United States District Court
for the
Southern District of Florida

Frank J. Ballesteros, Petitioner	)	
	)	
v.	)	Civil Action No. 14-22340-Civ-Scola
	)	
United States of America, Respondent.	)	

Order Adopting Magistrate Judge's Report and Denying Requests for Hearing, Appointment of Counsel, and Petition to Extend Writ

This case was referred to United States Magistrate Judge Patrick A. White, pursuant to Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a Report and Recommendation on any dispositive matters. On October 14, 2015, Judge White issued a Report, recommending that the Court deny Ballesteros's Motion To Vacate Pursuant to 28 U.S.C. Section 2255. (Report of Magistrate, ECF No. 51.) The Petitioner has filed his objections to the Report (Pet'r's Obj's, ECF No. 52.). The Government filed a Response in Opposition (ECF No. 55.)

The Court has considered—*de novo*—Judge White's Report, the Petitioner's Objections, the record, and the relevant legal authorities. The Court finds Judge White's Report and Recommendation cogent and compelling. The Court agrees with Judge White that Ballesteros's additional claims raised in his Amended Motion to Vacate (ECF No. 5) are barred by the one-year statute of limitations. (Report 26, ECF No. 51.) The Court will consider the remaining claims raised in the original motion to vacate (ECF No. 1).

As to the merits of his claims, Ballesteros did not show his counsel's performance was deficient or a reasonable probability that the deficient performance prejudiced his defense. (Report 27, ECF No. 51.) More specifically, as to Ballesteros's claim that he was denied effective assistance of counsel where his lawyer failed to investigate, present, and/or proffer a favorable plea, Judge White held an evidentiary hearing on October 6, 2015. (Report 36, ECF No. 51.) Judge White found Ballesteros's testimony that he was not presented with the Government's plea offer was self-serving and not supported by the evidence. (Report 41, ECF No. 51.) Therefore, as Judge White explained, Ballesteros did not prove that his attorney was deficient, much less that he was prejudiced. (*Id.* 42.)

In addition, Ballesteros takes issue once more with family court proceedings before the Court during the state trial proceedings, this time arguing ineffective assistance of counsel based on his lawyer's failure to file a motion to recuse. Ballesteros fails to present any factual support for his claims of bias, and

tenuous speculation is not enough to show impartiality. (Report 55, ECF No. 51.) Therefore, Ballesteros's lawyer was not deficient for failing to pursue this non-meritorious claim. (*Id.*)

To summarize Judge White's findings on the Ballesteros's remaining claims, the evidence against Ballesteros was more than sufficient to support his convictions—Ballesteros failed to demonstrate that his lawyer's conduct prejudiced his defense or that the results would have been affected had counsel proceeded differently. (*Id.* at n.4.) Likewise, Ballesteros received a fair trial and no constitutional violations occurred. (*Id.*)

Therefore, Ballesteros did not establish that he is entitled to habeas corpus relief. It is therefore **ordered and adjudged** that the Report (ECF No. 10) is **affirmed and adopted**, and Ballesteros's Motion to Vacate and Amended Motion to Vacate (ECF Nos. 1, 5) are **denied**. The Court does not issue a certificate of appealability. Because the Court affirms and adopts Judge White's Report and Recommendations, the Court **denies** Ballesteros Motion for Hearing (ECF Nos. 53, 54) and the Petition to Extend Writ (ECF No. 54).

Additionally, Ballesteros asks the Court to appoint counsel to represent him in this lawsuit. (Mot. 1, ECF No. 16.) "A plaintiff in a civil case has no constitutional right to counsel." *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999). Under 28 U.S.C. § 1915(e)(1), the district court has discretion to appoint counsel for an indigent plaintiff, but counsel should be appointed only in exceptional circumstances. *See Steele v. Shah*, 87 F.3d 1266, 1271 (11th Cir. 1996); *Bass*, 170 F.3d at 1320. Exceptional circumstances generally exist "where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *See Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990); *Brown v. John Deere Product, Inc.*, 460 F. App'x 908, 909 (11th Cir. 2012). Ultimately, "[t]he district court has broad discretion in making this decision[.]" *See Bass*, 170 F.3d at 1320. Here, Ballesteros has not shown that this case is exceptionally complex, nor that he is unable to present his cause without the help of a trained practitioner. Therefore, the Court **denies** Ballesteros's motion (ECF Nos. 52, 53) and declines to appoint counsel for Ballesteros.

The Court directs the Clerk to **close** the case.

Done and ordered in chambers, at Miami, Florida, on February 9, 2016.

Robert N. Scola, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.14-CIV-22340-WILLIAMS
(11-CR-20698-SCOLA)
MAGISTRATE JUDGE P.A. WHITE

FRANK BALLESTEROS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE FOLLOWING EVIDENTIARY HEARING

I. Introduction

Frank Ballesteros has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences entered following a jury verdict in case no. 11-CR-20698-Scola.

This case has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

The court has reviewed the movant's amended motion (Cv-DE#5) and memorandum in support thereof (Cv-DE#6), the government's response with multiple exhibits (Cv-DE#31) to this court's order to show cause, the government's pretrial narrative (Cv-DE#47), the Presentence Investigation Report ("PSI"), the Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file.

The movant, who has appeared *pro se*, has been afforded liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). As

can best be discerned, the movant raises the following grounds for relief:

Claim 1: He was denied effective assistance of trial counsel, where his lawyer failed to move to severe the movant's trial from that of co-defendant Billy Joe McCoy. (Cv-DE#6:7).

Claim 2: He was denied effective assistance of trial counsel, where his lawyer failed to call alibi and expert witnesses. (Cv-DE#6:8).

Claim 3: He was denied effective assistance of trial counsel, where his lawyer failed to call the movant to testify in his own defense. (Cv-DE#6:10).

Claim 4: He was denied effective assistance of trial counsel, where his lawyer failed to investigate, present and/or proffer a favorable plea. (Cv-DE#6:12).

Claim 5: He was denied effective assistance of trial counsel, where his lawyer failed to move to recuse the District Court judge. (Cv-DE#6:13).

Claim 6: He was denied effective assistance of trial counsel, where his lawyer failed to present Brady material and evidence improperly suppressed by the court. (Cv-DE#6:17).

Claim 7: He was denied effective assistance of appellate counsel, where his lawyer failed to appeal the denial of his motion for mistrial. (Cv-DE#6:18).

Claim 8: He was denied effective assistance of appellate counsel, where his lawyer failed to appeal the denial of the movant's motion for judgment of acquittal on counts 2, 4, and 9. (Cv-DE#6:20).

Claim 9: He was denied effective assistance of appellate counsel, where his lawyer failed to appeal adverse rulings on objections to the PSI and failure to challenge the District Court's abuse of discretion at sentencing. (Cv-DE#6:22).

In a January 26, 2015 amendment (Cv-DE#21), movant raised an

additional ground for relief as follows:

Claim 10: He was denied effective assistance of trial counsel during the sentencing proceedings.

II. Factual Background and Procedural History

For an appreciation of this case and the claims and arguments raised herein, a full review of the procedural history and facts underlying the criminal convictions is essential.

A. Facts Underlying the Offenses

The following is a summary of the evidence introduced by the government at trial. Ballesteros, who was a medical doctor, conspired with his co-defendants to divert oxycodone and oxymorphone, and to defraud Medicare. To obtain the drugs, the defendants Juan Gomez and his brother Gerardo "Gerry" Gomez set up an unlicensed pain clinic, or pill mill, at various locations in Miami-Dade County. The Gomez brothers enlisted Ballesteros to provide prescriptions for oxycodone and oxymorphone. Other co-conspirators, including Leroy "Batman" Paige, Cynthia Adderley, Petronella Smith Howard, Hattie Mae Green, Henry Conley, and Eric Miller, recruited corrupt Medicare beneficiaries to pose as Ballesteros's patients, and/or transported the fake patients. Howard and Conley also posed as patients. Ballesteros wrote prescriptions for oxycodone and oxymorphone knowing that the Gomez brothers would distribute the pills and that Medicare would fund their acquisition of the drugs.

The recruiters and drivers took the prescriptions and the patients to the four Roberts Drug Store pharmacies in Miami. When the prescriptions were filled, they collected the drugs and

delivered them to the Gomez brothers for repackaging and distribution. Aiman Aryan, the owner of Roberts Drug Store, knew that the Gomez brothers were distributing the oxycodone and oxymorphone that Ballesteros prescribed, and he extracted cash bribes from the brothers in exchange for dispensing the pills. Aryan's pharmacies also received Medicare Part D insurance payments for the prescriptions.

DEA Special Agent Gittelsohn testified to the following. He became involved in the investigation of Ballesteros in June of 2010, when he began conducting surveillance of Ballesteros's medical office at 893 East 10th Avenue, in Hialeah ("Hope Medical Corp."). (CR DE# 1093:193, 204-208). He authenticated surveillance photographs of that location, including photos showing Ballesteros and his co-defendants Leroy and Alyssa Paige entering the office, and a photograph of the front door showing a notice that the "Medical Center, Dr. Frank J. Ballesteros" would be moving to 3068-C Palm Avenue, in Hialeah. (CR DE# 1093:204-208, 1094:18-23; CV DE# 31, Exhibit 5, photograph of Hope Medical Corp. premises at 893 East 10th Avenue, Hialeah; Exhibits 6-A, 6-B, photographs of Ballesteros entering 893 East 10th Avenue; Exhibit 7, photograph of Leroy and Alyssa Paige entering 893 East 10th Avenue; Exhibit 10, photograph of sign in window.). Agent Gittelsohn observed the sign in the door at 893 East 10th Avenue announcing the office was moving and on June 22, 2010, he saw unidentified subjects remove furniture and boxes from that address and place them in a U-Haul truck. (CR DE# 1094:25; CV DE# 31, Exhibit 10, photo of sign in front door of 893 East 10th Avenue).

Agent Gittelsohn authenticated a photograph of the Medical Center at 3068-C Palm Avenue, Hialeah and testified that he conducted surveillance of that location. Agent Gittelsohn observed

Linberg Clark drive a number of patients from 3068-C Palm Avenue to the Roberts Drug Store in the Government Center in Miami and observed Eric Miller drive patients away from the office on another occassion. (CR DE# 1094:26-27; CV DE# 31, Exhibit 11, photo of 3068-C Palm Avenue).

On October 15, 2010, when Agent Gittelsohn was conducting surveillance of 3068-C Palm Avenue from a location across the street, he was approached by two men in a golf cart, one of whom he later identified as Juan Gomez. The other man asked Gittelsohn what he was doing and Gittelsohn admitted that he was a law enforcement officer working in the area. (CR DE# 1093:208-212, 1094:26). Soon after he disclosed his identity, the DEA intercepted telephone calls in which the subjects said the office was under surveillance. (CR DE# 1093:211). Shortly after Juan Gomez discovered him conducting surveillance, Gittelsohn returned to conduct spot surveillance at 3068-C Palm Avenue, but he observed no activity at the location. (CR DE# 1094:28).

By March of 2011, agents had located Ballesteros's office at Suite 101, 752 West Flagler Street, in Miami. Agent Gittelsohn authenticated a series of photographs that he took while conducting surveillance of that location. (CR DE# 1094:28-30; CV DE# 31, Exhibits 12-A to 12-D, photographs of Suite 101, 752 West Flagler Street, redacted). He testified that Exhibit 12-C depicts Linbirg Clark in front of Suite 101, and that the sign on the door of Suite 101 read "Dr. Frank Ballesteros, M.D." (CR DE# 1094:31-32). He also testified that Exhibit 12-D depicts Gerry Gomez standing in front of Suite 101. (CR DE# 1094:32).

According to Agent Gittelsohn, Ballesteros's office at Suite 101, 752 West Flagler Street closed shortly after April 6, 2011,

when DEA agents and Miami-Dade police seized oxycodone, oxymorphone, and cash from the defendants Gerardo Gomez, Danilo Falcon, Leroy Paige, and Alyssa Paige. (CR DE# 1094:32-33). While Ballesteros's office at 752 West Flagler Street was open, Agent Gittelsohn observed Gerardo Gomez, Juan Gomez, Eliezer Salgado, and Linbirg Clark at that location, as well as a lot of traffic in and out of the office. (CR DE# 1094:33-34).

In May or June of 2011, agents located a new Ballesteros office at Suite 205, 2140 West Flagler Street, Miami, and Agent Gittelsohn authenticated Exhibit 13-A, which is a photograph of that location. (CR DE# 1094: 34-35; CV DE# 31, Exhibit 13-A, photograph of Suite 205, 2140 West Flagler Street, Miami).

The United States introduced Ballesteros's prescriptions for oxycodone and oxymorphone in evidence through Agent Gittelsohn. These included Exhibits 4-A to 4-D, which are compact discs containing scanned copies of Ballesteros's prescriptions for Schedule II controlled substances (oxycodone and oxymorphone), filled at Roberts Drug Store. (CR DE# 1093:220-222; CV DE# 31, Exhibits 4-A to 4-D, copies of Ballesteros's prescriptions for Schedule II controlled substances filled at Roberts Drug Store pharmacies 1, 2, 3, and 4 respectively).

DEA Special Agent Kimberly Taylor testified as follows at trial. She conducted an undercover operation at Ballesteros's office at 893 East 10th Avenue, Hialeah, on June 3, 2010. Agent Taylor provided a confidential source ("CS") with a concealed video recorder, and she drove the CS to Ballesteros's office so the CS could introduce Taylor to Leroy Paige and obtain a prescription for oxycodone from Ballesteros. (CR DE# 1094:58-62; CV DE# 31, Exhibit 5.) According to Agent Taylor, the CS entered Ballesteros's office

on three occasions that day. (CR DE# 1094:61-65). After the first two visits, she and the CS were sitting in her undercover vehicle, in front of the office, when she saw Ballesteros arrive in a black BMW. At that point, she observed groups of people who were waiting in the parking lot enter the office. The CS also went into the office and remained there for a couple of hours. (CR DE# 1094:64-65, 76-77).

Agent Taylor authenticated Exhibits 9-A and 9-B, which are digital copies of the video recordings the CS made inside Ballesteros's office on June 3, 2010, and Exhibits 9-C to 9-O, which are still photographs from the video. (CR DE# 1094:68-74; CV DE# 31, Exhibits 9-A to 9-O). As Agent Taylor testified, Exhibit 9-A depicts Ballesteros's arrival at 893 East 10th Avenue, and the CS's consultation with Ballesteros. (CR DE# 1094:72-73, 76-80; CV DE# 31, Exhibit 9-A, Session 4 at 13:36:30, Ballesteros's arrival; Exhibit 9-A, Session 6 at 14:43:49, consultation with Ballesteros).

The CS's consultation with Ballesteros, which lasted seconds, included the following exchange:

> BALLESTEROS: We can switch it, give you the Percocet instead of the Roxy.
>
> CS: No, I don't think they want me to switch . . . .
>
> BALLESTEROS: Are you still taking the [U/I] and the [U/I]?
>
> CS: Yeah, I need some more of those . . . and, um, Xanax.
>
> BALLESTEROS: OK . . . I'll write it up, and I'll pass it up front. . . . OK.

(CV DE# 31, Exhibit 9-A, Session 6 at 14:43:49; CR DE# 1094:73, 80-82). Ballesteros did not ask the CS who "they" were, who wanted the CS to stick with Roxicodone.

Agent Taylor testified that while the CS was inside Ballesteros's office, she observed Leroy Paige standing in front of the building. Paige had small pieces of paper in this hand which he gave to Linbirg Clark, who was sitting in a gold Cadillac. (CR DE# 1094:66-67). The CS returned to the undercover vehicle at approximately 4:00 p.m., but the CS did not have a prescription in her possession. (Id.:65). Agent Taylor drove to the front of the office, and rolled down the passenger side window so that the CS could speak to Leroy Paige. (Id.:66). Leroy Paige told the CS that he did not have her prescription, Paige said the prescription was in a van that had departed from Ballesteros's office and was in route to a pharmacy. (Id.:66-67, 70-72).

Exhibits 9-C to 9-O are still shots from the video recording the CS took inside Ballesteros's office at 893 East 10th Avenue. Exhibits 9-I, 9-K, 9-L, 9-M, and 9-N show Leroy Paige in the back office area. Exhibit 9-N shows Paige receiving prescriptions from a co-conspirator at the office. (CV DE# 31, Exhibits 9-I, 9-J, 9-M, and 9-N).

Christopher Knox, Investigator, Florida Department of Health, Board of Medicine, testified to the following. He collected Ballesteros's prescriptions for oxycodone and oxymorphone that were filled at the four Roberts Drug Store pharmacies in Miami-Dade. Knox went through boxes of prescriptions for Schedule II controlled substances that were filled at the Roberts Drug Store pharmacies, extracted those that were written by Ballesteros, and scanned them. Knox created the compact discs marked as Exhibits 4-A to 4-D in evidence. (Cv DE# 31, Exhibits 4-A through 4-D). Each disc contains the Ballesteros prescriptions for Schedule II controlled substances that were filled at each of the Roberts Drug Store pharmacies. (CR DE# 1094:209-211).

Knox reviewed several of the prescriptions taken from Roberts Drug Store No. 1, saved on Exhibit 4-A, including one prescription for 120, 30 milligram tablets of oxycodone, which Ballesteros prescribed for a 100-year old patient. (CR DE# 1094:211-219). Knox testified that the prescriptions displayed a pattern: during the sixth month period beginning in approximately May of 2010, Ballesteros routinely prescribed a combination of OxyContin (oxycodone) 80 milligram tablets and Roxicodone (oxycodone) tablets. Then the combination changed. Ballesteros began writing prescriptions for Opana (oxymorphone) 40 milligram tablets combined with Roxicodone 30 milligram tablets. (Id.:219-220). Knox testified that this pattern was consistent across all four of the pharmacies. (Id.:220). Knox also testified that on October 12, 2011, he responded to Ballesteros's office at 2140 Flagler Street. He located Ballesteros's patient files and scanned or photocopied a number of them. (CR DE# 1094:202-207).

Lora Elliott, Health Analyst, National Benefit Integrity Medic (the "MEDIC"), testified to the following. (CR DE# 1095:18). The MEDIC is the Medicare Part D integrity provider for the Center for Medicare and Medicaid Services ("CMS"). The MEDIC investigates and detects fraud, waste, and abuse in Medicare Parts D and C. CMS keeps Medicare data in the Integrated Data Repository ("IDR"). The MEDIC does the data mining if the HHS-OIG or the FBI requests data. (Id.:19). The MEDIC received a request from the HHS-OIG for Medicare Part D prescriptions that were filled at Roberts Drug Store. (Id.:20). Elliott authenticated Exhibit 27, a compact disc containing Medicare Part D information for Roberts Drug Store, which she obtained from the IDR. (Id.:20-22).

With the contents of Exhibit 27 displayed on the courtroom monitors, Elliott explained the data stored thereon. She explained

that each row of data represented a "prescription drug event" or "PDE," meaning a single prescription that was filled and reimbursed by Medicare Part D. (CR DE# 1095:22-24). Elliott explained the meanings of various columns of the data display. In particular, she explained that column BC, date of service, means the date the prescription is filled; and the column BO, IDR process date, means the date that the patient's prescription drug insurance plan submits its claims to the IDR. She testified that insurance plans have 18 months after the date of service to submit their claims. (Id.:27-29.).

Elliott demonstrated the use of filters with Exhibit 27, to extract Ballesteros's prescriptions for Schedule II controlled substances. She testified that when the filters were applied, the IDR data disclosed a total of 6,751 PDEs for Schedule II controlled substances prescribed by Ballesteros and dispensed by Roberts Drug Store. (CR DE# 1095:31-32). Applying more specific filters, the IDR data showed 6,667 of the PDEs (individual prescriptions) were for OxyContin, oxycodone, and Opana. (Id.:32-33).

Elliott used the filtered data to create three "pivot tables," which were admitted in evidence: Exhibit 62 showing the PDEs for Schedule II controlled drugs prescribed by Frank Ballesteros and dispensed by Roberts Drug Store pharmacies during the period from January 1, 2009 to September 30, 2011; Exhibit 63 showing the PDEs and Medicare Part D reimbursements for Ballesteros's prescriptions for OxyContin, oxycodone, and Opana, from January 1, 2009 to September 30, 2011; and Exhibit 64, which shows the PDEs and Medicare Part D reimbursements for all of the OxyContin, oxycodone, and Opana that Roberts Drug Store pharmacies dispensed, during the same period. (CR DE# 1095:36-43; CV DE# 31, Exhibits 62, 63, 64).

Referring to Exhibit 63, Elliott testified that the loss to Medicare attributable to Ballesteros's prescriptions for OxyContin, oxycodone, and oxymorphone was $2,229,154.98. (CR DE# 1095:40-42). Significantly, she explained that this loss figure was a conservative estimate, because of the 18 month lag between the PDE date of service and the IDR process date. (Id.:39, 41-42). Comparing the Medicare reimbursement figures shown on Exhibits 63 and 64, Elliott testified that Frank Ballesteros was responsible for 20 percent of the prescriptions for Schedule II controlled drugs dispensed at the Roberts Drug Store pharmacies, during the period from January 1, 2009 to September 30, 2011. (Id.:42-44).

Petronella Smith Howard testified as follows. She first met Ballesteros at Hope Medical Corp. in 2010 and met Ballesteros a second time at the Palm Avenue office. (CR DE# 1096:134). She was introduced to Ballesteros by defendant Cynthia Adderley. Howard and Adderley lived in St. Lucie County. One day Adderley told Howard that she would pay Howard $400 if Howard would visit a pain clinic, and Howard accepted because she needed money. (Id.:134-135). Adderley instructed her to complain about problems in her back and neck. Adderley told her the doctor would write her a prescription and that Adderley would pay her for it. (Id.:135).

On April 17, 2010, Adderley picked her up and drove her to Hope Medical. Adderley brought approximately 21 people from Fort Pierce and Gifford, in three vehicles. (CR DE# 1096:136). When the group arrived at Hope Medical, they filled out paperwork and waited. Eventually, Howard met with Ballesteros. Howard testified that she said little or nothing to Ballesteros and he did not examine her. (Id.:136-137). Ballesteros wrote five prescriptions for Howard, including a prescription for 80 milligram OxyContin tablets and 30 milligram oxycodone tablets. (Id.:137). After Howard

saw Ballesteros, she waited until the other members of the group had seen him. After that, they went to a Roberts Drug Store on 54th Avenue, in Miami, where the prescriptions were filled. (Id.:137-138). Leroy Paige and another man arrived at the pharmacy. Adderley delivered the drugs to Paige and the other man; then she returned with money and paid Howard $400. (Id.:137).

On May 7, 2010, Adderley brought between 21 and 25 people, including Howard, from the Fort Pierce area to Ballesteros's office on Palm Avenue. (CR DE# 1096:138-141). Howard met with Ballesteros, but there was no conversation. She then returned to the waiting area, where she waited for about two hours. (Id.:138-139). Ballesteros prescribed 80 milligram OxyContin tablets and 30 milligram oxycodone tablets. (Id.:140-141). The group went to another Roberts Drug Store pharmacy on 7th Avenue; then they went to 10th Avenue, which was no longer serving as a clinic, where they waited for another two hours. (Id.:139, 141-142). Adderley took the bags containing the drugs into the building where she delivered them to Leroy Paige. Adderley returned with a bag full of money and paid each of the other patients $300. (Id.).

Howard explained that she was invited to join in the drug-trafficking and health care fraud conspiracies because she had Medicare prescription drug coverage. (CR DE# 1096:140). In May of 2010, she became a driver for Cynthia Adderley. She would drive people from the Fort Pierce area to the Palm Avenue office and pick them up at the former office location at East 10th Avenue. (Id.:143-145). Leroy Paige had other drivers who would take the patients to the pharmacies. (Id.:144, 146). Howard drove patients to Ballesteros's office every Monday, Wednesday, and Friday. (Id.:144).

Hattie Mae Green testified to the following. She met Leroy Paige in around September of 2009 and he offered her a job as a patient recruiter and driver for a pain clinic located at First and Flagler in Miami. (CR DE# 1096:176-179). She was asked to find patients with prescription drug insurance. (Id.:177). The doctor at the clinic was Ballesteros. (Id.:178-179). Ballesteros would write prescriptions for the people Green brought to the clinic; then, she and other drivers would take the patients to the Roberts Drug Store and Heart Med pharmacies. Green carried the prescriptions. (Id.:179-180).

Green testified concerning prescriptions for oxycodone and oxymorphone that Ballesteros wrote for "Patient D," on October 8, 2010. These prescriptions are the basis for Ballesteros's conviction for possession with intent to distribute oxycodone and oxymorphone, charged in Count 2 of the Indictment. Green testified that on October 8, 2010, at Leroy Paige's behest, she drove fake "Patient D" to a Roberts Drug Store pharmacy, where D's prescription was filled. Green took possession of the bag containing the medicines and gave it to Leroy Paige. Green and the other drivers were instructed not to open the pharmacy bags containing the medicines, but she understood that Ballesteros was prescribing oxycodone and Opanas. (CR DE# 1096:181-183). Green identified Exhibits 69-A and 69-B as the prescriptions for oxycodone and oxymorphone that Ballesteros wrote for Patient D on October 8, 2010. (Id.:191-192; CV DE# 31, Exhibits 69-A and 69-B).

Green testified that Ballesteros's office moved frequently. She stated that the office at First and Flagler moved to 893 East 10th Avenue, and to Palm Avenue. (CR DE# 1096:183). Green recognized the offices shown in Exhibit 5 (893 East 10th Avenue) and Exhibit 11 (3068-C Palm Avenue), and she testified that she saw

Ballesteros, Batman and his wife, Juan, Gerry, and Camila at both of those locations. (Id.:184-185).

Ronald Regains testified that he met Leroy Paige in 2010, and that Paige recruited him to sell his oxycodone and Opana (oxymorphone). (CR DE# 1096:195-96). Regains recognized the medical offices depicted in Exhibit 5 (Hope Medical Corp. at 893 East 10th Avenue), and Exhibit 11 (3068-C Palm Avenue), as the locations where he obtained prescriptions for oxycodone and Opana. (Id.:196-198). Regains testified that he saw a doctor at both offices, however, he did not identify Ballesteros and he was not sure that he saw the same doctor at both locations. (Id.:196-197). When Regains went to the offices the doctor would conduct only a brief physical examination or no examination at all. (Id.:200-201).

Regains testified about prescriptions for oxycodone and oxymorphone that Ballesteros wrote for him on October 25, 2010. These prescriptions were the basis for Ballesteros conviction for possession with intent to distribute oxycodone and oxymorphone, charged in Count 4 of the Indictment. Regains testified that on October 2, 2010 he visited the Palm Avenue office, where he obtained prescriptions for 30 milligram oxycodone tablets and 40 milligram oxymorphone tablets. (Id.:198-199). Regains was taken to the doctor's office and the pharmacy by a driver recruited by Leroy Paige. (Id.:198). The prescriptions were filled and Regains gave the drugs to Leroy Paige. (Id.:199).

Henry Conley, Jr. testified as follows at trial. In 2000 he was diagnosed as having thyroid cancer. He had surgery to remove his thyroid gland and to create a hole in his throat for breathing. (CR DE# 1096:206-207). Conley met Leroy Paige and Ballesteros in 2009, when the doctor's office was located on Flagler Street.

(Id.:205-207). Conley did not visit Ballesteros for medical treatment, he visited Ballesteros for the purpose of perpetrating fraud. (Id.:208). Ballesteros did not conduct any medical examination and he did not order an MRI. The consultation lasted only one or two minutes. (Id.:208-209). Ballesteros prescribed oxycodone and Roxicodone. (Id.:209).

When Ballesteros's office was on Flagler Street in Miami, Conley drove himself and other fake patients to the pharmacy, then drove them back to Ballesteros's office where they hand-delivered the drugs to Leroy Paige. (CR DE# 1096:211-213.) Leroy Paige paid Conley about $100/day to drive, and $200 or $300 for his prescription drugs. (Id.:213).

At some point, the Flagler Street location closed and the office moved to East 10th Avenue in Hialeah. Exhibit 5 depicts the office on East 10th Avenue. (CR DE# 1096:210, 214-215). Conley reviewed portions of Exhibit 9-A, the video recording taken by the DEA CS who visited Ballesteros's office on 893 East 10th Avenue. The video depicts that location, and Conley identified himself and Leroy Paige in one session of the video recording. (CR DE# 1096:215-216; CV DE# 31, Exhibit 9-A, Session 4 at 13:36:30 and 13:41:56). According to Conley, part of the video recording showed the back office of 893 10th Avenue, where Leroy Paige would give Conley prescriptions to be filled, and where he and other patients would deliver their drugs to Paige. (CR DE# 1096:216-217; CV DE# 31, Exhibit 9-A, Session 6 at 14:32:35). Conley listened to the CS's consultation at the office and identified Ballesteros as the other party to the conversation. (CR DE# 1096:217-218; CV DE# 31, Exhibit 9-A, Session 6 at 14:43:49).

Conley saw Gerardo Gomez and Leroy Paige meet with Frank

Ballesteros in the back office area of 893 East 10th Avenue. Conley saw Leroy Paige go into Ballesteros's office and come out with prescriptions. (CR DE# 1096:218-219).

Conley testified that Exhibits 42-A to 42-D were prescriptions that Ballesteros wrote for him, without conducting any physical examination. Exhibits 42-A and 42-B are dated December 30, 2009 and show Ballesteros's address as 1420 S.W. 1 Street, Suite A-1. Exhibits 42-C and 42-D are dated January 28, 2010, and show the same address. (CR DE# 1096:224-226). Each set of prescriptions included a prescription for 120, 80 milligram OxyContin tablets, and 120, 30 milligram Roxicodone tablets. (CV DE# 31, Exhibits 42-A to 42-D).

The United States called Dr. Rubenstein to testify to the following as an expert in the field of pain management medicine. (CR DE# 1095:84-158). Dr. Rubenstein's testimony showed that Ballesteros's prescriptions were medically unnecessary, and that Ballesteros knew that his "patients" were not taking the oxycodone and oxymorphone he prescribed for them. Oxycodone may be medically necessary where a patient is experiencing acute pain. Dr. Rubenstien explained the detailed evaluation that must be conducted before a physician may determine that oxycodone is appropriate. (Id.:95-97.) He further testified that oxycodone is properly prescribed for patients who need pain relief "around the clock," "for an extended period of time," and that 80 milligram strength oxycodone - the dosage Ballesteros prescribed - must never be prescribed for use "as needed" by "an opioid naïve patient," because it could result in an overdose, respiratory depression, and death. (Id.:106-114.) Dr. Rubenstein explained:

> The 80-milligram dose is only for people who've been on the equivalent of that amount of narcotics - be it morphine or oxycodone or oxymorphone, or any one of the other drugs that we have - who needs to be on this medication around the clock for an extended period of time. Not for a couple of days or a week, but for a long time.
>
> Typically, an end-stage cancer patient or a patient with a severe, severe pain syndrome that can't be adequately managed by other means. And you wouldn't do it "as needed" because then you're really varying the dose by the equivalent of 16 Percocet if you took one, one day, and two the next day, and didn't take it the next day. You can't vary that dose that much. Your body can't tolerate that. It's not intended to be taken "as needed."

(Id.:114).

Dr. Rubenstein was shown several examples of Ballesteros's prescriptions for 80 milligram oxycodone tablets, to be taken "as needed." (CR DE# 1095:111-18; CV DE# 31, Exhibit 4-A, pages 2, 8, 14). These included a prescription for 80 milligram oxycodone tablets to be taken as needed by a one-hundred-year-old patient. (CV DE# 31, Exhibit 4-A, page 14). Dr. Rubenstein opined that the only reason a physician would prescribe 80 milligrams of oxycodone for a one-hundred-year-old patient would be to assist them in dying:

> Q. Doctor, showing you Bates Stamp Number 14 in Exhibit 4-A. What is the prescription written for?
>
> A. OxyContin 80 milligrams in a quantity of 60 to take one every 12 hours, as needed, for pain.
>
> Q. Does the - it has the patient's age on the prescription. If this was for a patient who was 100 years old, would that cause you any concern?
>
> A. Causes me more than concern for a number of reasons. The first reason is that I've now said, three or four times, OxyContin 80 milligrams is never to be prescribed

> "as needed."
>
> Secondly, you have a 100-year-old patient. I can't think of a pain problem, other than terminal malignant cancer, that the patient would still be alive at the age of 100 needing that degree of pain medications.
>
> Number three, with the elderly, we have to modify the doses. They can't tolerate the same dose that a younger patient can do. To give them 80 milligrams of OxyContin will almost definitely result in severe constipation, if not respiratory depression and possibly death. . . .
>
> So I can't think of an instance, unless the patient was terminal and you were trying to assist in their death, or what's called passive euthanasia because they're terminal, they have cancer, you're just giving them comfort care, and that would be the only scenario I could even dream of. And OxyContin wouldn't be [the] drug that I would use to do that.

(CR DE# 1095:117-18).

Dr. Rubenstein testified that he reviewed twenty-two patient files from Ballesteros's office, and none of them had the documentation required to support Ballesteros's prescriptions for OxyContin 80 milligram tablets, Roxicodone 60 and 30 milligram tablets, or Xanax. He opined that there was no legitimate medical purpose for the prescriptions and the high dosages of opioids would have placed the patients at risk if they were, in fact, taking the medications. (CR DE# 1095:134-36). Dr. Rubenstein testified that opiates, such as OxyContin, oxycodone, and Opana, are not appropriate for a person with a tracheostomy, like Henry Conley. (Id.:151-52).

Juan de Dios Gomez testified to the following. In 2009, he opened an HIV-infusion therapy clinic called "Milu," in Miami. (CR DE# 1095:161). Milu was intended as a Medicare fraud scheme and the plan was to bill Medicare for services that were not provided.

(Id.:165-66). To run the scheme, Gomez needed a doctor, and his physician's assistant introduced him to Ballesteros; however, he and Ballesteros did not reach an agreement. (Id.:163-67). When Medicare would no longer pay for infusion therapy, Gomez closed Milu and reopened the location as a physical therapy clinic called "JCR." (Id.:167).

Juan Gomez opened JCR around June of 2009. (CR DE# 1095:169). He then approached Ballesteros again, and offered Ballesteros $1,000/week to sign the patients' charts and confirm that the patients were being seen. (Id.:169-70). Leroy Paige continued to recruit patients for JCR. (Id.:171). Ballesteros began coming to JCR once a week to sign charts, but he did not see any patients. (Id.:172-73). According to Gomez, JCR was in business for about three months, but Medicare was not paying, so he closed JCR on September 12, 2009. (Id.:174).

Juan Gomez testified that before he closed JCR, he learned that he could use his HIV-physical therapy patients and Medicare Part D prescription drug insurance to obtain prescription pain killers, which he could sell at a large profit. (CR DE# 1095:175-77). To do this he needed a doctor to write the prescriptions, so he invited Ballesteros to meet with him at JCR. (Id.:178). Gomez explained that he needed Ballesteros to write prescriptions for 30 milligram Roxicodone tablets and 80 milligram oxycodone tablets. (Id.:179-80). He told Ballesteros that he would pay him $275 for each patient, meaning $275 for the two prescriptions. Ballesteros asked Gomez what was in it for Gomez, and Gomez answered "for me the pills, for you the $275." (Id.:181-82). Ballesteros accepted the proposal, and Gomez began sending patients to the clinic where Ballesteros was working, California Club. (Id.:182-85). Gomez began sending the patients to

Ballesteros in June of 2009 and he paid Ballesteros in cash every day. (Id.:185-86). After two or three weeks, Ballesteros saw the money he could make, and he asked Gomez if he could start working at the JCR location in the afternoons. (Id.:186-87). Eventually, Ballesteros quit California Club and began working full-time at the JCR location. (Id.:187-88). In September of 2009, Gomez closed JCR and renamed the premises as the office of Dr. Frank Ballesteros. (Id.:188-89). Leroy Paige continued to recruit patients and Ballesteros would see between twenty and twenty-five patients a day, six days a week. (Id.:190).

Juan Gomez testified that they took the prescriptions that Ballesteros wrote to Roberts Drug Store pharmacies, and they sold the pills to an unindicted co-conspirator who knew the owner of Roberts Drug Store, Aiman Aryan. (CR DE# 1095:198-99). At some point the unindicted co-conspirator told Gomez that Aryan had asked her about the Ballesteros prescriptions, and that she told Aryan that Gomez was the person responsible for the influx of prescriptions. At Aryan's request, the unindicted co-conspirator set up a meeting with Gomez (Id.:199-200). Gomez testified that he met with Aryan in around October of 2009. During the meeting, Aryan told Gomez that Gomez would have to pay him $300 for each patient and that he could send from 5 to 7 patients to each pharmacy, each day. (Id.:200-201). Gomez testified that immediately after his meeting with Aryan, he explained what had happened to Ballesteros and that he would have to reduce Ballesteros's fee from $275 to $250 per patient. Ballesteros complained that Aryan was being greedy, but he agreed to reduce his fee for writing the fraudulent prescriptions to $250/patient. (Id.:203-205).

According to Juan Gomez, the patients did not pay for their visits to Ballesteros. (CR DE# 1096:10-11). Further, the

conspirators did not bill Medicare for the patients' visits, because they did not want to attract scrutiny from Medicare. (Id.:11). Instead, Gomez paid Ballesteros $250 in cash for each patient. Typically, Gomez paid Ballesteros $5,000, $6,000, or even $7,000, in cash, every day; and Ballesteros insisted on $100 or $50 bills. (Id.:12-13).

Juan Gomez explained the movement of Ballesteros's office during the course of the conspiracy, including his decision to close the Palm Avenue office when he discovered Agent Gittelsohn conducting surveillance from across the street. (CR DE# 1096:16-30, 39-49). He further testified regarding various incriminating telephone conversations that he had with Ballesteros, which were recorded during a court-authorized wire-tap. (Id.:67-95).

Special Agent Brian Hill, HHS-OIG testified as follows. He was a Special Agent with the Department of Health and Human Services, Office of Inspector General, assigned to the underlying investigation. Agent Hill testified regarding his surveillance of some of the premises occupied by Ballesteros. (CR DE# 1095:52-56). On October 12, 2011, he conducted a consent search of Ballesteros's final office location, at 2140 West Flagler Street, Miami, at the time of Ballesteros's arrest. (Id.:60, 65-66; CV DE# 31, Exhibit 67, Consent to Search). Agent Hill seized patient files, cash, and other items. (CR DE# 1095:60-62). He authenticated photographs marked as Exhibits 65, 66, and 68, which depict cash found on the patient table in Ballesteros's office, Ballesteros's wallet, and his briefcase. (Id.:62-66; CV DE# 31, Exhibit 65, photo of cash on patient table; Exhibit 66, photo of cash found in Ballesteros's wallet; Exhibit 68, photo of cash in briefcase). Hill estimated that law enforcement seized approximately $5,000 at Ballesteros's office. (CR DE# 1095:66).

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On September 30, 2011, the grand jury returned the indictment charging twenty-four defendants, including Frank J. Ballesteros, with conspiracy to possess with intent to distribute oxycodone and oxymorphone, in violation of Title 21, United States Code, Section 846, and conspiracy to commit health care fraud, in violation of Title 18, United States Code, Section 1349 (counts 1 and 9). (Cr DE# 3, Indictment). Ballesteros was also charged with two counts of possession with intent to distribute oxycodone and oxymorphone, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2 (Counts 2 and 4). (Id.).

Ballesteros's trial began on April 2, 2012 and concluded on April 10, 2012, when the jury returned a verdict finding him guilty on all four counts. (Cr DE# 636, Verdict).

Meanwhile, before sentencing, a PSI was prepared which reveals as follows. The guideline for each of Counts One, a violation of 21 U.S.C. §846, and Counts Two and Four, which were violations of 21 U.S.C. §841(a)(1), was found in §2D1.1. (PSI ¶56). The guideline for Count Nine, a violation of 18 U.S.C. §1349, was found in §2B1.1 via §2X1.1. Count Nine constituted a separate harm and victim than those for the counts which comprise Group One. Therefore, Count Nine could not be grouped with Counts One, Two and Four, and the grouping rules found in Chapter 3, Part D, Multiple Counts were applied. According to §3D1.1(a)(3), the Court would determine the combined offense level applicable to all groups taken together that shall be determined by applying the rules in § 3D1.4. Count Nine was to be identified as Group Two. (PSI ¶57).

With respect to the drug offenses, as to Counts One, Two and Four, the guideline for 21 U.S.C. §§846 and 841 offenses was found in §2D1.1. The defendant was accountable for at least 5,000 grams of oxycodone and at least 40 grams of oxymorphone. As noted in §2D1.1, comment. [n.10(D)], since neither drug was referenced in the Drug Quantity Table, the Drug Equivalency Tables were applied and the marijuana equivalent of each drug was determined. One gram of actual oxycodone was equivalent to 6.7 kilograms of marijuana, while one gram of oxymorphone was equivalent to 5 kilograms of marijuana. Therefore, 5,000 grams of oxycodone was equivalent to 33,500 kilograms of marijuana, while 40 grams of oxymorphone was equal to 200 kilograms of marijuana. Therefore, the defendant was accountable for 33,700 kilograms of marijuana, which rendered a base offense level of 38, §2D1.1(c)(1). (PSI ¶58).

Because the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense, the offense level was increased by two levels, §3B1.3. (PSI ¶61).

With respect to the Health Care Fraud charges, the guideline for an 18 U.S.C. §1349 offense was found in §2B1.1. That section provided that an offense involving health care fraud had a base offense level of six, §2B1.1(a)(2). (PSI ¶64). Because the loss was more than $7,000,000 but not more than $20,000,000 the offense level was increased by 20 levels, §2B1.1(b)(1)(K). (PSI ¶65).

In light of the foregoing, the total offense level was set at 40. (PSI ¶63).

The defendant had a total of zero criminal history points and a criminal history category of I (Chapter Five, Part A). (PSI ¶84).

As to each of Counts One, Two and Four, the term of imprisonment was 0 to 20 years, 21 U.S.C. §841(b)(1)(C). As to Count Nine, the term of imprisonment was 0 to 10 years, 18 U.S.C. §1347. (PSI ¶121). Based on a total offense level of 40 and a criminal history category of I, the guideline imprisonment range was 292 to 365 months. (PSI ¶122).

Attorney David Alvarez filed Ballesteros's motion for downward variance and objections to the PSI. (Cr DE# 903, 904). In Ballesteros's objections to the PSI, he specifically objected to Probation's finding in paragraph 44 of the PSI that he was responsible for 5,000 grams of oxycodone and 40 grams of oxycodone. (CR DE# 904:2).

Movant appeared for sentencing on August 10, 2012. (Cr-DE# 920). The Court denied Ballesteros's motion for a downward variance, overruled his objections to the PSI, and imposed a sentence of 365 months' imprisonment. (Id.).

Movant appealed, raising the following grounds for relief:[1] The district court plainly erred by failing to instruct the jury on the elements of health care fraud as the object of the conspiracy charged in count 9 of the indictment.

On July 11, 2013, the Eleventh Circuit Court of Appeals *per curiam* affirmed the movant's convictions and sentences in a written, but unpublished opinion. United States v. Ballesteros, 523 Fed.Appx. 611 (11th Cir. 2013). No certiorari review was filed.

[1]The claims are gleaned from movant's initial brief on appeal, which can be found on the Eleventh Circuit Court of Appeal's on-line docket in case no. 12-14468, located at www.pacer.gov, as well as, from the from the appellate opinion affirming movant's judgment of convictions. See United States v. Ballesteros, 523 Fed.Appx. 611 (11th Cir. 2013)(unpublished).

Consequently, for purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final at the latest on **October 9, 2013**, when the 90-day period for seeking certiorari review with the U.S. Supreme Court expired.[2]

For purposes of the one-year federal limitations period, the movant had one year from the time his conviction became final, or no later than **October 9, 2014**,[3] within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means petitioner's motion was timely filed on **July 22, 2014**. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311,

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[2]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[3]See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

On January 2, 2015, three months after the federal one-year limitations period had expired, movant filed a supplement to his original §2255 motion, raising additional claims of ineffective assistance of counsel during the sentencing hearing. (Cv DE# 21). However, pursuant to Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000), because it appears that the arguments raised for the first time in his amendment do not relate back to the timely filed §2255 motion, the amendment is time-barred. As a result, this court will not consider the claims raised in the supplemental petition.

III. Threshold Issues-Timeliness

The government rightfully does not challenge the timeliness of the movant's initial motion which has been timely filed, prior to the expiration of the federal one-year limitations period. See 28 U.S.C. §2255(f). The government has also challenged the movant's amendment thereto as time-barred. The undersigned agrees and will not consider the claims in the supplemental petition.

IV. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal

constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." Id. Section 2255 relief is limited, however. To obtain relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)(rejecting the plain error standard as not sufficiently deferential to a final judgment).

General Legal Principles

Because movant asserts in his motion to vacate that counsel rendered ineffective assistance during all stages of his criminal proceeding, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard is the same for claims challenging appellant counsel's effectiveness. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

To establish deficient performance, the movant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. Strickland, supra. The Court's review of counsel's performance should focus on

"not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000)(*en banc*), cert. denied, 531 U.S. 1204 (2001)(*quoting* Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)). There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. Id. at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Chandler, 218 F.3d at 1313. Instead the test is whether what counsel did was within the wide range of reasonable professional assistance. Id. at 1313 n.12.

Thus, in assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Strickland, 466 U.S. at 689-90. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler, 218 F.3d at 1316. Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial

under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ____, ____, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006)(citing Chandler v. United States, 218 F.3d at 1313).

As noted by the Supreme Court:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed .2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland,

466 U.S. at 690, 104 S.Ct. 2052.

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 788 (2011). See also Premo v. Moore, ___ U.S. ___, 131 S.Ct. 733, 739-740, 2011 WL 148253, *5 (2011). If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs). See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004).

As will be demonstrated in more detail below, the movant is not entitled to vacatur on the claims presented.[4] When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the movant a fundamentally trial and due process of law. The movant therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d

[4]Briefly, the evidence against the movant was more than sufficient to support his convictions. The movant has not shown that the result of the trial or appeal would have been affected had counsel proceeded differently. Further, no denial of due process has been demonstrated. To the contrary, it is clear after independent review of the record that the movant received a fair trial, and that no constitutional violations occurred. Consequently, he has failed to demonstrate that he is entitled to habeas corpus relief in this collateral proceeding.

The Eleventh Circuit has instructed courts to resolve all claims for relief raised in a motion to vacate prior to granting or denying relief. See Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (*en banc*) (involving state prisoner's 28 U.S.C. §2254 petition); see also, Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (applying Clisby to a federal prisoner's §2255 motion). Given the convoluted, narrative ramblings presented by movant in his numerous filings, and in order to avoid any argument by movant that the undersigned has ignored under Clisby any claim or argument, the undersigned wants to make clear at this juncture that any argument or claim that has not been specifically identified in this Report, but has been raised by movant in his motion, memorandum, supplement, or traverse, has been considered by the undersigned and are found to be without merit, warranting no further discussion.

699, 704 (9th Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990)(stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the movant's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

V. Discussion of the Claims

A. Hearing Claim

(Misadvice Regarding Pleading Guilty versus Trial)

In **claim 4**, movant asserted in his petition that he was denied effective assistance of counsel, where his lawyer failed to convey a concrete pre-trial plea offer made by the government. (Cv-DE#6:12). He concludes that had he been properly counseled, he would have been able to make an informed decision regarding whether to proceed to trial or accept the plea offer. (Id.:13). This claim warranted an evidentiary hearing. However, as is made clear below, the movant's testimony did not unequivocally support his assertion in the petition that the government made a formal plea offer to defense counsel which defense counsel failed to convey to the movant.

i. The Law Re Advice on Plea Offers

The law is clear that defense counsel has an affirmative duty under the Sixth Amendment of the U.S. Constitution to provide

competent advice, and to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to an accused. See Missouri v. Frye, 2012 WL 93202 (2012); Lafler v. Cooper, 2012 WL 932019 (2012). The Supreme Court has indicated that an evidentiary hearing may be conducted to determine whether the movant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. Lafler, supra.

As discussed in detail below, the movant cannot prevail on this claim. Although at first blush, the movant's assertions appear to be founded on fact and logic, careful analysis reveals that what is being represented is not candid or forthright. Further, it is the finding of the undersigned that the movant, an intelligent and involved defendant, would not have accepted any plea offer, but rather at all times insisted on litigating the charges against him. In fact, at the evidentiary hearing, movant again maintained his innocence as he did pretrial and post-trial.

Notably, "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. ____, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010). In the recent case of Missouri v. Frye, 566 U.S. ____, No. 10-444, ___ U.S. ___, ___, 132 S.Ct. 1399, 2012 WL 932020, *8 (Mar. 21, 2012), the Supreme Court said: "[A]s a general rule, defense counsel has the duty to communicate formal [plea] offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." If an attorney allows such an offer "to expire without advising the defendant or allowing him to consider it, defense counsel d[oes] not render the effective assistance the Constitution requires." Id.

The Strickland framework applies to advice regarding whether to plead guilty. Hill v. Lockhart 474 U.S. 52, 57-59 (1985). See also Premo v. Moore, ___ U.S. ___, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011); Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 1480-81 (2010)("Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'") (*quoting* McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

The analysis of Strickland's performance prong is the same, but instead of focusing on the fairness of the trial, the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59. Thus, when an ineffective assistance of counsel claim concerns the rejection of an offered plea agreement, the defendant "'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'" Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995)(quoting Hill v. Lockhart, 474 U.S. at 58, 106 S.Ct. at 370)(alterations in original).

Notwithstanding, it is also noted that a defendant has no right to be offered a plea, nor is there any federal right for a judge to accept it. Missouri v. Frye, 2012 WL 932020 at *10 (March 21, 2012). Notwithstanding, the Sixth Amendment right to counsel does include effective representation during the plea negotiation process. Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010). A "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'" Padilla, 130 S.Ct. at 1484 (2010) (quoting Libretti v. United States, 516 U.S.

29, 50-51 (1995)). "Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client...." United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987), overruled on other grounds by United States v. Watson, 866 F.2d 381 (11th Cir. 1989); see Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (stating joint representation of conflicting interests is suspect because it may well preclude defense counsel from exploring possible plea negotiations). Further, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, 2012 WL 932020 at *8. When defense counsel allows an offer to expire without advising the defendant or allowing him to consider it, counsel has provided ineffective assistance. Id.

Of course, an attorney has a duty to advise a defendant, who is considering a guilty plea, of the available options and possible sentencing consequences. Brady v. United States, 397 U.S. 742, 756 (1970). The law requires counsel to research the relevant law and facts and to make informed decisions regarding the fruitfulness of various avenues. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004). When a defendant "'lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to [plead] or take his chances in court.'" Id. (*quoting* Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995)). See also Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman ....").

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or has been rejected because of counsel's deficient advice, defendants must demonstrate:

> a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.... [and] a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at *9; see Lafler v. Cooper, 2012 WL 932019 at *5 (March 21, 2012) (same). Strickland's inquiry into whether the result of the proceeding would have been different "requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." Id.

To be clear, counsel has a responsibility to discuss the advantages and disadvantages of a plea offer with movant so that movant can then decide whether to accept or reject such an offer. Padilla, 130 S.Ct. at 1484 (2010) (a "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'"). Counsel's complete failure to confer with his client about the advantages and disadvantages of a plea offer just before the start of trial is deficient performance. See Padilla, 130 S.Ct. at 1418. However, that does not end the inquiry. The question then becomes whether movant can demonstrate counsel's deficiency prejudiced him.[5] Thus, movant must demonstrate:

[5]Although it appears that movant maintained his innocence during trial, sentencing, and appeal, this does not eliminate his ability to demonstrate prejudice here. See Lalani v. United States, 315 Fed. Appx. 858 (11th Cir. 2009) (an assertion of innocence does not preclude the movant from asserting he was

(1) there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler, 2012 WL 932019.

This court, concerned with movant's claim that his attorney failed to properly convey and/or otherwise discuss a plea offer extended by the government, as well as, the advantages of accepting the plea versus proceeding to trial, held an evidentiary hearing on October 6, 2015. At the evidentiary hearing, testimony was taken from the movant; former defense counsel, David Alvarez, Esq.; and DEA Agent Patrick Gittelsohn.

ii. Testimony at the Hearing

(a). Movant's Testimony

After Ballesteros was placed under oath, he testified to the following. He graduated from medical school in the Dominican Republic in 1982 at which point he moved to Miami and started his residency with the University of Miami at Jackson Memorial Hospital. He became a licensed doctor in 1989. In 1992, he was charged with being involved in a conspiracy to commit medicaid/medicare fraud. He entered a guilty plea and was sentenced to probation. His lawyer in 1992 was Manual Gonzalez. When he was charged in the underlying criminal case, Gonzalez represented him

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prejudiced by counsel's misadvice regarding pleading guilty or pursuing a plea agreement).

until the bond hearing, at which point the court denied him release on bond. Because Gonzalez was unsuccessful at the bond hearing, Ballesteros's wife hired David Alvarez to represent Ballesteros. His wife signed the retainer with Alvarez and paid the fees. Ballesteros did not personally hire Alvarez, but did not take steps to terminate Alvarez's representation. Ballesteros felt he had no choice but to continue with Alvarez as his attorney.

Ballesteros told Alvarez he wanted to cooperate with the government and enter a plea agreement. Alvarez assured him that the government's case was weak and advised Ballesteros to proceed to trial. Ballesteros finally demanded that Alvarez arrange a meeting with the government so Ballesteros could cooperate. During the meeting, the government shut things down quickly after concluding that Ballesteros was not providing genuine cooperation.

Alvarez did not visit Ballesteros or communicate with him prior to trial. Ballesteros had no idea what evidence the government planned to introduce. Alvarez also failed to review the sentencing guidelines with Ballesteros, which would have allowed Ballesteros to make an informed decision regarding whether to proceed to trial.

Ballesteros claimed that Alvarez had a financial incentive to represent Ballesteros at trial, rather than in connection with a plea agreement. Specifically, Alvarez earned $100,000 if Ballesteros entered a plea and $125,000 if Ballesteros proceeded to trial. Alvarez regularly complained about his financial problems to Ballesteros.

At the outset of the trial, Ballesteros's co-defendant informed the court that he had accepted a plea offer from the

government. Ballesteros turned to Alvarez and asked, "what about me," and Alvarez responded that the government made an offer to Ballesteros but he was sure Ballesteros would have rejected the offer. Ballesteros conceded that he never gave Alvarez parameters with respect to a plea agreement, i.e., how many years he was willing to serve. As he claimed in his petition, Ballesteros also never expressly testified that the government made a formal plea offer to Alvarez, which Alvarez failed to convey to Ballesteros.

After he was convicted, he signed off on the PSI, however, Alvarez never met with him to go over the PSI or sentencing guidelines. The last time he saw Alvarez was at the sentencing hearing.

On cross-examination, he was questioned about the meeting with the prosecutors and DEA agents. At first Ballesteros denied that he refused to admit guilt during the meeting. Eventually, he testified that the patient witnesses who testified against him at trial were all lying and that he "was duped."

(b) Attorney Alvarez

After Alvarez was sworn, he testified to the following. He began practicing law twenty years ago. He was a prosecutor for ten years, and entered private practice in 2006. Ballesteros's wife retained him after the bond hearing and signed the retainer agreement. Ballesteros did not sign the paperwork, but did not dispute Alvarez's representation.

When Alvarez first met with Ballesteros, he directed Alvarez to appeal the bond issue. The government took the position that because Ballesteros refused to enter a plea, the government would

fight Ballesteros on the bond issue.

With respect to the pre-trial preparations, Alvarez testified that the discovery was voluminous and the government had several damning pieces of evidence. Alvarez met with Ballesteros approximately ten times at the jail. They reviewed all of the evidence before the trial. Alvarez also explained the sentencing guidelines and informed Ballesteros that he was facing 25 to 30 years if he proceeded to trial.

Ballesteros expressed interest in entering a plea agreement and co-operating with the government. Alvarez informed AUSA Rodriguez-Schack, who said the government could make an offer of 15 years in prison. Alvarez conveyed this potential offer to Ballesteros, who found it unacceptable.

During the February 8, 2015 meeting with the AUSAs and DEA Agents, Ballesteros would not accept responsibility. As a result, the meeting came to an end.

The government introduced into evidence an email dated March 23, 2012 from AUSA Williams to Alvarez which provided as follows:

> I confirm our telephone conversation this morning. You advised that you had just spoken with your client and that he has rejected the United States' proposal of a plea agreement stipulating to a base offense level of 38 (based on at least 30,000 kg of marijuana), a two-level increase in offense level for abuse of a position of trust and use of special skill, no aggravating role adjustment, and no Booker waiver. You advised that Dr. Ballesteros wishes to proceed to trial.

(Evidentiary Hearing Exhibit A).

Alvarez testified that he received this email and that it

accurately explained the circumstances. The government made this offer, which would have required Ballesteros to serve ten to fifteen years, and Alvarez conveyed it to Ballesteros who said he would rather proceed to trial than accept the offer.

(c). DEA Agent Patrick Gittelsohn

Agent Gittelsohn testified on the government's behalf to the following. He became involved in the investigation into Ballesteros's in 2010. He briefly described the conspiracy, which is detailed above in the facts section. On February 8, 2015, a meeting took place with AUSA Dwayne Edward Williams, AUSA Yvonne Rodriguez-Schack, DEA Agent Spect, DEA Agent Gittelsohn, Attorney Alvarez, and Ballesteros. Ballesteros expressed interest in cooperating but then denied any awareness of or involvement in the conspiracy, instead, Ballesteros wanted to discuss other crimes which did not involve him. As a result, the government officials terminated the meeting after ten or fifteen minutes.

iii. Analysis

The court has carefully considered the testimony of the movant in the context of this case and paid close observation to his demeanor, as well as, careful attention to and review of the testimonies of the movant's trial counsel, Attorney Alvarez, along with the testimony of the government's witness, DEA Agent Gittelsohn. After taking into account the respective interests of the parties in the outcome of this proceeding, the undersigned finds movant's testimony to be self-serving, equivocal, qualified, and at times inconsistent. It is also worth noting that Ballesteros failed to sufficiently back up the claim he made in his petition with his testimony at the evidentiary hearing.

The undersigned rejects movant's testimony insofar as it relates to his claim that Attorney Alvarez failed to discuss and/or otherwise disclose a government plea offer, which was memorialized in a March 23, 2012 email. To the contrary, the undersigned credits Attorney Alvarez's testimony that he informed Balleteros of the government's plea offer. Moreover, the court credits the testimony of Attorney Alvarez that movant refused to entertain a fifteen-year sentence and preferred to take his chances at trial.

The court also rejects the testimonies of the movant that the plea offer was not conveyed to him until Alvarez referred to it during trial, when the movant's co-defendant entered a plea.

Furthermore, the movant never stated what plea offer would have been acceptable for him. He never provided any testimony to dispute Alvarez's testimony that the movant would not accept a fifteen-year sentence.

In conclusion, the court rejects movant's self-serving, disingenuous testimony that, but for counsel's failure to timely convey the government's plea offer, in addition to, failing to explain the strength of the government's case and the sentence exposure he faced if convicted at trial, the movant would have accepted a plea offer or otherwise pleaded guilty rather than proceed to trial. To the contrary, the court finds movant has insisted in the past, and continues to maintain today that he did not commit the crimes. At one point during the hearing, he claimed the witnesses who testified against him at trial were lying and that he was duped. The undersigned finds movant's testimony that he was unaware of the evidence the government planned to present was, at best, disingenuous, and at a worse, perjurious. In conclusion, the undersigned finds movant has not demonstrated that

his attorney was deficient, much less that he was prejudiced as to the advice provided by him regarding accepting a plea offer, pleading guilty, or proceeding to trial. He is thus entitled to no relief on this basis.

B. Remaining Claims

In **claim 1**, the movant asserts that he was denied effective assistance of trial counsel, where his lawyer failed to move to severe the movant's trial from that of co-defendant Billy Joe McCoy. (Cv-DE#6:7). Ballesteros argues that Alvarez's failure to request a severance prejudiced him during the selection of the jury, because he had to share the ten peremptory challenges provided by Fed.R.Crim.Pro. 24(b)(2). He contends that if Alvarez had requested a severance, it would have been granted, and he would have had all ten peremptory challenges to himself. (CV DE# 6:7-8).

Pursuant to Fed.R.Cr.P. 8(b), "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." "There is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro v. United States,[6] 506 U.S. 534, 537 (1993).

[6]Although joinder is proper under Rule 8(b), the district court may order severance when either the defendant or the government will be prejudiced. See Fed.R.Cr.P. 14. In Zafiro, the Supreme Court held that "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro, 506 U.S. 538-39. The Court further held that, when defendants have been properly joined under Rule 8(b), the district court should grant a Rule 14 severance only if (1) there exists "a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) a joint trial would "prevent the jury from making a reliable judgment about guilt or innocence." Id. at 539. The Court specifically recognized that limiting instructions "often will suffice to cure any risk of prejudice." Id.

The general rule is that defendants who are jointly indicted should be tried together, and this rule has been held to be particularly applicable to conspiracy cases. See United States v. Baker, 432 F.3d 1189, 1236 (11th Cir. 2005) (citing United States v. Pedrick, 181 F.3d 1264, 1272 (11th Cir. 1999)); United States v. Diaz, 248 F.3d 1065, 1100-1101 (11th Cir. 2001); United States v. Castillo-Valencia, 917 F.2d 494, 498 (11th Cir. 1990), cert. den'd, 499 U.S. 925 (1991), citing, United States v. Alvarez, 755 F.2d 830, 857 (11th Cir. 1985), cert. den'd, 474 U.S. 905 (1985); United States v. Sawyer, 799 F.2d 1494 (11 Cir. 1986).

In order to justify severance, it must be demonstrated that the movant would suffer compelling prejudice against which the trial court was unable to afford protection, and that his trial thereby was rendered fundamentally unfair. Sawyer, supra; United States v. Cassano, 132 F.3d 646, 651 (11th Cir. 1998); United States v. Schlei, 122 F.3d 944, 984 (11th Cir. 1997); see also Zafiro v. United States, 506 U.S. 534, 539 (1993). "A defendant does not suffer compelling prejudice, sufficient to mandate a severance, simply because much of the evidence at trial is applicable only to co-defendants." Cassano, 132 F.3d at 651; Schlei, 122 F.3d at 984 (quoting United States v. Smith, 918 F.2d 1501, 1510 (11th Cir. 1990)); United States v. Chavez, 584 F.3d 1354, 1360 (11th Cir. 2009); United States v. Knowles, 66 F .3d 1146, 1159 (11th Cir. 1995). A defendant must demonstrate that the jury will be unable to sift through the evidence and make an individualized determination as to each defendant. Schlei, 122 F.3d at 984 (citations and quotation marks omitted). This burden is difficult to meet because limiting instructions "often will suffice to cure any risk of prejudice." Zafiro, 506 U.S. at 539.

There are four typical cases where severance may be required: "(1) [w]here the Defendants rely upon mutually antagonistic defenses; (2) [w]here one Defendant would exculpate the moving defendant in a separate trial, but will not testify in a joint setting; (3) [w]here inculpatory evidence will be admitted against one Defendant that is not admissible against the other; and (4) [w]here a cumulative and prejudicial "spill over" effect may prevent the jury from sifting through the evidence to make an individualized determination as to each Defendant." United States v. Chavez, 584 F.3d at 1360-61 (citations omitted). Ballesteros does not show that any of these circumstances justified a severance from McCoy.

First, Ballesteros and McCoy did not assert mutually antagonistic defenses. In his opening statement, Ballesteros's counsel, David Alvarez, asserted that Ballesteros was unaware of the drug-trafficking and health care fraud conspiracies, because the perpetrators deceived him and wrote falsified prescriptions behind his back. (Cr DE# 1093:184). He stated the evidence would show that Ballesteros had no financial motive to engage in the drug-trafficking and health care fraud schemes. (Id.:184-185). In his opening statement on behalf of Billy Joe McCoy, attorney Michael Smith told the jury that McCoy was not "a fake patient," but was instead "genuinely and legitimately ill," and that McCoy needed and used the oxycodone and oxymorphone that were prescribed for him. (Id.:186-87). Mr. Smith also told the jury that the evidence would not incriminate McCoy. (Id.:187-191). Thus, McCoy's and Ballesteros's defenses were mutually supportive, rather than mutually antagonistic.

Second, Ballesteros was not entitled to a severance on the grounds that McCoy would have exculpated him in a separate trial,

but would not testify in a joint trial. Indeed, once McCoy pled guilty and was essentially severed, his testimony would only have incriminated Ballesteros. In particular, McCoy would have testified that on or about September 3, 2010, Ballesteros prescribed oxycodone for him, knowing that the oxycodone was not medically necessary and was intended for further distribution. (CR DE# 617, Billy Joe McCoy's Stipulated Factual Proffer).

Lastly, Ballesteros does not point to any incriminating evidence that was admissible against McCoy, but not admissible against him; nor does he discuss any spill-over effect resulting from evidence relating to McCoy's offense conduct. Thus, there were no grounds for a severance of McCoy. Accordingly, Ballesteros has failed to show that Alvarez's performance was deficient when Alvarez failed to request a severance, or that he was prejudiced by Alvarez's failure to request a severance. See Strickland.

In addition, the record refutes the movant's assertion that he was prejudiced by having to share his peremptory challenges with McCoy. The record shows that all twelve jurors were seated before Ballesteros and McCoy used their ten peremptory challenges. (CR DE# 1093:144-155). By the time juror number 12 was seated, Ballesteros and McCoy had used nine peremptory challenges. (Id.:153-155). Thus, one of the peremptory challenges remained unused. Ballesteros and McCoy then agreed to the alternate jurors, again with no peremptory challenges. (Id.:155-158).

In **claim 2**, the movant asserts that he was denied effective assistance of trial counsel, where his lawyer failed to call alibi and expert witnesses. (Cv-DE#6:8). Specifically, Ballesteros alleges that Alvarez was ineffective when he (1) failed to investigate and present to the jury witness testimony - including

expert testimony - that Ballesteros had complied with "all the standards of medical practice of a legitimate and bona fide medical office;" and (2) failed to call the witnesses that were on Ballesteros's witness list. (Cv DE# 6:8-10).

Ballesteros's claim that Alvarez was ineffective for failing to call an expert witness regarding his compliance with medical standards is without merit, because he fails to identify an expert and he fails to proffer the testimony the expert would have provided. See Winters v. United States, 716 F.3d 1098, 1104 (8th Cir. 2013) (Winters's §2255 claim that counsel was ineffective because he failed to obtain an expert to determine whether a videotape had been altered was "speculative" and "without merit for many reasons, the most obvious being that Winters failed to identify an expert and provide evidence of the testimony that expert would have given at the suppression hearing or at trial.") (citing Rodela-Aguilar v. United States, 596 F.3d 457, 462 (8th Cir. 2010)). See also Chandler v. United States, 218 F.3d 1305, 1316 n. 20 (11th Cir. 2000) ("[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to show ineffectiveness of counsel.").

Ballesteros's claim that Alvarez was ineffective when he failed to call a handwriting expert to testify about the signatures on prescriptions is without merit for the same reasons. See Rodela-Aguilar, 596 F.3d at 461-65 (movant failed to show that his defense counsel was ineffective when she failed to call a handwriting expert to show that he did not sign an express mail label, "A claim of ineffective assistance based on the failure to consult and call an expert requires 'evidence of what a scientific expert would have stated' at trial in order to establish Strickland

prejudice.") (citing Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009), accord Delgado v. United States, 162 F.3d 981, 983 (8th Cir. 1998)).

Ballesteros also fails to show that Alvarez was ineffective when he failed to call Luis Gomez, Jackie Achon-Valdez, David Behar, Laura Burke, who were on his witness list, and Officer Woodell, who was not listed.

Ballesteros does not offer affidavits from these witnesses, nor does he proffer the testimony they would have given. Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration. See United States v. Robinson, 64 F.3d 403, 405 (8 Cir. 1995), Ferguson v. United States, 699 F.2d 1071 (11 Cir. 1983), United States v. Ammirato, 670 F.2d 552 (5 Cir. 1982); United States v. Sanderson, 595 F.2d 1021 (5 Cir. 1979).

The movant also cannot prevail on this claim as counsel's strategic decision cannot be second-guessed in this proceeding. It is possible that retaining and then calling these witnesses would merely have supported the government's evidence, and thus hurt rather than aided movant's defense. Thus, counsel's strategic decision in this regard should not be disturbed here. Strickland v. Washington, 466 U.S. 668, 690-91 (1984); United States v. Costa, 691 F.2d 1358 (11 Cir. 1982); Coco v. United States, 569 F.2d 367 (5 Cir. 1978). In this case, counsel's strategic decision to forego calling these witnesses does not rise to the level of ineffective assistance.

Even if the undersigned were to assume, without deciding, that

counsel was deficient in that he failed to investigate and call the witnesses, then the Court must determine whether the movant suffered prejudice under Strickland. In order to establish prejudice, the court must determine whether, but for counsel's unprofessional error, the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). The movant, therefore, must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369 (quoting Strickland, 466 U.S. at 687). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690). This judicial scrutiny is "highly deferential." Id.

Regardless, the testimony of the witnesses listed in the §2255 motion would ultimately not have resulted in the movant's acquittal at trial. Given the facts adduced at trial, as summarized previously in this Report, no showing has been made in this collateral proceeding that the outcome of the guilt phase portion of the trial would have been different. It is evident from full review of the record that trial counsel did properly investigate the facts of the case and had investigated all possible defenses. Although the defense presented was unsuccessful, that does not in and of itself indicate that counsel rendered constitutionally ineffective assistance. Consequently, the movant is entitled to no relief on this claim. See Strickland, supra.

In **claim 3**, the movant asserts that he was denied effective assistance of trial counsel, where his lawyer failed to call the movant to testify in his own defense. (Cv-DE#6:10). He alleges that Alvarez prohibited him from testifying, and he asserts: "[t]here is no evidence that this defendant was fully advised of his right to testify." (Id.).

The law is clear that a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. Rock v. Arkansas, 483 U.S. 44, 49-52 (1987); United States v. Teague, 953 F.2d 1525, 1532 (11 Cir. 1992) (en banc). This right is personal to the defendant, and cannot be waived by the trial court or defense counsel. Teague, supra; Brown v. Artuz, 124 F.3d 73, 77-78 (2nd Cir. 1997). The proper vehicle for an argument that a defendant's right to testify was violated by her trial counsel is a claim of ineffective assistance of counsel, which requires analysis under Strickland v. Washington, 466 U.S. 668 (1984). Gallego v. United States,174 F.3d 1196 (11th Cir. 1999)(citing Teague, 953 F.2d at 1534); Brown, 124 F.3d at 79-80; Sexton v. French, 163 F.3d 874, 882 (4th Cir.), cert. den'd, 120 S.Ct. 139 (1999). United States v. Tavares, 100 F.3d 995, 998 (D.C. Cir. 1996).

In Teague, supra, the Eleventh Circuit held that an attorney who refused to accept the defendant's decision to testify, or failed to inform him/her of his/her absolute right to testify "would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected," and counsel's action would not have fallen "within the range of competence demanded of attorneys in criminal cases." 953 F.2d at 1534 (quoting Strickland v. Washington, supra). The Teague court, having the benefit of testimony from an evidentiary hearing on the

defendant's motion for a new trial, found that counsel's performance had not been deficient, and therefore did not address the prejudice prong of the Strickland analysis. Teague, 953 F.2d at 1535.

Not all assertions of ineffective assistance of counsel with regard to the right to testify or not testify warrant an evidentiary hearing. Underwood v. Clark, 939 F.2d 473, 476 (7 Cir. 1991)(barebones assertion by a defendant is insufficient to require a hearing on a claim that the right to testify was denied, greater particularity and **some substantiation such as an affidavit from the lawyer** who allegedly forbade his client to testify are necessary to give the claim sufficient credibility to warrant a further investment of judicial resources)(emphasis added); Siciliano v. Vose, 834 F.2d 29 (1 Cir.1987)(defendant's conclusory allegation that his attorney refused to allow him to testify in his own behalf was insufficient to entitle him to hearing on issue of whether his right to testify was violated); Passos-Paternina v. United States, 12 F. Supp. 231, 239-40 (D. Puerto Rico 1998).

The Fourth Circuit has held that a hearing was not necessary where the defendant suffered no prejudice under Strickland, supra, because "his testimony at trial only helped his case...." Sexton v. French, 163 F.3d 874, 883 (4 Cir. 1998), cert. den'd, 120 S.Ct. 139 (1999). As stated, the Eleventh Circuit has not determined whether a conclusory allegation of interference with the right to testify is sufficient to warrant further inquiry, such as the grant of a hearing.[7] See, e.g. Brown, 124 F3.d at 80. However, the Eleventh Circuit case law is also clear that an evidentiary hearing

[7]In Gallego v. United States, 174 F.3d (11 Cir. 1999) the Court rejected a "*per se* credit counsel in case of counsel rule," with regard to credibility findings in evidentiary hearings, but does not address the issue of when a hearing is actually required.

on a §2255 ineffective-assistance claim should be held only when the movant asserts facts that, if true, warrant habeas relief. See Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). The court need not hold an evidentiary hearing when the claims are frivolous, are unsupported conclusory allegations, or are contradicted by the record. Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989).

In addition, it is also clear that a movant must prove prejudice in order to be entitled to relief on such a claim. See Teague, supra. In order to satisfy the prejudice prong, the movant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra. at 694. In other words, the movant must prove "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687; see also, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993), citing, Kimmelman v. Morrison, 477 U.S. 365 (1986)("The essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

In Fretwell, the Supreme Court also concluded that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Fretwell, supra at 369, citing, United States v. Cronic, 466 U.S. 648, 653 (1984). The touchstone of an ineffective-assistance claim is the fairness of the adversary

proceeding, and "in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" Fretwell, supra at 370, citing, Strickland, supra at 695.

Prior to trial the United States filed notice of its intention to use Ballesteros's 1993 conviction for conspiracy to defraud the United States to impeach him, if he took the stand. The Court decided to resolve the admissibility of the conviction, so that Ballesteros could make a more informed decision on whether or not to testify. (CR DE# 1097:132). After hearing argument, the Court excluded the conviction. The Court then advised Ballesteros regarding his right to testify or remain silent; and Ballesteros made an informed decision not to testify:

> THE COURT: All right. I'm going to rule that the government cannot impeach Dr. Ballesteros with the felony conviction based upon the remoteness in time.
>
> However, I am making no ruling as to whether any of his testimony would open the door for the underlying activity related to that case to come in. . . .
>
> MR. ALVAREZ: Judge, if I may, just for your knowledge. I just spoke with my client and he is deciding not testify.
>
> THE COURT: Okay. Dr. Ballesteros, do you understand that you have a constitutional right to testify or not to testify?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And there are many parts of the trial where you lawyer can discuss certain strategic decisions, but ultimately, he can overrule you. And, like, if you say, look, I really want you to ask this witness this question on cross-examination, he can listen to you, but he can overrule you and say, no, I'm not going to do that. I'm not going to ask that question.
>
> But there are many parts of the case where you can

> overrule your attorney. For instance, if your attorney wants you to plead guilty, you can say, no, I'm not pleading guilty. If he wants you to plead not guilty, you can say, no, I want to plead guilty. And if he wants you to have a trial before a judge instead of a jury, you can say, no, I want a trial in front of a jury.
>
> And you have the personal right to make your own decision as to whether to testify or not testify. So do you understand that is your decision to make?
>
> THE DEFENDANT: Yes, Judge.
>
> THE COURT: And, obviously, you should consult with your attorney and listen to his advice because he's a very experienced and a very fine attorney. But, ultimately, it is your personal decision to make whether to testify or not; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And is it your own personal decision to testify or not testify in this case?
>
> THE DEFENDANT: Not to testify.
>
> THE COURT: And has anybody forced you, threatened you, or promised you anything to get you to come to that decision?
>
> THE DEFENDANT: No sir. No one.

(CR DE# 1097:136-138).

As is clear from the above exchange, the movant knowingly and voluntary chose not to testify on his own behalf, and denied being forced or otherwise pressured by anyone into giving up his right. Thus, he cannot establish either deficient performance or prejudice under Strickland.

Nevertheless, even if the movant had testified, challenging the government's evidence, and further making a blanket assertion of innocence as to the charged offenses under attack here, no

showing has been made that this would have affected the outcome of the proceeding, given the more than sufficient evidence adduced at trial, viewed in the light most favorable to the government. Thus, it is not likely that the result of the trial would have been different had the movant testified. Consequently, the movant cannot establish prejudice under Strickland for this alternative reasons, and is therefore not entitled to relief on this claim.

In **claim 5,** the movant asserts that he was denied effective assistance of trial counsel, where his lawyer failed to move to recuse the District Court judge. (Cv-DE#6:13). Ballesteros's allegation of bias is based on Judge Scola's rulings in Ballesteros's divorce cases in the Miami-Dade County Circuit Court (case numbers 03-31694-FC-04 and 10-29274-FC-04) and various rulings and comments made in the underlying criminal case. (CV DE# 6:13-16). Based on these allegations of bias, Ballesteros claims David Alvarez, was ineffective when he failed to move for recusal. (Id.).[8]

Regarding the court's lack of neutrality or bias, Title 28 U.S.C. §455 requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §§ 455(a) & (b)(1) (2000). The purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 874, 865 (1988). Title 28 U.S.C. §455(b)(1) provides that a judge shall recuse himself where he has a personal bias or prejudice concerning a party. The

[8]Ballesteros filed a motion to recuse Judge Scola on the same grounds in the §2255 proceedings. (Cv DE# 7). The undersigned issued a report recommending the motion be denied (Cv DE# 10), which was adopted by the District Court (Cv DE# 13). Ballesteros appealed (Cv DE# 14), however, the Eleventh Circuit dismissed the appeal sua sponte for lack of jurisdiction (Cv DE# 20).

standard for recusal under §455 is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt about the judge's impartiality. See United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003), cert. den'd, 540 U.S. 1149 (2004); see also, United States v. Kelly, 888 F.2d 732, 744-45 (11th Cir.1989); Parker v. Connor Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988).

It is well established that "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality recusal motion." Liteky v. United States, 510 U.S. 540, 556 (1994); see also, Byrne v. Nezhat, 261 F.3d 1075, 1103 (11th Cir. 2001). Likewise, judicial remarks during the court of a proceeding--even those that are "critical or disapproving of, or even hostile to, counsel, the parties or their cases" -- will not ordinarily support a bias motion. Liteky, supra at 556. In Liteky, the Supreme Court explained that "a judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune." Id. An allegation of impartiality must be supported by some factual basis, and a motion for recusal cannot be based on unsupported, irrational or highly tenuous speculation. United States v. Cerceda, 188 F.3d 1291 (11th Cir. 1999). Absent a showing of bias, the movant cannot prevail on this claim. No showing has been made that the court was not neutral in the underlying criminal proceedings. Consequently, counsel was not deficient for failing to pursue this nonmeritorious claim, and the movant is thus entitled to no relief on this claim. See Strickland v. Washington, 466 U.S. 668 (1984).

In **claim 6**, the movant asserts that he was denied effective assistance of trial counsel, where his lawyer failed to present

Brady material and evidence which the court improperly suppressed. (Cv-DE#6:17).

Ballesteros's sixth claim is presented in four parts. First, he alleges that the prosecution suppressed evidence that Gomez was in violation of INS parole, and that the Gomez brothers, and Juan Gomez in particular, were primary suspects in the robbery and murder of Linbirg Clark, all in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). (CV DE# 6:17). Second, he alleges that the United States used perjured testimony to misrepresent Juan Gomez's character. (Id.). Third, he alleges that the jury never learned that the "suppressed evidence contradicted the story of the Government's main witness." (Id.). Fourth, he contends that Alvarez failed to investigate evidence, including Brady material, and "allowed the Government to improperly use false testimony and allowed misrepresentation of their main witnesses, through suppressed Brady material." (Id.:117-18).

A defendant alleging a Brady violation must demonstrate (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. United States v. Severdija, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Stewart, 820 F.2d 370, 374 (11th Cir. 1987), quoting, United States v. Bagley, 473 U.S. 667, 682 (1985). As reflected below, the movant has failed to establish any of the prongs necessary to establish a Brady violation.

The record refutes that the government failed to provide Ballesteros with the evidence regarding the Gomez brothers' alleged murder of Linbirg Clark. Ballesteros knew about the evidence he claims was suppressed and he advised David Alvarez of this information when he first retained Alvarez. In June of 2014, Ballesteros wrote letters to the AUSA Williams and FBI Special Agent Julio Quinones. In his letter to the AUSA, Ballesteros proffered evidence that Linbirg Clark was murdered at the behest of Juan Gomez, including an alleged confession by Juan Gomez. (CR DE# 31, Exhibit B, letter from Ballesteros to AUSA Williams, at 3-4). In his letter to Agent Quinones, Ballesteros alleged that his conviction was based solely on the testimony of deportable aliens and that Juan Gomez was on "ICE/INS conditional release/parole." (CR DE# 31, Exhibit C, letter from Ballesteros to Quinones, at 2). Ballesteros stated that he had previously advised David Alvarez of these facts so that Alvarez could relay the information to law enforcement; however, Alvarez had failed to investigate or forward the information. (CR DE# 31, Exhibit B at 1; Exhibit C at 4). In July of 2014, Ballesteros wrote to FBI Special Agent John Gillies, regarding Juan Gomez's alleged involvement in the Linbirg Clark robbery and murder. Ballesteros stated that he told Alvarez about Juan Gonzalez's involvement during his initial meeting with Alvarez, but Alvarez had failed to relay that information to the FBI or any other investigators. (CR DE# 31, Exhibit D, letter from Ballesteros to Gillies, at 1).

Because Ballesteros's letters show that he had the evidence he claims was suppressed, he suffered no prejudice from the government's alleged suppression of the information/evidence.

Moreover, Alvarez would not have been permitted to cross-examine Juan Gonzalez about his alleged involvement in the

robbery and murder of Linbirg Clark or his alleged violation of INS parole, because Gomez had not been convicted of any offense regarding the alleged conduct, and the conduct was not probative of his character for truthfulness. See Fed. R. Evid. 608(b); United States v. Crutchfield, 26 F.3d 1098, 1102 n. 5 (11th Cir. 1994) ("Rule 608(b) generally prohibits the impeachment of witnesses by inquiry into specific bad acts of misconduct unless those acts resulted in a criminal conviction as described in Rule 609.") (citing United States v. Cox, 536 F.2d 65, 70 n. 11 (5th Cir. 1976)); United States v. Reed, 700 F.2d 638, 644 (11th Cir. 1983) (Rule 608(b) precluded cross-examination of defendant regarding possession of a marijuana cigarette, because possession was not probative of defendant's character for untruthfulness) (citing Truman v. Wright, 514 F.2d 150, 152 (5th Cir. 1975) ("It is firmly established in this Circuit that a witness may not be impeached by inquiry into specific acts of misconduct not resulting in a conviction.")). See also United States v. South, 295 Fed. Appx. 959, 970, 2008 WL 4492037, *9 (11th Cir. Oct. 8, 2008) (district court correctly prohibited defendant from cross-examining government's informant regarding informant's prior misdemeanor convictions for simple assault and battery, as those convictions did not relate to offenses involving truthfulness and were therefore not admissible under Rule 608(b)).

Even if Ballesteros could have used the allegedly suppressed evidence to impeach Juan Gomez, that evidence was cumulative and there is no reasonable probability that it would have changed the outcome of the trial. See Strickland. The United States disclosed to Ballesteros during discovery the Gomez brothers' plea agreements and evidence of their criminal histories, and David Alvarez cross-examined the brothers on those topics at trial. (CR DE# 159, 481, United States' First and Sixth Response to the Standing

Discovery Order, and attachments).

During cross-examination, Gerry Gomez testified that he had pled guilty and was facing up to 30 years' imprisonment, and that he had previously been convicted of five counts of fraudulent use of a computer and one count of gun theft arising from his involvement in a Medicaid fraud scheme. (CR DE# 1094:164-69). Juan Gomez admitted that in 1998 he had been convicted of cocaine-trafficking in Miami-Dade and Hillsborough Counties, and he testified that he had pled guilty and was facing a total of 70 years' imprisonment. (CR DE# 1096:101-105). Thus, the jury knew that the Gomez brothers were seasoned criminals, were facing lengthy prison sentences, and had an incentive to testify falsely. Under these circumstances, any suppression of impeachment evidence in violation of Brady and Giglio was harmless error. See United States v. Valera, 845 F.2d 923, 928 (11th Cir. 1988) ("Because the defense has not shown how the requested documents were material to the impeachment of McKenney, and not merely cumulative, any error in failure to produce them is harmless.") (citing United States v. Dekle, 768 F.2d 1257, 1263 (11th Cir. 1985); United States v. Barshov, 733 F.2d 842, 849 (11th Cir. 1984)). See also United States v. Mejia, 82 F.3d 1032, 1036 (11th Cir. 1996) (government disclosed that witness received $30,000 for his work as an informant, therefore information regarding additional inducements was cumulative; there was no reasonable probability that the outcome would have been different had the information been disclosed).

In **claim 7**, the movant asserts that he was denied effective assistance of appellate counsel, where his lawyer failed to appeal the denial of his motion for mistrial. (Cv-DE#6:18). Ballesteros argues that appellate counsel, Eric Cohen, was ineffective when he

failed to appeal the district court's denial of his motion for a mistrial based on Billy Joe McCoy's guilty plea and his alleged loss of peremptory challenges due to his joinder with McCoy. (CV DE# 6:18-19). Ballesteros asserts that this error was preserved by his trial counsel, David Alvarez. (Id.:19).

After Billy Joe McCoy pled guilty on the second day of the trial, Alvarez moved for a mistrial on three grounds: (1) Ballesteros had been prejudiced during jury selection by having to share challenges with McCoy; (2) the trial had begun with two defendants and now there was only one; and (3) Alvarez had shared investigative information with McCoy's counsel. (CR DE# 1094:15-16). The District Court denied the motion and ordered McCoy's defense counsel never to divulge any of Alvarez's communications. (Id.:16). With regard to McCoy's absence, counsel stipulated to a curative instruction that McCoy would no longer be participating in the trial and instructing the jury not to draw any inferences from his absence. (Id.).

Had counsel appealed the denial of Ballesteros's motion for mistrial on the second day of trial, the Eleventh Circuit would have reviewed the District Court's ruling for abuse of discretion because that standard of review is frequently applied to the denial of mistrials and to procedures for the selection of jurors. See, e.g., United States v. Alexander, 782 F.3d 1251, 1256 (11th Cir. 2015) ("We review for abuse of discretion the denial of a motion for a mistrial based on allegations of extraneous influence on the jury.") (citing United States v. Khanami, 502 F.3d 1281, 1291 (11th Cir. 2007)); United States v. Isom, 88 F.3d 920, 923 (11th Cir. 1996) ("The procedure adopted by the trial court to regulate the selection of jurors and the parties' exercise of peremptory challenges is reviewed for abuse of discretion.") (citing United

States v. Bryant, 671 F.2d 450, 455 (11th Cir. 1982)). "An abuse of discretion occurs where 'the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.'" United States v. Jayyousi, 657 F.3d 1085, 1113 (11th Cir. 2011) (quoting United States v. Westry, 524 F.3d 1198, 1214 (11th Cir. 2008)).

In applying the abuse of discretion standard, the Eleventh Circuit recognizes that a district court has a range of choices and so long as its decision does not amount to a clear error of judgment it will not reverse the district court, even if it would have decided the issue differently. See United States v. Campbell, 491 F.3d 1306, 1310 (11th Cir. 2007) (citing McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001)).

Applying the abuse of discretion standard in Ballesteros's case, would have likely resulted in an affirmance of the District Court's decision. Ballesteros cannot show prejudice, because he cannot show that a reasonable probability that the result in his case would have been different if appellate counsel had appealed the denial of his motion for mistrial. Moreover, as explained above, Ballesteros suffered no prejudice from sharing peremptory challenges with Billy Joe McCoy. Thus, an appeal based on Ballesteros's erroneous allegation of prejudice would have been frivolous. Appellate counsel exercised sound professional judgment when he chose not to raise the issue on direct appeal. As a result, he is not entitled to relief on this ground.

In **claim 8**, the movant asserts that he was denied effective assistance of appellate counsel, where his lawyer failed to appeal the denial of the movant's motion for judgment of acquittal on counts 2, 4, and 9. (Cv-DE#6:20).

At the close of the United States' case, Ballesteros moved for a judgment of acquittal on Counts 2 and 4, charging possession with intent to distribute oxycodone and oxymorphone, on the grounds that there was no evidence that Ballesteros ever possessed the drugs, and with respect to Count 4, that Ronald Regains was unable to identify him. (CR DE# 1097:114-15). He moved for judgment of acquittal on Count 9, charging conspiracy to commit health care fraud, on the grounds that there was no evidence of communications between himself and Juan Gomez, Aiman Aryan, or Emerson Carmona. (Id.:115). He also moved for acquittal on Count 1, conspiracy to possess with intent to distribute oxycodone and oxymorphone, on the grounds that no narcotics were admitted in evidence. (Id.). The Court denied his motions. (Id.:118.).

Ballesteros called two witnesses in his defense. First, he called Jack Calvar, a private investigator engaged by Alvarez. (CR DE# 1097:122-23). Calvar testified that he reviewed patient files from Ballesteros's office and that he ran background checks on certain unnamed witnesses in the case whose ages ranged from 48 to 58 years old. (Id.:124-27). After the AUSA objected to Alvarez's line of questioning, Ballesteros declined to proceed further and Calvar was excused. (Id.:127-132).

Ballesteros then called Felix Morales, the owner of a printing company. (CR DE# 1097:139-141). Morales testified that he printed prescription pads for Ballesteros. (Id.:141-43). Morales testified that on one occasion an unidentified woman came to his business and asked him to print some prescription pads for Ballesteros, but he called Ballesteros and Ballesteros told him not to print any pads unless he received an order from Ballesteros or Danay Camila Manso Perez. (Id.:142-43). On cross-examination, Morales testified that he followed Ballesteros's instructions and that all of the

prescription pads that he printed for Ballesteros were requested by Camila, who acted as Ballesteros's agent. (Id.:145).

After Ballesteros rested his case, he renewed his motion for judgment of acquittal, but only on the drug possession offenses charged in Counts 2 and 4. He did not renew his motion for a judgment of acquittal on the drug-trafficking and health care fraud conspiracies charged in Counts 1 and 9. (CR DE# 1097:148). In view of this procedural history, Ballesteros had no grounds to challenge the sufficiency of the evidence on direct appeal.

First, when Ballesteros called his defense witnesses he waived any appeal from the Court's denial of his motion for acquittal made at the close of the government's case-in-chief. See United States v. Brown, 53 F.3d 312, 314 n. 3 (11th Cir. 1995) ("A defendant who presents evidence waives the right to appeal the denial of his Rule 29 motion made and denied at the end of the government's case. Instead, the law of this Circuit is that an insufficiency of the evidence claim like this one will be reviewed taking into account all evidence presented in the case, including evidence presented by the defendant.") (citing United States v. Thomas, 8 F.3d 1552, 1558 n. 12 (11th Cir. 1993)); United States v. Rue, 144 F.3d 1397, 1402 (11th Cir. 1998) ("'In our circuit, a defendant's decision to present [her] case after denial of a motion for judgment of acquittal operates as a waiver of [her] objection to the denial of [her] motion for acquittal.'") (quoting United States v. Jones, 32 F.3d 1512, 1516 (11th Cir. 1994)).

Second, when Ballesteros failed to renew his motion for judgment of acquittal on Counts 1 and 9 at the close of all the evidence, those convictions became immune to challenge absent a miscarriage of justice. See Rue, 144 F.3d at 1402 ("Because Rue did

not renew her motion at the close of all of the evidence, her conviction will be affirmed absent a miscarriage of justice.") (citing Jones, 32 F.3d at 1516; United States v. Tapia, 761 F.2d 1488, 1491-92 (11th Cir. 1985) (defining manifest injustice as requiring "a finding that the evidence on a key element of the offense is so tenuous that a conviction would be shocking")).

Focusing on Counts 2 and 4, the testimony of Jack Calvar and Felix Morales did not rebut the more than sufficient evidence the government presented in support of the drug-trafficking offenses charged in those counts, described in detail above. Thus, it would have been futile to challenge the sufficiency of the evidence for Counts 2 and 4 on appeal. With regard to Counts 1 and 9, Ballesteros's failure to move for a judgment of acquittal at the close of all of the evidence essentially waived any challenge to the sufficiency of the evidence for those counts. Thus, he would not have been able to establish that his convictions on Counts 1 and 9 were a miscarriage of justice. It is unlikely he could have overcome this burden, in light of the overwhelming evidence described in the facts section above. Accordingly, appellate counsel was not ineffective.

In **claim 9**, the movant asserts that he was denied effective assistance of appellate counsel, where his lawyer failed to appeal adverse rulings on objections to PSI and failure to challenge the District Court's abuse of discretion. (Cv-DE#6:22-24). Specifically, Ballesteros argues that Eric Cohen was ineffective when he failed to raise Ballesteros's objections to the drug quantity and loss amount used to compute his total offense level, and when he failed to argue that the Court had abused its discretion at sentencing. (Id.).

As a preliminary matter, Ballesteros's offense level and his advisory guideline range of imprisonment were determined by his drug-trafficking offenses, not his health care fraud offense. Thus, Ballesteros's complaints regarding the calculation of his offense level for health care fraud are not relevant. Even if that calculation was incorrect, and it was not, he suffered no prejudice. Further, there was more than sufficient evidence to support the drug quantity that Probation and the Court used to compute his advisory guideline range of imprisonment. Indeed, the record includes Ballesteros's prescriptions for oxycodone and oxymorphone, and Medicare Part D records of the drugs that were dispensed when the prescriptions were filled. See (Testimony of Christopher Knox and Exhibits 4-A to 4-D; Testimony of Lora Elliott and Exhibits 27, 62, 63, and 64.) In short, the drug quantity is based on the oxymorphone and oxymorphone that Ballesteros prescribed in furtherance of the conspiracy. Accordingly, there was no basis to appeal the Court's guideline calculations. Appellate counsel was not ineffective in failing to raise a meritless claim on appeal.

VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1).

Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

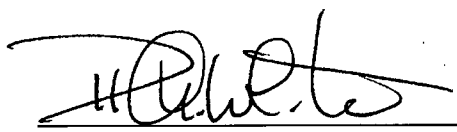
However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied int his case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VII. Conclusion

It is therefore recommended that this motion to vacate be denied; that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 13th day of October, 2015.



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