuel Mullet essentially confessed to the allegations against him and his

community. I failed to adequately articulate an objection to this evidence. Although I raised Welsh-Huggins's article in a post- trial New Trial Motion, I failed to adequately secure an objection to the article during the trial.

28. I did not allow the Welsh-Huggins article to be admitted without adequate objection for strategic reasons. There was nothing helpful in Mr. Welsh-Huggins article to Samuel Mullet's defense.

29. We also failed to raise the admission of the Welsh-Huggins article on appeal, even though there was a colorable argument that the admission of the article, without testimony from Welsh-Huggins himself, violated Samuel Mullet's Confrontation Clause rights. We did not fail to raise this issue on appeal for strategic reasons. We simply failed to raise the argument.

30. The government called Dr. Donald Kraybill as an expert on the Amish religion. Although we engaged in significant pretrial advocacy to limit the scope of Dr. Kraybill's testimony, Kraybill testified far beyond the scope that was originally agreed to by the parties. I should have objected to this prejudicial testimony, but failed to do so. I did not fail to object to Kraybill's testimony for strategic reasons.

31. I should have also raised Kraybill's testimony as an issue on both the first and second appeal, because Kraybill's testimony affected the fairness of the entire trial, including the Obstruction and False Statement counts.

32. One of the issues we did preserve on Samuel Mullet's first appeal was the introduction of "other act" "404(b)" evidence regarding alleged sexual misconduct by Samuel Mullet the District Court permitted over objection during the trial. The evidence was the testimony of Samuel Mullet's estranged daughter-in-law who claimed Samuel Mullet engaged in inappropriate sexual conduct with her and others. However, we failed to re-raise this issue in Samuel Mullet's second appeal of his Obstruction of Justice and False Statements convictions and the Sentence he received on these counts.

33. We should have raised the 404(b) issue in Mr. Mullet's second appeal because the prejudice of this inflammatory, but not relevant evidence infected the entire trial, including the Obstruction and False Statement charges. In fact, one of the Sixth Circuit panel members strongly admonished the United States Attorney during oral argument for introducing this evidence in Samuel Mullet's first trial.

34. We also failed to raise sufficiency of evidence arguments in either appeal regarding his Obstruction of Justice convictions. Ultimately, it was the survival of the obstruction convictions that permitted the government to argue for, and the district court to essentially sentence Samuel Mullet to a similar sentence he faced on the vacated hate crimes convictions. We did not fail to raise the sufficiency argument on appeal for

strategic reasons. We simply failed to recognize the amount of sentencing exposure Samuel Mullet faced on the obstruction convictions alone.

35. I regret that our representation of Mr. Mullet was deficient regarding the above issues. If we properly preserved the above issues, Samuel Mullet may have been entitled to relief that would have resulted in his release from custody by now.

36. Because of the nature and depth of Samuel Mullet's case, I spent a lot of time with Mr. Mullet and members of his family and community. I sadly was able to attend the funeral of Samuel's wife Martha, who passed after his conviction.. It was awfully incongruous to me that I could attend such a solemn event when Samuel Mullet could not. Mr. Mullet has also suffered the loss of several grandchildren while he has been incarcerated. His 12- year-old granddaughter was tragically killed in a car buggy accident. His nephew's 15-year-old son accidentally drowned this past summer in a farm pond. Samuel Mullet also recently underwent triple by-pass surgery. It is clear to me that this event and the tragedies his family and community have suffered since his incarceration have had a significant impact on Samuel Mullet.

37. Throughout all of this time, I have remained in contact with Samuel Mullet and visited him in federal prison. Mr. Mullet spent a considerable amount of time in federal custody in Texarkana, Texas, where his family and community were unable to visit. Mr. Mullet did not have the opportunity to visit in person with his wife before she died. Since he has been in FCI Elkton, Samuel Mullet has been able to receive weekly visits from his family and community.

38. Samuel Mullet has always remained kind and patient with me over his six years of incarceration. He has been deeply affected by his separation from his family and community, and his family and community have been deeply affected by their separation from him.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct, based upon my knowledge, information, and belief.

Executed on January 8, 2018

Edward G. Bryan

Edward G. Bryan

Assistant Federal Public Defender