CA No. 13-35236

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTER SVEN EVERTSON,

Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee.

On Appeal from the United States District Court
for the District of Idaho
No. 10-148-BLW
(Honorable B. Lynn Winmill)

PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY

Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Counsel for Petitioner

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MOTION FOR CERTIFICATE OF APPEALABILITY

Petitioner Krister Evertson hereby moves pursuant to Fed.R.App.P. 22 and Circuit Rule 22-1 for a Certificate of Appealability (COA) from the district court's denial of his petition for relief pursuant to 28 U.S. C. § 2255. At the same time that it denied the petition, the district court declined to issue a COA. Evertson seeks a COA regarding the trial court's refusal to conduct any sort of evidentiary hearing prior to denying two significant aspects of his ineffective assistance of counsel claim: (1) counsel's refusal to permit him to testify in his own defense; and (2) counsel's failure to object to improper and highly prejudicial jury instructions regarding the elements of the offense with which Evertson was charged. In support of his motion, Evertson states as follows.

PRIOR PROCEEDINGS

Following a jury trial in 2007 in U.S. District Court for the District of Idaho, Evertson was convicted of moving hazardous materials without complying with Department of Transportation regulations, in violation of the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), 49 U.S.C. § 5124 (Count I); and two counts of storing and disposing of hazardous wastes in violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d)(2)(A). Judge B. Lynn Winmill imposed a sentence of 21 months on each count to be served concurrently, three years of supervised release, and restitution of $421,049

(to pay costs incurred by the federal government in disposing of Evertson's chemicals and other property). This Court affirmed the conviction and his sentence on all but the restitution issue. *United States v. Evertson*, 320 Fed. Appx. 509 (9th Cir. 2009). In October 2009, the U.S. Supreme Court denied a petition for a writ of certiorari. 130 S. Ct. 460 (2009).

On March 17, 2010, Evertson filed a timely *pro se* motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. At the time he filed the motion, he was subject to supervised release, and he continues to suffer the numerous collateral consequences that flow from his felony conviction. The § 2255 petition alleged that Evertson was denied his Sixth Amendment right to counsel at trial, because his court-appointed counsel provided ineffective assistance. The two principal bases for the ineffective assistance claim were that defense counsel refused his demand that he be permitted to testify and that, because of their lack of understanding of environmental law, they failed to object to highly prejudicial jury instructions regarding the elements of the offenses with which he was charged.

The district court did not act on the petition for more than three years. It did not respond to Evertson's repeated requests for an evidentiary hearing on his ineffective assistance claim. Finally, on March 6, 2013, the district court denied the petition without conducting a hearing, and also declined to issue a COA.

Evertson filed a timely notice of appeal from the district court decision. The Washington Legal Foundation (WLF) thereafter agreed to represent Evertson in connection with the appeal. This motion requests that the Court grant a COA so that Evertson can proceed with the appeal. As explained herein, the facts of this case amply demonstrate that it is at least debatable that trial counsel's performance was constitutionally deficient and that Evertson was prejudiced thereby. Under those circumstances, a COA should issue.

STATEMENT OF FACTS

The facts regarding Evertson's business activities in Idaho in 2000-2002 are largely undisputed. Evertson agreed with his sister and brother-in-law, Diana and Tim Sundles, to establish a business for the purpose of developing an inexpensive method of manufacturing sodium borohydride, a chemical with numerous industrial uses. Evertson was to supply the technical know-how, while Tim Sundles would supply $100,000 in initial funding. Because Tim Sundles wanted to keep a careful eye on how company funds were spent, he insisted that Evertson move from Alaska to Salmon, Idaho (the Sundles's home town) to operate the business there.[1] The company began operations in 2000 and quickly spent most of

[1] Prior to his experiences in Salmon, Evertson had had no brushes with the law. He was an Eagle Scout and a promising chemist, and was widely considered to be an upstanding member of his community.

its start-up capital acquiring equipment and chemicals, including a March 2001 shipment of ten metric tons (22,000 lbs.) of pure sodium metal, packed in 55 gallon drums.

Evertson worked without salary for 21 months to perfect a low-cost method of manufacturing sodium borohydride. In July 2002, he determined that: (1) he was close to perfecting the technology; but (2) he needed to purchase additional propane in order to achieve the operating temperatures necessary to produce sodium borohydride using his technology; and (3) he was unable to raise the funds necessary to purchase more propane. He determined that he should move back to Alaska to earn the funds necessary to restart his business. In the meantime, he intended to leave the company's chemicals in storage in Salmon.

There were three categories of stored materials that the United States later deemed to be hazardous: (1) sodium metal, still packaged in the 55-gallon metal drums which were shipped to Mr. Evertson in March 2001;[2] (2) 2,500 gallons of liquid (presumed by all parties to be sodium hydroxide) in two pressurized process tanks; and (3) 11,000 pounds of an amalgam (consisting largely of a mixture of borax, sodium, silicon, and mineral oil) in a stainless steel, insulated 4,000-gallon

[2] Eighty drums of sodium metal had been shipped; the 62 drums that had not been opened as of August 2002 were placed into storage.

reactor tank. The United States presented no evidence at trial that any material ever leaked from any of these containers during storage, or that the material caused any environmental damage. Items #2 and #3 were the focus of Count II of the indictment; Item #1 (the unopened – and extremely valuable and useful – drums of sodium metal) were the focus of Count III.

The parties accounts regarding subsequent events differ significantly. Evertson contends that he always intended to return to Salmon and resume business operations, as soon as he earned enough money to purchase additional supplies. The Government, on the other hand, contended at trial that Evertson abandoned the stored materials and never intended to return to Salmon to use them. The issue of Evertson's intent was crucial to the two RCRA counts (Counts II and III); a hazardous substance is not considered "waste" (and thus not subject to RCRA's permitting requirements) unless it has been disposed or abandoned, or is being stored temporarily while awaiting its eventual disposal. Because the trial turned largely on Evertson's state of mind during 2002-04, he deemed it crucial that he testify on his own behalf.

Unfortunately, Evertson's court-appointed counsel – who had little or no experience with RCRA prosecutions and only a rudimentary understanding of

chemistry – refused to allow him to testify at trial.[3] Evertson repeatedly asked to be allowed to testify and never agreed that he would not testify. Counsel rejected each of Evertson's requests to testify, explaining that in their experience testimony from the defendant almost always damages the defense. Because of Evertson's experience with court rules in Alaska (which require trial judges to ask defendants whether they wish to testify), he expected that Judge Winmill would ask him before the defense rested whether he wanted to testify. He planned to answer yes, he wanted to testify, and to enlist Judge Winmill's support in overruling his counsel's decision. Judge Winmill never asked the anticipated question, however, and the defense rested without calling Evertson as a witness. Counsel also failed to object to highly prejudicial jury instructions regarding the elements of the offenses with which Evertson was charged.

Following Evertson's conviction and exhaustion of his direct appeals, he timely filed this § 2255 motion, alleging ineffective assistance of counsel. Judge

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[3] This account of Evertson's dealings with defense counsel is taken from his § 2255 motion, and his August 5, 2010 Reply to the Government's opposition brief. The latter was supported by sworn affidavits of Evertson, his sister Kristina Daly, and Dwayne Shelton (a police officer who witnessed a key conversation between Evertson and his defense counsel). Because the district court denied Evertson's requests for an evidentiary hearing, his sworn factual allegations must be accepted as true for purposes of this appeal. *Taylor v. United States*, 238 F.2d 409, 413 (9th Cir. 1956); *Owens v. United States*, 483 F.3d 48, 57 (1st Cir. 2007).
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Winmill's decision noted that, in order to state a Sixth Amendment ineffective-assistance-of-counsel claim, a criminal defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that it is probable that, but for counsel's errors, the result of the proceeding would have been different. Memorandum and Decision ("Decision") at 8. Judge Winmill made no effort to defend counsel's refusal to permit Evertson to testify.[4] Rather, he stated merely that defense counsel had a reasonable basis for concluding that Evertson should not testify. Decision at 24. He also held that Evertson waived his ineffective-assistance-of-counsel claim by remaining silent at trial regarding his right to testify. *Id.*[5]

Judge Winmill also rejected Evertson's claim that counsel were ineffective in failing to object to jury instructions regarding the RCRA charges (Counts II and III). Decision at 26-29. Given his authorship of the disputed jury instructions, it is hardly surprisingly that Judge Winmill deemed the instructions unobjectionable.

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[4] Indeed, if Evertson's sworn statement is credited, counsel acted highly unethically. *See* Rule 1.2(a), Idaho Rules of Professional Conduct.

[5] In his lengthy discussion of Evertson's denial-of-right-to-testify claim, Judge Winmill did not directly rule on whether Evertson's testimony might have led to an acquittal. Decision at 11-24. He did opine, however, that the "conclusion [that Evertson would have been acquitted had he testified] is entirely speculative, especially given the impeachment potential" of prior statements made by Evertson. *Id.* at 17.

He conceded that because defense counsel failed to object, the instructions were reviewed by the Ninth Circuit under a relaxed "plain error" standard rather than the far more rigorous "harmless error" standard that would have applied otherwise. *Id.* He nonetheless concluded that the instructions would have been upheld even under a "harmless error" standard. *Id.*

SUMMARY OF ARGUMENT

A Certificate of Appealability should be issued when a movant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Evertson has made such a "substantial showing." Indeed, the case law overwhelmingly supports Evertson's position that the district court erred in denying the § 2255 motion without even conducting an evidentiary hearing. But the Court need not go that far in order to grant this motion; it is enough that Evertson has raised substantial doubts regarding the propriety of the district court's ruling.

Federal law provides that a district court should "grant a prompt hearing" on a § 2255 motion unless the motion and the files and records in the case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The facts of this case, as sworn to by Evertson, demonstrate that defense counsel did not merely perform ineffectively; they performed unethically. They were

ethically bound to defer to Evertson's unwavering desire to testify in his own defense, yet they allowed their preference for nontestifying defendants to overcome their ethical obligations. The affidavit of a police officer who was present during the key attorney-client discussion supports Evertson's position on this issue. Moreover, there is substantial evidence that counsel's decision was catastrophic to Evertson's defense. The overriding issue in this case was Evertson's state of mind: did he intend to abandon his stored chemicals or did he intend to return to Salmon when his finances permitted a return? By preventing Evertson from testifying, counsel prevented the jury from hearing evidence from the best source of what Evertson was thinking: Evertson himself. They also prevented Evertson from providing responses to testimony that, the Government claimed, showed that the chemicals had been abandoned.

The trial court held that Evertson waived his right to claim ineffective assistance regarding his right to testify by remaining silent at trial. That holding is an incorrect statement of the law; at the very least, there is a reasonable basis for concluding that the law is otherwise. The trial court cited case law holding that silence at trial creates a rebuttable presumption that the defendant has waived his right to testify. But the issue here is not denial of the right to testify; the issue is ineffective assistance of counsel. Case law is unanimous that, at the very least, a

defendant is entitled to an evidentiary hearing on the question of whether counsel assists ineffectively (thereby denying the defendant his constitutional right to assistance of counsel) when he overrides the defendant's unequivocally expressed desire to testify in his own defense.

In response to the § 2255 motion, defense counsel submitted affidavits stating that they decided not to call Evertson as a witness because they feared opening the door to allegedly damaging cross-examination regarding statements Evertson made during judicial proceedings in Alaska. The Alaska statements allegedly could have undermined Evertson's nonabandonment defense. If an evidentiary hearing had been held, Evertson could have demonstrated that the "Alaska statements" rationale was a post-trial invention and, in any event, made no sense. Counsel argued with Evertson at length during the trial that he should not testify, but they *never once mentioned* to him the Alaska statements. Instead, they advised against testifying on the grounds that a defendant generally hurts his case when he takes the stand. Moreover, if read fairly, the Alaska statements do not undercut the "no abandonment" defense in the slightest. Evertson's district court submissions demonstrate that, if questioned about the Alaska statements on cross-examination, he would have had little difficulty explaining that the statements did not suggest that he had abandoned the chemicals that remained in Salmon.

Most importantly, the Alaska statements are obviously a red herring because if the Government had wanted to introduce the Alaska statements into evidence, it could have done so (under FRE 801(d)(2)(A), as the prior testimony of a party) without regard to whether Evertson took the stand. The fact that the Government did not introduce the Alaska statements is strong evidence that the Government did not believe that the statements supported its abandonment theory. Indeed, as explained below, it was *the Government* that insisted that no mention be made of the prior Alaska judicial proceedings (which resulted in an acquittal), because it correctly feared that any such mention would create jury sympathy for Evertson as the victim of relentless prosecutors who filed a second set of charges against Evertson after the first set of charges did not stick.

A COA should also issue with respect to counsel's failure to object to the jury instructions. The entire basis of Evertson's RCRA defense was that the hazardous materials stored in Salmon did not qualify as "waste" within the meaning of RCRA because he never intended to abandon the materials. Yet, counsel failed to object to the jury instructions regarding the elements of the RCRA offenses, even though those instructions clearly suggested that the jury should find that the hazardous materials were "waste" so long as *EPA* had determined that they were waste. It was uncontested that EPA made a "waste"

determination at the time it disposed of Evertson's property, and the jury was told of that determination. Accordingly, the jury very possibly determined the "waste" issue against Evertson based on the erroneous jury instruction, thereby essentially nullifying Evertson's nonabandonment defense. By failing to object to the jury instruction, a failure that likely derived from their unfamiliarity with RCRA (a notoriously convoluted statute), trial counsel prevented an appellate challenge to the instruction under anything other than the lenient "clear error" standard of review.

ARGUMENT

EVERTSON HAS MADE A "SUBSTANTIAL SHOWING" THAT THE TRIAL COURT ERRED IN REFUSING TO CONDUCT AN EVIDENTIARY HEARING REGARDING HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

I. Evertson Was Denied Effective Assistance of Counsel When His Attorneys Refused to Permit Him to Testify in His Own Defense

Federal law provides that a district court should "grant a prompt hearing" on a § 2255 motion unless the motion and the files and records in the case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The facts of this case, as sworn to by Evertson, demonstrate that defense counsel did not merely perform ineffectively; they performed unethically. Accordingly, at the very least, Evertson has made a "substantial showing" that he was entitled to an

evidentiary hearing that he was denied effective assistance of counsel when his attorneys refused to permit him to testify in his own defense.

The ethical obligations of Idaho attorneys regarding the scope of their representation of clients is set forth in Rule 1.2 of the Idaho Rules of Professional Conduct, a rule that was also in effect at the time of trial in 2007. Rule 1.2(a) states unequivocally that the final decision regarding whether a criminal defendant is to testify at a trial is to be made by the defendant, not the attorneys: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify."[6] The Local Rules of Civil and Criminal Practice before the U.S. District Court for the District of Idaho provide that lawyers practicing before the district court "must" comply with the Idaho Rules of Professional Conduct. *See* Local Civil Rule 83.5. Evertson submitted a sworn affidavit, averring that he repeatedly told counsel that he wanted to testify but that they refused to accede to that request. His version of events is supported by the affidavit of Dwayne Shelton, a police officer who was present during a meeting between Evertson and his attorneys during a lunch recess on the final day of testimony. Shelton's

[6] The Model Rules of Professional Conduct, adopted by the American Bar Association, contain an identical Rule 1.2(a).

affidavit states:

- The attorneys were pressuring Evertson not to testify;
- Evertson was visibly upset and "it was obvious he really wanted to testify";
- "Krister told his attorneys several times he wanted to testify" and that he believed that he would be convicted if he did not testify;
- The meeting ended inconclusively, with the attorneys still insisting that he should not testify, and Evertson left the meeting "visibly upset" and crying;
- After the defense closed its case, Evertson told Shelton privately that he had told one of his attorneys, Nick Vieth, that "he felt the Lord wanted him to testify," and that "Nick then told Krister his God says he should not testify."

Shelton Affidavit at 1, submitted to district court on August 5, 2010. In other words, a police officer fully corroborates Evertson's version of events – that Evertson did not acquiesce to counsel's advice that he not testify. The affidavit also bolsters Evertson's credibility by demonstrating that his version of conversations he had with his attorneys was not a recent fabrication designed to strengthen an ineffective assistance claim. Under these circumstances, 28 U.S.C. § 2255(b) required the district court to conduct a "prompt hearing" to determine whether Evertson's counsel (as alleged in Evertson's affidavit) acted unethically.[7]

[7] Because the district court denied Evertson's requests for an evidentiary hearing, his sworn factual allegations must be accepted as true for purposes of this appeal. *Taylor v. United States*, 238 F.2d at 413; *Owens v. United States*, 483 F.3d at 57.

Counsel's conduct cannot be condoned, as the district court attempted to do, as simply a matter of "trial strategy." As the Fifth Circuit has explained:

> [I]t cannot be permissible trial strategy, regardless of its merits otherwise, for counsel to override the ultimate decision of a defendant to testify contrary to his advice. . . . "If defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental right to testify. . . . Under such circumstances, defense counsel has not acted within the range of competence demanded of attorneys in criminal cases, and *the defendant has not received reasonably effective assistance of counsel*."

United States v. Mullins, 315 F.3d 449, 453-53 (5th Cir. 2002) (emphasis added) (quoting *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992)).

In order to establish a Sixth Amendment ineffective assistance of counsel claim, a defendant must establish both that: (1) his counsel's performance was seriously deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Evertson's allegations regarding his attorney's unethical behavior are sufficient to establish his right to an evidentiary hearing with respect to the first of the two *Strickland* requirements.[8] Moreover, as set forth below, counsel's conclusion that Evertson should not testify

[8] *Strickland* held that an attorney's performance is to be judged "under prevailing professional norms." 466 U.S. at 688. Those professional norms include state-imposed ethical standards. *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003).

was a disastrously bad tactical decision that fell far below expected levels of attorney competence. Evertson was highly prejudiced by their decision, because it prevented him from rebutting the prosecution's evidence regarding the key issue in this case: did Evertson intend to abandon the chemicals that remained in Salmon, Idaho? Finally, the district court erred as a matter of law in concluding that Evertson waived his right to effective assistance of counsel.

A. The Decision Not to Call Evertson as a Witness Constituted Ineffective Assistance, Quite Apart from Its Being a Violation of Counsel's Ethical Obligations

As noted above, counsel were ethically required to call Evertson as a witness because he told them that he wanted to testify. Moreover, even if he had acquiesced in their decision that he should not testify (and the evidence submitted by Evertson indicates that he did not), their decision would have constituted ineffective assistance under the facts of this case.

Understanding the importance of Evertson's testimony requires a brief discussion of the elements of the RCRA charges filed against him. RCRA prohibits the "treatment, storage, or disposal" of any "hazardous waste" except in accord with a RCRA permit at a RCRA-permitted facility. 42 U.S.C. § 6925(a). RCRA makes it a felony for any person to "knowingly treat[ ] , store[ ], or dispose[ ] of any hazardous waste identified or listed under [RCRA] . . . without a permit

. . ." 42 U.S.C. § 6928(d)(2)(A).[9]

For purposes of this case, the key term is "hazardous waste." For material to be "hazardous waste," it must first be determined to be "solid waste." Under RCRA, the term "solid waste" includes "garbage, refuse, . . . and *other discarded material*. . ." 42 U.S.C. § 6903(27) (emphasis added). EPA has defined "discarded material" to include any material that is "abandoned." 40 C.F.R. § 261.2(a)(2)(i)(A). "Abandoned" material is material that has been: (1) "disposed of"; (2) "burned or incinerated"; or (3) "accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b). The United States asserted at trial that the materials stored by Evertson in Salmon, Idaho were "abandoned" (and were thus "discarded material" and "solid waste") because they were being stored "in lieu of being abandoned" – Evertson did not intend to return to Salmon to resume his business and to resume using his stored chemicals.

Accordingly, Evertson's state of mind was the single most important fact at his trial. If he *intended* to return to Salmon to resume his business and to resume

[9] RCRA authorizes EPA to "identif[y]" or "list" substances as "hazardous" within the meaning of RCRA. Evertson does not contest the Government's claim that EPA had identified the types of chemicals he possessed in Salmon as being hazardous; rather, he contends that his chemicals were not "waste."

using his stored chemicals, then he could not be convicted for any RCRA violations because his chemicals would not have been "abandoned" (or stored "in lieu of being abandoned") and thus would not be deemed "solid waste" within the meaning of 42 U.S.C. § 6903(27).

In order to prove that Evertson had abandoned the chemicals, the Government relied to a large extent on the testimony of prosecution witness Robert Chaffin. Chaffin, of course, had strong motives to pin responsibility on Evertson for the storage of hazardous materials in Salmon, so as to avoid being held responsible himself: he was the owner of the storage area where the chemicals were kept, and he was the one who moved the chemicals one-half mile from the operating facility to the storage area. In support of its abandonment theory, the Government pointed to Chaffin's testimony that: (1) Evertson paid rent for the storage facility for only one year (only until August 1, 2003), yet Evertson did not attempt to reclaim the materials in the ten months following that date; (2) Evertson had told Chaffin in 2002 that he planned to return to Salmon within one year, yet he did not; (3) Evertson spoke by phone with Chaffin only once during the 22 months that the materials were being held in storage by Chaffin; (4) Chaffin sent emails to Evertson to inquire about Evertson's plans to take possession of the materials but received no response; and (5) Chaffin spoke with Evertson's sister

and brother-in-law (who continued to live in Salmon) regarding Evertson's plans, but they told him that they had not been in contact with Evertson.

Although Evertson's defense was that he never intended to abandon the chemicals, the defense had little "intent" evidence to point to in the absence of Evertson's testimony. Judge Winmill's March 6, 2013 decision summarized the evidence that supported Evertson's non-abandonment claim; *e.g.*, both Chaffin and Timothy Sundles testified that Evertson told them before leaving Salmon that he intended to return, Sundles testified that his wife spoke with Evertson by phone while he was in Alaska during the relevant time period (thus indicating that the Sundles family knew how to contact him), and Evertson's expert witness testified that the materials left in Salmon were quite valuable and useful, and could have been used to resume the business at any time. Decision at 23.

While the evidence cited by Judge Winmill provided the defense with some basis for contesting abandonment, it is inconceivable that a competent attorney would have deemed that evidence to be an adequate replacement for direct testimony from Evertson, the very person whose intent was at issue. As the Supreme Court has emphasized, in the course of recognizing that criminal defendants have a "fundamental" constitutional right to testify on their own behalf, "[T]he most important witness for the defense in many criminal cases is the

defendant himself." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). His testimony is particularly important when, as here, conviction or acquittal hinges on the jury's assessment of the defendant's intentions.

In a case similar to Evertson's, the First Circuit reversed a trial court decision that had denied a § 2255 motion without providing the petitioner with an evidentiary hearing on his claim that counsel provided ineffective assistance by denying him the right to offer testimony exculpating himself. *Owens v. United States*, 483 U.S. 48, 57-61 (1st Cir. 2007). The appeals court explained:

> Owens claims that he would have offered testimony exculpating himself from at least some of the crimes for which he was convicted. A defendant's testimony as to non-involvement should not be disregarded lightly, especially given his constitutional right to explain his version of the facts. . . . A district court may not deny a prisoner an evidentiary hearing simply because the court believes that the prisoner's allegations as stated in the habeas corpus petition are untrue. Owens' allegations were neither so evanescent or bereft of detail that they cannot reasonably be investigated, nor threadbare allusions. Nor were Owens' allegations unsubstantiated.

Id. at 59-60 (citations omitted). Evertson is similarly entitled to an evidentiary hearing on his claim (supported by the affidavit of a police officer) that counsel assisted him ineffectively by denying him his right to offer his own exculpatory testimony.

Perhaps the most damaging testimony relied on by prosecutors was Chaffin's testimony that Evertson paid storage rent for only one year, through

August 2003. The jury might well have interpreted that failure to pay rent past August 2003 as strong evidence of abandonment. Had Evertson been permitted to testify, he would have explained: (1) there was no written rental agreement; (2) his oral agreement with Chaffin provided that he would pay rent by providing bags of borax (which Chaffin knew he could sell) in lieu of cash, 1,000 pounds of borax for each year's rent: and (3) he gave Chaffin a 2,000-pound sack of borax, thereby satisfying Evertson that he had paid rent for two years. Such testimony, if believed, would likely have led to acquittal – it would indicate that Evertson had not abandoned his materials but rather believed that he had paid rent up to and past the date in May 2004 on which EPA seized his materials. But because counsel did not permit Evertson to testify, the jury never had an opportunity to hear his explanation regarding rental payments.

In affidavits submitted to the district court in connection with the § 2255 motion, both defense counsel submitted affidavits that attempted to explain their decision not to call Evertson as a witness. They both asserted that they decided not to call Evertson as a witness because they feared opening the door to allegedly damaging cross-examination regarding statements Evertson made during judicial

proceedings in Alaska.[10] They alleged that the Alaska statements could have undermined Evertson's nonabandonment defense.

Counsel's explanation for not calling Evertson as a witness is not credible; indeed, it lends further support for Evertson's ineffective assistance of counsel claim. First, counsel *never* told Evertson that the Alaska statements had anything to do with their advice that he not testify. Evertson Aff. at 2. Rather, in conversations with Evertson, their sole rationale was the one spelled out by Steven Richert in his 2010 affidavit:

> I did express to Mr. Evertson that I have a strong preference against defendants testifying at trial, unless necessary. I expressed to Mr. Evertson that my experience had been that Defendants who choose to testify at trial usually produce more harm than good.

Richert Aff. at 2. At the very least, an evidentiary hearing is required to determine whether Richert permitted his general prejudice against allowing defendants to testify to overcome the need for evidence regarding Evertson's thought processes, and also to overcome Evertson's desire to testify in his own behalf.

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[10] Prior to his Idaho indictment, Evertson was acquitted in Alaska on charges related to his efforts to sell sodium metal on Ebay. The Government asserted (unsuccessfully) that Evertson had not properly labeled his sodium metal shipments, in violation of the federal regulations issued pursuant to HMTUSA. Evertson testified in his own defense at that trial; the statements that counsel said they feared would be used for impeachment purposes were part of Evertson's testimony in the Alaska trial.

Moreover, there is nothing in Evertson's Alaska testimony that, if used during cross-examination, would have seriously undercut his nonabandonment defense. Both counsel and Judge Winmill incorrectly asserted that the testimony suggested that Evertson intended not to return to Idaho. To the contrary, nothing in the testimony either expressed or implied an intent not to return. In their opposition to the § 2255 motion, prosecutors highlighted testimony in which Evertson admitted that his business shut down because it ran out of funds, that he had no money when he left Idaho, and that he made very little money even after returning to live with his mother in Alaska. U.S. Opp. Br. at 8-10. Such admissions are not, however, inconsistent with an intent to try to earn enough money to return to Idaho and restart his business – particularly given Evertson's repeatedly expressed belief that the materials in storage in Salmon were quite valuable and useful. Accordingly, there was no reason to fear that the nonabandonment defense would have been undercut if Evertson had been cross-examined with his Alaska testimony.

Moreover, counsel's rationale for not calling Evertson as a witness – a fear that doing so would open the door to cross-examination regarding the Alaska statements – suggests a basic misunderstanding on their part of the Federal Rules of Evidence. Evertson's intent was very much at issue during the trial. If

prosecutors had believed that the Alaska testimony would undermine the nonabandonment defense, they did not need to wait until cross-examination to introduce it into evidence; they could have introduced it as part of their case-in-chief. Under FRE 801(d)(2)(A), the pre-trial statements of a party-opponent (such as Evertson) are not deemed hearsay and thus are admissible into evidence so long as they are relevant to issues raised by the case. The fact that prosecutors did not introduce the Alaska testimony as part of their case-in-chief is a good indication that even they did not believe that the testimony would undercut the nonabandonment defense.

There is an additional reason why prosecutors almost surely would not have used the Alaska testimony during any cross-examination of Evertson. Doing so would have made the jury aware of the Alaska prosecution. Such awareness is likely to have generated considerable jury sympathy for Evertson. Prosecutors had brought criminal charges against Evertson in Alaska based on violations of highly technical federal environmental statutes and regulations. He was acquitted on those charges, and almost immediately thereafter he was indicted in Idaho on very similar environmental charges, based on facts that prosecutors learned about from statements Evertson made during the Alaska prosecution. Prosecutors justifiably feared that if the jury learned all those facts, it would sympathize with Evertson

and would be less inclined to convict him on the Idaho charges.

Indeed, it was at the insistence of *prosecutors* (who filed a motion in limine) that Judge Winmill at the start of the Idaho proceedings issued an order prohibiting all mention of the Alaska criminal proceedings. Accordingly, there is no credible basis for asserting that an effective attorney would have feared that prosecutors would risk opening the window to the Alaska proceedings by using the Alaska testimony during cross-examination, or that the Alaska testimony could have undermined the nonabandonment defense.

B. The Decision Not to Call Evertson as a Witness Prejudiced His Defense

Counsel's conclusion that Evertson should not testify was a disastrously bad tactical decision that fell far below expected levels of attorney competence. Evertson was highly prejudiced by their decision, because it prevented him from rebutting the prosecution's evidence regarding the key issue in this case: did Evertson intend to abandon the chemicals that remained in Salmon, Idaho? It also prevented him from introducing evidence regarding a key factual issue with respect to Count I: did Evertson authorize Chaffin to move his materials to the storage area. At the very least, Evertson was entitled to a evidentiary hearing regarding whether he was prejudiced by counsel's failure to call him as a witness.

Evertson's defense was prejudiced for many of the same reasons, discussed

above, that counsel's failure to call him as a witness constituted ineffective assistance of counsel. The prosecution was able to introduce into evidence, principally through the testimony of Robert Chaffin (the man who agreed to move and store Evertson's materials), several pieces of information that tended to support the prosecution's abandonment theory. While (as noted *supra* at 19) Evertson's counsel had some evidence upon which to base its nonabandonment defense, their ability to respond to the Government's theory was significantly hampered by the absence of testimony from the person with the best knowledge of Evertson's intent: Evertson himself.

Prosecutors made much of Chaffin's testimony that Evertson paid storage rent only through August 2003 yet kept his materials in storage until they were seized by EPA in May 2004. In the absence of Evertson's testimony, the only evidence that the defense could point to in response was Chaffin's admission that *perhaps* there had been a misunderstanding regarding the length of the lease, in light of the absence of a written agreement. But if Evertson had testified, he could have nullified any damage done by Chaffin's testimony, by demonstrating that: (1) he had, in fact, paid two year's rent; and (2) regardless what Chaffin may have thought, Evertson's good-faith belief that he had paid two year's rent is strong evidence that he had no intent to abandon the materials. *See supra* at 20-21.

Evertson could also have explained why the stored materials were so valuable and useful, an explanation that would have called into question any motive for abandoning the chemicals.

Evertson also could have testified regarding whose decision it was to move the chemicals from the Tanner Building (where his business operated) the one-half mile to Chaffin's storage facility – a key issue with respect to Count I. Evertson repeatedly told counsel that he wanted to testify that it was Chaffin, not himself, who made the decision to move the chemicals.[11] Although counsel Nick Veith stated in his affidavit he did not recall Evertson ever having claimed that the decision to move the materials was made by Chaffin, Judge Winmill explicitly found that Evertson did make that claim to Vieth in advance of trial. Decision at 24. Counsel's principal defense at trial to Count I was that the facts as alleged (regarding the movement of the materials to the storage facility) did not constitute a violation of the HMTUSA regulations. Once that defense was rejected by Judge Winmill as a matter of law, Evertson was left with little defense on Count I. Accordingly, counsel acted ineffectively in failing to follow up on Evertson's "I

[11] Evertson would have testified that: (1) on the one hand, he recognized that the materials would eventually have to be moved to a storage facility; (2) on the other hand, he did not want to go forward with the move until he was sure it could be done properly; and (3) he was not present at the time that Chaffin made a unilateral decision, without Evertson's knowledge, to move the materials.

didn't authorize the move" defense to Count I, a defense that was fully consistent with counsel's other defenses and that, if believed by the jury, would almost surely have resulted in an acquittal under Count I.

Evertson's defense was also prejudiced because his failure to be called as a witness left him unable to introduce evidence to respond effectively to prosecution claims that he became inaccessible once he left Idaho and returned to Alaska. He would have testified that: (1) he returned to the same house in Alaska in which he had lived with his mother for many years before moving to Idaho; (2) Diana and Timothy Sundles (his sister and brother-in-law, who continued to live in Salmon, who were his business partners, and who were well acquainted with Robert Chaffin) knew exactly where he lived in Alaska and knew how to contact him at any time; (3) Diana Sundles corresponded with him in Alaska during the period when the materials remained in storage in Salmon; (4) he would have responded to any letters or emails that Chaffin sent him, but Evertson never received any letters or emails from Chaffin in the period in question, albeit they did speak once by phone; (5) it is unlikely that Chaffin ever tried to email Evertson, because he never asked for an email address and thus Evertson never provided him with one – but would have done so if asked; and (6) on at least one occasion during the period in question, he communicated with Chaffin through a former Chaffin employee with

whom Evertson met in Alaska. Given that prosecutors, during closing arguments, placed such importance on Evertson's supposed inaccessibility during 2002-2004 as evidence that he had abandoned the materials being stored in Salmon, Evertson was highly prejudiced by his inability to testify regarding his accessibility.

Finally, Evertson was prejudiced because a jury that was being asked to determine the defendant's state of mind was denied an opportunity to hear him express his thoughts first-hand. A defendant (such as Evertson) who so passionately desires to be able to tell his story as he knows it is likely to be among the most effective of witnesses. As the Supreme Court has explained, "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). In the absence of any plausible basis for keeping him off the witness stand, other than counsel's longstanding, general aversion to such testimony, Evertson was prejudiced by not being allowed to tell his story as only he could do.

C. Evertson Did Not Waive His Right to Effective Assistance of Counsel

The trial court also denied the § 2255 motion on the grounds that Evertson waived his right to assert ineffective assistance of counsel by failing to speak up in court when his counsel told the judge that the defense would be calling no more witnesses. Decision at 14. That ruling was a clear error of law.

The trial court confused the right to effective assistance of counsel (a right explicitly protected by the Sixth Amendment) with the right to testify in one's own defense (a right not explicitly mentioned in the Bill of Rights but deemed by the Supreme Court in *Rock* to be protected by the Sixth Amendment's Compulsory Process Clause, the Fifth Amendment's privilege against self-incrimination, and the Due Process Clauses of the Fifth and Fourteenth Amendments). The trial court cited case law holding that silence at trial creates a rebuttable presumption that the defendant has waived his right to testify. But the issue here is not denial of the right to testify; the issue is ineffective assistance of counsel. Case law is unanimous that, at the very least, a defendant is entitled to an evidentiary hearing on the question of whether counsel assists ineffectively (thereby denying the defendant his constitutional right to assistance of counsel) when he overrides the defendant's unequivocally expressed desire to testify in his own defense.

In support of his conclusion that Evertson waived his right to complain of

his counsel's failure to call him as a witness, the trial judge stated as follows:

> Veith advised the Court after the noon break that Evertson would not be called as a witness. *Trial Tr.* at 724. The Court then confirmed with Vieth that he had discussed with Evertson the right to testify and explained his options. *Trial Tr.* at 725. The Court noted that it sometimes questions a defendant when "through body language or otherwise" it thinks a defendant may want to testify. *Id.* However, the Court did not observe any indications at the time that Evertson wanted [to] testify, and it was satisfied with Vieth's representation that Evertson concurred with the decision. *Id.*

Decision at 12.

The quoted paragraph is an inaccurate account of what actually occurred at trial. What Judge Winmill fails to state is that all of the colloquy that occurred at Page 725 of the Trial Transcript occurred as part of a sidebar beyond the hearing of Evertson. He was unaware of this conversation until he read the transcript, long after the trial had concluded. Moreover, Veith never said during the sidebar that Evertson "concurred with the decision" that he not testify; rather, he merely answered "yes" when asked by the judge whether he had "discussed with your client and explained to him his options." *Trial Tr.* 725.[12] The most that can be said is that Evertson failed to stand up and object when his lawyer said that the defense

[12] It should be noted that this sidebar took place immediately after the meeting at which, according to the affidavits of both Evertson and Shelton, Evertson refused to agree that he would not testify. Thus, Veith's failure to tell Judge Winmill at that time that Evertson had concurred in the decision that he not testify is strong evidence that Veith understood that Evertson had not concurred.

would not be calling any more witnesses. There is no support in the case law for an assertion that a defendant who fails to raise such an objection waives his right to assert ineffective assistance of counsel.

Moreover, Evertson has advanced a very plausible explanation for why he did not object. As stated in detail in his affidavit, his federal defense counsel in Alaska had explained to him that a judge is required to ask a criminal defendant directly during the trial whether he wishes to testify. That explanation was a correct statement of Alaska law.[13] Evertson reasonably (but incorrectly) assumed that the same rule applied to federal courts in Idaho. Accordingly, he determined after the tearful and inconclusive lunch-break meeting with his counsel on the last day of testimony that: (1) he would be unable to make any headway with counsel on his own; and therefore (2) he would wait until asked by the trial judge whether he wanted to testify and then would state forcefully that he did, indeed, wish to testify. He was dumbfounded when the testimony closed and Judge Winmill had not asked him whether he wished to testify. *See* Evertson Aff. at 2.

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[13] *See* Alaska Rule of Criminal Procedure 27.1(b) ("Before the defense rests, the defense shall notify the court outside the presence of the jury that the defense intends to rest. If the defendant has not testified, the court shall ask the defendant to confirm that the decision not to testify is voluntary. This inquiry must be directed to the defendant personally and must be made on the record outside the presence of the jury.").

None of the Ninth Circuit cases cited by Judge Winmill hold that a defendant waives his right to assert ineffective assistance of counsel by failing to speak up before the defense rests, and several of those cases go the other way. In several of the cited cases, the Court held that the habeas corpus petitioner had failed to demonstrate that he had been prejudiced by his inability to testify, and thus there was no reason even to consider whether counsel had provided ineffective assistance by failure to call him as a witness.[14] In several cases, the "no prejudice" determinations were made following an evidentiary hearing;[15] of course, the principal basis for this appeal is that Evertson was *denied* an evidentiary hearing. In other cases, the trial court held an evidentiary hearing and made a factual determination that the defendant had concurred with counsel's determination not to call him as a witness.[16]

The trial court cited *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993), for the proposition that "[a]lthough the ultimate decision whether to testify rests with the defendant, he is presumed to assent to his attorney's tactical decision not to have him testify." 7 F.3d at 177. The trial court failed to mention, however,

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[14] *See, e.g.*, *Medley v. Runnels*, 506 F.3d 857, 861 (9th Cir. 2007); *Matylinsky v. Budge*, 577 F.3d 1083, 1098 (9th Cir. 2009).

[15] *See,, e.g., Matylinsky*, 577 F.3d at 1098.

[16] *See, e.g., Serpa v. Borg*, 967 F.2d 590 (9th Cir. 1992) (table).

that *Joelson* involved a denial-of-right-to-testify claim (not an ineffective assistance of counsel claim) and that the case was on direct appeal (not on appeal from denial of a § 2255 motion). Indeed, although the Court held that it was premature for the defendant to raise his ineffective assistance of counsel claim on direct appeal (because the record was not yet sufficiently developed on that issue), it explicitly held that the defendant would be permitted to raise the claim in a collateral proceeding based on a claim that counsel had refused to allow him to testify: "Joelson may raise these claims in a collateral proceeding under 28 U.S.C. § 2255 in order to develop a record regarding his counsel's alleged incompetence." *Id.* at 179. In other words, *Joelson* flatly contradicts the trial court's determination that a defendant waives an ineffective assistance of counsel claim by failing to interrupt court proceedings in order to tell the trial court that he wishes to testify against the advice of his attorneys.

It makes very little sense on the one hand to require represented defendants to defer to counsel as their sole spokespersons in court, yet on the other hand to rule that a defendant waives his right to effective assistance of counsel unless he jumps up in open court (with the jury present) to contradict his lawyer's statement that – against his client's express wishes – the defense will call no more witnesses. *See Teague*, 908 F.2d at 759-60 (finding it "anomalous" to hold that clients can be

deemed to have waived their constitutional rights by failing to speak out in court, while at the same time "in the interests of decorum and the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court."). Judge Winmill's waiver decision finds no support in any reported federal appellate decision.

II. Evertson Was Denied Effective Assistance of Counsel When His Attorneys Failed to Object to the Jury Instructions

Ordinarily, a court evaluates ineffective assistance claims based on the overall performance of counsel. "The pertinent inquiry in evaluating claims of ineffective assistance of counsel is whether 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Joelson*, 7 F.3d at 179 (quoting *Strickland*, 446 U.S. at 687). Accordingly, if Evertson has convinced the Court that he is entitled to a COA regarding the trial court's failure to conduct an evidentiary hearing on the issues discussed above, there should be no reason to consider the COA with respect to other alleged deficiencies in the performance of trial counsel; rather, any evidentiary hearing logically should encompass the totality of counsel's performance.

Evertson does not want to leave the Court with the impression that counsel's deficiencies were limited to their refusal to permit Evertson to testify, however. In

particular, Evertson wishes to call attention to counsel's failure to object to highly prejudicial jury instructions which may have weighed heavily on the jury's decision to convict Evertson on the RCRA counts.

As explained above, *the* key disputed factual issue at trial was whether Evertson intended to abandon the materials he placed into storage in Salmon. If not, then he did not violate RCRA, because the materials could not qualify as either "solid waste" or "hazardous waste" unless Evertson had abandoned them. *See* 42 U.S.C. § 6903(27); 40 C.F.R. §§ 261.2(a)(2)(i)(A) & 261.2(b). Under those circumstances, one would have expected the trial judge to instruct the jury that it should acquit Evertson unless it found beyond a reasonable doubt that he had abandoned the materials being stored in Salmon. But the pivotal instructions (Nos. 17 and 18) did not mention the words "abandoned" or even "solid waste."

Indeed, the instructions indicated that while it was up to the jury to determine whether Evertson stored hazardous materials in Salmon,[17] the jury should defer to EPA's determination regarding whether those hazardous materials were "hazardous wastes." The jury's only guidance regarding how to go about determining whether the stored hazardous materials were "hazardous wastes"

[17] That determination would have been easy for the jury, because Evertson does not deny that the stored materials were hazardous.

appeared in the third element of Instruction Nos. 17 and 18: the jury was instructed to determine whether "the 'hazardous waste' was identified as a hazardous waste by [EPA] pursuant to RCRA." In other words, if the jury found that EPA itself had identified the hazardous materials being stored in Salmon as hazardous wastes, then the jury was to conclude that the stored materials were, indeed, "hazardous wastes" within the meaning of § 6928(d)(2)(A). As Evertson readily concedes, the EPA officials who inspected the Salmon storage facility determined that the materials listed in the Indictment had been abandoned, were hazardous, and (at least by the time they were disposed of by EPA) were "hazardous wastes." Accordingly, Instruction Nos. 17 and 18 relieved prosecutors of their obligation under the statute to demonstrate to the jury that the stored materials constituted "hazardous waste."

Unfortunately, and perhaps due to their unfamiliarity with RCRA, counsel did not object to Instructions No. 17 and 18. As a result, when new counsel challenged the jury instructions on direct appeal, this Court held that they were subject to "plain error" review, rather than the far more rigorous "harmless error" standard that would have applied had counsel objected to them at trial. Although the Court held that Instructions 17 and 18 could pass muster under the "plain error" standard, the instructions' strong (and erroneous) suggestion that the jury should

defer to EPA's determination that the stored materials were "waste" make it unlikely that they would have been upheld under "harmless error" review.

Moreover, the prejudice to Evertson caused by counsel's failure to object to the jury instructions is plain. His entire defense to the RCRA charges was based on his contention that he never intended to abandon the stored material. Yet, although counsel made that argument to the jury, it was given RCRA jury charges that made no mention of abandonment and instructed them to find that the stored materials were "hazardous waste" if it found that EPA had determined that the materials were "hazardous waste" (and EPA had undeniably done so).[18] To compound the prejudice, the jury instructions stated that Evertson could be convicted if he either "disposed of" *or* "stored" "hazardous waste" in the Salmon storage facility.[19] Because Evertson clearly was "storing" materials in Salmon, and because Instruction Nos. 17 and 18 essentially directed the jury to defer to EPA's finding that the stored materials were "hazardous waste," the jury in all probability

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[18] In ruling on the § 2255 motion, the district court noted that Evertson had faulted counsel for failing to object to the jury instructions, but then failed to address the central deficiency in Instruction Nos. 17 and 18 – their direction to the jury to defer to EPA's determination that the stored materials were "hazardous waste" within the meaning of RCRA. *See* Decision at 26-29.

[19] As noted above, RCRA requires a permit before one can even "store" a hazardous waste.

was able to reach a guilty verdict on the RCRA counts without ever having to determine whether Evertson intended to abandon the stored materials.

An attorney with reasonable competence in RCRA law would have objected immediately to Instructions No. 17 and 18, because he or she would have recognized that the instructions undermined Evertson's nonabandonment defense. By failing to object to those instructions, and thereby eliminating any realistic possibility that the erroneous instructions would be overturned on appeal, counsel failed to provide effective assistance. At the very least, Evertson is entitled to an evidentiary hearing where counsel could be asked to explain their failure to object.

CONCLUSION

Petitioner/Appellant Krister Evertson respectfully requests that the Court reverse the district court's denial of his § 2255 motion. On remand, the trial court should be directed to conduct an evidentiary hearing on Evertson's ineffective assistance claim, particularly with respect to: (1) counsel's refusal to permit him to testify in his own defense; and (2) counsel's failure to object to jury instructions regarding the elements of the RCRA offenses with which he was charged.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: April 10, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 2013, I electronically filed this motion for a Certificate of Appealability with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also placed a copy of the motion in the U.S. Mail, addressed as follows:

J. Ronald Sutcliffe, Esq.
Office of the U.S. Attorney
MK Plaza, Plaza IV
Suite 600
800 Park Blvd.
Boise, ID 83712-9903

/s/ Richard A. Samp
Richard A. Samp