IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO.: 13-50917

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

KEITH AIKEN

Defendant-Appellant

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 28.2.4 of the Fifth Circuit Rules, the Defendant-Appellant, KEITH AIKEN ("Mr. Aiken"), submits that the following listed persons and entities as described in the fourth sentence of Rule 28.2.4 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) Briones, David (District Court Judge)

2) Gay, Joseph, Jr. (Assistant U.S. Attorney)

3) McLain, Matthew (Appellate Attorney for Defendant-Appellant)

4) Newaz, Daphne (Assistant U.S. Attorney)

5) Ramos, Robert (Prior Attorney for Defendant-Appellant)

6) Sirianni, Robert, Jr. (Appellate Attorney for Defendant-Appellant)

7) Wallbaum, Teresa (Assistant U.S. Attorney)

Matthew R. McLain.
Matthew R. McLain, Esq.
Attorney of Record for Applicant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant respectfully requests that oral argument be granted pursuant to Federal Rules of Appellate Procedure 34(a)(1) and Rule 34(a)(1) of the Fifth Circuit Rules because the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of counsel before the Court to comment upon the issues and respond to inquiries from the Court.

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STATEMENT OF JURISDICTION

This Jurisdictional Statement is submitted pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A). The District Court for the Western District of Texas had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3238. This Honorable Court has appellate jurisdiction over the judgment and sentence entered on September 20, 2013, and timely appealed on September 25, 2013, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The judgment and sentence is a final order that disposes of all matters pending before the district court.

STATEMENT OF THE ISSUES

1. Whether Mr. Aiken's convictions for two counts of providing false statements were improperly multiplicitous?

2. Whether the Government's improper closing argument deprived Mr. Aiken of a fair trial?

3. Whether Mr. Aiken was denied effective assistance of counsel when his trial counsel failed to move the district court to suppress both his involuntarily obtained confessions?

STATEMENT OF THE CASE

Mr. Aiken was charged by an indictment on January 9, 2013 with two counts of making false statements to government officials in violation of 18 U.S.C. § 1001(a)(2). (Doc. 1). A jury trial was held from June 24 to June 27, 2013. Ultimately, the jury found Mr. Aiken guilty of both counts. (Doc. 72). On September 20, 2013, the district court sentenced Mr. Aiken to concurrent terms of three years' probation. (Doc. 89).

A notice of appeal was filed by Mr. Aiken on September 25, 2013. (Doc. 93). This appeal follows.

STATEMENT OF THE FACTS

Mr. Aiken, an African American male, was assigned to work at the 4th Battalion, 401st Army Field Support Brigade, Kandahar Airfield, Afghanistan as a quality assurance specialist. V. 1 at p. 143-44. While working at the Kandahar Airfield, Mr. Aiken was subjected to interoffice racial tensions, including the hanging of a noose. V. 2 at p. 210-12. Significant to this case was Channing Ross, a co-worker, who would make disparate and threatening remarks in the presence of Mr. Aiken concerning President Barack H. Obama: "Somebody needs to shoot him right between the eyes, or I can shoot the bastard myself" and "I have a friend ready to blow Air [F]orce One up." V. 3 at p. 160, 163.

Mr. Aiken attempted to handle Mr. Ross' threats against the President internally with his supervisors, but felt that his reports of Mr. Ross were not being taken seriously. *Id*. at 161-64. After a few months of Mr. Ross making similar type threats, Mr. Aiken, on January 13, 2011, reported Mr. Ross' threats against the President to multiple federal agencies and his senator. *Id*. at 164.

The military's Criminal Investigation Division ("CID") was alerted to the reported threats against the President and in turn advised the United States Secret Service. V. 1 at p. 105, 187. After being informed of the reported threats, both agencies launched their respective investigations. *Id*. at 115, 188. Both United States government agencies had jurisdiction over the reported activity and threats. *Id*. at

188. The two agencies worked with each other throughout the investigative process. *Id*. at 190-91, 205, 217-19.

On January 14, 2011, during an interview with Agent Scott Fout and Barry Young, Jr. of CID, Mr. Aiken provided the following statements, in part:

> I, Keith Aiken, want to make the following statement under oath: Around November 2010 when I first met Mr. Channing Ross he was make racial slur about President Obama that he should shoot the bastard himself right between the eyes. Mr. Ross repeated the same ph[r]ase each morning and all day…
>
> …he just said he had a friend who was ready to blow the plane up (Air Force One).

(Government's Exhibit 2-A).

Agent Carruthers of the Secret Service arrived Afghanistan on January 28, 2011 to investigate the threats made against the President. Despite having skepticism about the threats, Agent Carruthers insisted that Mr. Ross "was never not considered a threat:"

> Yeah, we can't be reactive. When it comes to the president—you know, when somebody comes to punch you in the face, you're not going to wait for the punch in the face. You're going – you're going to punch him first. It's not a reactive mission; it's a proactive mission.

V. 1 at p. 190, 215. Agent Carruthers interviewed Mr. Aiken on January 30, 2011. *Id*. at 189. Mr. Aiken reiterated his statement previously made to the CID:

> I have encountered several severe encounters of racist acts committed by another civil service employee assigned to the 401st AFSB. During my tenure working for the 401st, there has been numerous offensive racist gestures made against minorities. Please be advised that at my

> current job I live in constant fear. However, I do not suffer from normal fear one would imagine you may have or encounter while working in Afghanistan. I am afraid that Channing Ross, another civil service employee (GS-12) assigned to my unit, will do something to harm me and others. He constantly makes death threats toward President Obama and his family. In previous months Mr. Ross committed several other racist acts that I let go based on my commander's guidance.

Id. at 198.

Within weeks of the interview with the Secret Service, Mr. Aiken was placed on suicide watch to prevent him from committing suicide or any crimes. V. 3 at p. 168. During his placement on suicide watch, Mr. Aiken was personally assigned a soldier who stayed within his sight twenty-four hours a day. *Id*. at 169.

While on suicide watch, Mr. Aiken was re-interviewed by CID on March 1, 2011. *Id*. at 170. According to Mr. Aiken, during this unrecorded one-hour and fifteen minute interview, he re-explained Mr. Ross' statements to CID about four times. V. 2 at p. 185; V. 3 at p. 171. However, according to CID, its investigation revealed a lack of corroborating evidence to support his report of Mr. Ross. V. 1 at p. 205; V. 2 at p. 150. Unsatisfied with Mr. Aiken's statements, CID began to repeatedly assert that Mr. Aiken was lying in a tone of voice that Mr. Aiken equated to "I'm going to rip you apart," while moving within inches of his face. V. 3 at p. 171. CID then completed a question-and-answer report. V. 3 at p. 175. Mr. Aiken reviewed it, and advised that it contained inaccurate information: "I would say yes; he would say no." V. 3 at p. 175. However, according to Mr. Aiken, CID did not

care about the inaccuracies, and coerced him to sign the question-and-answer report in which he stated his reports of Mr. Ross were false. V. 3 at p. 177. After being coerced into signing a confession, Mr. Aiken told CID, "[t]his is what you guys do to get people, by making them confess to lies." V. 3 at p. 178.

The day after the interview, Mr. Aiken reported CID's misconduct to his supervisors and advised them that his confession was coerced. V. 3 at p. 180-81. Nevertheless, Mr. Aiken was subsequently terminated from his position as a quality assurance specialist at the Kandahar Airfield and returned to the United States on or about March 12, 2011. V. 3 at p. 181.

On July 10, 2012, Agent Carruthers and Mitchel Morton of the Secret Service re-interviewed Mr. Aiken in El Paso, Texas. V. 1 at p. 220. In an unrecorded interview, Mr. Aiken purportedly confessed that his report of Mr. Ross was false. *Id*. at 225-26. Mr. Aiken contended that this alleged confession was also involuntarily obtained. V. 3 at p. 183. In particular, Mr. Aiken testified that during the three-and-a-half hour interview, the Secret Service accused him of lying and threatened to damage his and his wife's career and place him in jail if he did not confess. V. 3 at p. 186-89. Involuntarily, Mr. Aiken wrote and signed the confession which the Secret Service dictated to him. V. 3 at p. 189.

Based on the statements Mr. Aiken provided CID and to the Secret Service during different interviews, the Government indicted Mr. Aiken for two counts of

making false statements to a government official. (Doc. 1). At trial, Mr. Aiken's defense was that his original report of Mr. Ross' threats to kill the President was true and that any subsequent confessions to the contrary were involuntarily obtained by CID and the Secret Service. To support his defense, Mr. Aiken testified and presented the testimony of two co-workers, Roy Adams and Harold Perkins, an investigator, Ronald Larry Slaughter, Jr., and the ex-wife of Mr. Ross, Iricia Hass. Mr. Adams and Mr. Slaughter testified to the toxic and racist work environment endured by Mr. Aiken at the Kandahar Airfield. V. 2 at p. 203-229 and V. 3 at p. 2-118. Mr. Adams also testified that he heard Mr. Ross make threats against the President while stationed at the Kandahar Airfield. V. 3 at p. 67-68. Mr. Perkins and Ms. Hass testified regarding other instances of Mr. Ross' racism. *Id*. at 119-52. While trial counsel argued the involuntariness of the confessions to the jury throughout trial, he never filed a motion to suppress either confession before the matter proceeded to trial.

SUMMARY OF THE ARGUMENT

Mr. Aiken was charged and convicted for (1) providing a false statement to CID during an interview and (2) subsequently providing a nearly identical statement to the Secret Service during an interview a few days later. While the statements were made to different agencies during different interviews, they repeated the same concerns: that Mr. Ross threatened the life of the President. Since the repetition of the statement did not cause any additional impairment to the latter agency's governmental function, Mr. Aiken should not have been convicted more than once for making nearly identical statements in violation Section 1001. This Court should vacate Mr. Aiken's conviction for his statement to the Secret Service because it is improperly multiplicitous to his conviction for his prior statement to CID.

During closing argument, the Government argued to the jury that Mr. Aiken and certain witnesses he presented lacked credibility. However, in doing so the Government improperly misconstrued the evidence and interjected its personal belief as to the credibility of these witnesses. The Government's improper remarks during its closing argument deprived Mr. Aiken of his right to a fair trial. The convictions as to both counts must be reversed.

Mr. Aiken was also deprived his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to request that the district court exclude both Mr. Aiken's involuntary confessions through a pretrial motion. By Mr.

Aiken's trial counsel failing to request these confessions be excluded, Mr. Aiken was deprived of his right to challenge their admissibility at trial. Both convictions should be vacated by this Court as a result of Mr. Aiken receiving ineffective assistance of counsel.

ARGUMENT

I. MR. AIKEN'S CONVICTIONS FOR TWO COUNTS OF MAKING FALSE STATEMENTS TO A FEDERAL OFFICIAL WERE IMPROPERLY MULTIPLICITOUS.

A. Standard of Review

A claim that is to be considered for the first time on appeal is reviewed under a plain error standard of review. *United States v. Dixon*, 273, F.3d 636, 642 (5th Cir. 2001). To demonstrate reversible plain error, a defendant must show that (1) there is error; (2) it is plain; and (3) it affected his substantial rights. *United States v. Jones*, 484 F.3d 783, 792 (5th Cir. 2007).

B. Argument on the Merits

Mr. Aiken was charged and convicted for providing a false statement to (1) the CID on January 14, 2011 and (2) the Secret Service on January 30, 2011. While the statements were made to different agencies during different interviews, they repeated the same concerns: that Mr. Ross threatened the life of the President. Since the subsequent repetition of the statement did not cause any additional impairment to the latter agency's governmental function, Mr. Aiken should not have been convicted more than once for making a false statement to a federal official.

A multiplicitous indictment charges a single offense in separate counts. Multiplicitous charges violate the Fifth Amendment's prohibition against double jeopardy. *United States v. Brechtel*, 997 F.2d 1108, 1112 (5th Cir. 1993). "The chief

danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense." *United States v. Swaim,* 757 F.2d 1530, 1537 (5th Cir.1985). As related to allegations of making false statements in violation of Section 1001, the government may not charge separate violations unless: "(1) the declarant was asked the same question and gave the same answer**;** and (2) the later false statement further impaired the operations of the government." *United States v. Stewart*, 420 F.3d 1007, 1013 (9th Cir. 2005) (citing *United States v. Salas–Camacho,* 859 F.2d 788, 791 (9th Cir.1988)).

For instance, in *Stewart* the same FBI agent asked Stewart in two separate interviews whether he had threatened a federal judge during a criminal investigation. Stewart made identical denials both times. As a result of these false statements, Stewart was charged with two counts of making material false statements to FBI agents in violation of Section 1001. On appeal, Stewart challenged the two counts as being multiplicitous. Since the FBI agent did not establish any additional impairment to his investigation because of the second interview, "the government already 'had every man on alert' in an attempt to thwart any attempt to harm" the federal judge, the Ninth Circuit Court of Appeals found that the two counts were improperly multiplicitous and reversed Stewart's conviction for his statement made during the second interview.

The Eighth Circuit Court of Appeals similarly found identical statements to be improperly multiplicitous in *United States v. Trent*, 949 F.2d 998 (8th Cir. 1991). Trent argued that she should not have been charged with two separate violations of Section 1001 since the statements that she made to agents Meehan and Ravenvelle on December 5, 1988, were essentially the same as those that she had made to agent Tucker two days earlier. *Id*. at 1000. Because the duties between agents Meehan and Ravenelle were not different from agent Tucker, the Eight Circuit found that the charge based on the latter interview constituted impermissible piling on of multiple convictions. *Id*. The Eighth Circuit reversed Trent's conviction related to the second interview. *Id*.

In this case, Mr. Aiken was charged and convicted under a two count indictment for providing identical statements to different federal officials in violation of Section 1001. However, like in *Stewart* and *Trent*, the repetition of Mr. Aiken's initial statement to CID did not further impair the Secret Service's investigation of the reported threats. Once Mr. Aiken allegedly misled CID by stating Mr. Ross had threated the life of the President, repeating the statement to the Secret Service, who was acting in conjunction with CID and possessed Mr. Aiken's initial statement to CID at the time of its interview, added little or nothing to the harm caused to the Secret Service's investigation. In other words, the Secret Service's continued investigation would not have concluded had Mr. Aiken not

repeated his statement made to CID during its interview or had his statement been retracted at the time because Mr. Ross "was never not considered a threat" after the initial report.

Since Mr. Aiken's repeated statement during the second interview with the Secret Service did not cause additional impairment to the Secret Service's function, he should not have been convicted of multiple crimes under Section 1001. This Court should vacate the judgment and sentence related to Mr. Aiken's statement to the Secret Service because it was improperly multiplicitous with his charge and conviction for his statement made to the CID.

II. THE GOVERNMENT'S IMPROPER CLOSING ARGUMENT DENIED MR. AIKEN A FAIR TRIAL.

A. Standard of Review

Mr. Aiken's trial counsel made no objections to the Government's closing arguments. Therefore, the plain error standard of review should be applied. *United States v. Fields*, 483 F.3d 313, 360 (5th Cir. 2007). To demonstrate reversible plain error, a defendant must show that (1) there is error; (2) it is plain; and (3) it affected his substantial rights. *Jones*, 484 F.3d at 792.

B. Argument on the Merits

"The sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence." *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. 1981). A prosecutor thus "is confined in closing argument to discussing

properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence." *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008). The prosecutor "may not directly refer to or even allude to evidence that was not adduced at trial," *id.*, or "inject into his argument any extrinsic or prejudicial matter that has no basis in the evidence." *United States v. Goodwin*, 625 F.2d 693, 699 (5th Cir. 1980). The prosecutor "may not express a personal opinion on the merits of the case or on the credibility of the witnesses ...." *United States v. Bermea*, 30 F.3d 1539, 1563 (5th Cir. 1994). In this case, the Government violated these prohibitions.

1. The Government argued facts that were not in evidence or were contradicted by evidence in an effort to improperly discount Mr. Aiken's testimony.

During its closing argument, the Government contended that Mr. Aiken's testimony lacked any indicia of reliability. In so arguing, the Government provided several examples of where it characterized Mr. Aiken's testimony as being inconsistent. However, the examples provided by the Government misconstrued the evidence presented at trial and impermissibly cast unwarranted doubt as to Mr. Aiken's testimony.

For instance, the Government provided the following example to conclude that Mr. Aiken's testimony was dishonest:

> Now, the Defendant said - - he said, 'well no, I reported it to Colonel Lienemann in December.'

> And I said, 'Okay. So that's a period of 30 days where you heard over 30 threats, and you didn't do anything about it.'
>
> And then the Defendant said, 'Oh, no, no, no. Wait. Okay. No. No, it was November.'
>
> That's an example…of from yesterday when the defendant was presented with a problem and he changed his answer, he changed his testimony. When you see a person from one second to the next completely change what they say, that's an example of somebody who is not being honest with you.

V. 4 at p. 7. Contrary to Government's recitation of Mr. Aiken's testimony, the record demonstrates that Mr. Aiken never varied his testimony at trial on this point:

> Q. When did you first report these threats?
>
> A. I reported sometime around December.
>
> Q. And that was to Colonel Lienemann?
>
> A. Yes, that was to Colonel Lienemann. And I pulled Moffat and Denny, Mark, out.
>
> Q. Okay. Okay. So you waited a month then, right?
>
> A. Yes.
>
> Q. So you waited 30 days, right, to report it?
>
> A. Yes
>
> Q. And that's at least 30 times he must have been threatening to shoot President Obama between the eyes you didn't report it, correct?
>
> A. I reported it.
>
> Q. During the Month of November?

A. Yes. I reported it to Colonel Lienemann.

Q. But you said you reported it during December; isn't that right?

A. You crossing me up there, ma'am. You going back and forth.
…

Q. You stated that you reported it to Colonel Lienemann in December of 2010, correct?

A. Yes. I report it to also Colonel Lienemann again in November, and he said he was going to take care of it.

Q. That's not what you said before. Okay. But - - So you're clarifying now that it was November, not December, right?

A. It was November and December.

Q. So multiple times. You reported this to Colonel Lienemann more than once?

A. Yes. He told me to turn the other cheek.

V. 3 at p. 196-97.

In further casting Mr. Aiken as a liar during closing argument, the Government again provided another example completely rebuffed by the record:

> Probably the most important problem from yesterday, if you remember, the Defendant testified that he heard Channing Ross say the word 'nigger.' Okay. And I pointed him to - - I put it up on the screen for him, Government's Exhibit 2-A, which was his signed statement, and you can see I've highlighted it there. He was asked in his sworn statement, 'Have you ever heard Channing Ross use a racial slur?'
>
> And he said, 'No, I have never heard that.'

I presented him with this. You remember, initially he said, 'Yes, that's right.' And then he said, 'Oh, wait, no. Okay. No. Scott Fout, the agent who took that, he changed my answer.'

V. 4 at p. 8. In actuality, the record was as follows:

Q. Isn't it true, sir, that in your statement given on January 14 of 2011, to CID, you were specifically asked, 'Has Mr. Ross ever used racial slurs?' and your answer was, 'No, he has never used racial slurs since I've been around him'? Isn't that true?

A. Who did the investigation?

…

A. I answered yes; the agent put no.

Q. Okay. So this CID agent was lying. When he wrote this statement, he was lying?

A. Ma'am, I just answered your question.

Q. And so you're saying that Scott Fout, a completely different CID agent that - -

A. He's the first agent that interviewed me, and I told him all my answers.

Q. And let me ask you that, sir. He asked you, 'Have you ever heard Channing Ross make racial slurs?'
You said 'No.'
Isn't that right?

A. That's your assumption.

Q. It's in writing, sir. Can you please look at what's on your screen.

Mr. Aiken's trial counsel: Objection, Your Honor. It's the same question over and over.

> The district court: I'm going to take a 15-minute break, and I want you to cool off.

V. 3 at p. 207-08.

Finally, the Government cited the following example to argue that Mr. Aiken utterly lacked credibility to the jury:

> And I asked him, I said, Well, if Devon Delgado got a false confession out of you, why didn't you tell Devon Delgado, 'Hey, that was a false confession'? Why did you do that? He admitted he didn't do it.
>
> I said, 'Would it have been important for you to have said that in the text message?
>
> 'Yes.'

V. 4 at p. 11. When compared to actual testimony adduced at trial, it is clear the Government misconstrued the record to again tilt the scale in its favor:

> Q. And in that text message you said that you didn't like that people were talking bad about you, didn't you?
>
> A. I can't recall.
>
> Q. Okay. But do you recall whether or not in that text message you said, "I can't believe you coerced my confession"?
>
> A. No.
>
> Q. Did you say that?
>
> A. No.
>
> Q. Well, why not? You text-messaged him, didn't you?
>
> A. Yes. That wasn't the text message, though.

> Q. Well, why not? I mean, you say that you - - that you retracted your confession the next day, right?
>
> A. Yes.
>
> Q. So when you're sending text messages to somebody who allegedly coerced you, why wouldn't you say, 'I can't believe you coerced me. I didn't do it'? Why wouldn't you say that?
>
> A. I don't have to say that to him.
>
> Q. Of course you don't have to, but why wouldn't you?
>
> A. I don't' have to say that to him.

V. 3 at p. 212-13.

Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974). This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty, whose interest in a criminal prosecution is not that it shall win a case, but that justice will be done. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Here, there can be little doubt that the prosecutor's unsupported and inflammatory arguments influenced jurors in their consideration of Mr. Aiken's testimony. On the basis of this misconduct, alone and in conjunction with the other improper conduct, Mr. Aiken's convictions must be reversed.

2. In addition to misrepresenting the record to improperly argue Mr. Aiken lacked credibility at trial, the Government also repeatedly interjected its personal belief as to his credibility and presentation of certain witnesses at trial.

The Government attacked Mr. Aiken and certain witnesses that he presented at trial as liars by interjecting its personal belief as to their credibility. The Government's personal attacks on Mr. Aiken and his witnesses' credibility were improper. *United States v. Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) (noting that prosecutors "should not express…personal belief or opinion as to the…falsity of any testimony or evidence…"); *Hodge v. Hurley*, 426 F.3d 368, 385 (6th Cir. 2005) (holding that "failure to object to any aspect of the prosecutor's egregiously improper closing argument was objectively unreasonable," which included prosecutor's argument that the defendant was a liar and the victim and her family "absolutely believable").

Examples of the Government's repeated improper injection of its personal beliefs as to the credibility of witnesses throughout its closing argument were as follows: (1) "And I submit to you, ladies and gentleman, that basically his (Mr. Aiken) credibility was – it was off the charts completely not credible." V. 4 at p. 6; (2) "Why is that? I can tell you why that is. It's because he (Mr. Aiken) has some kind of personal bias or motivation to do something about it in January." *Id*. at 7; (3) "When somebody (Mr. Aiken) creates new information every time they're asked about a specific event, that indicates that they are not being credible with you or

honest." *Id*. at 8; (4) "And then we took a break, and then he (Mr. Aiken) came on the stand, and what he told you all was that Scott Fout, CID agent, manipulated his statement. It's utterly ridiculous, ladies and gentleman." *Id*. at 9; (5) "That makes absolutely no sense, ladies and gentlemen…I mean, it's completely ludicrous." *Id*. at 10; (6) "Right there, ladies and gentlemen, credibility. When you can show that somebody has provided false statements to law enforcement officers, their credibility is shot. Roy Adams's credibility is shot." *Id*. at 15; (7) "That's another change in his testimony. When that happens, that means that credibility, out the window." *Id*. at 16; "Because she's (Iricia Hass) not credible, I think her testimony is discounted." *Id*. at 16.

Because the Government's case was called into serious doubt by Mr. Aiken and his witnesses' testimony, the Government's improper comments, individually and cumulatively, were highly prejudicial when combined with its various misrepresentations of the record cited *supra*. As such, reversal of both convictions is required.

III. MR. AIKEN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO MOVE THE DISTRICT COURT TO SUPPRESS BOTH HIS INVOLUNTARILY OBTAINED CONFESSIONS.

A. Standard of Review

This Court reviews claims of ineffective assistance of counsel under *de novo* standard of review. *Chandler v. United States*, 218 F.3d 1305, 1311 (11th Cir. 2000).

B. <u>Argument on the Merits</u>

The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. *United States v. Cronic*, 466 U.S. 648, 658 (1984). The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id*. at 687. In circumstances where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, the Supreme Court has held that courts should presume prejudice. *Cronic*, 466 U.S. at 659.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the

wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

1. Trial counsel was ineffective for failing to file a motion to suppress based on involuntarily obtained confessions.

It is well-established that the failure to file a pretrial motion to suppress falls "outside the wide range of professionally competent assistance" unless there is a tactical reason for the decision not to pursue a motion to suppress. *Kirkpatrick v. Butler*, 870 F.2d 276, 283 (5th Cir. 1990); *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.").

In *Kirkpatrick v. Butler*, 870 F.2d 276, 283 (5th Cir. 1989), the Court admonished that "any competent attorney exercising reasonable professional judgment" should "challenge[] the admissibility" of incriminating evidence. The *Kirkpatrick* court found that counsel's failure to move for suppression of damaging evidence seized at defendant's apartment was "outside the wide range of professionally competent assistance" even though it did not affect the outcome at

trial. *Id.* Underlying the *Kirkpatrick* reasoning is the principle that moving to suppress damaging evidence is a baseline function of criminal defense counsel.

Throughout trial, Mr. Aiken's counsel asserted to the jury that CID and the Secret Service coerced Mr. Aiken into providing multiple confessions. Despite trial counsel introducing competent evidence to the jury to demonstrate that Mr. Aiken involuntarily confessed, trial counsel never moved the district court to suppress either confession for violating the Fourth Amendment during pretrial proceedings. Unlike in *Kirkpatrick,* in which this Court found that the granting of a motion to suppress would not have affected the outcome of the trial, had trial counsel pursued a motion to suppress the confessions, it would have been granted and the evidence excluded would have undoubtedly affected the outcome of the trial. As such, trial counsel's failure to challenge the admissibility of the confessions, which were the cornerstones of the Government's case, amounts to ineffective assistance of counsel and requires this Court to reverse both convictions.

a. Mr. Aiken would have been meritorious in excluding both confessions from being introduced at trial had a pretrial motion to suppress been filed by his trial counsel.

Mr. Aiken's trial counsel should have moved to suppress his confession on involuntariness grounds. This motion would have been successful due to undue influence and coercion at the time the confessions were made.

Coerced confessions are inherently unreliable, and "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Arizona. v. Fulminante*, 499 U.S. 279, 288 (1991). Promises or inducements can taint the voluntariness of a confession. *United States v. Restrepo*, 994 F.2d 173, 184 (5th Cir. 1993) (citing *United States v. McClure*, 786 F.2d. 1286, 1289 (5th Cir. 1986)).

Before the government may present evidence of a defendant's statement/confession, it must satisfy the Court that the statement was provided voluntarily and not in violation of a defendant's constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 474-75 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964). The prosecution bears the burden of proving, at least by a preponderance of the evidence, both the Miranda waiver and the voluntariness of the confession. *Missouri v. Seibert*, 124 S. Ct. 2601, 2607 n.2. (2004).

The voluntariness of a confession depends on whether, under the totality of the circumstances the statements are 'the produce of the accused's free and rational choice." *United States v. Garcia Abrego*, 141 F.3d 142, 170 (5th Cir. 1998). However, "coercive police activity is [also] a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Further,

this Court noted in *United States v. Raymer*, 876 F.2d 383, 386-87 (5th Cir. 1989) (quoting *Connelly*, 479 U.S. at 164), "[a] defendant's mental condition still properly figures into the voluntariness calculus. Police exploitation of the mental condition of a suspect, using 'subtle forms of psychological persuasion,' could render a confession involuntary."

Effective counsel could have proven both of these elements as necessary to suppress Mr. Aiken's confessions as being involuntary. At the time of his first confession, Mr. Aiken was stationed on a military base during a period of war and being monitored on twenty-four hour suicide watch. CID used strong arm tactics during Mr. Aiken's weakened state of mind to obtain a confession by repeatedly calling him a liar within inches of his face in a tone of voice Mr. Aiken equated to "I'm going to rip you apart." CID then forced Mr. Aiken to sign a report it generated, despite Mr. Aiken stating that it contained inaccurate statements. Tellingly, Mr. Aiken reported these unlawful tactics utilized by CID the next day in a sworn statement to his supervisors.

In similar fashion, the Secret Service obtained an involuntary confession from Mr. Aiken in July of 2012. During this three-and-a-half hour unrecorded interview, Mr. Aiken recalled that Secret Service accused him of lying and threatened to damage his and his wife's career and place him in jail if he did not confess. Only

after these threats did Mr. Aiken unwillingly write and sign a confession which was dictated by the Secret Service to him.

Based on the totality of the circumstances, both confessions were the result of coercion, intimidation and deception and not from free will or unfettered choice. With this evidence at hand, trial counsel should have moved to suppress the confessions prior to the matter proceeding to trial because such a challenge would have been successful. However, due to trial counsel's failure to file a motion to suppress, the district court was never given the opportunity to entertain such action.

b. There is a reasonable probability that the verdict would have been different absent the confessions.

The district court, at sentencing, concluded that it would not have found Mr. Aiken guilty for making false statements had it been on the jury because it felt Mr. Aiken was telling the truth about Mr. Ross' threats against the President and that Mr. Ross and other co-workers were "racist." (Sent. at p. 4-5). Notwithstanding, the district court noted that the jury probably found Mr. Aiken guilty because he did not stick to his original report of Mr. Ross by subsequently confessing that his original report was false. (Sent. at p. 5).

Mr. Aiken contends that the district court's assessment of the case at sentencing is accurate and that absent the introduction of Mr. Aiken's confessions at trial, the Government would have been without its trump card and left with little reliable evidence to prove the falsity of both statements. Therefore, had either, or

both, confessions been suppressed, there is a reasonable probability, as noted by the district court, that the verdict would have been different.

c. The record is clear to show ineffective assistance of counsel because there could not be a strategic move for trial counsel's failure to file a motion to suppress.

Ordinarily, the issue of ineffective assistance of counsel is not appropriate for direct appeal and this Court does not allow claims for ineffective assistance of counsel to be resolved on direct appeal when the claim has not first been presented before the district court. *United States v. Brewster,* 137 F.3d 853, 859 (5th Cir. 1998). This is because the record is rarely sufficiently developed on the issue of attorney incompetence. *United States v. Maria-Martinez,* 143 F.3d 914, 917 (5th Cir. 1998). However, this Court will take an ineffective assistance case on direct appeal, when the record allows it to evaluate fairly the merits of the claim. *United States v. Navejar,* 963 F.2d 732, 735 (5th Cir. 1992).

Here, the entire trial record is before the Court and the failure of Mr. Aiken's trial counsel to file a motion to suppress both confessions is plainly set forth in the record before this Court. By no stretch of the imagination could trial counsel's failure to file a motion to suppress be a strategic move. First, trial counsel attempted to convince the jury throughout trial that Mr. Aiken was coerced into providing both confessions, yet he inexplicably and inexcusably did not make such an argument to the district court in a pretrial motion to suppress. Second, had trial counsel filed a

motion to suppress the confessions, the Government's most important evidence to prove the falsity of Mr. Aiken's statements, as noted by the district court at sentencing, would have been excluded at trial. As such, Mr. Aiken contends that the record is clear to show that he received ineffective assistance of counsel, and that reversal is necessary.

CONCLUSION

Because the Government's improper closing argument deprived Mr. Aiken of a fair trial and received ineffective assistance of counsel, both of his convictions for making false statements to government officials should be reversed and this case remanded to the district court for further proceedings. In the alternative, Count Two should be vacated because it is improperly multiplicitous to Count One.

DATED this 12th day of December 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December 2013, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System and that a true and correct copy has thereby been served upon Joseph Gay, counsel for Respondent.

Matthew R. McLain
Matthew R. McLain, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief is under thirty pages long. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

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