

**APPENDIX # 1**

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UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAY 4 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS COSME,

Defendant-Appellant.

No. 17-56811

D.C. Nos. 3:16-cv-02049-WQH  
3:10-cr-03044-WQH-5

Southern District of California,  
San Diego

ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 UNITED STATES OF AMERICA,  
11 Plaintiff,  
12 v.  
13 CARLOS COSME,  
Defendant.

CRIM CASE NO. 10cr3044WQH  
CIVIL CASE NO. 16cv653WQH  
CIVIL CASE NO. 16cv2049  
**ORDER**

HAYES, Judge:

14 The matter before the Court is the motion to reopen and reenter judgment  
15 pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) (ECF No. 2360)  
16 filed by Defendant/Petitioner.

17 On January 11, 2017, this Court entered an order denying the motion pursuant  
18 to 28 U.S.C. § 2255 on the grounds of ineffective assistance of counsel filed by the  
19 Defendant/Petitioner. (ECF No. 2333). Defendant moves the Court to reopen his case  
20 and to reenter judgment on the grounds that his counsel did not send his a copy of the  
21 order denying relief and it recently came to his attention that the motion had been  
22 denied.

23 “Rule 60(b)(6) is a catch-all provision that allows a court to vacate a judgment  
24 for ‘any other reason justifying relief from the operation of the judgment.’ That rule  
25 has been used sparingly as an equitable remedy to prevent manifest injustice.” *Lehman*  
26 *v. U.S.*, 154 F.3d 1010, 1017 (9th Cir. 1998). Relief under Rule 60(b)(6) “is to be  
27 utilized only where extraordinary circumstances prevented a party from taking timely  
28 action to prevent or correct an erroneous judgment.” *Harvest v. Castro*, 531 F.3d 737,

1 749 (9th Cir. 2008) (internal quotation marks omitted). The Court concludes that  
2 Defendant/Petitioner has moved in a timely manner and set forth good cause to reopen  
3 and reenter judgment.

4 IT IS HEREBY ORDERED that the motion to reopen and reenter judgment  
5 pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) (ECF No. 2360)  
6 filed by Defendant/Petitioner is granted.

7 IT IS FURTHER HEREBY ORDERED that motion pursuant to 28 U.S.C. §  
8 2255 (ECF No. 2301) is denied on the grounds stated in the January 11, 2017 order  
9 (ECF No. 2333). As stated in the January 11, 2017 order, a certificate of appealability  
10 is denied. The Clerk of the Court shall send a copy of this order and a copy of ECF  
11 No. 2333 to the Defendant at the address stated in ECF No. 2360.

12 DATED: November 6, 2017

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14 WILLIAM Q. HAYES  
United States District Judge  
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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 UNITED STATES OF AMERICA,  
11 Plaintiff/Respondent,  
12 v.  
13 CARLOS COSME (5),  
14 Defendant/Petitioner.

10cr3044WQH  
16cv653WQH  
16cv2049 WQH  
**ORDER**

HAYES, Judge:

15 The matter before the court is the motion to vacate, set aside, or correct sentence  
16 pursuant to 28 U.S.C. § 2255 filed by the Defendant Carlos Cosme. (ECF No. 2301).

17 **BACKGROUND FACTS**

18 On December 22, 2011, the grand jury issued a two-count second superseding  
19 indictment. The second superseding indictment charged the Defendant Cosme and  
20 others defendants in Count 1 with conspiring to conduct enterprise affairs through a  
21 pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d) and in Count 2 with  
22 conspiring to distribute cocaine, marijuana and methamphetamine in violation of 21  
23 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(A)(vii), 841(b)(1)(A)(viii) and 846.

24 On May 21, 2012, Defendant Cosme signed a Plea Agreement. In the Plea  
25 Agreement, Defendant agreed to plead guilty to Counts 1 and 2 of the Second  
26 Superseding Indictment. The parties agreed to jointly recommend a total offense level  
27 of 37 and to recommend that the Court impose a sentence of 235 months. Defendant  
28 initialed each page of the Plea Agreement and signed the Plea Agreement on the last

1 page along with his counsel and counsel for the Government.

2 The FACTUAL BASIS of the Plea Agreement stated:

3 Defendant has fully discussed the facts of this case with defense counsel.  
 4 Defendant has committed each of the elements of the crime, and admits  
 5 that there is a factual basis for this guilty plea. Defendant stipulates and  
 6 agrees that the facts set forth in the numbered paragraphs below occurred.  
 Defendant also stipulates and agrees that if this case were to proceed to  
 trial, the Government could prove the following facts beyond a  
 reasonable doubt by competent and admissible evidence:

7 1. Between the time period of November 2008 and July 22, 2010,  
 8 defendant Carlos Cosme entered into an agreement with other individuals  
 9 named in the above-noted charge to participate in the affairs of the  
 10 Fernando Sanchez Organization (the "FSO"), an "association-in-fact"  
 enterprise as defined in Title 18, United States Code, Section 1961(4).  
 Defendant Carlos Cosme agreed that a member of the FSO would commit  
 at least two racketeering acts.

11 2. During the time period noted above, members of the FSO engaged in  
 12 a pattern of racketeering activity, to include the commission of the  
 13 following crimes: murder; conspiracy to commit murder; attempted  
 14 murder; kidnaping; conspiracy to kidnap; attempted kidnaping; robbery;  
 15 conspiracy to commit robbery; attempted robbery; importation of  
 16 controlled substances into the United States from Mexico; conspiracy to  
 17 import controlled substances into the United States from Mexico;  
 distribution of controlled substances; conspiracy to distribute controlled  
 substances; money laundering; and conspiracy to launder money. The  
 FSO's pattern of racketeering activity affected interstate and foreign  
 commerce. During the time period relevant to this guilty plea, the FSO  
 operated in the Southern District of California and elsewhere.

18 3. Pursuant to his agreement to participate in the affairs of the FSO,  
 19 defendant Carlos Cosme was aware that the FSO's racketeering activities  
 20 included the commission of the crimes specified above in the preceding  
 paragraph, including the crimes of: (a) conspiracy to import and distribute  
 over 50 grams (pure) of methamphetamine; and (b) conspiracy to commit  
 murder.

21 4. The FSO constitutes an ongoing organization whose members function  
 22 as a continuing unit for the common purpose of achieving the objectives  
 23 of the FSO, which include: (a) enriching the members of the FSO  
 24 through, among other things, the importation and distribution of illegal  
 25 narcotics in the United States, committing robberies, the kidnaping of  
 26 individuals in the United States and Mexico, and "taxing" individuals  
 27 involved in criminal activities within the geographical areas controlled by  
 the Enterprise, to include Tijuana, Mexico, and areas of San Diego,  
 California; (b) keeping rival traffickers, potential informants, witnesses  
 against the FSO, law enforcement, the media, and the public-at-large in  
 fear of the FSO, and in fear of its members and associates through threats  
 of violence and violence; (c) preserving, protecting and expanding the  
 power of the FSO through the use of intimidation, violence, threats of  
 violence, assaults and murders; (d) preserving the continuity of  
 28 membership in the FSO by threatening members, associates and  
 individuals with knowledge of the FSO's illegal activities wishing to

1 leave the FSO with violence, assault and murder; and (e) preserving the  
 2 ongoing viability of the FSO by assaulting law enforcement officers  
 3 attempting to arrest FSO members, bribing public officials to secure the  
 4 release of arrested FSO members and making payments to public officials  
 5 in order to gain access to confidential law enforcement information  
 6 adverse to the interests of the FSO.

7 5. In furtherance of his agreement to participate in the affairs of the FSO,  
 8 defendant Carlos Cosme committed numerous racketeering offenses,  
 9 including: (a) conspiracy to import and distribute more than 50 grams  
 10 (actual) of methamphetamine and (b) conspiracy to commit murder.

11 6. Given his personal participation in the affairs of the FSO, defendant  
 12 Carlos Cosme knew that members of the FSO would, during the time  
 13 frame of the above-noted conspiracy, import and distribute more than 50  
 14 grams of actual methamphetamine. Further, defendant Carlos Cosme  
 15 personally performed numerous overt acts in furtherance of a conspiracy  
 16 to commit murder, including the recruitment of codefendant Jose Ortega  
 17 Nuno to run a "hit squad" on behalf of defendant Cosme.

18 7. In furtherance of his agreement to participate in the affairs of the FSO,  
 19 during February 2010, defendant Cosme arranged to sell a confidential  
 20 informant ("CI") 2 pounds of methamphetamine in Tijuana, Mexico.  
 21 Defendant Cosme knew that the methamphetamine would thereafter be  
 22 imported into the United States from Mexico. Once 1 3/4 pounds (1/4  
 23 pound was seized at the border by U.S. law enforcement officials) of  
 24 methamphetamine (758 grams of actual methamphetamine) had been  
 25 successfully imported into the United States, the CI paid defendant  
 26 Cosme for the methamphetamine.

27 (ECF No. 1703 at 5-8). These factual admissions are contained on Pages 5, 6, 7 and 8  
 28 of the Plea Agreement. Defendant's initials appear at the bottom right of each page as  
 follows: ("Def. Initials CC"). The Plea Agreement stated that "... the Government will  
 not be obligated to recommend any adjustment of Acceptance of Responsibility if  
 defendant engages in conduct inconsistent with acceptance of responsibility including,  
 but not limited to, the following: ... Materially breaches this plea agreement in any  
 way." *Id.* at 14. The Plea Agreement provided:

Defendant acknowledges, understands and agrees that if defendant  
 violates or fails to perform any of defendant's obligations under this  
 agreement, such violation or failure to perform may constitute a material  
 breach of this agreement.

Defendant acknowledges, understands and agrees further that the  
 following non-exhaustive list of conduct by defendant unquestionably  
 constitutes a material breach of this plea agreement: ...

4. Attempting to withdraw the plea...

In the event of defendant's material breach of this plea agreement,  
 defendant will not be able to enforce any of its provisions, and the  
 Government will be relieved of all its obligations under this plea  
 agreement.

1 *Id.* at 17.

2 On May 25, 2012, Defendant appeared before this district court judge for a  
3 change of plea to the second superseding indictment pursuant to the Plea Agreement.  
4 At the change of plea hearing, Defendant, represented by counsel, acknowledged that  
5 he had been sworn under penalty of perjury and that he could be prosecuted for perjury  
6 if he failed to provide truthful answers in this proceedings. Defendant represented that  
7 he initialed each page of the plea agreement and signed his name on the last page of the  
8 agreement. Defendant represented to the Court that he had an opportunity to review the  
9 plea agreement paragraph by paragraph and line by line with his counsel and that the  
10 agreement was translated to him in the Spanish language. Defendant represented to the  
11 Court that he was satisfied with the services of his counsel and that he had no questions  
12 about the terms of the plea agreement.

13 The Court reviewed the elements of the charge in Count One and the elements  
14 of the charge in Count Two. Defendant stated that he understood that by admitting –  
15 or pleading guilty to these offenses he will be admitting to each element of the offenses.  
16 The Court then reviewed each of the seven paragraphs of the factual basis for the plea  
17 contained in the Plea Agreement starting on page 5 and continuing through page 8. The  
18 plea colloquy provided in part as follows:

19 THE COURT: Do you agree that pursuant to your agreement to  
20 participate in the affairs of the FSO you were aware of the FSO's  
21 racketeering activities, including the commission of the crimes specified  
22 above that I just referred to, including the crimes of conspiracy to import  
23 and distribute over 50 grams pure of methamphetamine and conspiracy to  
24 commit murder?

25 THE DEFENDANT: Yes, Your Honor.

26 THE COURT: Do you agree that the FSO constitutes an on-going  
27 organization whose members function as a continuing unit for the common  
28 purpose of achieving the objectives of the FSO which include enriching  
the members of the FSO through among other things the importation and  
distribution of illegal narcotics into the United States, committing  
robberies, the kidnaping of individuals in the United States and Mexico,  
taxing individuals involved in criminal activities within the geographical  
areas controlled by the enterprise to include Tijuana, Mexico, and areas of  
San Diego, California?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It is also includes keeping rival drug traffickers, potential  
informants, witnesses against the FSO, law enforcement, the media and  
the public at large in fear of the FSO, in fear of its members and associates



1 through threats of violence and harm?

THE DEFENDANT: Yes, Your Honor.

2 THE COURT: That includes preserving, protecting, and expanding the  
3 power of the FSO through the use of intimidation, violence, threats of  
4 violence, assaults and murders?

THE DEFENDANT: Yes, Your Honor. I understand.

4 THE COURT: Preserving the continuity of membership in the FSO by  
5 threatening members, associates, and individuals with knowledge of the  
6 FSO's illegal activities wishing to leave the FSO with violence, assault and  
7 murder, and preserving the on-going viability of the FSO, by assaulting  
8 law enforcement officers attempting to arrest FSO members, bribing  
9 public officials to secure the release of arrested FSO members, and making  
10 payments to public officials in order to gain access to confidential law  
11 enforcement information adverse to the interests of the FSO?

THE DEFENDANT: Yes, Your Honor. I understand.

...

9 THE COURT: Further, do you agree that you personally performed --  
10 performed numerous overt acts in furtherance of a conspiracy to commit  
11 murder, including the recruitment of co-defendant Jose Ortega Nuno to  
12 run a hit squad on behalf of you? And I am reading from paragraph -- page  
13 8 paragraph 6. Do you understand the question, sir? Do you want me to  
14 ask it again?

THE DEFENDANT: Yes, Your Honor.

13 THE COURT: This is on page 8 of your plea agreement, paragraph 6,  
14 lines 3 through 11. Given your personal participation in the affairs of the  
15 FSO, defendant Carlos Cosme knew that members of the FSO would  
16 during the time frame of the above-noted conspiracy import and distribute  
17 more than 50 grams of actual methamphetamine. Further defendant Carlos  
18 Cosme personally performed numerous overt acts in furtherance of a  
19 conspiracy to commit murder, including the recruitment of co-defendant  
20 Jose Ortega Nuno to run a hit squad on behalf of defendant Cosme. Do  
21 you agree that statement is true? Do you accept that as part of your factual  
22 basis, sir, that statement?

THE DEFENDANT: It wasn't like that -- yes, Your Honor. Yes, Your  
Honor.

19 THE COURT: Let me read it again and make sure that I have an answer  
20 that is clear. Here is the statement again, sir, I'll read it to you. Given his  
21 personal participation in the affairs of the FSO, defendant Carlos Cosme  
22 knew that members of the FSO would during the time frame of the  
23 above-noted conspiracy import and distribute more than 50 grams of  
24 actual methamphetamine. Further defendant Carlos Cosme personally  
25 performed numerous overt acts in furtherance of a conspiracy to commit  
26 murder, including the recruitment of co-defendant Jose Ortega Nuno to  
27 run a hit squad on behalf of defendant Cosme. Do you agree that statement  
28 is true? That statement is in your plea agreement. Do you agree that  
statement is true?

THE DEFENDANT: Yes, Your Honor.

(ECF No. 1913-1 at 32-37).

The Court reviewed the sentencing provisions of the plea agreement including  
the joint sentencing recommendation. Defendant stated that he understood that the  
maximum penalty for the charge in Count 1 included life in prison and that the plea

1 agreement provides that the joint recommendation of the parties would be 235 months  
 2 in custody. At the conclusion of the plea, the Court stated on the record in open court:  
 3 “The pleas to Count 1 and 2 are accepted. I find the defendant has freely, voluntarily,  
 4 and competently entered the pleas; that he understands the plea agreement, including  
 5 the forfeiture provision; the charges against him and the consequences of the plea; that  
 6 there is a factual basis for the plea and that the defendant has knowingly intelligently  
 7 waived his rights.” (ECF No. 1913-1 at 45).

8 On October 5, 2012, Defendant filed a motion to withdraw his plea of guilty and  
 9 a request for new counsel. (ECF No. 1868). The Court granted Defendant’s request for  
 10 new counsel and provided new counsel with the opportunity to meet with the Defendant  
 11 and to decide whether or not to pursue the motion to withdraw his plea.

12 On January 25, 2013, Defendant filed a second motion to withdraw his plea of  
 13 guilty. (ECF No. 1906). The Court subsequently held an evidentiary hearing at which  
 14 prior counsel and the Defendant testified. Defendant testified under oath at the  
 15 evidentiary hearing that the factual allegation of a conspiracy to commit murder  
 16 including the recruitment of co-defendant Jose Ortega Nuno to run a hit squad “took  
 17 [him] by surprise.” (ECF No. 1935 at 13). Defendant testified that when he answered  
 18 “It wasn’t like that” to the judge’s questions he felt a “blow from behind” delivered by  
 19 his counsel and that “I felt in truth I had to say guilty.” *Id.* Defendant testified that it  
 20 was his understanding from his counsel that he was pleading guilty to “the sale of the  
 21 methamphetamine and the RICO.” *Id.* at 16. Defendant testified as follows:

22 Defense counsel: Okay. Did you agree at any time to plead guilty to  
 23 forming a hit squad as alleged in the plea agreement with co-defendant  
 24 Antonio Nuno?

25 Defendant: No, I wasn’t in agreement.

26 *Id.*

27 On April 19, 2013, the Court entered an order denying the Defendant’s motion  
 28 to withdraw his guilty plea. (ECF No. 1940). The Court stated:

The Court examined each of the factual admissions in the plea agreement independently and thoroughly. The Court informed the Defendant that he had no obligation to admit any facts in the Plea Agreement, and that he

1 could go forward on the trial date. (ECF No. 1913-1 at 35) (“He has no  
 2 obligation to admit to it. He has no obligation to admit to that. We can  
 3 take it off calendar and have a trial date set and we can pursue that.”) In  
 4 order to avoid any confusion, the Court stated: “Let me read it again and  
 5 make sure that I have an answer that is clear.” After reading Paragraph 6  
 6 of the Plea Agreement in its entirety, the Court stated: “Do you agree that  
 7 statement is true? That statement is in your plea agreement. Do you agree  
 8 that statement is true?” Defendant stated: “Yes Your Honor.” *Id.* at 37.

9 At the time of the plea, the Court found that the Defendant  
 10 knowingly admitted the factual basis for the plea of guilty. The Court  
 11 concludes that there is no credible evidence to the contrary in this record.  
 12 Defendant’s claim that he did not know that the Plea Agreement contained  
 13 an admission to conspiring to commit murder or that he did not knowingly  
 14 make those admissions at the plea hearing is directly contradicted by the  
 15 Plea Agreement, the Defendant’s statements at the plea colloquy, and the  
 16 credible testimony at the evidentiary hearing.

17 Finally, Defendant contends that “there is no evidence or factual  
 18 basis to believe the overt act of organizing a ‘hit squad’ alleged in the plea  
 19 agreement, actually transpired.” (ECF No. 1906-1 at 5). Defendant  
 20 asserts that the phone conversations intercepted by the Government have  
 21 been improperly interpreted. Defendant asserts that any reference to a  
 22 “hit” that was to occur “was *not* a murder, but an arrest of the competing  
 23 street vendors. When Mr. Cosme referred to a ‘knife on them’ the  
 24 conversational figure of speech was intended to explain placing a knife on  
 25 the individual’s person, not in them, a method of taking a person into  
 26 custody (i.e. pretext arrest).” (ECF No. 1906-1 at 10).

27 Defendant admitted at the evidentiary hearing that he used code  
 28 words (12,1 and cashing a check) to refer to homicide on the taped  
 conversations, that he advised a person known as Cabo that he had  
 individuals in Mexico who could commit homicides at his request, and  
 that he sold an album of police officer photographs to the confidential  
 informant in this case. Defendant admitted at the evidentiary hearing that  
 he knew that the confidential informant wanted to purchase the  
 photographs so that he could target Mexican police officers for physical  
 attack and murder. Defendant’s plea of guilty to conspiracy to commit  
 murder is supported by the factual admissions at the time of the guilty plea  
 and the record in this case.

Defendant signed a Plea Agreement, swore in open court that he  
 committed the facts as stated in the Plea Agreement, and actually  
 committed the crime charged. The Court found a factual basis for the plea  
 and explicitly accepted the plea of guilty. The Court concludes that  
 Defendant has not shown any fair and just reason for requesting  
 withdrawal of his plea of his guilty.

(ECF No. 1940 at 18-19).

Plaintiff United States of America, subsequently, filed a motion for an order  
 finding Defendant’s material breach of the plea agreement. On June 21, 2013, this Court  
 granted the motion for an order finding Defendant’s material breach of the plea  
 agreement. The Court concluded “that the Defendant materially breached the Plea  
 Agreement by testifying under oath at the evidentiary hearing on the motion to

1 withdraw his plea of guilty to facts directly contrary to the facts admitted in the ‘factual  
2 basis’ portion of the Plea Agreement and admitted by the Defendant under oath at the  
3 plea hearing.” (ECF No. 1989 at 11).

4 On June 28, 2013, the Court sentenced the Defendant to a term of imprisonment  
5 of 262 months in custody as to each count concurrently. (ECF No. 1995 at 2).

6 Defendant filed a timely notice of appeal to the Court of Appeals for the Ninth  
7 Circuit on the grounds that the decision of the district court to deny his motion to  
8 withdraw his guilty plea was an abuse of discretion.

9 On December 15, 2014, the Court of Appeals dismissed the appeal. The Court  
10 of Appeals concluded that the district court did not abuse its discretion in denying  
11 Defendant’s motion to withdraw his plea and that Defendant knowingly and voluntarily  
12 waived his right to appeal the district court’s order. (ECF No. 2183).

13 On June 24, 2015, Defendant Carlos Cosme filed a request for the Court to  
14 appoint counsel to assist him in the preparation of a writ of habeas corpus. (ECF No.  
15 2144). Defendant informed the Court that he did not speak or write the English  
16 language and was unable to represent himself.

17 On September 1, 2015, this Court entered an order appointing counsel to  
18 represent the Defendant in the preparation of a writ of habeas corpus. (ECF No. 2235).

19 On March 14, 2016, Defendant Carlos Cosme, representing himself, filed a  
20 motions pursuant to 28 U.S.C. § 2255. (ECF No. 2283).

21 On April 27, 2016, the Court ordered that Defendant Cosme and appointed  
22 counsel for Defendant Cosme shall notify the Court in writing within 45 days of this  
23 order whether Defendant will proceed representing himself or proceed through  
24 appointed counsel. (ECF No. 2286).

25 On May 25, 2016, Defendant Cosme notified the Court in writing that he would  
26 proceed through appointed counsel. (ECF No. 2290).

27 On August 09, 2016, Defendant Cosme, represented by counsel, filed a motion  
28

1 pursuant to 28 U.S.C. § 2255. (ECF No. 2301).<sup>1</sup>

2 On November 07, 2016, Plaintiff United States filed a response.

### 3 **APPLICABLE LAW**

4 28 U.S.C. §2255 provides that “A prisoner under sentence of a court established  
5 by Act of Congress claiming the right to be released upon the ground that the sentence  
6 was imposed in violation of the Constitution or laws of the United States, or that the  
7 court was without jurisdiction to impose such sentence, or that the sentence was in  
8 excess of the maximum authorized by law, or is otherwise subject to collateral attack,  
9 may move the court which imposed the sentence to vacate, set aside or correct the  
10 sentence.”

### 11 **CONTENTIONS OF PARTIES**

12 Defendant contends that he received ineffective assistance of counsel during the  
13 plea agreement negotiations, execution of the written plea agreement with the  
14 Government, and at the change of plea hearing held on May 25, 2012. Due to the  
15 ineffective assistance of counsel, Defendant asserts that his plea agreement was not  
16 knowing or voluntary. Defendant asserts that “his counsel did not inform him that, he  
17 was admitting to recruiting for and forming a ‘hit squad’ . . . an allegation which he  
18 vehemently denies.” (ECF No. 2301 at 7). Defendant contends that his counsel  
19 informed him that he was admitting only to the distribution of methamphetamine and  
20 the RICO count in general without any factual allegations related to murder.

21 Plaintiff United States contends that all of the assertions that support the claim  
22 for ineffective assistance of counsel were fully litigated and resolved at the time  
23 Defendant moved to withdraw his plea. Plaintiff United States asserts that the same  
24 factual claims relating to the conduct of prior counsel were adversely decided against  
25 Defendant and that Defendant is not entitled to relitigate these factual issues in this  
26 collateral attack.

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28 <sup>1</sup> Motion (ECF No. 2283) filed on March 14, 2016, by Defendant Carlos Cosme,  
representing himself, was deemed moot.

## RULING OF COURT

The Sixth Amendment right to effective assistance of counsel “applies to all critical stages of criminal proceedings,” including “the entry of a guilty plea.” *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012). A defendant is entitled to challenge the intelligent, knowing, and voluntary aspects of his plea by demonstrating that the advice he received from counsel did not constitute effective representation. *See Lambert v. Blodgett*, 393 F.3d 943, 979-80 (9th Cir. 2004).

In order to prevail on a claim of ineffective assistance of counsel, Petitioner must show that representation of counsel fell below an objective standard of reasonableness, and that any deficiencies in counsel’s performance were prejudicial. *See Strickland v. Washington*, 466 U.S. 688, 690 (1984). Both deficient performance and prejudice are required before it can be said that a conviction or sentence resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable and thus in violation of the Sixth Amendment. *See United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005). To prevail on the prejudice prong of a claim of ineffective assistance of counsel, the defendant must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 69.

Defendant sets forth the following three specific factual assertions in support of his claim of ineffective assistance of counsel: 1) his counsel did not inform him that, he was admitting to recruiting for and forming a ‘hit squad’ with co-defendant Jose Antonio Ortega Nuno; 2) his counsel informed him that he was admitting only to the distribution of methamphetamine and the RICO count in general without any factual allegations related to murder; and 3) his counsel intimidated him during the plea colloquy to admit the “hit squad” allegation. The identical factual issues were litigated as a basis for Defendant’s motion to withdraw his plea. During the litigation of this motion, the parties submitted extensive briefing, and the Court held a two day evidentiary hearing,

1 which included the testimony of prior defense counsel and the Defendant. At the  
2 conclusion of the hearing the Court issued an order finding no credible evidence to  
3 support the factual assertions of the Defendant. The Court made the following ruling:

4 After the Defendant entered his plea, he began to advance a contention that  
5 he was physically coerced by his defense counsel in the courtroom at the  
6 time of the plea. The allegations by the Defendant began with a "pinch"  
7 (ECF No. 1868 at 8), moved to "lightly hit or patted me in the back" (ECF  
8 No. 1868 at 15), and became a "punch ... in the side" (ECF No. 1868 at  
9 6). At the evidentiary hearing, Defendant testified that his counsel  
10 delivered a "blow from behind." (ECF No. 1935 at 13). The Court finds  
11 the testimony of the Defendant at the evidentiary hearing that he felt a  
12 "blow from behind" delivered by his counsel in open court during the plea  
13 colloquy entirely without credibility. The Court further finds the  
14 testimony of the Defendant that "I felt in truth I had to say guilty" was not  
15 truthful and that this testimony is contradicted by all of the other evidence  
16 in the record. The Court finds that the Defendant did not testify truthfully  
17 in specific aspects of his testimony and concludes that the testimony of the  
18 Defendant generally lacked credibility.

19 ... The Court finds that all of the credible evidence in the record supports  
20 the conclusion that the Defendant fully discussed the factual basis for the  
21 plea with his counsel, understood the factual admissions in the plea  
22 agreement, and understood the factual admission at the plea colloquy.

23 The Court finds that the testimony of defense counsel Levine that he  
24 reviewed the plea agreement with the Defendant and an interpreter line by  
25 line and page by page is credible and supported by the evidence.  
26 Defendant's initials appear at the bottom of each page of the plea  
27 agreement and the Defendant signed the plea agreement on the last page.  
28 Counsel for Defendant testified credibly that his practice was to review the  
plea agreement thoroughly with an interpreter and Spanish speaking  
Defendant and that he recalled following these procedures with the  
Defendant in this case. There is no evidence to the contrary in the record  
of this case.

Defendant's plea agreement in Paragraph 6 stated that the Defendant  
stipulates and agrees that the following facts occurred: "[D]efendant  
Carlos Cosme personally performed numerous overt acts in furtherance of  
a conspiracy to commit murder, including the recruitment of co defendant  
Jose Ortega Nuno to run a 'hit squad' on behalf of defendant Cosme."  
(ECF No. 1703 at 8). Defendant's initials appear at the bottom of this  
page. Defense counsel Levine testified that he advised the Defendant  
while reviewing the plea agreement that the plea agreement required him  
to admit that he formed a hit squad with his co-defendant Ortega-Nuno.  
Levine testified: "I had Mr. Ortega Nuno's plea agreement as well, and we  
discussed the contents of that plea agreement which mirrors that part of  
Mr. Cosme's plea agreement." (ECF No. 1935 at 52). The factual  
admissions of the Plea Agreement for the Defendant Jose Antonio Ortega  
Nuno signed by Nuno on December 6, 2001 stated in part: "In furtherance  
of his agreement to participate in the affairs of the FSO, defendant Jose  
Antonio Ortega Nuno agreed to operate and supervise a 'hit squad' under  
the direction of Carlos Cosme. Defendant Jose Antonio Ortega Nuno  
knew that the 'hit squad' he agreed to operate and supervise would be

1 tasked with murdering individuals on behalf of the FSO.” (ECF No. 1152  
 2 at 6). This provision mirrors the provision in Defendant Cosme’s Plea  
 3 Agreement and supports the testimony of defense counsel Levine that he  
 4 advised that Defendant Cosme that the plea agreement required him to  
 5 admit that he formed a hit squad with his co-defendant Ortega-Nuno, as  
 6 well as Levine’s testimony that there was no confusion voiced by the  
 7 Defendant Cosme that he was required to make this admission regarding  
 8 the conspiracy to commit murder.

9 At the time of the Rule 11 plea colloquy, the Court reviewed each of the  
 10 seven paragraphs of the factual basis of the plea with the Defendant in  
 11 open court. The Court stated: “Do you agree that pursuant to your  
 12 agreement to participate in the affairs of the FSO you were aware of the  
 13 FSO’s racketeering activities, including the commission of the crimes  
 14 specified above that I just referred to, including the crimes of conspiracy  
 15 to import and distribute over 50 grams pure of methamphetamine and  
 16 conspiracy to commit murder?” Defendant answered: “Yes, Your  
 17 Honor.” The Court asked the Defendant about his personal participation  
 18 as stated in Paragraph 6 of the Plea Agreement.

11 THE COURT: Let me read it again and make sure that I  
 12 have an answer that is clear. Here is the statement again, sir,  
 13 I’ll read it to you. Given his personal participation in the  
 14 affairs of the FSO, defendant Carlos Cosme knew that  
 15 members of the FSO would during the time frame of the  
 16 above-noted conspiracy import and distribute more than 50  
 17 grams of actual methamphetamine. Further defendant Carlos  
 18 Cosme personally performed numerous overt acts in  
 19 furtherance of a conspiracy to commit murder, including the  
 20 recruitment of co-defendant Jose Ortega Nuno to run a hit  
 21 squad on behalf of defendant Cosme. Do you agree that  
 22 statement is true? That statement is in your plea agreement.  
 23 Do you agree that statement is true?

24 THE DEFENDANT: Yes, Your Honor.

25 (ECF No. 1913-1 at 41). The Court asked the Defendant in open court to  
 26 acknowledge his personal participation in the conspiracy to distribute  
 27 methamphetamine and the conspiracy to commit murder. When defense  
 28 counsel answered on behalf of the Defendant, the Court asked that the  
 Defendant personally answer. Reading from the facts stipulated by the  
 Defendant in the Plea Agreement, the Court stated: “[D]efendant Carlos  
 Cosme personally performed numerous overt acts in furtherance of a  
 conspiracy to commit murder, including the recruitment of co-defendant  
 Jose Ortega Nuno to run a hit squad on behalf of defendant Cosme. Do  
 you agree that statement is true? Do you accept that as part of your factual  
 basis, sir, that statement?” Defendant answered: “It wasn’t like that -- yes,  
 Your Honor. Yes, Your Honor.” The Court stated:

25 Let me read it again and make sure that I have an answer  
 26 that is clear. Here is the statement again, sir, I’ll read it to  
 27 you. Given his personal participation in the affairs of the  
 28 FSO, defendant Carlos Cosme knew that members of the  
 FSO would during the time frame of the above-noted  
 conspiracy import and distribute more than 50 grams of  
 actual methamphetamine. Further defendant Carlos Cosme  
 personally performed numerous overt acts in furtherance of



1 a conspiracy to commit murder, including the recruitment of  
 2 co-defendant Jose Ortega Nuno to run a hit squad on behalf  
 3 of defendant Cosme. Do you agree that statement is true?  
 That statement is in your plea agreement. Do you agree that  
 statement is true?

4 (ECF No. 1913-1 at 41). Defendant unequivocally answered: "Yes, Your  
 5 Honor." The Court examined each of the factual admissions in the plea  
 6 agreement independently and thoroughly. The Court informed the  
 Defendant that he had no obligation to admit any facts in the Plea  
 7 Agreement, and that he could go forward on the trial date. (ECF No.  
 8 1913-1 at 35) ("He has no obligation to admit to it. He has no obligation  
 to admit to that. We can take it off calendar and have a trial date set and  
 we can pursue that.") In order to avoid any confusion, the Court stated:  
 9 "Let me read it again and make sure that I have an answer that is clear."  
 After reading Paragraph 6 of the Plea Agreement in its entirety, the Court  
 10 stated: "Do you agree that statement is true? That statement is in your plea  
 agreement. Do you agree that statement is true?" Defendant stated: "Yes  
 Your Honor." *Id.* at 37.

11 At the time of the plea, the Court found that the Defendant knowingly  
 12 admitted the factual basis for the plea of guilty. The Court concludes that  
 there is no credible evidence to the contrary in this record. Defendant's  
 13 claim that he did not know that the Plea Agreement contained an  
 admission to conspiring to commit murder or that he did not knowingly  
 14 make those admissions at the plea hearing is directly contradicted by the  
 Plea Agreement, the Defendant's statements at the plea colloquy, and the  
 credible testimony at the evidentiary hearing.

15 (ECF No. 1940 at 17-19).

16 In this case, the Court has found the factual assertions that defense counsel did  
 17 not properly inform the Defendant of the facts admitted in the Plea Agreement and  
 18 intimidated the Defendant at the time of the plea lack any credibility and denied the  
 19 Defendant's motion to withdraw his plea. Defendant filed an appeal and the Court of  
 20 Appeals affirmed the decision. Having litigated these same factual issues regarding the  
 21 conduct of his counsel on direct appeal, Defendant may not relitigate the same issue  
 22 under 28 U.S.C. § 2255. *Foster v. Chapman*, 136 S.Ct. 1737, 1758 (2016), Alito  
 23 concurring ("As a general rule, federal prisoners may not use a motion under 28 U.S.C.  
 24 § 2255 to relitigate a claim that was previously rejected on direct appeal."), *Onley v.*  
 25 *United States*, 433 F.2d 161, 162 (9th Cir. 1965) ("Having raised this point  
 26 unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a  
 27 petition under § 2255."). The Court concludes that are no facts asserted in this motion  
 28 that would support the claim that representation of counsel fell below an objective

1 standard of reasonableness.


2 **CONCLUSION**

3 IT IS HEREBY ORDERED that motion pursuant to 28 U.S.C. § 2255 (ECF No.  
4 2301) on the grounds of ineffective assistance of counsel filed by the Defendant is  
5 denied. IT IS FURTHER ORDERED that Gerardo A. Gonzalez is relieved from further  
6 representation of the Defendant on this matter.

7 A certificate of appealability must be obtained in order to pursue an appeal from  
8 a final order in a Section 2255 habeas corpus proceeding. 28 U.S.C. § 2253(c)(1)(B).  
9 A certificate of appealability may issue "if the applicant has made a substantial showing  
10 of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A certificate should  
11 issue where the prisoner shows that jurists of reason would find it debatable whether the  
12 petition states a valid claim of the denial of a constitutional right, and whether the  
13 district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473,  
14 484 (2000). The Court finds that reasonable jurists could not find Defendant's claim  
15 that he was entitled to relief under 28 U.S.C. § 2255 to be debatable.

16 A certificate of appealability is denied.

17 DATED: January 11, 2017

18   
19 **WILLIAM Q. HAYES**  
20 United States District Judge  
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**Additional material  
from this filing is  
available in the  
Clerk's Office.**