



Feb. 14, 2018

Board of Disciplinary Appeals

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

IN THE MATTER OF ABRAHAM M. FISCH STATE BAR CARD NO. 07039900	§ § §	CAUSE NO. 57005
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MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT

TO THE HONORABLE BOARD:

COMES NOW, Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), and files this its Motion for Entry of Judgment of Disbarment, showing as follows:

1. On December 2, 2015, Petitioner filed its Petition for Compulsory Discipline against Respondent, Abraham M. Fisch, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's conviction in Case No. 4:11CR00722-001, styled *United States of America v. Abraham Moses Fisch, aka Anthony Fisch*, in the United States District Court for the Southern District of Texas, Holding Session in Houston, wherein Respondent was found guilty of Count One S - Conspiracy to Commit Obstruction of Justice, Count Two S - Obstruction of Justice, Aiding and Abetting, Count Three S - Obstruction of Justice, Aiding and Abetting, Count Five S- Obstruction of Justice, Aiding and Abetting, Count Six S - Obstruction of Justice, Aiding and Abetting, Count Seven S - Conspiracy to Commit Money Laundering, Counts Eight S through Thirteen S - Money Laundering, Aiding and Abetting, Count Sixteen S - Money Laundering, Aiding and Abetting, Counts Seventeen S through Twenty-One S - Failure to File Tax Return and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months. This term consists of 53 months as to Count 1S; 120 months as to each of Counts 2S, 3S, 5S, 6S and 8S through 13S and 16S; 180 months as to Count 7S; and 12 months

as to each of Counts 17S through 21S; all terms to run concurrently for a total of 180 months. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years as to each of Counts 1S through 3S, 5S, 6S, 8S through 13S and 16S; 5 years as to Count 7S; and 1 year as to each of Counts 17S through 21S; all such terms to run concurrently for a total of 5 years, ordered to pay an assessment of \$1,425.00.

2. On January 12, 2016, an Agreed Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

It is further ORDERED that this Order is interlocutory and that the Board retains jurisdiction to enter a final judgment when the appeal of the criminal conviction is final. *In the Matter of Mercer*, 242 SW 3d 46 (Tex.2007).

3. Following the appeal by Respondent of his criminal conviction in Case No. 4:11CR00722-001, on the charges of Count One S - Conspiracy to Commit Obstruction of Justice, Count Two S - Obstruction of Justice, Aiding and Abetting, Count Three S - Obstruction of Justice, Aiding and Abetting, Count Five S- Obstruction of Justice, Aiding and Abetting, Count Six S - Obstruction of Justice, Aiding and Abetting, Count Seven S - Conspiracy to Commit Money Laundering, Counts Eight S through Thirteen S - Money Laundering, Aiding and Abetting, Count Sixteen S - Money Laundering, Aiding and Abetting, Counts Seventeen S through Twenty-One S - Failure to File Tax Return, an Opinion (Exhibit A) was issued by the United States Court of Appeals for the Fifth Circuit, on or about March 14, 2017, in Cause No. No. 15-20663, *United States of America, Plaintiff – Appellee v. Abraham Moses Fisch, also known as Anthony Fisch, Defendant – Appellant*, which affirmed the judgment issued by the District Court.

4. On or about April 5, 2017, a Judgment was issued as Mandate (Exhibit B) by the United States Court of Appeals for the Fifth Circuit, in Cause No. No. 15-20663, *United States of America, Plaintiff – Appellee v. Abraham Moses Fisch, Defendant – Appellant*, which affirmed

the judgment issued by the District Court. True and correct copies of the Opinion and Judgment Issued as Mandate issued by the United States Court of Appeals for the Fifth Circuit, are attached hereto as Exhibits A and B, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits A and B at the time of hearing of this cause.

5. Respondent filed a Petition for a Writ of Certiorari with the Supreme Court of the United States. An Order Denying Petition for a Writ of Certiorari was issued by the United States Supreme Court on October 30, 2017 (Exhibit C), in Case No. 16-1483, styled *Abraham Moses Fisch, Petitioner v. United States*. A true and correct copy of the Order Denying Petition for a Writ of Certiorari issued on or about October 30, 2017, by the Supreme Court of the United States is attached hereto as Exhibit C, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce a certified copy of Exhibit C at the time of hearing of this cause.

6. Petitioner represents to the Board that the Judgment entered against Respondent, Abraham M. Fisch, has now become final. Petitioner seeks the entry of a judgment of disbarment. Attached hereto as Exhibit D is a true and correct copy of the form of judgment of which Petitioner seeks the entry herein.

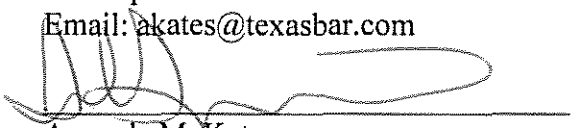
PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays, upon notice to Respondent, that the Board enter its order disbarring Respondent and for such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

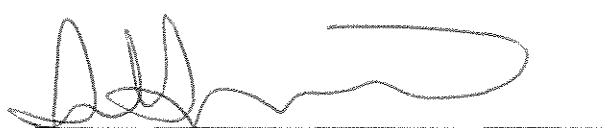
Linda A. Acevedo
Chief Disciplinary Counsel

Amanda M. Kates
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Austin, Texas 78711
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Amanda M. Kates
Bar Card No. 24075987
ATTORNEYS FOR PETITIONER

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a trial on the merits of the Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 20th day of April 2018.**


Amanda M. Kates

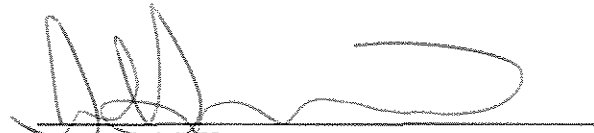
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent for personal service on February 14, 2018, as follows:

Abraham Moses Fisch #02040-379
Fort Dix FCI
5756 Hartford & Pointville Road
Joint Base MDL, New Jersey 08640

Abraham M. Fisch c/o Regina Criswell
Carriage Place
7803 Bent Briar
San Antonio, Texas 78250

By facsimile 210.251.2071


Amanda M. Kates

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20663

United States Court of Appeals
Fifth Circuit

FILED

March 14, 2017

Lyle W. Cayce
Clerk

consolidated with 15-20636

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ABRAHAM MOSES FISCH, also known as Anthony Fisch,

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Texas

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

Abraham Moses Fisch challenges the sufficiency of evidence supporting his convictions for conspiracy, obstruction of justice, money laundering, and tax evasion; the district court's jury instructions at trial; and pre- and post-trial orders issued by the district court. For the reasons set forth below, we AFFIRM as to all issues except the district court's denial of Fisch's ineffective assistance of counsel claims, which may be raised anew in a collateral proceeding.

A true copy
Attest:

Clerk, U. S. Court of Appeals, Fifth Circuit

By: Christina H. Hurd
Deputy 5/24/17
New Orleans, Louisiana

Exhibit

A

I

Fisch was a criminal defense attorney. He and former FBI informant Lloyd Williams approached defendants who had criminal charges pending against them. Fisch and Williams told the defendants to pay them large sums of money as purported legal fees. They promised to use the money to pay off high-ranking federal government officials in return for the officials' getting the defendants' cases dismissed or resolved on more favorable terms. Fisch and Williams, of course, had no such government contacts that could be paid off to influence pending legal proceedings.

Once their scheme unraveled, Fisch and Williams were indicted for conspiracy, obstruction of justice, money laundering, tax evasion, and impeding administration of the IRS. Malkah Bertman, Fisch's wife, was indicted for conspiracy and obstruction of justice. Williams pleaded guilty but Fisch and Bertman proceeded to trial.

The indictment included a notice of criminal forfeiture, which identified "[r]eal property located at 9202 Wickford Dr., Houston, Texas 77024"—Fisch's home—as an asset traceable to criminal proceeds. The government recorded a *lis pendens* (notice of pending legal action) on the home. Fisch challenged the *lis pendens* and sought a hearing on the basis that he needed it lifted so he could use the equity in his home to pay for counsel of choice. The district court denied a hearing due to Fisch's failure to show that he lacked sufficient alternate, available funds to pay for counsel of choice.

The case proceeded to trial. The jury found Fisch guilty on eighteen counts (three counts had been dismissed) but not guilty on the count for impeding administration of the IRS. The jury acquitted Bertman.

At the government's request, the district court entered a forfeiture order in the amount of \$1,150,000. The government then moved to amend the

forfeiture order to include Fisch's home as substitute property. The district court granted the motion.

On the day of sentencing, Fisch filed a "motion to determine the effectiveness of trial counsel," arguing that his trial counsel was ineffective in several respects. The district court orally ruled that trial counsel was not ineffective. Fisch was sentenced to 180 months in prison.

II

Fisch challenges the sufficiency of evidence supporting his convictions for conspiracy to obstruct justice, obstruction of justice, money laundering, and tax evasion. This court's review of a jury verdict is "highly deferential." *United States v. McNealy*, 625 F.3d 858, 870 (5th Cir. 2010). The court asks whether, "viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Clark*, 577 F.3d 273, 284 (5th Cir. 2009).

A. Conspiracy to Obstruct Justice, 18 U.S.C. § 371

"To support a conspiracy conviction under [18 U.S.C.] § 371, the government must prove three elements: (1) an agreement between two or more people to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy's objective." *United States v. Porter*, 542 F.3d 1088, 1092 (5th Cir. 2008). "The government must prove the same degree of criminal intent as is necessary for proof of the underlying substantive offense." *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001).

Fisch challenges whether the government proved that he knowingly and voluntarily entered into an agreement to obstruct justice. "Direct evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial

evidence.” *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994). “An agreement may be inferred from concert of action, voluntary participation may be inferred from a collection of circumstances, and knowledge may be inferred from surrounding circumstances.” *United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009).

Testimony established that Fisch and Williams met with potential clients together. At such meetings, they discussed the details of their scheme. For example, Elida Sanchez testified that Fisch and Williams told her that her husband, Edilberto Portillo, would get out of jail “very soon” through “friends that work in the CIA” if she paid \$1.1 million. Similarly, Princewill Njoku testified that Fisch “guaranteed” his case would be dismissed if he and co-defendant Clifford Ubani paid \$150,000. The evidence was sufficient to infer a knowing and voluntary agreement between Fisch and Williams to obstruct justice. *See Casilla*, 20 F.3d at 603 (“Presence and association with other members of a conspiracy, along with other evidence, may be relied upon to find a conspiracy.”).

Fisch also questions the veracity of statements made by the government’s witnesses. But the court is “bound to accept the [jury’s] credibility choices that support th[e] verdict.” *United States v. Espinoza*, 53 F.3d 1282, 1282 (5th Cir. 1995).

Viewed in the light most favorable to the verdict, the evidence was sufficient for the jury to find that Fisch conspired to obstruct justice.

B. Obstruction of Justice, 18 U.S.C. § 1503

“The elements of obstruction of justice [under 18 U.S.C. § 1503] are: (1) a judicial proceeding was pending; (2) the defendant knew of the judicial proceeding; and (3) the defendant acted corruptly with the specific intent to influence, obstruct, or impede that proceeding in its due administration of justice.” *United States v. Sharpe*, 193 F.3d 852, 864 (5th Cir. 1999). Fisch

concedes that judicial proceedings were pending and that he knew of them. His attack is twofold: first, he argues that the government did not offer sufficient evidence of specific intent to influence, obstruct, or impede the proceedings; and second, he argues that 18 U.S.C. § 1515(c) operates as an affirmative defense to the obstruction charges.

1. *Specific Intent to Obstruct Justice*

A defendant's specific intent to obstruct justice "can be proven by showing the defendant's endeavors had the 'natural and probable effect of interfering with the due administration of justice.'" *United States v. Coppin*, 569 F. App'x 326, 337 (5th Cir. 2014) (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)). "[A]n *un* successful 'endeavor' to obstruct justice violates section 1503; justice need not actually have been obstructed." *United States v. Williams*, 874 F.2d 968, 981 (5th Cir. 1989).

Evidence showed that Fisch implored criminal defendants not to accept plea agreements in return for false promises to favorably influence the outcome of their cases. As an example, Edilberto Portillo testified that he rejected a plea offer to be sentenced to no more than 80 months in prison "[b]ased on what Mr. Fisch and Mr. Williams told" his wife. He further testified that he did little to prepare for trial "[b]ecause Mr. Abraham Fisch told me that trial is never going to take place." In addition, Ezinne Ubani testified that Fisch told her husband, Clifford Ubani, "not [to] take [a] plea" and "kept promising how he's going to dismiss the case and stuff like that." Fisch's false representations clearly had the probable effect of interfering with the administration of justice. *See United States v. Moree*, 897 F.2d 1329, 1333 (5th Cir. 1990) ("It is hard to imagine a more invidious obstruction of justice than an offer to bribe officials in control of the judicial system to fix the result of a trial.").

Viewed in the light most favorable to the verdict, the evidence was sufficient for the jury to find that Fisch obstructed justice.¹

2. 18 U.S.C. § 1515(c)

The federal obstruction of justice statute, 18 U.S.C. §§ 1501-1521, contains a “general provision” at Section 1515. It provides, “[T]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.” 18 U.S.C. § 1515(c). Fisch argues that Section 1515(c) acts as an affirmative defense to an obstruction of justice charge and that the government must disprove its applicability, but did not do so here.

Fisch did not argue below that the government failed to meet its burden under Section 1515(c). We do not reach this new argument. *See N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996) (“We will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances.”); *see also United States v. Crawford*, 60 F. App’x 520, 532 (6th Cir. 2003) (“Because Crawford raises the § 1515(c) claim for the first time before this Court, the claim is waived.”).

C. Failure to Timely File Income Tax Returns, 26 U.S.C. § 7203

Under 26 U.S.C. § 7203, the government had to demonstrate “proof of failure to file [federal income tax returns] and willfulness in doing so.” *United States v. Buckley*, 586 F.2d 498, 504 (5th Cir. 1978). Willfulness “is simply the intentional violation of a known legal duty.” *Id.* (internal quotation marks omitted). Fisch admitted that he intentionally violated a known duty to file. The evidence was sufficient on the income tax counts.

¹ Fisch argues that if the court reverses on the conspiracy to obstruct justice and obstruction of justice convictions, it too must reverse on the conspiracy to commit money laundering and money laundering convictions. Because the evidence was sufficient on the relevant counts, this argument fails.

III

Fisch challenges whether his Fifth Amendment rights were violated by the denial of a hearing regarding the *lis pendens* on his home. The district court afforded Fisch numerous opportunities to present evidence of his financial inability to pay for counsel of choice without an order lifting the *lis pendens*. Once Fisch did submit information, it was only “a very brief statement with no supporting documents.” The district court found the submission “scant, conclusory, and insufficient” to show that Fisch lacked alternate, available assets. For example, Fisch continued to practice law but failed to state whether his law practice was continuing to generate income.

Fisch again submitted information to the district court, but this time some of it was illegible. The district court ordered Fisch to resubmit legible information. At this stage, Fisch “elected not to file anything further,” choosing instead to stand by his position that “there is no threshold requirement” of demonstrating financial need. The district court rejected this argument but allowed Fisch yet another chance “to file the information, complete and legible,” otherwise Fisch’s failure would “end this issue.” Fisch declined.²

This court has observed “broad agreement that due process requires the district court to hold a prompt hearing at which the property owner can contest [a] restraining order . . . at least when the restrained assets are needed to pay for an attorney to defend him on associated criminal charges.” *United States v. Melrose E. Subdivision*, 357 F.3d 493, 499 (5th Cir. 2004) (citing *United States v. Jones*, 160 F.3d 641, 645 (10th Cir. 1998)). We have favorably cited *Jones*, which requires “[a]s a preliminary matter [that] a defendant . . . demonstrate to the court’s satisfaction that she has no assets, other than those restrained,

² Instead, Fisch filed a notice of appeal, which he subsequently dismissed. In his motion to dismiss that appeal, Fisch stated that he “d[id] not intend to pursue the appeal to conclusion.”

with which to retain private counsel and provide for herself and her family.” *Jones*, 160 F.3d at 647.

We have declined to “elaborate the precise details of the circumstances and showings necessary to trigger a due process hearing” when it was not necessary to do so. *Melrose*, 357 F.3d at 501 n.5. No such expounding is needed here when Fisch ultimately elected not to file any evidence that would demonstrate his financial need. Fisch chose not to “provid[e] any further documentation pursuant to the court’s directive” and instead “object[ed] to any consideration of his financial status as a prerequisite to a . . . hearing.” He did so at his own peril.³ Even if the *lis pendens* were a restraint of property triggering due process protection—an issue we need not reach⁴—Fisch decided not to make any showing that “the restrained assets [we]re needed to pay for an attorney.” *Id.* at 499.

Fisch has not made out a Fifth Amendment violation.

IV

Fisch argues that his Sixth Amendment rights were violated by the government’s seeking a *lis pendens* on his home as an asset traceable to his criminal proceeds, which he claims the government never could prove. He asserts that the government’s conduct limited his ability to pay for counsel of choice.

³ In contesting whether any threshold evidentiary showing was required, Fisch cites a Supreme Court decision, *Kaley v. United States*, 134 S. Ct. 1090 (2014). But he relies on the dissenting opinion and oral argument transcript rather than the Court’s majority opinion. As the district court noted, the Court in *Kaley* did not address what a threshold evidentiary showing entails.

⁴ Fisch also briefly argues that the *lis pendens* was a seizure requiring probable cause under the Fourth Amendment. This argument was not raised below. We review an unpreserved claim only for plain error, and Fisch fails to argue, much less show, that the elements of plain error review are met.

As discussed above, Fisch's decision not to make an evidentiary showing of financial need meant that the district court was not required to hold a traceability hearing. And ultimately the government did not have to establish traceability because it instead asked the district court to order the home forfeitable as substitute property. Because Fisch did not properly raise his specific objection to the government's motion to forfeit the home as substitute property, *see infra* Part VII.B, we need not opine here on the propriety of the government's recording a lis pendens on Fisch's home for four years but ultimately forfeiting the home as substitute property.

Fisch further asserts that the government made suggestions in bad faith that two of his attorneys below had conflicts of interest so that they would be disqualified. Fisch does not actually appeal the district court's holding that attorney Norman Silverman had a conflict of interest requiring disqualification. And he admits it was attorney Mark Bennett that informed the district court, "I have learned that I have a potential conflict of interest." Fisch offers no legal support for why his Sixth Amendment rights were violated due to his chosen attorneys' conflicts of interest.

Fisch has not established a Sixth Amendment violation.

V

Fisch summarily argues that "the entire proceedings were infected by prosecutorial misconduct." He cites no specific constitutional right other than a vague reference to "due process and equal protection violations." Fisch's argument is not adequately briefed. *See United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010). At any rate, because Fisch "did not preserve error by objecting to these instances of alleged prosecutorial misconduct at trial," the court "review[s] these claims only for plain error." *United States v. Tomblin*, 46 F.3d 1369, 1386 (5th Cir. 1995). Fisch has not made the requisite showing.

VI

Fisch raises two challenges to the district court's jury instructions.

A. Failure to Instruct Jury on 18 U.S.C. § 1515(c)

Fisch challenges the district court's failure to instruct the jury that the government had the burden to prove beyond a reasonable doubt that Fisch's conduct was not lawful, bona fide legal representation under 18 U.S.C. § 1515(c). This issue was not raised before the district court, so this court reviews only for plain error. Fisch's perfunctory argument does not include any factual support to satisfy a plain error showing. Moreover, the district court's jury instructions on obstruction of justice, which tracked Fifth Circuit Pattern Jury Instruction (Criminal Cases) 2.63A, provided the essence of Fisch's requested charge. *See United States v. St. John*, 267 F. App'x 17, 22 (2d Cir. 2008) (rejecting similar argument under plain error review because jury instruction on specific intent to obstruct justice "exclude[d] the possibility of bona fide legal advice constituting criminal behavior").

B. Deliberate Ignorance

Fisch next argues that the district court abused its discretion in instructing the jury on deliberate ignorance. The government asked the district court to include a deliberate ignorance instruction on the obstruction of justice counts that modeled Fifth Circuit Pattern Jury Instruction (Criminal Cases) 1.37A. Fisch objected. On appeal, Fisch argues that there was insufficient evidence to warrant the instruction. This court reviews for abuse of discretion. *United States v. Fuchs*, 467 F.3d 889, 901-02 (5th Cir. 2006).

A deliberate ignorance instruction provides that the jury may find that a defendant knew of a fact if he deliberately shielded himself from that fact. The instruction must have a proper evidentiary basis, which is present "if the record supports inferences that (1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant

purposely contrived to avoid learning of the illegal conduct.” *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (internal quotation marks omitted). In determining whether the evidence supports the charge, the court must view the evidence in the light most favorable to the government. *Id.* This court has “consistently approved a deliberate ignorance instruction in [conspiracy] cases.” *Sharpe*, 193 F.3d at 872.

Fisch challenges the sufficiency of the evidence on the second element: whether the record supported an inference that he purposely sought to avoid learning of illegal conduct. Fisch’s testimony at trial showed that he took what Williams said at face value, declining to ask questions about the legality of the proposed conduct. For example, Fisch testified that “[Williams] kept me out of it. He kept me in the dark basically as far as what he was doing and how he was doing it. I didn’t ask a lot of questions. . . . Mr. Williams basically kept me in the dark. Whatever I knew is what he told me.” He repeatedly testified that he “didn’t ask” specific questions of Williams. Fisch’s testimony supports the instruction. *See United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) (holding that instruction is appropriate where defendant’s actions reflect demeanor of “[d]on’t tell me, I don’t want to know,” so jury can consider defendant’s “charade of ignorance” as circumstantial proof of knowledge). The district court did not abuse its discretion.

VII

Fisch appeals several aspects of the district court’s post-trial forfeiture orders. In particular, he challenges: whether the district court complied with Federal Rule of Criminal Procedure 32.2; whether the district court erred in forfeiting the home as substitute property; and whether the district court erred in including \$450,000 in the money judgment.

A. Federal Rule of Criminal Procedure 32.2

Fisch argues that the district court did not comply with Federal Rule of Criminal Procedure 32.2. The Rule states in part that the district court must determine before jury deliberations whether “either party requests” that the jury be retained to determine the forfeitability of specific property, in the event that the jury returns a guilty verdict. Fed. R. Crim. P. 32.2(b)(5)(A). Fisch admits he did not make a “request” before jury deliberations and that review is for plain error. *United States v. Valdez*, 726 F.3d 684, 698-99 (5th Cir. 2013).

Assuming that the district court clearly erred in not inquiring of the parties whether they wanted the jury to be retained, Fisch still must show that the error affected his substantial rights, i.e., it was prejudicial. Fisch has the burden of establishing “a reasonable probability that any forfeiture imposed would have been less than” what actually was imposed. *United States v. Marquez*, 685 F.3d 501, 510 (5th Cir. 2012). The difference, Fisch argues, is that the jury would have found that his home was not traceable to criminal proceeds. But that would not have been the case, as the government eventually sought a forfeiture order only in the form of a money judgment. He makes no argument as to how the money judgment would have differed. Fisch does not satisfy a plain error showing. *Cf. id.* (“Marquez simply focuses on the district court’s errors independent of any prejudice they may have caused.”).

B. Forfeiture of Home as Substitute Property

Fisch challenges the government’s pre-trial tactic of alleging that his home was forfeitable as an asset traceable to his criminal proceeds under 18 U.S.C. § 981 and then, post-trial, alleging that the home was forfeitable as substitute property under 21 U.S.C. § 853(p). He also argues that the government failed to meet the substitute property criteria of 21 U.S.C. § 853(p).

These arguments were not properly raised below. Fisch’s counsel was given an opportunity at a combined forfeiture/sentencing hearing to object to

the government's motion to amend the forfeiture order to include substitute property. Although Fisch's counsel did not have an ideal opportunity to formulate and lodge objections—as the government's forfeiture motion was served on the morning of the hearing—counsel did not raise either of the specific arguments that Fisch now raises on appeal. Under Federal Rule of Criminal Procedure 51(b), Fisch's claims were not preserved and are reviewed now only for plain error. *See Puckett v. United States*, 556 U.S. 129, 133-35 (2009) (discussing “contemporaneous-objection rule”). Fisch makes no attempt to satisfy plain error review, and we do not find it satisfied.

C. Money Judgment

Last, Fisch argues that the money judgment included \$450,000 not found by the jury beyond a reasonable doubt. The court reviews the district court's findings of fact as to forfeiture for clear error. *United States v. Olguin*, 643 F.3d 384, 398 (5th Cir. 2011). Elida Sanchez testified that her son gave Fisch \$450,000 in cash stored in a Stetson hat box. And her son testified that he put the hat box containing \$450,000 in Fisch's car. The district court's finding that there was “extensive evidence” that the money was paid to Fisch was not clearly erroneous.

VIII

Finally, Fisch contends that trial counsel was ineffective. On the morning of sentencing, Fisch filed a “motion to determine the effectiveness of counsel,” arguing that his trial counsel, Michael McCrum, was ineffective in several respects. Fisch argued that McCrum: (1) failed to interview key government and defense witnesses; (2) failed to investigate or pursue potential defenses; (3) failed to introduce impeachment evidence; (4) failed to make evidentiary offers of proof to admit exhibits; (5) failed to request a defensive jury instruction on 18 U.S.C. § 1515(c); and (6) refused to request a trial continuance after falling ill during trial and undergoing surgery. Fisch

submitted exhibits supporting his claims, including affidavits and text message conversations between him and McCrum.

The district court orally ruled on the motion without requesting further briefing or holding an evidentiary hearing.⁵ The government concedes that Fisch was not able to develop his claims below, which prohibits appellate review. We conclude that the factual issues underlying Fisch's claims of ineffective assistance cannot be determined on the current record. The Supreme Court has noted that such factual issues are best resolved by the district court on 28 U.S.C. § 2255 review. *See Massaro v. United States*, 538 U.S. 500, 505 (2003). Consequently, we decline to address Fisch's ineffective assistance claims on direct appeal. Nothing about our affirmance of Fisch's convictions affects Fisch's right to bring ineffective assistance of counsel claims—including those that were stated in Fisch's motion below—in a timely § 2255 proceeding.

IX

We AFFIRM as to all issues except the district court's denial of Fisch's ineffective assistance of counsel claims, which may be raised anew in a timely § 2255 proceeding. In permitting ineffective assistance to be raised collaterally, we express no view on the merits of that claim.

⁵ The district court's oral ruling only specifically addresses Fisch's claim that McCrum was ineffective in "fail[ing] to call and to investigate [certain] FBI agents."

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

April 05, 2017

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 15-20663 USA v. Abraham Fisch
USDC No. 4:11-CR-722-1

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Appellant's separate motion for reconsideration of the motion to release deed of trust is still pending before the court.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
James deMontluzin, Deputy Clerk
504-310-7679

cc:

Mrs. Regina Bacon Criswell
Mr. Gerald Paul Doyle
Ms. Katherine Lisa Haden
Ms. Carmen Castillo Mitchell

A true copy
Attest:

Clerk, U. S. Court of Appeals, Fifth Circuit

By Christina Jordan
Deputy 5/24/17
New Orleans, Louisiana

Exhibit

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20663

United States Court of Appeals
Fifth Circuit

FILED

March 14, 2017

Lyle W. Cayce
Clerk

D.C. Docket No. 4:11-CR-722-1

consolidated with 15-20636

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ABRAHAM MOSES FISCH, also known as Anthony Fisch,

Defendant - Appellant

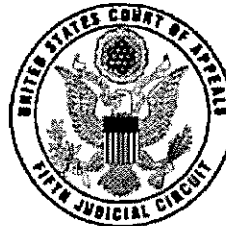
Appeals from the United States District Court for the
Southern District of Texas, Houston

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.



A true copy
Attest:

Clerk, U. S. Court of Appeals, Fifth Circuit

By Christina Stender
Deputy 5/24/17
New Orleans, Louisiana

Certified as a true copy and issued
as the mandate on Apr 05, 2017

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Supreme Court of the United States

I, SCOTT S. HARRIS, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing photocopied document, pages numbered from 1 to 2, inclusive, is a true copy of the Supreme Court Order denying the Petition for a Writ of Certiorari filed on October 30, 2017 and Docket in the case of

ABRAHAM MOSES FISCH,

Petitioner

v.

UNITED STATES

No. 16-1483, of the October Term 2017, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of the Supreme Court of the United States, at the City of Washington, D.C. this 18th day of December, A.D., 2017.

/s/ SCOTT S. HARRIS
Clerk of the Supreme Court
of the United States

by *Danny Bickell*
Danny Bickell
Deputy Clerk



Exhibit

C

No. 16-1483

Title: Abraham Moses Fisch, Petitioner
v.
United States

Docketed: June 13, 2017

Linked with 17A240

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (15-20663)

Decision Date: March 14, 2017

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Jun 6 2017 Petition for a writ of certiorari filed. (Response due July 13, 2017)

Jun 19 2017 Waiver of right of respondent United States to respond filed.

Jun 21 2017 DISTRIBUTED for Conference of September 25, 2017.

Jul 19 2017 Response Requested . (Due August 18, 2017)

Aug 10 2017 Order extending time to file response to petition to and including September 18, 2017.

Aug 28 2017 Application (17A240) for a stay, submitted to Justice Alito.

Sep 5 2017 Application (17A240) denied by Justice Alito.

Sep 18 2017 Brief of respondent United States in opposition filed.

Oct 3 2017 Reply of petitioner Abraham M.Fisch filed. (Distributed)

Oct 4 2017 DISTRIBUTED for Conference of 10/27/2017.

Oct 30 2017 Petition DENIED.

~~~Name~~~~~

~~~~~Address~~~~~

~~~Phone~~~

Attorneys for Petitioner:

Regina Bacon Criswell

Counsel of Record

7803 Bent Briar

San Antonio, TX 78250

rbclaw@yahoo.com

210-775-1155

Party name: Abraham M.Fisch

Attorneys for Respondent:

Noel Francisco

Counsel of Record

Solicitor General

United States Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530-0001

SupremeCtBriefs@USDOJ.gov

202-514-2217

Party name: United States

A True copy SCOTT S. HARRIS

Test:

Clerk of the Supreme Court of the United States

By

Danny S. Harris

Deputy

Supreme Court of the United States

No. 16-1483

Abraham Moses Fisch,

Petitioner

v.

United States

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit, No. 15-20663.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED by this Court that the said petition is denied.

October 30, 2017

A true copy SCOTT S. HARRIS

Test:

Clerk of the Supreme Court of the United States

By *Danny Kirkell*

Deputy

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

| | | |
|------------------------------------|---|------------------------|
| IN THE MATTER OF | § | |
| ABRAHAM M. FISCH | § | CAUSE NO. 57005 |
| STATE BAR CARD NO. 07039900 | § | |

JUDGMENT OF DISBARMENT

On the 20th day of April 2018, the Board of Disciplinary Appeals considered the Motion for Entry of Judgment of Disbarment filed in the above case by Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, against Respondent, Abraham M. Fisch. The Board finds that:

- (1) It has continuing jurisdiction of this matter pursuant to Texas Rules of Disciplinary Procedure 8.05 ("TRDP");
- (2) The United States Court of Appeals for the Fifth Circuit affirmed Respondent, Fisch's, criminal conviction and issued a Mandate indicating that the decision was final on or about April 5, 2017;
- (3) Petitioner filed its Motion for Entry of Judgment of Disbarment on or about February 14, 2018, and served same on Respondent in accordance with TRDP 8.05;
- (4) Respondent's conviction for the commission of Intentional Crimes as defined by TRDP 1.06(T), for which he was sentenced in the United States District Court for the Southern District of Texas, Holding Session in Houston, has become final and is not subject to appeal;
- (5) Petitioner's Motion for Entry of Judgment of Disbarment should be granted.

Interlocutory Suspension

On the 12th day of January 2016, the Board of Disciplinary Appeals entered an Agreed Interlocutory Order of Suspension, which included the following findings of fact and conclusions of law:

- (1) Respondent, Abraham M. Fisch, whose State Bar Card number is 07039900, is licensed by the Supreme Court of Texas to practice law and is authorized to practice law in the State of Texas.
- (2) On or about October 19, 2011, Respondent was charged by Indictment with Count One - Conspiracy, in violation of 18 U.S.C. §371, Count Two - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Three - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Four - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Five - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Six - Money Laundering Conspiracy, in violation of 18 U.S.C. §1956(h), Counts Seven through Fifteen - Money Laundering, in violation of 18 U.S.C. §§ 1957 and 2, and Counts Sixteen through Twenty - Failure to File Tax Return, in violation of 26 U.S.C. §7203, in Cause No. H-11-722, styled *United States of America v. Abraham Moses Fisch aka Anthony Fisch (Counts 1-20), Lloyd Glen Williams (Counts 1-15, 21), Monica Bertman aka Marsha Zaluska Pavlovich aka Malkah Aliyah Bertman (Count 1, 2)* in the United States District Court for the Southern District of Texas, Houston Division.
- (3) On or about April 3, 2013, Respondent was charged by Superseding Indictment with Count One - Conspiracy, in violation of 18 U.S.C. §371, Count Two - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Three - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Four - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Five - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Six - Obstruction of Justice, in violation of 18 U.S.C. §1503, Count Seven - Money Laundering Conspiracy, in violation of 18 U.S.C. §1956(h), Counts Eight through Sixteen - Money Laundering, in violation of 18 U.S.C. §§ 1957 and 2, Counts Seventeen through Twenty-One - Failure to Timely File Tax Return, in violation of 26 U.S.C. §7203, and Count Twenty-Two - Corrupt Endeavor to Impede the Due Administration of the Internal Revenue Code, in violation of 26 U.S.C. § 7212(a) in Cause No. H-11-722, styled *United States of America v. Abraham Moses Fisch aka Anthony Fisch (Counts 1-22), Monica Bertman aka Marsha Zaluska Pavlovich aka Malkah Aliyah Bertman (Count 1, 2)* in the United States District Court for the Southern District of Texas, Houston Division.
- (4) On or about November 10, 2015, a Judgment in a Criminal was entered in Case No. 4:11CR00722-001, styled *United States of America v. Abraham Moses Fisch, aka Anthony Fisch*, in the United States District Court for the Southern District of Texas, Holding Session in Houston, wherein Respondent was found guilty of Count One S - Conspiracy to Commit Obstruction of Justice, Count Two S - Obstruction of Justice, Aiding and Abetting, Count Three S - Obstruction of Justice, Aiding and Abetting, Count Five S- Obstruction of Justice, Aiding and Abetting, Count Six S - Obstruction of Justice, Aiding and Abetting, Count Seven S - Conspiracy to Commit Money Laundering, Counts Eight S through Thirteen S - Money

Laundering, Aiding and Abetting, Count Sixteen S – Money Laundering, Aiding and Abetting, Counts Seventeen S through Twenty-One S - Failure to File Tax Return and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months. This term consists of 53 months as to Count 1S; 120 months as to each of Counts 2S, 3S, 5S, 6S and 8S through 13S and 16S; 180 months as to Count 7S; and 12 months as each of Counts 17S through 21S; all terms to run concurrently for a total of 180 months. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years on each of Counts 1S thorough 3S, 5S, 6S, 8S through 13S and 16S; 5 years as to Count 7S; and 1 year as to each of Counts 17S through 21S; all such terms to run concurrently for a total of 5 years, ordered to pay an assessment of \$1,425.00.

- (5) On or about November 25, 2015, an Amended Judgment in a Criminal Case was entered in Case No. 4:11CR00722-001, styled *United States of America v. Abraham Moses Fisch, aka Anthony Fisch*, in the United States District Court for the Southern District of Texas, Holding Session in Houston, wherein Respondent was found guilty of Count One S - Conspiracy to Commit Obstruction of Justice, Count Two S - Obstruction of Justice, Aiding and Abetting, Count Three S - Obstruction of Justice, Aiding and Abetting, Count Five S- Obstruction of Justice, Aiding and Abetting, Count Six S - Obstruction of Justice, Aiding and Abetting, Count Seven S - Conspiracy to Commit Money Laundering, Counts Eight S through Thirteen S - Money Laundering, Aiding and Abetting, Count Sixteen S - Money Laundering, Aiding and Abetting, Counts Seventeen S through Twenty-One S - Failure to File Tax Return and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months. This term consists of 53 months as to Count 1S; 120 months as to each of Counts 2S, 3S, 5S, 6S and 8S through 13S and 16S; 180 months as to Count 7S; and 12 months as to each of Counts 17S through 21S; all terms to run concurrently for a total of 180 months. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years as to each of Counts 1S thorough 3S, 5S, 6S, 8S through 13S and 16S; 5 years as to Count 7S; and 1 year as to each of Counts 17S through 21S; all such terms to run concurrently for a total of 5 years, ordered to pay an assessment of \$1,425.00.
- (6) Respondent, Abraham M. Fisch, is the same person as the Abraham Moses Fisch who is the subject of the criminal case described above.
- (7) Respondent has appealed the criminal convictions.
- (8) This Board has jurisdiction to hear and determine this matter. Tex. R. Disciplinary P. ("TRDP") 7.08(G);

- (9) Respondent, Abraham M. Fisch, having been convicted of Count One S - Conspiracy to Commit Obstruction of Justice, Count Two S - Obstruction of Justice, Aiding and Abetting, Count Three S - Obstruction of Justice, Aiding and Abetting, Count Five S - Obstruction of Justice, Aiding and Abetting, Count Six S - Obstruction of Justice, Aiding and Abetting, Count Seven S - Conspiracy to Commit Money Laundering, Counts Eight S through Thirteen S - Money Laundering, Aiding and Abetting, Count Sixteen S - Money Laundering, Aiding and Abetting, has been convicted of Intentional Crimes as defined by TRDP 1.06(T).
- (10) Respondent has also been convicted of Serious Crimes as defined by TRDP 1.06(Z).
- (11) Having been found guilty and convicted of Intentional and Serious Crimes and having appealed such conviction, Respondent, Abraham M. Fisch, should have his license to practice law in Texas suspended during the appeal of his criminal convictions. TRDP 8.04.
- (12) The Board retains jurisdiction to enter a final judgment in this matter when the criminal appeal is final.

Disbarment

The Board has determined that disbarment of the Respondent is appropriate. It is, therefore, accordingly, ORDERED, ADJUDGED, AND DECREED that Respondent, Abraham M. Fisch, State Bar No. 07039900, be and he is hereby DISBARRED from the practice of law in the State of Texas, and his license to practice law in this state be and is hereby revoked.

It is further ORDERED, ADJUDGED and DECREED that Respondent, Abraham M. Fisch, is hereafter permanently prohibited, effective immediately, from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney," "counselor," or "lawyer."

It is further ORDERED Respondent, Abraham M. Fisch, shall immediately notify each of his current clients in writing of this disbarment. In addition to such notification, Respondent is ORDERED to return any files, papers, unearned monies and other property belonging to clients and former clients in the Respondent's possession to the respective clients or former clients or to another attorney at the client's or former client's request. Respondent is further ORDERED to file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that all current clients have been notified of Respondent's disbarment and that all files, papers, monies and other property belonging to all clients and former clients have been returned as ordered herein.

It is further ORDERED Respondent, Abraham M. Fisch, shall, on or before thirty (30) days from the signing of this judgment by the Board, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing. Respondent is further ORDERED to file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice has received written notice of the terms of this judgment.

It is further ORDERED that Respondent, Abraham M. Fisch, if he has not already done so, immediately surrender his Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P. O. Box 12487,

Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

It is further ORDERED that a certified copy of the Petition for Compulsory Discipline on file herein along with a copy of this Final Judgment of Disbarment be sent to the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

Signed this _____ day of _____ 2018.

Chair Presiding
BOARD OF DISCIPLINARY APPEALS