No. _____

In the
SUPREME COURT OF THE UNITED STATES

SERGIO ANTONIO HARO
Petitioner,
V.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KATHLEEN G. WILLIAMSON
Law Offices of Williamson & Young, P.C.
P.O. Box 249
Tucson, AZ 85702-0249
Telephone (520) 623-8414
Arizona State Bar No. 012595
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

Was the petitioner denied his Sixth Amendment right to the effective assistance of counsel based on trial counsel's failure to effectively use government agent reports to impeach their credibility, including whether the district court erred by denying this claim without first affording him, as a *pro se* habeas appellant/petitioner, the opportunity to obtain those reports, which had been withheld from petitioner based upon a pretrial disclosure agreement.

II

Did the district court err in not conducting an evidentiary hearing on defendant-petitioner's claim that the Magistrate Judge assigned to the case impermissibly participated in plea negotiations, which, in turn, prejudiced the defendant-petitioner.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY LOWER COURTS

The Ninth Circuit's unpublished opinion of its denial of Mr. Haro's appeal of the issues addressed herein is reported at *United States v. Haro-Verdugo*, Nos. 12-16611, 12-16740, 2018 U.S. App. LEXIS 24889 (9th Cir. Aug. 31, 2018) and included in the Appendix at 1-A.

STATEMENT OF THE BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal relevant to the issues addressed herein was entered on August 31, 2018. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Rule 11 and Part III of the Rules of the Supreme Court of the United States.

Service has been made on the United States Attorney's Office and the Solicitor General.

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

U.S. Const. amend. V provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend. VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

Federal Rule of Criminal Procedure 11(c) provides that:

> (1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

However, Federal Rule of Criminal Procedure 11(h) provides that:

> A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

STATEMENT OF THE CASE

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the district court final judgment against Mr. Haro's 18 U.S.C. §2255 petition in DC No. CV 11-00245 on July 5, 2012. Mr. Haro filed a timely notice of appeal on August 8, 2012.[1] The memorandum and order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal relevant to the issues addressed herein was entered on August 31, 2018. See Appendix.

RELEVANT BACKGROUND OF CASE

Question One

On October 12, 2010, anticipating a habeas petition after trial, sentencing and the dismissal of direct appeals, codefendant Julio Haro-Verdugo filed a Motion for Disclosure and Reappointment of Counsel, joined by codefendants Sergio and Lorenia Haro.[2] He sought to receive copies of investigative reports in order to prepare a collateral attack on his conviction based on the claim that trial counsel

[1] On August 3, 2012, Sergio filed a timely notice of appeal from the district court's July 5, 2012 order and judgment of dismissal. (245 CR 56). On August 8, 2012, Sergio filed, in the Ninth Circuit, an application for a certificate of appealability (1DN 2; 1ER VOL. II, pp. 253-284). On September 6, 2012, Sergio filed a second application for a certificate of appealability, which this Court characterized as an addendum to his August 8, 2012 application. (1DN 7; 1ER VOL. II, pp. 116-235).

[2] 125 CR 1316, 2ER VOL. II, pp. 253.

did not effectively cross-examine government witnesses and agents. The district court, relying solely on a pre-trial non-disclosure agreement,[3] denied the motion for disclosure as well as the motion for appointment of counsel.

At the outset of the criminal proceedings, earlier attorneys for the codefendants signed a disclosure agreement, which precluded giving any copies of government disclosure to anyone, including clients/defendants.[4] At the above mentioned October 12, 2010 post-conviction and post-appeals hearing, the attorneys adamantly argued that the disclosure agreement was a contract of adhesion and that is was based in local government office policy and not in law, that it served no purpose to protect anyone in the instant case, and that the defendants could not litigate their cases for post-conviction relief without having the files provided to them. Further, citing the Sixth Amendment of the United States Constitution, 18 U.S.C. §3500, FRCP Rule 16, and Arizona Professional Conduct Rule 1.16,[5] they argued for their clients' rights to their trial files. They also argued that they had an ethical duty under professional codes to provide the entire file, including government reports, to their clients.[6] The district court denied their motions, specifically denying defendants' personal access to the government's investigative and arrest reports. The district court's ruling was

[3] 125 CR 1321; 2ER VOL. II, pp. 253

[4] See 125 CR 1321; 2ER VOL.II, pp. 2534 (05-cr-00125-DCB-BPV Dkt. 1319-1, Filed 11/02/10

[5] Id.

[6] See 1 ER Vol. III, p. 174-5; also 2 ER Vol. II, pp. 105-119; Dkt. 59-7; RT 11/3/2010 proceedings.

seemingly based on basic contract law,[7] despite the resultant lack of access to trial files which obstructed their ability to pursue their habeas claims and loss of due process and Sixth Amendment rights to effectively pursue post-conviction litigation.

On May 23, 2011, Petitioner, proceeding *pro se*, filed his first 28 USC §2255 petition.[8] On November 8, 2011, the district court again denied Sergio's request for hearing transcripts and for the trial and appellate attorneys' complete files.[9] The Ninth Circuit eventually dismissed the appeal of that district court order on jurisdictional grounds because the district court's orders were not final.[10] On July 5, 2012, the district court summarily denied all relief requested, without allowing Sergio Haro to engage in any meaningful discovery, without an evidentiary hearing, without appointing counsel, and without granting Haro any access to the government agents' investigative reports.[11] The district court also declined to issue a certificate of appealability.[12]

On October 2, 2012, the Ninth Circuit consolidated the codefendants' 2255 appeals, granted the requests of Sergio Haro and Julio Haro for counsel, and certified the issue as to both Sergio and Julio of whether appellants were denied

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[7] *Id.* 1ER VOL. I, p. 24

[8] ER Vol. III pp. 605-646 (CV-11-245-TUC-DCB (CR Doc. 1330).

[9] 1ER VOL. I, p. 24; 245 CV 27

[10] 1ER VOL. I, p. 19; 245 CR 46;

[11] 1ER VOL.I, pp. 4-18; 245 CR 53, 54; 125 CR Dkt. 1349.

[12] *Id.*

their Sixth Amendment right to the effective assistance of counsel based on trial counsel's failure effectively to use government agent reports to impeach their credibility and whether the district court erred by denying this claim without first affording the pro se appellant the opportunity to review those reports.[13]

In the joint opening brief, prior appellate counsel for Sergio Haro relegated this certified issue to a single footnote. Both co-counsel elected not to assert the issue.[14] In footnote 6, prior counsel and co-counsel stated the following:

> "After an exhaustive review of the trial record and the agent's reports, neither party elected to brief this issue. While it was arguably improper for the district court to deny defendant-appellants access to the agents' reports, and, at the same time, deny them counsel (who, presumably, could have reviewed those reports with/for them without violating the pretrial discovery agreement), both defendant-appellants concluded that they could not advance a non-frivolous ineffective assistance of counsel claim, given the question of whether their respective attorneys' representation was ineffective under "prevailing professional norms" (*Strickland v. Washington*, 466 U.S. 668, 690 (1984)), the quantum of evidence against them, including the substantial physical evidence and the testimony of eight cooperating co-defendants, and the requirement of a showing of prejudice such that the outcome would have been different. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693."[15]

[13] 1ER VOL. I, pp. 1-3; 1DN 10.

[14] 1 DN 59-1, Page 18, ftnote. 6.

[15] 1 DN 59-1, Page 18, ftnote. 6.

In a supplemental opening brief, Mr. Haro conditionally agreed through succeeding counsel,[16] who had also exhaustively reviewed the trial record and agents' reports. With the explicit caveat and qualification, however, that Sergio Haro was unable to assist either counsel in this review, Mr. Haro, through undersigned counsel, conditionally agreed with the assessment of co-counsel and prior counsel's assessment, i.e., that there may be no merit to an argument that trial counsel was ineffective by inadequately cross-examining the government's witnesses. This accord was explicitly conditioned on the assertion that succeeding counsel could not effectively evaluate the *Strickland* issue without Mr. Haro's ability to assist counsel by reviewing the trial file and reports himself. As was argued, there was a crucial second part of the certified question, which was whether the client should have had the full files.

Concerning the second part of the certified question, the 2255 appeal argued that the district court was wrong to deny Sergio Haro -- whether as a *pro se* litigant or as a court-appointed-represented litigant who had very limited access to counsel due to incarceration a lengthy distance from his attorney -- a copy of the full trial file, including the government's disclosure and agents' reports so that Haro could fully and effectively exercise his rights to pursue a thorough post-conviction review of his trial. Therefore, it was argued, the appointment of counsel did not remedy the constitutional violation of Sergio Haro's right to

[16] First 2255 counsel for Sergio Haro, Michael Brenehan, withdrew with the permission of the Ninth Circuit due to a conflict discovered after the filing of the first opening brief.

effectively challenge his conviction because any ability to assist his counsel on the issue of whether agents were effectively cross-examined relies upon Haro's ability to review the disclosure and help counsel see the deficiencies that only Haro might understand as a firsthand participant and witness to the events.

Question Two

Concerning the second issue raised, i.e., the FRCP Rule 11 violation, in his §2255 motions Haro asserted that he was so confused and frightened by the tactics used by the Magistrate Judge pressuring him to accept the government's plea offer that he rejected plea offers which he would otherwise have accepted. In other words, the Magistrate Judge's alleged conduct was so outrageous as to cause Sergio to seriously question the Magistrate Judge's judgment and sincerity in offering such advice. The prejudice shown was that instead of receiving a 20-year plea agreement sentence, Mr. Haro received a post-trial life sentence.

In response to the 2255 motion, the government submitted "interrogatories" completed by the defendants' attorneys, concerning whether those allegations about the judge's behavior at two settlement conferences were true. [17]

Asserted in the appeal of the 2255 arguments was that the "interrogatories" did not call for sworn or detailed responses. Mr. Haro's trial attorney for those proceedings, Mr. Sean Chapman, did not provide a detailed (or even general) description of what transpired at the settlement conference.

[17] 245 CR 45-1; 1ER VOL. III, pp. 385-386 and 179 CR 11; 2ER VOL. II, p. 268.

Trial counsel simply responded with unsworn statements that the proceedings were conducted in a "dignified and professional manner," and the Magistrate Judge did not engage in the "actions" alleged by Sergio in his petition. As argued to the Ninth Circuit, the record fails to indicate whether Mr. Chapman regularly appeared before Magistrate Judge Velasco, and, therefore, might arguably have felt uncomfortable publicly criticizing him. Indeed, although it apparently caught him off guard, neither Mr. Chapman, nor any of the other attorneys present, took exception or made objection to Magistrate Judge Velasco's talking past Mr. Chapman to continue the Rule 11 violation with an then uninvited attempt to persuade his client at a second status conference on January 31, 2007.

Apparently, no "interrogatories" were sent to Magistrate Judge Velasco regarding the settlement conference, and Sergio was permitted no meaningful discovery to develop his § 2255 claims.[18]

Without conducting any evidentiary hearing, the district court denied Sergio relief on the following grounds:

> 1) Sergio's attorney indicated, through his interrogatory answers, that the Magistrate Judge explained the gravity of the case and the advisability of accepting the plea;
> 2) Sergio's attorney denied, in his interrogatory answers, that any of the alleged inappropriate behavior on the part of the Magistrate Judge occurred;
> 3) the settlement conference was conducted in a dignified manner;

[18] See, e.g., district court's order denying all of Sergio's discovery requests at 245 CR 27; 1ER VOL. I, p. 24.

4) a co-defendant outside of the Haro family made no improper judicial involvement claim in his § 2255 action;

5) none of the experienced attorneys present at the settlement conference objected to the manner in which the Magistrate Judge conducted the proceeding;

6) months after the settlement conference, Sergio knew that they could have still accepted the plea, but didn't. Hence, even if the Magistrate Judge *did* act improperly at the settlement conference, his actions did not prevent either from accepting the plea offer; and

7) there is no record corroborating the defendant's allegations, and the mere assertion that improper judicial interference occurred did not meet the burden
of proof to establish same, or to establish that either was prejudiced by same.[19]

In so ruling, the district court failed to acknowledge that the Magistrate Judge's involvement in the settlement conference was a *per se* violation of Rule 11(c)(1), and likely constituted plain error. The Ninth Circuit found it was plain error, however, ruled that Mr. Haro failed to show prejudice, which we dispute here. Moreover, the district court seemingly brushed off the allegations regarding the settlement conference as preposterous, notwithstanding Magistrate Judge Velasco's improper

[19] The district court mistakenly referred of the responses to the interrogatories as "affidavits." (179 CR 28; 2ER VOL. I, pp. 19-20) (245 CR 53; ER VOL. I, pp. 11-12). The responses were not submitted under oath. One was merely an email message. (179 CR; 2ER VOL. I, pp. 35-36). Because the district court judge apparently took judicial notice of the allegations of judicial misconduct at the settlement conference set forth in the co-defendants' § 2255 motions, along with the co-defendants' respective attorneys' answers to interrogatories regarding the settlement conference, those pleadings and documents were included in the excerpts of the record, and can be found at 179 CR 24; 1ER VOL. III, pp. 457-461, and 229 CR 30; 1ER VOL. III, pp. 495-502).

encroachment on plea negotiations in the same case at the very next status conference. On January 31, 2007, at a status hearing attended by Sergio, Julio and some of the other defendants, Magistrate Judge Velasco talked past retained counsel directly to Sergio Haro in the following colloquy:

> THE COURT: (Unintelligible) have you made any decision?
>
> MR. CHAPMAN: Sorry, Your Honor?
>
> THE COURT: I am asking Sergio if he has made any decisions.
>
> SERGIO HARO: No.
>
> THE COURT: Do you think you are going to?
>
> SERGIO HARO: It's a lot of years. I'm not going to take a lot of years.
>
> THE COURT: You need to understand that life is a lot of years. 20 years is a lot less than you realize. But it does mean that you will be able to have family and have a life when you are going to be much younger, well, than I am right now.
>
> How old are you?
>
> SERGIO HARO: 25.
>
> THE COURT: 25. When you get out, you will be less than 45. When you are 45, if you don't take this deal, you are going to have, if you have a normal life expectancy, 31 years to go.
>
> Do you understand that?
>
> SERGIO HARO: Yes, sir.
> THE COURT: So do you understand the difference between 20 and 51?

SERGIO HARO: Yes, sir.

THE COURT: Which is the big number?

SERGIO HARO: 51.

THE COURT: You don't take this deal, you will never arrive at a card game. You will never walk into a movie theater. You will never have cable channels.

Do you have children?

SERGIO HARO: Yes, sir.

THE COURT: You will never go to another birthday party. You will never go to another wedding. You won't be there for your grandkids.

Do you understand what that means?

SERGIO HARO: Yes.[20]

The Magistrate Judge's apparently unsolicited comments were improper on a number of levels, but were presented to the Ninth Circuit as evidence that he was capable of driving home his point in an arguably heavy-handed way. The Magistrate Judge continued to enter rulings in the case after the settlement conference.

It was further argued at the circuit court that the defense attorneys who, in their *unsworn* "interrogatory" answers, seemingly contradicted Sergio's account of what transpired, should have been cross-examined, under oath regarding any motives they might have had to tolerate or minimize the Magistrate Judge's misconduct.

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[20] 125 CR 1156; R.T. 1/31/07, pp. 3-4; ER VOL. IV, pp. 765-766.

During the § 2255 proceedings, Sergio filed a motion asking that a transcript of the December 2006 settlement conference in issue be prepared and given to him, apparently unaware that the lengthy settlement conference had not been recorded.[21] Mr. Sergio Haro's allegations were corroborated; co-defendants Julio and Lorenia Haro made nearly identical claims of misconduct by the Magistrate Judge in their respective § 2255 actions.[22]

On appeal, Sergio alleged a prima facie violation of Fed.R.Crim.Proc. Rule 11(c)(1), and that the district court's error was plain under *United States v. Gonzalez-Melchor*, 648 F.3d 959, 963 (9th Cir. 2011); *United States v. Anderson*, 993 F.2d 1435, 1437 (9th Cir. 1993). The Ninth Circuit agreed there was a violation, though we disagree that there was no prejudice:

> Here, the Magistrate Judge conducting a settlement conference, absent a clear waiver by defendants, violated Julio and Sergio's right to be free from judicial interference into plea negotiations under Rule 11. *See United States v. Myers*, 804 F.3d 1246, 1253, 1255–56 (9th Cir. 2015). However, it is not reasonably probable that but for the improper judicial interference, Julio and Sergio would have proceeded differently by accepting the government's plea offer." [23]

[21] (245 CR 21; 1ER VOL. III, pp. 524-527).

[22] 179 CR 7; 1ER VOL. III, pp. 572-574) (229 CR 9, 1ER VOL. III, pp. 591-595.

[23] 12-16740, Dkt. 128-1, Page 8.

REASONS FOR GRANTING THIS PETITION

The U.S. Court of Appeals has decided important federal questions in a way that has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

We urge the court to use the facts of this case to guide prosecutors, courts, and defense counsel that there are 1) rights in certain circumstances under the Fifth Amendment and Sixth Amendments to full access and copies of trial files and investigative reports in order to assist counsel; and 2) freedom from judicial interference in plea negotiations under Federal Rules of Criminal Procedure Rule 11, all of which are to be clarified, respected and enforced.

ARGUMENTS

I
PETITIONER ARGUES THAT HIS FIFTH AND SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL INCLUDES AFFORDING THE *PRO SE* APPELLANT THE OPPORTUNITY TO OBTAIN THOSE REPORTS FOR EFFECTIVE REVIEW.

In order to grant Sergio Haro habeas relief, he must have suffered a violation of his federal constitutional rights. Mr. Haro must demonstrate both that (1) the district court committed federal constitutional error and (2) that he was prejudiced as a result. *Ayala v. Wong*, 756 F.3d 656 (9th Cir. 2014), reversed on other grounds,. *Davis v. Ayala*, 135 S.Ct. 2187 (2015).

Although it applies to transcripts, the same logic should apply as that in *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), where this Court held that, on appeal, indigent defendants must be provided with a free copy of a "report of proceedings," defined by the Court as "all proceedings in the case from the time of the convening of the court until the termination of the trial" including "all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record." *Griffin* ruled that the denial of transcripts to assist the *pro se* appellant would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.*, at 13, n. 3.

In addition to the reasoning of *Griffin*, we add that the same logic that rejected the Government's non-disclosure in *Jencks*, should be expanded to apply here in the ability to effectively review the Government's reports for purposes of a 28 USC §2255 review. Similar to the instant case, the *Griffin* trial court denied the motion without a hearing. Distinguished from the *Griffin* case, which sought the trial reporters' transcripts, Sergio Haro sought his defense trial files, including the *Jencks*[24] and *Brady*[25] agents' reports for purposes of analyzing and presenting an argument that there was ineffective cross-examination of government witnesses. *Brady* and *Jencks* materials are essential to defending oneself at trial as well as on appeal. Mr. Haro, as a *pro se* litigant cannot

[24] *Jencks v. United States*, 353 US 657 (1957)

[25] *Brady v. Maryland*, 373 US 83 (1963)

accomplish a 28 USC §2255 without the trial file on this issue of whether his attorney effectively cross-examined the government's witnesses over the course of a lengthy trial. "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony," *Jencks*, at p. 667, "the accused is helpless to know or discover conflict without inspecting the reports" *Id*., at p. 668.

Government protection of informant's identities were not the government's interest in denying reports in this case but, rather, it was merely their assertion of an office generic template disclosure agreement trumps the defendant's constitutional rights to adequately pursue his habeas review of a criminal conviction. For the district court to unnecessarily deprive the *pro se* defendant/petitioner -- or a petitioner with a court-appointed attorney with inadequate resources to achieve personal access to the petitioner imprisoned in a remote and distant place in order to show him the extensive files -- based solely on uncritical contract law reasoning is to violate the underlying logic of *Jencks*.

Jencks rested on such logic as that in *United States v. Andolschek*, 2 Cir., 142 F.2d 503, 506 (2nd Cir. 1944), in which Judge Learned Hand wrote:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the

> documents may possess; it must be conducted in the open, and will lay bare their subject matter." As quoted in *Jencks*, p. 671.

.

Thus, concerning the second question in the certified issue, we argue that there was a violation of federal constitutional rights. It is only with this disclaimer that undersigned counsel, without Sergio Haro's access to the trial file in order to effectively assist counsel, concurred with the joint opening brief that Haro may not have been prejudiced by the asserted *Strickland* violation, i.e., ineffective cross-examination of the government's witnesses. In other words, counsel could not effectively answer that question with any certainty without the informed assistance of client. The first part cannot be answered and cannot be relevant without the client's assistance in evaluating the entire trial file.

Accordingly, we ask this Court to address our assertion that Sergio Haro was prejudiced because undersigned counsel as well as prior counsel did not have the benefit of assistance from Sergio Haro by virtue of his inability to analyze the extensive agents' reports as compared to the weeks of trial testimonies. The inability is due to the denial of his access to the *Jencks* and *Brady*[26] materials and agents' reports to review alongside the transcripts.

During the span of time covering this 28 USC §2255, petition and its appeal, Sergio Haro had been incarcerated in Northern California.

[26] Jencks Act, 18 U.S.C. § 3500, and the rule articulated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Telephonic legal communications were and continue to be sparse, limited in duration, never private, and extremely difficult to arrange and achieve. Personal visits would be time and cost prohibitive for a court-appointed attorney or even a private attorney, except for a wealthy client. The files are too burdensome and it is too onerous and expensive for counsel to travel from Tucson, Arizona to Atwater, California, to allow for Haro's personal review of the agents' reports alongside his attorney or legal staff, especially in lieu of the highly predictable bureaucratic obstructions and limitations endemic to attempting such an extensive review alongside out-of-town counsel in a federal prison setting. The only fair, efficient, and logical solution is for the Government to simply allow and/or the court to order, the release of the full trial files to Mr. Haro.

Thus, herein lies the due process and equal protection prongs addressed in *Griffin*. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956); See also *Ross v. Moffitt*, 417 U.S. 600 (1974) at 608-09, 94 S.Ct. at 2442-43. If Sergio Haro had ample funds of his own, he could have hired his attorneys or staff to travel, meet, and review the extensive records and files together. The right to counsel on direct appeal arises from due process and equal protection considerations. See, e.g., *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). The *Douglas* rationale is that it would be unfair to allow wealthy defendants the benefit of

representation on appeal, while denying the benefit to indigent defendants. See *Douglas*, 372 U.S. at 355-58, 83 S.Ct. at 815-17.

Sergio Haro's constitutional fair trial rights and access to post-conviction justice should be superior to the generic contractual agreement, which trial attorneys argued was a contract of adhesion. The validity of the disclosure agreement should be subject to an evidentiary hearing in the district court. Furthermore, as was argued in the circuit court, the arrests, investigation, trials and convictions occurred between 9-14 years ago.[27] Any anticipated arguments by the Government that the reports would endanger certain people are more formulaic and rote than factual, were not asserted in the district court, and should be subject to an evidentiary hearing in the district court.

[27] The investigation began in early 2003 when Julio Haro was arrested for possession of marijuana with intent to distribute. On January 19, 2005, Petitioner and members of the Haro family were indicted on charges of Possession with Intent to Distribute Marijuana and Cocaine, and Conspiracy to Possess with Intent to Distribute Marijuana and Cocaine, in violation of 21 U.S.C. §§841, 846, 848. Petitioner was found guilty by a jury on April 14, 2008 and sentenced on October 6, 2008. (CR-05-125-TUCDCB.)

II

THE DISTRICT COURT ERRED IN NOT CONDUCTING AN EVIDENTIARY HEARING ON DEFENDANT-APPELLANTS' RESPECTIVE CLAIMS THAT THE MAGISTRATE JUDGE ASSIGNED TO THE CASE IMPERMISSIBLY PARTICIPATED IN PLEA NEGOTIATIONS, WHICH, IN TURN, PREJUDICED DEFENDANT-APPELLANTS.

The Ninth Circuit has previously held that such improper involvement can affect a substantial right, and can seriously affect the fairness, integrity or public reputation of judicial proceedings. *United States v. Kyle*, 734 F.3d 956, 966 (9th Cir. 2013). In order to determine whether Haro was prejudiced by the Magistrate Judge's interference in the plea negotiation process, it was incumbent upon the district court to conduct an evidentiary hearing, where the attendees of the settlement conference could be placed under oath, and asked to provide a detailed account of what transpired at that proceeding. See *United States v. James*, 8 F.3d 32 (9th Cir. 1993) (unpublished), cited in instant case Ninth Circuit Memorandum- United States v. Haro-Verdugo (9th Cir., 2018)(See Appendix #).

The denial of an evidentiary hearing on a §2255 motion will not be disturbed absent a finding of abuse of discretion. *Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989). To demonstrate that the district court erred in not granting an evidentiary hearing, Sergio alleged specific facts, which, if true, would entitle him to relief. At the same time, the district court record cannot conclusively show that they are entitled to no relief. 28 U.S.C. § 2255; see, also, *United States v. Rodriguez*, 347 F.3d 818, 824 (9th Cir. 2008). A

claim must be so palpably incredible or patently frivolous as to warrant summary dismissal in order to justify the refusal of an evidentiary hearing. *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984).

The Ninth Circuit relied on *United States v. Myers*, 804 F.3d 1246 (9th Cir. 2015) to agree with appellant/petitioner that there was a Rule 11 violation but that Haro did not show prejudice. We dispute the finding of no prejudice. In contrast to Mr. Haro, Myers' failed to establish that the alleged error affected his substantial rights because the settlement conference helped Myers reach a plea deal with the government and resulted in Myers receiving a below-Guidelines sentence.

If the *Myers* rationale is the basis for showing prejudice, then the showing of prejudice in this case is in Mr. Haro's favor: Mr. Haro lost a 20-year plea agreement and was instead sentenced to life in prison after conviction by trial.

As the Circuit court agreed, there was a clear contravention of Rule 11(c)(1), Fed.R.Crim.Proc., which provides, in pertinent part, as follows:

> (c) Plea Agreement Procedure.
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions . . .

This is such a bright-line rule that "a finding of judicial misconduct in connection with a plea proceeding constitutes plain error, and entitles a

defendant to withdraw his guilty plea even if the error is identified for the first time on appeal." *United States v. Anderson*, 993 F.2d at 1437.

Rule 11's ban on judicial involvement in plea negotiations is an absolute command, which admits no exceptions. *United States v. Anderson*, 993 F.2d 1435, 1438-1439 (9th Cir. 1993). However, these types of errors are not structural. *United States v. Davila*, 133 S.Ct. 2139, 2142, 186 L.Ed.2d 139 (2013). Moreover, Rule 11(h) calls for an across-the-board application of the "harmless-error" prescription. *Id.* at 2142.

To the extent that such judicial interference impacts the voluntariness of the defendant's decision either to enter a guilty plea or go to trial, it implicates the defendant's Fifth Amendment due process rights, as well. *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (due process requires that a guilty plea be voluntary).

A district court must grant a federal habeas petitioner's motion for an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000); *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003).

It was argued at the Ninth Circuit level that even if the Magistrate Judge acted in an arguably "dignified" manner, the district court still needed a detailed evidentiary account of what was said to the defendants at the settlement conference to allow a *judicial* determination of its probable impact

on them. Even objectively "dignified" conduct and statements might have changed the minds of Sergio and Julio about entering into a plea agreement. That the district court thought, without any evidentiary hearing, that such conduct, as alleged, was unlikely, is not the test. The ruling by the district court that the allegations are improbable and unbelievable cannot serve to deny the defendant the opportunity to support them by evidence. *Machibroda*, 386 U.S. at 495.

For these reasons, this Court should vacate the district court's dismissal of the § 2255, and remand for evidentiary hearings to determine whether the Magistrate Judge improperly interfered with their plea negotiations, causing prejudice to both. Furthermore, this Court should direct the district court to appoint counsel to represent Sergio and Julio, pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings. *United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995).

CONCLUSION

For the reasons stated herein, Appellant requests that the petition for certiorari be granted.

Dated November 15, 2018

Kathleen G. Williamson
LAW OFFICES OF WILLIAMSON & YOUNG, P.C.
Attorney for Petitioner

APPENDICES

1-A Memorandum of Ninth Circuit Court

1-B Notice of Appeal from District Court

NOT FOR PUBLICATION

FILED

AUG 31 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO MARIO HARO-VERDUGO, Defendant-Appellant.	No. 12-16611 D.C. Nos. 4:11-cv-00179-DCB 4:05-cr-00125-DCB- BPV-3 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO ANTONIO HARO, Defendant-Appellant.	No. 12-16740 D.C. Nos. 4:11-cv-00245-DCB 4:05-cr-00125-DCB-BPV-2

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted August 14, 2018
San Francisco, California

Before: SCHROEDER, SILER,** and MURGUIA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants-Appellants Julio Mario Haro-Verdugo ("Julio") and Sergio Antonio Haro ("Sergio") appeal the district court's decision denying each of their motions under 28 U.S.C. § 2255. Reviewing *de novo*, we affirm all claims except one. *See Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994). We reverse and remand the second certified issue regarding Sergio's double jeopardy claim.

The district court certified three issues for appeal. The defendants raise three uncertified claims, and Sergio raised two "amended issues" in his supplemental brief. We certify the three uncertified issues because the defendants have made a "substantial showing of the denial of a constitutional right" and reasonable jurists could debate the federal district court's resolution of the claims. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We dismiss Sergio's two "amended issues" because he did not initially present these issues to the district court. The claims are not properly before this court and are dismissed. *See United States v. Mejia-Mesa*, 153 F.3d 925, 931 (9th Cir. 1998).

1. In the first certified claim, Julio and Sergio claim they were denied their Sixth Amendment right to the effective assistance of counsel based on each of their trial counsels' failure to effectively use government-agent reports to impeach the government agents' credibility. In their joint opening brief, Julio and Sergio

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** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

stated they were no longer advancing this claim. Sergio's subsequent appeal counsel, however, filed a supplemental opening brief and argued this claim of ineffective assistance in part. Thus, while Julio has waived this claim, we consider Sergio's argument on this claim.

Sergio contends that his Sixth Amendment rights were violated because he lacked access to his full trial file, which, he argues, was necessary for him to identify issues during trial that may have resulted in developing viable claims for his section 2255 motion. Sergio, however, does not point with any particularity to an argument he might have pursued had he had access to his file. He also cites to no authority for the proposition that the lack of personal access to his full trial file violated his Sixth Amendment rights. In short, Sergio fails to show prejudice, a necessary element to succeed on an ineffective assistance of counsel claim on a section 2255 motion. *See Davis v. Ayala*, 135 S. Ct. 2187, 2197–98 (2015). Accordingly, Sergio's claim fails. The first certified claim is denied as to both Julio and Sergio.

2. The second certified claim only pertains to Sergio. Sergio contends his appellate counsel was ineffective for failing to raise a violation of his double jeopardy rights when Sergio was convicted and sentenced for engaging in a continuing criminal enterprise and for conspiring to distribute and to possess with intent to distribute marijuana and cocaine. The government concedes on this claim

and agrees that this court should reverse and remand for the district court to decide which convictions to vacate and reconsider Sergio's sentence. *United States v. Hector*, 577 F.3d 1099, 1104 (9th Cir. 2009) (reversing and remanding for the district court to make a discretionary determination as to which conviction should be vacated).

We have previously addressed the underlying double jeopardy question as to one of Sergio's co-defendants in *United States v. Burgos-Valencia*, 2010 U.S. App. LEXIS 5674 (9th Cir. 2010), and granted relief. We rely on our reasoning in *Burgos-Valencia* here. Convicting and sentencing Sergio to the continuing criminal enterprise count and the drug distribution conspiracy counts is plain error, because, here, the same underlying conduct was involved as to all counts, and the drug distribution conspiracy is a lesser-included offense of the continuing criminal enterprise offense. *Id*. at *16–17; *see also Rutledge v. United States*, 517 U.S. 292, 300, 306–07 (1996) (holding that when the same underlying conduct is involved, the drug distribution conspiracy is a lesser-included offense of the continuing criminal enterprise offense and a conviction of both violates double jeopardy). A conviction of the continuing criminal enterprise offense and the lesser-included offenses violates double jeopardy. *Rutledge*, 517 U.S. at 307.

Sergio's counsel was deficient for failing to raise this double jeopardy violation issue, and Sergio was prejudiced by counsel's deficiency where he was

convicted and sentenced on all counts. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that to establish an ineffective assistance of counsel claim one must show that counsel's performance was deficient and that the individual was prejudiced by the deficiency). Accordingly, we reverse and remand on this claim related to Sergio's convictions for Counts 1, 3, and 11 for the district court to hold a hearing and then to make a discretionary determination as to which of the convictions should be vacated. Upon vacating either the continuing criminal enterprise conviction or the drug distribution conspiracy convictions, the district court should reconsider the sentence imposed on Sergio.

3. The third certified claim only pertains to Julio. Julio argues that he was denied his Sixth Amendment right to effective assistance of counsel based on his counsel's alleged absence during a pretrial settlement conference. Julio had a Sixth Amendment right to effective assistance of counsel in the plea negotiation process as plea negotiations are a "critical stage" of criminal proceedings. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). To make an ineffective assistance of counsel claim and establish prejudice in the plea context, Julio must show that, but for the ineffective advice of counsel, there is a reasonable probability that Julio would have accepted the plea offer and it would have been presented to the court. *Id*. at 164.

Even assuming that Julio was not represented by counsel at the settlement

conference and that counsel's absence would constitute deficient performance under *Strickland*, Julio's claim fails because he cannot show prejudice. Julio claims he would have accepted the government's plea offer but for the Magistrate Judge's offensive and upsetting comments made during the settlement conference. But Julio does not explain how his counsel's presence would have shielded him from or changed his reaction to the Magistrate Judge's comments. Moreover, Julio had approximately a year after the settlement conference during which he could have decided to take the plea offer once his feelings toward the Magistrate Judge's behavior lessened. Julio's second, later-appointed counsel also submitted an affidavit in which she states that she advised Julio of the benefits of the plea offer and that it was available to Julio. Julio contends in his declaration that his counsel did not advise him about the plea offer. His allegations, however, when viewed against the record as a whole, are "palpably incredible or patently frivolous." *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984). Based on the evidence of counsel's multiple meetings with Julio and the Magistrate Judge's discussions with the defendants in this case, it is not believable that Julio was unaware of the potential benefits of the plea agreement. The record does not support that but-for Julio's counsel presumed absence at the settlement conference, Julio would have accepted the government's plea offer. Thus, Julio has failed to show prejudice. This claim is denied.

4. The first uncertified claim pertains to both defendants. Julio and Sergio claim that the district court erred in not conducting an evidentiary hearing on their claims that the Magistrate Judge impermissibly participated in plea negotiations in violation of Federal Rule of Criminal Procedure 11 when the Magistrate Judge held a settlement conference with various defendants, which the defendants argue prejudiced them.

We review the denial of a motion for an evidentiary hearing for an abuse of discretion. *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003). "A district court must grant a federal habeas petitioner's motion for an evidentiary hearing 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *Id*. at 824 (quoting 28 U.S.C. § 2255). "Although section 2255 imposes a fairly lenient burden on the petitioner, the petitioner is nonetheless 'required to allege specific facts which, if true, would entitle him to relief.'" *Id*. (quoting *United States v. McMullen,* 98 F.3d 1155, 1159 (9th Cir. 1996)).

Here, the Magistrate Judge conducting a settlement conference, absent a clear waiver by defendants, violated Julio and Sergio's right to be free from judicial interference into plea negotiations under Rule 11. *See United States v. Myers*, 804 F.3d 1246, 1253, 1255–56 (9th Cir. 2015). However, it is not reasonably probable that but for the improper judicial interference, Julio and

Sergio would have proceeded differently by accepting the government's plea offer. *See United States v. Kyle*, 734 F.3d 956, 963 (9th Cir. 2013). As stated, significant time passed between when the settlement conference took place and when the initial trial began, and there were several intervening events that undermine a causal link between the Rule 11 violation and the defendants' decision to not accept the plea deal. During the year, both defendants had time to speak with their attorneys and consider whether they wanted to accept the plea. It is "palpably incredible" that it was solely the Magistrate Judge's interaction with the defendants in the settlement conference that led to their decision to not take the plea in light of the record here. *See Schaflander*, 743 F.2d at 717. Because the record shows that the defendants would not have been entitled to relief on this claim because they cannot show prejudice, the district court did not abuse its discretion in denying defendants' motion for an evidentiary hearing. This claim is denied.

5. The second uncertified claim pertains to Julio. Julio contends that the district court erred in not conducting an evidentiary hearing on his claim that his attorney failed to render effective assistance in advising him regarding the plea offer, thereby leading to his rejection of the plea offer. Julio again fails to demonstrate prejudice because he cannot show that but for the alleged ineffective assistance of counsel there is a reasonable probability that the plea offer would have been presented to the court. *Lafler*, 566 U.S. at 162–64. In his briefing, Julio

provides no specific factual allegations as to how his counsel's alleged general failure to advise him led to his rejection of the plea offer. Because Julio fails to make any specific factual allegations, he fails to show how he might be entitled to relief. *See* 28 U.S.C. § 2255; *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003). Accordingly, the district court did not abuse its discretion by not holding an evidentiary hearing. This claim is denied.

6. In the third uncertified claim, Sergio contends ineffective assistance of counsel on the part of his trial counsel for failing to raise the double jeopardy issue discussed above. As stated, Sergio is entitled to relief on the double jeopardy issue.

7. The fourth uncertified claim pertains to Sergio. He argues that the district court erred in not conducting an evidentiary hearing on Sergio's claim that his counsel was ineffective by failing to adequately advise him of the benefits of the government's plea offer. On the record before us, Sergio's prior counsel only submitted answers to government interrogatories that do not appear to be sworn statements. We have previously required that, at a minimum, district courts should at least require the government to produce sworn statements from a defendant's attorney to clarify issues arising from ineffective assistance claims. *See United States v. James*, 8 F.3d 32 (9th Cir. 1993) (unpublished).

However, here, despite the lack of sworn attorney statements, on the record as a whole, Sergio's claims are "palpably incredible or patently frivolous."

Schaflander, 743 F.2d at 717. Sergio claims that he was never told about the basic elements of his criminal charges, the evidence of the government's case, and the benefits of the plea offer. These allegations are palpably incredible in light of the multiple attorney statements in this case, the evidence that Sergio was aware of the plea offer for a long period of time, and that he was involved in discussions about his case with his family members who were also co-defendants. In light of this record, Sergio's assertions as to his total lack of advice regarding the plea agreement are not believable. Therefore, his allegations do not show he would be entitled to relief, and he is not entitled to an evidentiary hearing. *See Leonti*, 326 F.3d at 1116. This claim is denied.

AFFIRMED in part, REVERSED and REMANDED in part. We REVERSE and REMAND as to the second certified claim regarding Sergio's double jeopardy claim. Specifically, we reverse and remand Sergio's convictions on Counts 1, 3, and 11 for the district court to hold a hearing and then make a discretionary determination as to which conviction or convictions should be vacated. Upon vacating, the court should reconsider the sentence imposed on Sergio.

NOT FOR PUBLICATION

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AUG 31 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO MARIO HARO-VERDUGO, Defendant-Appellant.	No. 12-16611 D.C. Nos. 4:11-cv-00179-DCB 4:05-cr-00125-DCB- BPV-3 MEMORANDUM*

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Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted August 14, 2018
San Francisco, California

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provides no specific factual allegations as to how his counsel's alleged general failure to advise him led to his rejection of the plea offer. Because Julio fails to make any specific factual allegations, he fails to show how he might be entitled to relief. *See* 28 U.S.C. § 2255; *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003). Accordingly, the district court did not abuse its discretion by not holding an evidentiary hearing. This claim is denied.

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However, here, despite the lack of sworn attorney statements, on the record as a whole, Sergio's claims are "palpably incredible or patently frivolous."

Schaflander, 743 F.2d at 717. Sergio claims that he was never told about the basic elements of his criminal charges, the evidence of the government's case, and the benefits of the plea offer. These allegations are palpably incredible in light of the multiple attorney statements in this case, the evidence that Sergio was aware of the plea offer for a long period of time, and that he was involved in discussions about his case with his family members who were also co-defendants. In light of this record, Sergio's assertions as to his total lack of advice regarding the plea agreement are not believable. Therefore, his allegations do not show he would be entitled to relief, and he is not entitled to an evidentiary hearing. *See Leonti*, 326 F.3d at 1116. This claim is denied.

AFFIRMED in part, REVERSED and REMANDED in part. We REVERSE and REMAND as to the second certified claim regarding Sergio's double jeopardy claim. Specifically, we reverse and remand Sergio's convictions on Counts 1, 3, and 11 for the district court to hold a hearing and then make a discretionary determination as to which conviction or convictions should be vacated. Upon vacating, the court should reconsider the sentence imposed on Sergio.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

August 08, 2012

No.: 12-16740
D.C. No.: 4:11-cv-00245-DCB
Short Title: USA v. Sergio Haro

Dear Appellant

The Clerk's Office of the United States Court of Appeals for the Ninth Circuit has received a copy of your notice of appeal and/or request for a certificate of appealability.

A briefing schedule will not be set until the court determines whether a certificate of appealability should issue.

Absent an emergency, all subsequent filings in this matter will be referred to the panel assigned to consider whether or not to grant the certificate of appealability.

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Sergio Antonio Haro
Reg. #12320-196
USP Victorville
P.O. Box 3900
Adelanto, CA 92301

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No.: 12-16740
Plaintiff-Appellee,	Nos. CV-11-245-TUC-DCB CR-05-125-TUC-DCB
vs.	(District of Arizona)
SERGIO ANTONIO HARO,	
Defendant/Applicant.	**APPLICANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY**

On July 5, 2012, Honorable David C. Bury, United States District Judge for the District of Arizona, Tucson Division, denied Applicant's Section 2255 Motion, and at the same time declined to issue a certificate of appealability ("COA"). Afterwards, Applicant filed a Notice of Appeal. Now, Applicant seeks a COA from this Court for the following issues:

(1) Due to counsel's ineffective assistance at sentencing and on appeal, were defendant's double jeopardy rights violated?

(2) Did U.S. Magistrate Judge Bernardo Velasco's improper and unethical participation in the settlement conference result in defendant changing his settled decision to plead guilty, a decision he had made before the settlement conference was held?

(3) Did Counsel's ineffective assistance deprive defendant of the procedural right to a bifurcated sentencing trial on the drug quantities as well as his right to testify in his own

behalf, rendering the result of his life sentence fundamentally unfair and unreliable?

(4) Were the Agents' reports that were turned over to trial counsel, but kept from Defendant, effectively used to impeach the credibility of the agents during cross-examination?

(5) Did the District Judge err by failing to appoint habeas counsel to review the Agents' reports and to file section 2255 pleadings, after the Judge said he would on the record and Defendant requested appointment of counsel?

(6) Did the District Judge err by failing to hold an evidentiary hearing?

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

When a district judge denys a section 2255 motion and in the same stroke of a pen declines to grant a certificate of appeability, the petitioner is not provided with the opportunity to request a COA from the district judge on any specific issues. In such a case, the petitioner's Notice of Appeal is "deemed to constitute a request for a COA" from the United States Court of Appeals for the Ninth Circuit. In addition, a "petitioner may file a motion for a COA in the court of appeals within 35 days of the district court's entry of its order denying a COA in full." Circuit Rule 22-1(d).

A Certificate of Appealability is to be granted only if the applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This "substantial showing" requirement for a COA is "relatively low," Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir.2002), and is satisfied

when the applicant shows 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.'" Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). This Court must resolve any doubt about granting a COA in the petitioner's favor. Jennings, 290 F.3d at 1010.

Following a dismissal on procedural grounds an applicant must satisfy a two prong test in order to meet the requirements to obtain a COA. Slack, 529 U.S. at 484. First, applicant must show that jurists of reason would find it debatable whether the section 2255 motion states a valid claim of the denial of a constitutional right. Id. Second, the applicant must show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Id. "Section 2253 mandates that both showings be made ... and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id.

ISSUE #1:

In this case defendant was convicted and sentenced both for engaging in a continuing criminal enterprise and for conspiring to distribute cocaine and marijuana. The drug distribution conspiracies in Counts 3 and 11 are lesser-included offenses of the continuing criminal enterprise in Count 1 because both charges relied on the same conduct. To convict and sentence him

on all three counts violated his double jeopardy clause rights. Counsel was ineffective at sentencing for allowing this to occur as well as when he failed to raise this stronger issue on appeal than the ones he did raise.

District Judge Bury denied this issue on the grounds that "the sentences for the CCE and the lesser included offense of conspiracy run concurrently, Petitioner will simply serve the sentence for one if the other is overturned. Thus, Petitioner is not being subjected to double punishment. As no double jeopardy occurred, Petitioner's trial counsel had no way to object or prevent this turn of events other than proving his client innocent beyond a reasonable doubt. Therefore, assistance of counsel cannot be found deficient." Order at p. 10 (Doc 53-1). The District Judge is wrong.

The Fifth Amendment's prohibition on double jeopardy protects against being punished twice for a single criminal offense. U.S. Const. amend. V.; Brown v. Ohio, 432 U.S. 161, 165 (1977). When multiple sentences are imposed in the same trial, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown, 432 U.S. at 165. When a defendant has violated two different criminal statutes, the double jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other. Rutledge v. United States, 517 U.S. 292, 297 (1996). To determine whether two statutory provisions prohibit the same offense,

courts must examine each provision to determine if it "requires proof of a[n additional] fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932); Ball v. United States, 470 U.S. 856, 861 (1985). Courts also employ this analysis, commonly known as the Blockburger test, to determine whether one offense is a lesser included offense of the other. Rutledge, 517 U.S. at 297. If two different criminal statutory provisions indeed punish the same offense or one is a lesser included offense of the other, then conviction under both is presumed to violate congressional intent. See Missouri v. Hunter, 459 U.S. 359, 366-67 (1983).

This principle of law was well-established at the time defendant was sentenced, and as a result counsel should have moved the court to vacate either the CCE count or both of the conspiracy counts. Rutledge, 517 U.S. at 297. Had counsel done so at sentencing the result would have been different. See e.g., United States v. Cabaccang, 481 F.3d 1176, 1180 (9th Cir.2007) ("At Roy's original sentence, the government conceded that Roy's conspiracy convictions under Count II and III had to be vacated as lesser-included offenses of Count I"); United States v. Luong, 393 F.3d 913, 916 (9th Cir.2004)("a 21 U.S.C. § 846 conspiracy to distribute controlled substances is a lesser included offense of a Continuing Criminal Enterprise (CCE) offense under 21 U.S.C. § 848").

Counsel was ineffective on appeal, too, when he failed to raise this clearly stonger issue than the ones he did raise. Had he done so, counsel would have prevailed on appeal. This

fact is starkly apparent because defendant's co-defendant Leonardo Burgos-Valencia raised this same claim on appeal and the Ninth Circuit Court of Appeals reversed and remanded for "a hearing and then to make a discretionary determination as to which conviction should be vacated." See United States v. Burgos-Valencia, USCA No. 08-10444, 2010 U.S. App. LEXIS 5674, issue #12.

This issue should have been resolved in a different manner. Judge Bury should have held that counsel was ineffective. Thus, a COA should issue, where this Court ultimately holds that petitioner must be resentenced.

ISSUE #2:

Petitioner submitted that his father, mother and himself were prejudiced by Magistrate Judge Velasco's improper participation at the settlement conference. The entire Haro family was prepared to accept the plea offer extended by the government until Magistrate Judge Velasco intimidated them into rejecting the plea offer. In support of this claim petitioner submitted a Declaration (as did both his father and mother in separate section 2255 proceedings) detailing what took place.

District Judge Bury countered:

> Petitioner's attorney, who attended the settlement conference, denies that any of the inappropriate behavior alleged by Petitioner took place. (Doc. 45-2 p.5). Petitioner's attorney responded by affidavit that the Magistrate Judge explained the gravity of the case and the advisability of accepting the plea offer to the Petitioner, and that the conference was conducted in a dignified and professional manner. Id. Petitioner's allegations regarding the events that occurred at the plea negotiation border on the absurd. Other defense

> counsel present and representing other Haro family members responded by affidavit that the Magistrate Judge behaved appropriately and professionally.

Order at p. 11 (Doc 53-1).

It is no suprise that these defense attorneys would state as much because, after all, they are officers of that court and make their living before this judge. Under no circumstance would these attorneys freely, openly and voluntarily jeopardize their livelihoods by exposing Velasco's unethical and unprofessional behavior.

The settlement conference was held off the record, and therefore there is no transcript detailing what was said. Thus, petitioner's accusations and the defense attorneys statements cannot be verified by the record. "Evidentiary hearings are particularly appropriate when claims raise facts which occurred off the record." United States v. Chacon-Palomares, 208 F.3d 1157, 1159 (9th Cir.2000).

Because of the particular egregious nature of the allegations leveled against Magistrate Judge Velasco and the possible retaliatory effect that might follow if the defense attorneys and the United States Marshals who were present were to collaborate petitioner's allegations, the District Judge erred by failing to schedule an evidentiary hearing in a different Division of Arizona. A COA should therefore issue, and the matter should ultimately be remanded to another Division for an evidentiary before a different United States District Judge other than David Bury.

ISSUE #3:

In this drug case Petitioner could not take the stand and testify on his own behalf without incriminating himself and negating his claim of innocence on all counts. As a result, counsel advised him not to testify to which he agreed.

Petitioner has a procedural and constitutional right to a bifurcated sentencing trial. Once Petitioner was convicted by the jury on all counts, counsel should have sought a separate sentencing trial on the amounts of cocaine and marijuana and placed him on the stand to testify on his own behalf. This would have subjected the indictment's drug quantities and the testimony against him at trial to meaningful adversial testing. Because counsel failed to do so, the result - Petitioner's life sentence - is fundamentally unfair and unreliable.

District Judge Bury denied this issue for the following reasons:

> Neither Apprendi, nor any of its progeny cited by Petitioner establish a right in all criminal trials to a bifurcated sentencing proceeding. Here, the factors affecting sentencing (the various counts and the amounts of drugs were found to be factually true beyond a reasonable doubt by the jury. As the factors affecting sentencing were found beyond a reasonable doubt, Petitioner had no right to a bifurcated trial. It follows that Petitioner's trial counsel could not fail to protect a right that Petitioner did not possess.

Order, page 10 (07/05/12)(Doc 53-1). What Judge Bury fails to appreciate is that the jury never heard Petitioner's testimony before they decided the drug amounts. Had the jury heard him in a bifurcated sentencing trial, he would not have received a life sentence.

It is well established that the Sixth Amendment guarantees a criminal defendant the right to a jury trial of his peers, where each element of the offense must be unanimously found by twelve jurors by a beyond-a-reasonable-doubt standard. In re Winship, 397 U.S. 358 (1970); Sullivan v. Louisiana, 508 U.S. 275 (1993); United States v. Gaudlin, 515 U.S. 506 (1995).

More recently in Recuenco, the Supreme Court held that courts must now, in the wake of Apprendi and Blakely, "treat sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt." Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 2552 (2006). Accordingly, "elements and sentencing factors must be treated the same for Sixth Amendment purposes." Id. This being the case, if the "relevant evidence would prejudice him at trial," Blakely v. Washington, 124 S.Ct. 2531, 2541 (2004), "the Guidelines require, among other things, ... a bifurcated trial for sentencing. The district court may convene a sentencing jury to try the drug quantity ...." United States v. Ameline, 376 F.3d 967, 983 (9th Cir.2004), superceded on reh'g en banc by 409 F.3d 1073, (quoting United States v. Booker, 375 F.3d 508, 514 (7th cir.2004)("There is no novelty in a separate jury trial with regard to the sentence just as there is no novelty in a bifurcated jury trial"); United States v. Khan, 325 F.Supp.2d 218, 226-232 (E.D.N.Y. 2004)(Discussing in depth why today the use of a jury in criminal sentencing is consistent with our judicial history).

In the instant case the indictment alleged large quantities of cocaine and marijuana in each count. The government's witnesses testified that petitioner was involved in each count as the drug amount alleged. Most of the witnesses were cooperating members of the drug conspiracy, who were doing so to shorten the amount of time they would spend in prison, or better yet, escape incarceration all together. That being the case, each one had a personal reason to testify as the government wanted - to save their own skin. Because petitioner could not testify on his own behalf during trial, he could not offer any rebuttal testimony to the contrary.

Counsel never informed petitioner that he had a right to a bifurcated sentencing trial and the right to testify at it on his own behalf. Had he known this he would have requested both. On page 15 thru page 18 of his First Amended Section 2255 Motion, petitioner specifically detailed what his testimoney would have been.

Recuenco, Blakely, Ameline, Booker and Khan all make clear that a defendant is entitled to a bifurcated sentencing trial. Accordingly, a COA should issue.

ISSUE #4:

In this case prior to preparing and submitting his section 2255 motion, petitioner submitted a written request to his attorney requesting his entire case file. When such a request is made by a former client, the State Bar of Arizona requires the prior attorney to turn it over in its entirety.

When the Government initially turned over discovery, it only included the Agents' Reports under the condition that the defense attorneys would not give a copy of them to the Haros. As a result, all the defense attorneys sought a hearing with District Judge Bury to discuss this matter in relation to the Haros' request for a complete copy of the case file to use to prepare a section 2255 motion. At the hearing Judge Bury agreed to appoint habeas counsel for petitioner, his father and his mother, if they would only ask.

In light of District Judge Bury's statement, which he had prior to submitting a section 2255 motion, petitioner filed a section 2255 motion asserting that the Agents' reports were not effectively used at trial by defense counsel, and requested the District Judge to appoint habeas counsel because he did not have a copy of the Agents Reports to make specific factual allegations. Petitioner did so with the expectation that Judge Bury would keep his word.

Instead, District Judge Bury denied appointment of habeas counsel and this claim for the following reasons:

> Petitioner's trial attorney responded by affidavit and reported that in his professional opinion, he was indeed able to make the most effective use of the agents' reports possible in cross-examining the agents who testified. Petitioner's trial attorney is experienced and reputable. There are no independent doubts about counsel's professionalism and honesty, as might be considered in reconstructing the circumstances of counsel's conduct in order to evaluate that conduct from counsel's perspective at the time. Here the unsupported allegations against his trial counsel do not satisfy Petitioner's burden to overcome the strong presumption that counsel's conduct fell within the wide range of professional assistance. As he is unable to overcome this burden, he fails to show that he received deficient assisistance of counsel. Order, page 9 (7/05/12)(Doc 53-1).

Is it any wonder that petitioner failed to put forth any evidence to support his allegations given he did not have the Agents' Reports to make specific references to? The answer is obviously, No.

Again, a COA should issue and the matter reversed so the court can appoint habeas counsel to compare the agents' reports with the conduct of defense counsel.

ISSUES #5 and #6:

Both issues, failure to appoint habeas counsel and to hold an evidentiary hearing are inextricably intertwined with the other issues. In each case the District Judge wrongfully denied petitioner these procedural rights to conclusively demonstrate the truth of his factual allegations. Thus, a COA should issue on both of these issues too.

CONCLUSION

WHEREFORE, based on the record (and lack thereof in this case), a Certificate of Appealability is requested on all six issues.

Respectfully submitted on this 3rd day of August, 2012.

Sergio Haro

Sergio Antonio Haro

Certificate of Service

I, Sergio Antonio Haro, do hereby declare under penalty of perjury and the laws of the United States that I have served a true and correct copy of my Application for a Certificate of Appealability on:

David A. Kern
Assistant U.S. Attorney
405 West Congress Street
Suite 4800
Tucson, AZ 85701

by placing same in a prepaid envelope and hand delievering it to prison authorities for forwarding through the United States Postal Mail Service on this 3rd day of August, 2012.

Sergio Haro

Sergio Haro #12320-196
USP Victorville
P.O. Box 3900
Adelanto, CA 92301

No. _____

In the
SUPREME COURT OF THE UNITED STATES

SERGIO ANTONIO HARO
Petitioner,
V.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

Pursuant to Rule 29.4 of this Court, I hereby certify that on this date, one copy of Petitioner's Motion for Leave to Proceed In Forma Pauperis and one copy of the Petition for Writ of Certiorari were first class postage prepaid mailed and electronically delivered to:

ERICA MCCALLUM
Office of the United States Attorney
405 W. Congress Street, Suite 4800
Tucson, AZ 85701-5040

On this date, one copy of Petitioner's Motion for Leave to Proceed In Forma Pauperis and one copy of the Petition for Writ of Certiorari were delivered to:

Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

On this date, the original and ten copies of Petitioner's Motion for Leave to Proceed In Forma Pauperis and the Petition for Writ of Certiorari were delivered to:

UNITED STATES SUPREME COURT
Clerk's Office
1 First Street, N.E.
Washington, DC 20543

Dated November 15, 2018

Kathleen G. Williamson
Law Offices of Williamson & Young, P.C.
P.O. Box 249
Tucson, AZ 85702-249
Telephone (520) 623-8414
Arizona State Bar No. 012595
Counsel for Petitioner