APPENDIX "A"
Eleventh Circuit's Opinion Denying COA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11174-K

ANTONIO MACLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Antonio Macli moves for a certificate of appealability ("COA"), in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Macli must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Macli has failed to satisfy this standard, and his motion for a COA is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"
District Court Opinion Denying § 2255 and COA

Antonio Macli, Movant, v. United States of America, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2019 U.S. Dist. LEXIS 14687
Civil Action No. 16-23544-Civ-Scola
January 30, 2019, Decided
January 30, 2019, Entered on Docket

Editorial Information: Subsequent History

Certificate of appealability denied Macli v. United States, 2019 U.S. App. LEXIS 21675 (11th Cir. Fla., July 19, 2019)

Editorial Information: Prior History

Macli v. United States, 2018 U.S. Dist. LEXIS 189979 (S.D. Fla., Nov. 5, 2018)

Counsel **{2019 U.S. Dist. LEXIS 1}**For USA, Plaintiff: Michael Scott Davis, LEAD ATTORNEY, Carlos Javier Raurell, Evelyn Baltodano-Sheehan, Marlene Rodriguez, Maureen Donlan, Vivian Rosado, United States Attorney's Office, Miami, FL; Alicia E. Shick, United States Attorney's Office, Fort Lauderdale, FL; James V. Hayes, US Department of Justice, Washington, DC; Nicholas E. Surmacz, Robert Zink, U. S. Department of Justice, Washington, DC.

Judges: Robert N. Scola, Jr., United States District Judge.

Opinion

Opinion by: Robert N. Scola, Jr.

Opinion

Order Adopting Magistrate Judge's Report and Recommendation

This case was referred to United States Magistrate Judge Patrick A. White, consistent with Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters. Movant **Antonio Macli** raises six claims in his 28 U.S.C. § 2255 petition for habeas relief. With respect to his fifth claim, that he received ineffective assistance from counsel regarding the plea-bargaining process, Judge White held an evidentiary hearing on June 5 and 6, 2018. Thereafter, on November 5, 2018, Judge White issued a report, recommending that the Court deny Macli's motion in its entirety. (Report of Magistrate,**{2019 U.S. Dist. LEXIS 2}** ECF No. 42.) Both Macli and the Government filed objections to the report. (Mov.'s Objs., ECF No. 48; Govt.'s Objs., ECF No. 45.) The Government has responded to Macli's objections. (Govt.'s Resp., ECF No. 52.)

As an initial matter the Government, in its objections, directs the Court's attention to nine discrete factual findings presented in the report that it believes warrant clarification. The Court acknowledges these proposed corrections but at the same time notes that none of these findings affect the ultimate outcome in this case. Conversely, the Court points out that Judge White's report addresses only five of the six grounds Macli raises in his petition. This omission demands more and the Court will thus

evaluate the excluded claim (claim six) de novo.

With respect to the first five grounds Macli raises in his petition, the Court has reviewed de novo those portions of Judge White's report to which Macli objects, and the remaining parts for clear error. *See* 28 U.S.C. § 636(b); *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). Having considered Judge White's report, both parties' objections, the Government's response, and the relevant legal authorities, the Court adopts Judge White's report and recommendation, regarding grounds one through five.**{2019 U.S. Dist. LEXIS 3}**

As mentioned, Judge White's report neglects to address the sixth ground Macli contends warrants relief under § 2255. As set forth in his petition, through this ground, Macli complains that his trial counsel was ineffective for failing to object to the absence of a definition of "defraud" in the jury instructions. One of Macli's codefendants, Sandra Huarte, raised this same issue in her own § 2255 petition. Judge White addressed this ground in an earlier report and recommendation, recommending that the Court deny her petition. (*Huarte v. United States*, 16-Civ-23720, Rep. & Rec., ECF No. 22.) As Judge White pointed out in that report, the Court's instructions tracked the Eleventh Circuit's pattern jury instructions for health care fraud. (*Id.* at 25.) As further explained by Judge White, any objection to this instruction would have been meritless and thus Macli's claim here, as Huarte's claim there, fails. Thus, upon its own review, and in adopting the analysis set forth Judge White's report in Case No. 16-Civ-23720, the Court denies Macli's petition with respect to his sixth claim.

Accordingly, the Court **affirms and adopts** Judge White's report and recommendation (**ECF No. 42**) with respect to the first five**{2019 U.S. Dist. LEXIS 4}** grounds Macli raises in his petition. Separately, the Court denies Macli's petition with respect to the sixth ground he raises for the same reasons set forth in Judge White's report and recommendation on Huarte's petition. (Huarte Rep. at 24-26.) In sum, then, the Court **denies** Macli's petition in its entirety (**ECF No. 1**). The Court does not issue a certificate of appealability. Finally, the Court directs the Clerk to **close** this case. Any pending motions are **denied as moot**.

Done and ordered, at Miami, Florida, on January 30, 2019.

/s/ Robert N. Scola, Jr.

Robert N. Scola, Jr.

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-CV-23544-SCOLA
(11-CR-20587-SCOLA)
MAGISTRATE JUDGE P.A. WHITE

ANTONIO MACLI,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE FOLLOWING EVIDENTIARY HEARING

I. Introduction

The Petitioner, **Antonio Macli**, has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences entered following a trial in case 11-CR-20587-SCOLA. His son, Jorge Macli, and daughter, Sandra Huarte, were also defendants in case no. 11-CR-20587. All three have filed §2255 motions, Jorge Macli in case No. 16-CV-23421-Scola/White and Sandra Huarte in case No. 16-CV-23720-Scola/White. Although this report focuses on Antonio Macli, the Undersigned will refer to all three individuals as "the Movants." Furthermore, the Undersigned will refer to each individual movant by his or her first name, specifically, Jorge, Antonio, and Sandra.

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

The court has reviewed the movant's motion (Cv-DE#1), the government's response (Cv-DE# 13) to this court's order to show

cause, the Presentence Investigation Report ("PSI"), the Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file. With respect to the evidentiary hearing conducted in these proceedings, the court has reviewed the movant's pretrial narrative (Cv DE# 30); the government's pretrial narrative (Cv-DE# 31); transcripts of the June 5-6, 2018 evidentiary hearing (Case No. 16-CV-23421, DE# 46, 47); and the government's post-hearing memorandum (Cv DE# 41).

The movant, who has appeared *pro se*, has been afforded liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the movant raises the following grounds for relief:

> **Claims 1**: Counsel misapprehended the governing law and how it applied to the evidence, resulting in a futile defense strategy (Cv DE# 1:14-15);
>
> **Claim 2**: The government violated due process of law and its duty to ensure a fair trial when it engaged in pretrial discovery tactics designed to surreptitiously discover the defense strategy (Cv DE# 1:16);
>
> **Claim 3**: The government knowingly presented unreliable and false testimony in violation of due process (Cv DE# 1:17-19);
>
> **Claim 4**: Federal fraud statutes are unconstitutionally vague and as applied constitute a bill of attainder or an *ex post facto* law (Cv DE# 1:20-21);
>
> **Claim 5**: Counsel provided inadequate assistance in connection with the plea bargaining negotiations (Cv DE# 1:22).

All three movants raised identical arguments under claims 1

through 4 in their respective §2255 motions.[1] (CV DE# 1:14-21; Jorge, 16-CV-23544, DE#1:14-21; Sandra, 16-CV-23720, DE# 1:14-21). Although each movant raised a claim that counsel provided inadequate assistance during the plea bargaining process under claim five (CV DE# 1:22; Jorge, 16-CV-23544, DE#1:22; Sandra, 16-CV-23720, DE# 1:22), this court determined that only Jorge and Antonio were entitled to an evidentiary hearing. Finally, Sandra alone raised a sixth claim, namely, counsel was ineffective for failing to object to jury instructions and as a result, the instructions were only reviewable for plain error on appeal. See (Sandra, 16-CV-23720, DE# 1:23).

II. Factual Background and Procedural History

On June 5, 2012, a grand jury returned a 44-count superseding indictment against Jorge, Antonio, and Sandra, along with seven additional individual defendants and one organizational defendant, Biscayne Milieu Health Center, Inc. ("Biscayne Milieu"). (CR DE# 611). The indictment alleged a series of health care fraud and associated money laundering offenses. The charges in the indictment arose out of an alleged Medicare fraud scheme stemming from the operations of Biscayne Milieu, which was a local community mental health center. The dates of the charged conduct spanned from January 2007 through August 2011. (Id.:6-7, 13).

The superseding indictment charged the Movants as follows:

- Count 1: Conspiracy to violate 18 U.S.C. §1347 by committing health care fraud, in violation of 18 U.S.C.

[1]In Sandra Huarte's §2255 proceeding, the Undersigned issued a report concluding that claims 1 through 4 were without merit. (Huarte, 16-CIV-23720, DE# 22). The District Court adopted these findings. (Huarte, 16-CIV-23720, DE# 35). As a result, the Undersigned will rely on its prior analysis and conclusions with respect to these four claims.

§1349 - all three Movants charged.

• Counts 2-14: Substantive health care fraud, in violation of 18 U.S.C. §§1347 and 2 - all three Movants charged in all 13 counts.

• Count 15: Conspiracy to violate 42 U.S.C. §§1320a-7b(b)(1) & (b)(2) by receiving and paying health care kickbacks, in violation of 18 U.S.C. §371 - all three Movants charged.

• Counts 16-26: Payment of kickbacks in connection with a federal health care program, in violation of 42 U.S.C. §1320a-7b(b)(2)(A) - Movants Antonio and Jorge both charged in all 11 counts.

• Count 30: Conspiracy to violate 18 U.S.C. §§1956(a)(1)(B)(I) & 1957 by committing money laundering, in violation of 18 U.S.C. §1956(h) - all three Movants charged.

• Counts 31-37: Money laundering, in violation of 18 U.S.C. §1957 - Movant Antonio charged in Counts 31-37; Movant Jorge charged in Counts 32, 33, 35 & 37; Movant Sandra charged in Counts 31 & 34.

• Counts 38-44: "Concealment" money laundering, in violation of 18 U.S.C. §1956(a)(1)(B)(I) - Movant Antonio charged in Counts 38-44; Movant Jorge charged in Counts 39, 40, 42 & 44; Movant Sandra charged in Counts 38 & 41.

(Id.).

All three Movants, five individual defendants, and Biscayne Milieu all proceeded to trial. Jury selection took place on July 2-3, 2012. (CR DE# 709 & 712). Trial started on July 9, 2012. (CR DE# 715).

The scheme has been summarized by the Eleventh Circuit's opinion affirming the movant's conviction as follows:

In 1996, Biscayne Milieu Health Center, Inc. ("Biscayne

Milieu"), located in North Miami, was incorporated in Florida. It offered a partial hospitalization program ("PHP") for patients with mental illness. In 1997, Biscayne Milieu was certified as a Community Mental Health Center; it received a provider number allowing it to bill Medicare for PHP treatment. A PHP provides intensive outpatient treatment for patients with acute mental illness who are sufficiently ill that they would otherwise require inpatient hospitalization. Medicare covers partial hospitalization programs providing treatment for mental illness, but only does so subject to a variety of conditions.

These Medicare rules and regulations are set forth in the Local Coverage Determination ("LCD"). Medicare requires that, to qualify for the PHP benefit, the services must be reasonable and necessary for the diagnosis and active treatment of the patient's condition. The LCD makes clear that PHPs are structured to "provide patients with profound or disabling mental health conditions an individualized, coordinated, intensive, comprehensive, and multidisciplinary treatment program not provided in a regular outpatient setting." A given patient must be experiencing "an acute onset or decompensation of a covered Axis I mental disorder," severe enough to prevent the patient from functioning in normal daily activities outside of a hospital setting.1 And there must also *951 be a reasonable expectation that active treatment in the PHP will improve the patient's condition. Patients should not remain in PHPs indefinitely.

Further, dual diagnosis patients are those suffering from both substance abuse and acute mental disorders. Under Medicare's regulations, dual diagnosis patients may be eligible for PHP treatment. But PHP treatment is not authorized for "individuals with persistent substance abuse" who "cannot or refuse to participate with active treatment of their mental disorder." An addicted individual may be admitted as long as the individual is not actively using the substance at the time of admission and has an acute mental health crisis.

For a patient to be admitted to a PHP, a "psychiatrist or physician trained in the diagnosis and treatment of psychiatric illness" must certify that the patient would require in-patient psychiatric hospitalization if the PHP services were not provided, and must attest that the services will be furnished while the patient is under the

care of a physician and pursuant to an individualized plan of care. Once a patient is enrolled in a PHP, Medicare requires documentation supporting the medical necessity of the claims made by the PHP provider. This documentation includes progress notes detailing the patient's participation in and response to the intensive treatment.

Partial hospitalization in a PHP is a very intensive and expensive form of treatment for patients experiencing an acute mental health crisis. The evidence showed that Biscayne Milieu was paid $165 per patient per day for outpatient treatment or approximately $5000 per month per patient.

The owners and operators of Biscayne Milieu—the appellants here—agreed to be bound by these rules and regulations and to refrain from filing false claims. Because of the volume of claims processed by Medicare, the candor and truthfulness of the appellants, as health care providers making claims into the system, are absolute necessities.

As is too often the case, the appellants here concocted and engaged in a pernicious scheme to defraud Medicare and preyed upon vulnerable victims. To carry out the scheme, the owners and operators of Biscayne Milieu: (a) submitted false and fraudulent claims to Medicare for PHP services for patients who were not eligible for PHP treatment, for PHP services that were not medically necessary, for PHP services that were not eligible for Medicare reimbursement, and for PHP services that were not actually provided by Biscayne Milieu; (b) offered, paid, or received kickbacks and bribes for recruiting Medicare beneficiaries to attend Biscayne Milieu; (c) paid kickbacks and bribes to patients to ensure the attendance of ineligible Medicare beneficiaries at Biscayne Milieu; (d) concealed the submission of false and fraudulent claims to Medicare, the receipt and transfer of the proceeds from the fraud, and the payment of kickbacks and bribes to patient recruiters and Medicare beneficiaries; and (e) diverted proceeds of the fraud for personal use.

Further, Biscayne Milieu employees and agents, including a doctor, therapists, nurses, and social workers, implemented the fraud by admitting ineligible patients to Biscayne Milieu, holding therapy sessions for patients

who did not qualify for PHP treatment, falsifying group therapy notes to justify fraudulent claims to Medicare, and recruiting Haitian patients who did not qualify for PHP treatment by promising to assist such patients with applications for United States citizenship. At trial, numerous former employees of Biscayne Milieu, many of whom were separately indicted and had previously pled guilty to their participation in the fraud scheme, offered substantial evidence of the scheme's scope and design.

From 2007 to 2011, Biscayne Milieu submitted $57,689,700 in Medicare claims for PHP care of mentally ill patients, and Medicare paid $11,481,593 on those claims. This billing was largely fraudulent for the simplest of reasons. Virtually all of the patients treated at Biscayne Milieu's PHP were not suffering an acute onset of a covered Axis I mental disorder; did not have a reasonable expectation of improvement as a result of PHP treatment; or were not cognitively able to participate in PHP treatment. As the district court found, even the few patients who might have had such an acute mental disorder did not receive the medical care that was required under the PHP rules.

Rather than eligible PHP patients, the patient population principally fell into four categories: (1) chronic substance abusers; (2) elderly patients with dementia; (3) Haitian patients seeking immigration benefits; and (4) paid patients. Chronic substance abusers constituted an enormous percentage of the patient population at Biscayne Milieu. Trial witnesses testified that between 70 percent and 96 percent of Biscayne Milieu patients were chronic substance abusers. By virtue of their chronic substance abuse and lack of an acute mental disorder, the patients at Biscayne Milieu were, for the most part, not eligible for PHP treatment at all. Even though it was regularly admitting substance abusers, Biscayne Milieu also failed to provide meaningful treatment for substance abuse. In short, during the relevant period, Biscayne Milieu operated a patient mill supported by a kickback scheme that ensured an ongoing supply of patients.

The kickback scheme itself was highlighted by the use of what the parties often referred to as the "money sheet." The money sheet included columns for: the patient's name; the physician responsible for admitting the patient into

> the PHP; the initials of the person who referred the patient; and a box for each day of the month. Biscayne Milieu billed Medicare, and paid the recruiter, for each day that had an "X" in the box, which showed that the patient attended therapy that day. Recruiters were paid only for days the patient attended therapy, and they were not paid for any days that the patient was absent.

United States v. Moran, 778 F.3d 942, 950-52 (11th Cir. 2015).

The Eleventh Circuit described Antonio's actions as follows:

> Defendant Antonio Macli was Biscayne Milieu's chief executive officer ("CEO"). He also served as Biscayne Milieu's primary contact with Medicare for purposes of provider certification. Defendant Antonio Macli certified compliance with Medicare rules and regulations despite clear knowledge that Biscayne Milieu's patient inventory had been stocked through the payment of illegal recruiter kickbacks. He also directed these recruiters to expand their efforts, including by recruiting patients from outside the state, and he ensured that recruiters masked the nature of their employment via false case management contracts. Defendant Antonio Macli also instructed recruiters to recruit Haitian patients to attend the PHP, even though such patients did not qualify for PHP treatment.
>
> At trial, former employees of Biscayne Milieu testified to defendant Antonio Macli's control over the operation. Former therapist Nikki Charles testified that Antonio Macli stated that it was "his business" and that he was "in charge," further adding, when disputes arose, that there were "too many chiefs and not enough [I]ndians." Recruiter James Edwards testified that he was hired as a recruiter by Antonio Macli with the explicit understanding that he would be paid $25 per client per day of treatment. Former therapist Manotte Bazile testified that Antonio Macli offered her $1000 in addition to her salary if she would recruit patients from the Haitian community. A government agent testified that Antonio Macli signed the checks on behalf of Biscayne Milieu that went to patient recruiters. And John Jackson, the former clinical director of Biscayne Milieu, testified that Antonio Macli signed the check that was cashed to pay off a patient who threatened to expose the

fraud.

Id. at 952-53.

The government rested its case on August 13, 2012. (CR DE# 790). Prior to the start of the defense case, the Court granted defense motions of judgment of acquittal as to Counts 9, 10, 13, 14, 38, 39, 40, and 42. (CR DE# 798).

The defense case started on August 15, 2012 and concluded on August 20, 2012. (CR DE# 800, 809, 822). After the court conducted a colloquy, none of the three Movants decided to testify in their defense. (CR DE# 1171:199-201). In a Rule 29 hearing conducted following the close of the evidence, the Court granted judgments of acquittal as to Counts 43 and 44, and the government dismissed Count 41. (Id.:210-11).

Closing arguments took place over the course of August 21-22, 2012. (CR DE# 827 & 835). The jury was charged on August 23, 2012. (CR DE# 839). On August 24, 2012, the jury returned a verdict convicting each of the defendants of at least one of the counts charged against them. (CR DE# 845-852 & 854). The jury convicted Antonio of Counts 1, 7, 15-26, and 30-37, and acquitted Antonio of Counts 2-6, 8, 11-12. (CR DE# 845). The jury convicted Jorge of Counts 1, 4, 7, 15-26, 30, 32-33, 35, and 37, and acquitted Jorge of Counts 2-3, 5-6, 8, and 11-12. (CR DE# 846).

The three Movants filed a joint post-trial motion for judgment of acquittal or, alternatively, for new trial. (CR DE# 907). The government filed a consolidated response in which it opposed all the post-trial motions. (CR DE# 1014). The Court denied the motions. (CR DE# 1025).

Prior to sentencing, a PSI was prepared for **Antonio Macli** that revealed as follows. The guideline for a 18 U.S.C. §1347 offense was found in U.S.S.G. §2B1.1 and pursuant to §2B1.1(a)(2), the base offense level was six. (PSI ¶164). Because the loss was more than $7,000,000 but not more than $20,000,000, the offense level was increased by 20 levels, §2B1.1(b)(1)(K). (PSI ¶165). Because the offense was committed through mass-marketing, the offense level was increased by two levels, §2B1.1(b)(2)(A)(ii). (PSI ¶166). Because the offense involved sophisticated means, the offense level was increased by two levels, §2B1.1(b)(9)(C). (PSI ¶167). Because the offense involved the conscious reckless risk of death or bodily injury, the offense level was increased by two levels, §2B1.1(b)(13)(A). (PSI ¶168). Because the defendant knew or should have known that a victim of the offense was a vulnerable victim, the offense level was increased by two levels, §3A1.1(b)(1). (PSI ¶169). Because the offense involved a large number of vulnerable victims, the offense level was increased by an additional two levels, §3A1.1(b)(2). (PSI ¶170). Because the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, the offense level was increased by four levels, §3B1.1(a). (PSI ¶171).

The total offense level was set at 40. (PSI ¶176).

The probation officer next determined that the movant had a total of zero criminal history points and had a criminal history category of I. (PSI ¶179).

Statutorily, as to each of Counts 1, 7, 31 through 37, the term of imprisonment was 0 to 10 years, 18 U.S.C. §§1347 and 1957; as to each Counts 15 through 26, the term of imprisonment was 0 to 5 years, 18 U.S.C. §371 and 42 U.S.C. §1320a-7b(b)(2)(A); as to

Count 30, the term of imprisonment was 0 to 20 years, 18 U.S.C. §1956(a)(1).(PSI ¶225).

Based on a total offense level of 40 and a criminal history category of I, the guideline imprisonment range was 292 to 365 months. (PSI ¶226).

Jorge and Antonio filed objections to the PSI. (CR DE# 1242 & 1245). The government filed a consolidated response to Movants' PSI objections. (CR DE# 1251). Jorge filed a response to the government's reply (CR DE# 1262 & 1263), while Antonio filed a motion for a variance from the advisory sentencing guidelines (CR DE# 1264), and Jorge filed a sentencing memorandum (CR DE# 1266).

On April 5, 2013, the Court held a sentencing hearing as to the Movants. (CR DE# 1270-1272). The Court sentenced Antonio to a total of 360 months' imprisonment as follows: 120 months as to each of Counts 1, 7, 31-37, to run concurrently; and 60 months as to Counts 15 through 26, to run consecutively to the terms imposed on the other counts. (CR DE# 1280 & 1325).

The Court also entered a preliminary order of forfeiture as to all Movants in the form of a money judgment of $5,000,000, and to include their right, title, and interest in five specifically identified bank accounts. (CR DE# 1279). On April 25, 2013, the Court amended the judgments to include restitution orders of $11,481,593.43 for each Movant. (CR DE# 1319 & 1325-1327).

The Movants filed notices of appeal. (CR DE# 1285, 1289 & 1297). Following oral argument, the Eleventh Circuit issued an opinion on February 17, 2015, affirming as to all defendants. See United States v. Moran, 778 F.3d 942 (11th Cir. 2015). According to

the Eleventh Circuit docket sheet, on March 16, 2015, Movant Sandra filed a motion for rehearing on *en banc*, which was joined by Jorge and Antonio Macli. By order dated **May 18, 2015**, the Court of Appeals denied the motion. Petitioner Antonio did not file a petition for certiorari review.[2]

Thus, the judgment of conviction became final on **August 16, 2015**, when the 90-day period for seeking certiorari review with the U.S. Supreme Court expired.[3] See United States v. Gentry, 432 F.3d 600, 604 n. 2 (5th Cir.2005) (noting that federal prisoner's conviction became final ninety days after court of appeals dismissed direct appeal for want of prosecution, when the time for filing for writ of certiorari expired); United States v. Sosa, 364 F.3d 507, 509 (4th Cir.2004) (finding that federal prisoner's conviction became "final," triggering one-year limitations period applicable to § 2255 motion to vacate, ninety days after court of appeals dismissed defendant's direct appeal).

The movant had one year from the time his judgment became final, or no later than **August 16, 2016,**[4] within which to timely

---

[2]Sandra Huarte filed a petition with the Supreme Court for a writ of certiorari, which was denied on October 5, 2015. See Huarte v. United States, 136 S.Ct. 238 (2015).

[3]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007) (conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[4]See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the

file his federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

Movant timely filed this §2255 on **August 12, 2016**, the date he signed his petition.[5] (Cv DE# 1:13). The government correctly does not dispute that the petition filed on July 29, 2016 is untimely. See (Cv DE# 13).

After the government filed a joint response to this court's orders to show cause in connection with both Jorge Macli (16-CV-23421, DE# 13) and Antonio Macli (16-CV-23544, DE# 13), the Undersigned concluded that Petitioners' claims that counsel failed to properly advise them regarding the plea negotiations warranted evidentiary findings. As a result, this Court appointed counsel and

---

"anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

[5]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

set an evidentiary hearing. (16-CV-23544, DE# 22; 16-CV-23421, DE# 22). Jorge and Antonio Macli filed a joint motion to consolidate the evidentiary hearing. (16-CV-23544, DE# 24; 16-CV-23421, DE# 27). This court granted their motions. (16-CV-23544, DE# 26; 16-CV-23421, DE# 29). The movants each filed a pre-trial narrative. (16-CV-23544, DE# 30; 16-CV-23421, DE# 34). The government filed a pre-trial narrative. (16-CV-23544, DE# 31; 16-CV-23421, DE# 35). The hearing took place on June 5 and 6, 2018. (16-CV-23421, DE# 46 & 47, Evidentiary Hearing Transcripts). Following the hearing, the government filed a post-hearing memorandum (Cv DE# 41).

III. Standard of Review

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

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the

applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous").

It should further be noted that the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005). The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. Id.

A. Ineffective Assistance of Counsel Principles

Because the movant asserts in the petition that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. at 689. This two-part standard is also applicable to ineffective-assistance-of-counsel claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985).

Generally, a court first determines whether counsel's

performance fell below an objective standard of reasonableness, and then determines whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Padilla v. Kentucky, ___ U.S. ___, ___, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). In the context of a guilty plea, the first prong of Strickland requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he would have entered a different plea. Hill, 474 U.S. at 56-59. If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1100 (11th Cir. 2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). See also Kelley v. Alabama, 636 F.2d 1082, 1084 (5th Cir. Unit B. 1981); United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1997). Moreover, a criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So.2d 782, 785 (Fla. 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); Iacono v. State, 930 So.2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F.2d

166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

As will be demonstrated in more detail *infra*, the movant is not entitled to vacatur on any of the arguments presented. When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner due process of law. The petitioner therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9 Cir. 1999) (holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10 Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the petitioner's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

IV. Discussion

A. Evidentiary Hearing Claim

In **claim 5**, Antonio asserts that counsel provided inadequate assistance during the plea bargaining negotiations (Cv DE# 1:22). The movant's entire argument under claim 5 is as follows:

> The government offered Mr. Macli a plea bargain that after departures would have likely resulted in a sentence of less than five years. Mr. Macli rejected the plea bargain because he believed he was innocent of the crime as the attorneys explained the elements to him. Mr. Macli still believes his conduct was innocent, but he

> understands that with so broad a legal net a prosecutor may persuade a jury that something is a fraud, even when the perpetrator believes it is not.
> Under that expansive view of the law, Mr. Macli would have been inclined to accept a plea bargain if for no other reason than to save his children and their families the horror of trial and extended incarceration. Counsel's failure to explain the true nature of the charges rendered the not-guilty plea (i.e., the decision to reject the plea bargain) constitutionally, unintelligent and involuntary.

(Cv DE# 1:22).

1. Applicable Law Re Pleas

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

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

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

It is noted, however, that a defendant has no right to be offered a plea, nor is there any federal right for a judge to accept it. Missouri v. Frye, 2012 WL 932020 at *10 (March 21, 2012). Notwithstanding, the Sixth Amendment right to counsel does include effective representation during the plea negotiation process. Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010). A "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'" Padilla, 130 S.Ct. at 1484 (2010) (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)). "Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client...." United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987), overruled on other grounds by United States v. Watson, 866 F.2d 381 (11th Cir. 1989); see Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (stating joint representation of conflicting interests is suspect because it may well preclude defense counsel from exploring possible plea negotiations). Further, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, 2012 WL 932020 at *8. When defense counsel allows an offer to expire without advising the defendant or allowing him to consider it, counsel has provided ineffective

assistance. Id.

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

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

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

Id. at *9; see Lafler v. Cooper, 2012 WL 932019 at *5 (March 21, 2012) (same).

Strickland's inquiry into whether the result of the proceeding would have been different "requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." Id.

Further, counsel has a responsibility to discuss the advantages and disadvantages of the plea offer with movant so that movant could decide whether to accept or reject that offer. Padilla, 130 S.Ct. at 1484 (2010) (a "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'"). Counsel's complete failure to confer with his client about the advantages and disadvantages of a plea offer just before the start of trial is deficient performance. See Padilla, 130 S.Ct. at 1418. However, that does not end the inquiry.

The question then becomes whether movant can demonstrate counsel's deficiency prejudiced him. Movant must demonstrate: (1) there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler, 2012 WL 932019.

2. Evidentiary Hearing Testimony

During the evidentiary hearing, Jorge Macli was represented by Curt David Obront, Esq.; Antonio Macli was represented by Michael Gary Smith, Esq.; and the government was represented by AUSA Michael Scott Davis, Esq. AUSA Davis called Jorge's trial counsel,

Melvin Black, Esq., and Antonio's trial counsel, Rene Sotorrio, Esq., to testify. Mr. Obront called Jorge and Mr. Smith called Antonio as witnesses.

a. Jorge Macli's Testimony

On **direct examination by Mr. Obront**, Jorge testified to the following. Black failed to state whether the evidence was sufficient to convict, failed to tell Jorge that he should plead guilty, and failed to warn Jorge that the chance of a conviction was high. Black presented and explained the state's plea offer to Jorge, who understood the offer as requiring 17.5 years' imprisonment and including a $50 million loss amount. See (Gov't Ex. 4-b, Proposed Plea Agreement). Black also informed Jorge that the offer was a package deal, requiring all three movants to accept. Jorge informed Black that he would serve five years and that the loss amount should be set at $11.4 million. Jorge was aware that his father and sister did not want to accept the plea deal. As a result, Jorge concluded that going to trial was his only option.

The plea agreement included 2 points for sophisticated means and 2 points for sophisticated laundering. Black failed to explain that this was in error as it constituted "double counting."

Jorge also testified that his counsel never informed him of his right to enter an open plea to the charging document.

On **direct-examination by Mr. Smith**, Jorge testified to the following. During the pre-trial period, Jorge met with his father, sister, and their defense attorneys on several occasions. His father's attorney, Rene Sotorrio, only attended ten percent of these meetings. Jorge never discussed the plea agreement with his father. He never witnessed Sotorrio discussing the agreement or

sentencing guidelines with Antonio.

On **cross-examination by the AUSA**, Jorge testified to the following. In 2011 and 2012, Jorge believed he was innocent. He did not enter an open plea because Black failed to inform him of this option. Jorge testified several times he would only have entered a guilty plea if "the guidelines were correct." Jorge asked Black about pleading no contest because he believed he was innocent.

The AUSA turned to the discussions between Black and Jorge prior to rejecting the plea offer. Jorge received reports of FBI interviews with witnesses who were going to testify against him at trial. Black did not review the reports with Jorge. Jorge conceded that Black reviewed the plea offer with him, but he responded that he did not remember the details of what Black said during these discussions. Jorge informed Black at the time that he was willing to serve approximately five years. He met with Black a couple times a month, but was unwilling to testify that he was getting enough attention from Black. Although Black did discuss some of the specific evidence with Jorge, he did not warn Jorge that the evidence was strong enough to convict.

b. Antonio Macli's Testimony

On **direct-examination by Mr. Smith**, Antonio testified to the following. Rene Sotorrio represented him and met with Antonio six or seven times. He does not remember Sotorrio being present at the group meetings with his children and their lawyers. Sotorrio failed to review the government's evidence in detail, send him evidence at the jail to review, review the indictment, explain the theory of vicarious liability, explain the elements of conspiracy and/or agency, review sentencing guidelines, bring him a sentencing guidelines book, and/or review the written plea offer. His lawyer did not tell him the evidence was overwhelming and that he should

enter a guilty plea. He had no idea he was facing 30 years' imprisonment.

Antonio did not read the plea offer but learned the details in his meetings with his children and their lawyers. Antonio understood that the offer was made to all three of them and it included a ten-year sentence for him and required cooperation in the form of testifying against co-defendant Dr. Kushner. In testifying to his response to the plea offer, Antonio stated, it "**really upset me and I said no. No way.**" (Cv DE# 46, Evidentiary Hearing Transcript, p. 66). Antonio never had any conversations with his lawyer about resolving the case without a trial.

Sotorrio did not tell him about the option to enter an open plea. Had he known that he could be criminally responsible for the actions of his co-defendants, he would have plead guilty.

On **cross-examination by the AUSA**, Antonio testified to the following. Had he known it was the law that he was responsible for an employee's mistake, he would have pled guilty. However, when the AUSA asked, "When you went to trial, were you guilty?" Antonio answered, "**Not at all.**" (Cv DE# 46:72). Antonio did not known if the verdict was incorrect, but he did know that he had done honest work for sixteen uninterrupted years. He conceded that he was prosecuted for events that took place at Biscayne Milieu, but stressed that everything he did there was honest, with some mistakes or human errors.

Antonio was aware that many of his former employees had entered pleas and would testify against him at trial. The main government witness, John Jackson, clearly lied throughout his testimony. Many of the other witnesses lied as well.

On **redirect-examination by Mr. Smith**, Antonio testified to the

following. He completed high school and was a technician in the Argentinian Air Force. His lawyer never explained any of the evidence to him prior to trial. As a result, he believed he was innocent. Had he understood the law, he would have plead guilty.

c. Melvin Black's Testimony

On **direct-examination by the AUSA**, Melvin Black testified to the following. He is a criminal defense attorney who went to University of Miami Law School and graduated in 1969. He entered the Volunteers in Service to America and served in the Ozarks for about eight months, then worked for legal services of Greater Miami for two years. He joined the Dade County Public Defender's Office in 1973. In 1976, he went into private practice where he has worked ever since. His concentration is trial work in both state and federal court. He has represented clients in countless jury trials, however, many cases ended with a plea agreement.

Black was contracted to represent Jorge the day after his arrest in September of 2011. Bruce Alter represented Sandra and Rene Sotorrio represented Antonio. All three lawyers were hired at the same time and worked the cases through sentencing. The lawyers had an informal joint defense agreement which permitted them to communicate with each others' clients.

During the pre-trial detention hearing, the AUSA stated on the record that each movant was facing 25 to 30 years' imprisonment. All three movants were present at this hearing.

Black received extensive discovery from the AUSAs including FBI cooperating witness forms (302s), a lengthy inventory form search warrant and affidavit, 240 boxes full of evidence and documents seized during the search of Biscayne Milieu's headquarters and clinic, CDs with scanned documents, and two audio

recordings made by undercover officers. Black gave Jorge the cooperating witness statements so he understood what kind of testimony would likely be introduced at a trial.

Black met with Jorge nineteen times between his arrest and when the government extended the plea offer. Black kept detailed hand-written notes regarding his meetings with Jorge and the other movants in this case. The AUSA introduced many of these notes at the evidentiary hearing.

Black first met with Jorge alone the day after the detention hearing. (Gov't Ex. 2d, Black's Notes re: 9/15/11 Meeting with Jorge Macli). Jorge indicated a desire to see what the government wanted from him. Black explained that there was a rage in the community regarding Medicare fraud and the government wanted him to serve a long sentence. Black explained the only way to reduce his sentence was to provide cooperation and seek a Rule 35 reduction after sentencing. Upon hearing this, Jorge shook his head no.

In late September or early October of 2011, Black met with AUSAs Alicia Shick and Michael Davis to discuss a potential plea offer. Black informed them that the movants were concerned Antonio's wife, Wilma, would be indicted and also felt Antonio would not survive prison. Shick stated she was open to giving Antonio a ten-year sentence, with cooperation. Davis stated the movants had to make a proffer and give meaningful substantial assistance to the government.

Black met with Jorge after his meeting with the AUSAs and took hand-written notes. (Gov't Ex. 2f). Black asked if Jorge was willing to serve ten years. According to Black's testimony and his written notes, **Jorge stated he would not accept ten years even if it meant his mother, father, and sister went free.** (Gov't Ex. 2f).

Black spoke with Sotorrio following the latter's conversation with Shick. According to Sotorrio, Shick stated the government was open to allowing Antonio to serve little to no time if his children took full responsibility for the activities at Biscayne Milieu. (Gov't Ex. 2g).

During a meeting between Black and Jorge in lock-up following a December 6, 2011 status hearing, Jorge asked if he could plead guilty to one kick-back charge and serve five years' imprisonment. Jorge stated he would not accept a plea deal that included more than five years in prison. (Gov't Ex. 3b).

Jorge asked about entering a no contest plea on November 10, 2011 and December 6, 2011. (Gov't Ex. 2h, 3b). Black explained the government would not allow it, but Judge Scola might. (Gov't Ex. 2h).

AUSA Shick sent Black a written plea agreement for the movants to sign. It included a ten-year sentence for Antonio (Gov't Ex. 4c), a seventeen-year sentence for Jorge (Gov't Ex. 4a), and a twelve-year sentence for Sandra (Gov't Ex. 4d). The sentences could be reduced with cooperation. (Gov't Ex. 4a). The aggregate statutory maximum according to the plea offer made to Jorge was thirty-five years. (Gov't Ex. 4a, ¶4). The agreement included standard cooperation language. (Gov't Ex. 4a, ¶7). The agreement noted that Biscayne Milieu had billed $50 million and received $11 million from the government. (Gov't Ex. 4a). It also included an enhancement for sophisticated means and sophisticated laundering. (Gov't Ex. 4a).

Shick emailed Black the plea agreement on February 3, 2012. Black met with Jorge on February 5, 2012 to discuss the offer and took four pages of hand-written notes. (Gov't Ex. 6a). Jorge wanted to meet with Shick to explain he was innocent. Black explained the risk of talking to Shick as she was in contact with former

employees who were cooperating. Jorge refused to accept a plea offer which allowed for a thirty-five-year sentence. He said he wanted to make a counter offer, but did not explain further. Jorge explained that his cooperation with the AUSA would consist of discussing other healthcare clinics. He stressed that Biscayne Milieu did not get kickbacks. Jorge said he wanted to evaluate the evidence and speak with his father and sister. Black explained that there was not time to review all 240 boxes prior to the plea acceptance deadline, and told Jorge that he needed to be honest with himself about what he knew went on at Biscayne Milieu.

On February 13, 2012, Black met with Jorge, Antonia, Sotorrio, Sandra, and her lawyer, Bruce Alter. Black took handwritten notes. (Gov't Ex. 6c). Jorge stated he would not testify against Dr. Kushner, which Black felt would be necessary to constitute substantial assistance. The lawyers explained the offer was a group plea offer and if any one of them refused to accept, the entire offer would be revoked. Black suggested he counter with a request that the government dismiss one count, which would cap the sentence exposure at twenty years, rather than thirty-five years. Antonio refused to accept any plea offer, stating he was innocent. Jorge said he would plead guilty to no more than five years.

Jorge and Antonio were aware that the government had flipped thirteen witnesses who would testify at trial. Black explained that the jury is instructed that a flipped witness has accepted a plea, however, with so many witnesses there could be a cumulative impact that juries rarely ignore. Jorge and Antonio countered that all the witnesses were liars. Black also reminded them that the government had audio recordings of their criminal activities with undercover officers. Jorge, Antonio, and Sandra left briefly to discuss the situation. When they returned, they informed the lawyers that they all wanted to proceed to trial. Jorge seemed morose.

Black met with the three movants again on February 15, 2012,

and took handwritten notes. (Gov't Ex. 6e). Black explained the penalty would be much higher after trial, as they could get an obstruction of justice enhancement and no relief under Rule 35. Black reviewed some additional evidence and had a long conversation with the movants about the kickbacks. Black asked Jorge directly about making the counter offer to drop one count and cap the sentence exposure at twenty years. Jorge refused this plan, but gave Black permission to counter with a five-year sentence. Black relayed this counter offer to Shick, who rejected it. The following day, the movants met with Black again and he informed them that Shick had rejected the five-year counter offer. They did not react, but said they wanted to focus on the trial. No subsequent plea offers were made.

On June 26, 2012, movants' co-defendant, Curtis Gates, entered a plea. Following the change of plea hearing, Black ran into Shick and learned she had given Dr. Kushner and Curtis Gates five-year plea deals. Black asked Shick if there was anything she could do for Jorge. She reiterated that it was a package plea offer to all three movants.

Subsequently, Black learned from Sotorrio that Antonio refused a last minute plea deal as he was not interested in pleading guilty under any circumstances. On June 29, 2012, Black met with Jorge and Sandra. He explained his brief discussion with Shick as well as Antonio's refusal to enter any guilty plea. Jorge seemed resigned to the fact that he was going to trial. Black again explained the strength of the evidence and stated it would be a very tough case. Jorge looked shaken but did not express a desire to enter a plea. Black took hand-written notes about the meeting. (Gov't Ex. 7c). Several days later, the trial took place.

Black provided the following testimony during **cross-examination by Mr. Obront**, Black agreed that the government's offer

incorrectly included an enhancement for both sophisticated means and sophisticated laundering. Black believed both enhancements would not have withstood scrutiny by the probation officer or sentencing judge. At the time of the offer, Black was aware of the dispute regarding the amount billed versus amount collected. He viewed the offer as the government putting forth its belief that the amount was $50 million but that he would have been able to challenge the amount at sentencing.

Black had no recollection of discussing an open plea with Jorge. If Jorge entered an open plea, there would have been drawbacks. Black conceded that Jorge would have been allowed to appeal following an open plea.

During **cross-examination by Mr. Smith**, Black provided as follows. Black did not consult directly one on one with Antonio. Black could not recall how often Sotorrio was at the group meetings. Antonio insisted that he was innocent. Black did not recall discussing vicarious liability or agency law with Antonio.

d. Rene Sotorrio's Testimony

During **direct examination by the government**, Sotorrio testified to the following. He attended Georgetown law, has been licensed to practice in Florida since 1977, and has been a criminal defense attorney since 1978. He is also licensed in New Jersey.

Sotorrio received ample discovery from the government, including many FBI 302 reports. He explained to Antonio the charges, the elements of the crimes, the government's evidence, and how it applied to the charges. He primarily communicated with Antonio in Spanish. Antonio consistently denied culpability. He claimed all the government's witnesses were liars, hoping to get a benefit from the AUSA.

Sotorrio received the plea agreement via email. He reviewed the agreement with Antonio, discussing the plea's terms and potential consequences. Sotorrio explained that the government had substantial evidence and warned Antonio that because of his advanced age, he could die in prison. Sotorrio explained that the plea deal could lead to a sentence which would not force him to accept what would amount to a life sentence following a trial. Antonio's response was that he never committed any crimes and would not plead guilty. At one point, Antonio said the only appropriate outcome was that the case be dismissed and the government return all the money seized. He also wanted a letter of apology from the government officials. After he was convicted at trial, he continued to insist that he was innocent.

During **cross-examination by Mr. Smith,** Sotorrio explained that he reviewed with Antonio the various theories which would make him culpable for the actions of others. Whenever Sotorrio would expand on these theories, Antonio would respond by stating that he was not guilty and did nothing wrong.

Sotorrio explained the sentencing guidelines and how they would apply with or without proceeding to trial. Sotorrio showed Antonio the guideline table and went over the enhancements. He stressed to Antonio that if he entered a plea he could get ten years or less but if he went to trial, he was facing thirty years in prison.

3. Discussion

After careful consideration of the testimony of **Antonio** in the context of this case and close observation of his demeanor, as well as careful attention to and review of the testimony of Antonio's defense counsel **Sotorrio** and taking into account the respective interests of the parties in the outcome of this proceeding, the

Undersigned finds Antonio's testimony equivocal, inconsistent, and disingenuous. The Undersigned therefore rejects Antonio's testimony insofar as it relates to any discussions with counsel about pleading guilty versus proceeding to trial, as well as, any purported misadvice regarding acceptance of the government's plea offer. Furthermore, the Undersigned finds Sotorrio's testimony regarding his discussions with Antonio credible. The Undersigned did not find **Jorge's** testimony credible, but believed the testimony provided by Jorge's trial counsel, **Black**, which was supported by Black's hand-written notes made at the time of his pre-trial meetings with the movants.

Here, Antonio is not arguing that his counsel failed to inform him of a plea offer, but instead, that his counsel failed to fully explain the risks of going to trial versus accepting the plea agreement. The Undersigned rejects movant's testimony that Sotorrio failed to explain to him that he could be found guilty based on the actions of others. Sotorrio provided credible testimony that he specifically explained the various agency and vicarious liability theories to Antonio, in Spanish. It appears that Sotorrio simply did not get through to Antonio, who was completely convinced he had done nothing wrong. According to Sotorrio, Antonio went so far as to insist that the government should drop all charges, return all of his money, and issue a formal apology.

Sotorrio's testimony that Antonio consistently denied culpability is supported by Antonio's own testimony at the evidentiary hearing. Antonio testified that when he heard about the government's ten-year plea offer, it "really upset" him and he "said no, no way." When the AUSA asked, "When you went to trial, were you guilty?" Antonio answered, "Not at all." Antonio continued to maintain his innocence at the evidentiary hearing, testifying that he had done honest work for sixteen uninterrupted years at Biscayne Milieu. He conceded that he was prosecuted for events that

took place at Biscayne Milieu, but stressed that everything he did there was honest, with some mistakes or human errors. The evidence which the Undersigned found credible established that Antonio would not admit guilt back in 2011 or at the recent evidentiary hearing. Even assuming that Sotorrio failed to effectively advise Antonio regarding the plea offer, Antonio's claim that he would have accepted the plea but for counsel's ineffective assistance is not credible.

In conclusion, the court rejects Antonio's self-serving, disingenuous testimony that, but for counsel's alleged misadvice, the movant would have accepted a plea offer. To the contrary, the Undersigned finds movant did not want to accept any plea offer from the government. The Undersigned finds movant has not demonstrated that his attorney was deficient, much less that he was prejudiced as to the advice provided by him regarding accepting a plea offer, pleading guilty, or proceeding to trial. He is thus entitled to no relief on this basis.

Briefly turning to the package deal aspect of the government's offer, namely, that all three movants had to accept the deal. The evidence which the Undersigned found credible at the evidentiary hearing established that Antonio had no intention of accepting the plea offer made by the government, regardless of whether his son and daughter wanted to enter the plea agreement. As a result, the package deal aspect is not relevant or dispositive to the Undersigned's conclusions.

4. Open/Alford Plea

That, however, does not end the issue before this court. Antonio argues that his counsel was deficient for failing to advise him that he could plead guilty to the charges in open court without being constrained by the government's plea offer, which required

his children's acceptance as well. However, even if, as movant suggests, he would have been amenable to a plea of convenience, the court rejects this claim as disingenuous. The evidence which the Undersigned finds credible shows that Antonio was not willing to admit his guilt in 2011 or at the recent evidentiary hearing.

The law is clear that when a defendant attempts to plead guilty, while protesting his innocence, a trial judge may accept the plea if the defendant clearly indicates his desire to plead guilty, and a strong factual basis for the plea exists. United States v. Dykes, 244 Fed.Appx. 296, 297-298, 2007 WL 1953538, 1 (11th Cir. 2007), quoting, North Carolina v. Alford, 400 U.S. 25, 31-32, 38 (1970)[6]; United States v. Gamboa, 166 F.3d 1327, 1331 n.4 (11th Cir. 1999)(stating that "[a] court cannot accept a guilty plea unless it is satisfied that the conduct to which the defendant admits constitutes the offense charged"). It is well-settled, however, that a defendant has no absolute right under the United States Constitution or under Fed.R.Cr.P. 11 to have his guilty plea accepted by the court. United States v. Gomez-Gomez, 822 F.2d 1008, 1010 (11th Cir. 1987); Santobello v. New York, 404 U.S. 257, 262 (1971); North Carolina v. Alford, 400 U.S. 25, 38 n. 11 (1970). When a defendant attempts to couple a guilty plea with an assertion of facts that would negate his guilt, a judge may properly treat this assertion as a protestation of innocence. United States v. Gomez-Gomez, 822 F.2d at 1011. In Gomez, the Eleventh Circuit concluded that when a defendant casts doubts upon the validity of his guilty plea by protesting his innocence or by making exculpatory statements, the court may resolve such doubts against acceptance of the plea. Id. at 1011.

---

[6]In Alford, the Supreme Court concluded that a district court does not err by accepting a guilty plea that is accompanied by the defendant's assertion of innocence when the defendant concludes that a guilty plea is in his best interest and there is strong evidence of guilt. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

As is evident from review of the record in the underlying criminal case, as well as the credible evidence introduced at the evidentiary hearing, the Undersigned concludes that the movant would not have admitted his guilt to the charged offenses in open court, rather than proceeding to trial. There is no objective evidence, other than the movant's self-serving representations in his §2255 filings and then initially during his testimony, that he ever intended to plead guilty. Antonio said on cross-examination at the evidentiary hearing that he was "not at all" guilty when he went to trial. Even faced with a guilty verdict, he continued to insist that he had done honest work for sixteen years at Biscayne Milieu. It is clear he would not have been willing to admit guilt to the charges in open court.

Therefore, the Undersigned finds movant would have been unable to accept full responsibility for his relevant conduct. Thus, the Undersigned rejects the movant's position that but for counsel's alleged misadvice regarding the strength of the government's case, movant would have entered an open plea to the court. The Undersigned further finds it is pure speculation whether or not on the record here, even if the court had accepted the plea of convenience, the court would have given movant an adjustment for acceptance of responsibility. In pleading guilty, the movant's conduct at a Rule 11 proceeding would be weighed against conduct that is inconsistent with acceptance of responsibility.

Even if he had been advised by counsel that he could plead guilty to the charges prior to or during trial, no showing has been made that the court would have accepted such a plea. Even if the court could have accepted the movant's Alford plea, it was not required to do so and it was within its discretion to interpret the movant's statements as a claim of innocence. Consequently, the movant has shown neither deficient performance nor prejudice arising from counsel's failure to advise the movant regarding pleading guilty or proceeding to trial. He is thus entitled to no

relief on this claim. Strickland v. Washington, 466 U.S. 668 (1984); Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

While a defendant's protestations of innocence before and after trial do not, in and of themselves, prove that a defendant would not have accepted a guilty plea if properly advised, see Lalani v. United States, 315 Fed.Appx. 858, 2009 WL 465989 (11 Cir. 2009), *citing*, Griffin v. United States, 330 F.3d 733, 738 (6 Cir. 2003), it is important to note that the movant steadfastly maintained his innocence as to his involvement in the charged criminal activities. He rejected the idea of accepting any plea offer, insisting that the government drop the charges, return the seized funds, and apologize.

The movant's postconviction assertion that he would have pled guilty is not believable. Now serving a severe sentence, the movant has "buyer's remorse," wanting to go back in time and accept responsibility in the hopes of obtaining a lesser sentence. But his actions before trial and his refusal to admit guilt clearly demonstrate that he would not have pled guilty nor would he have admitted guilt in a change of plea proceeding. The movant decided to take his chances at trial in hopes of an acquittal and lost. The movant's claim that he would have pled guilty as charged is therefore rejected.

Accordingly, his after the fact assertions concerning his desire to plead to guilty are insufficient to establish prejudice under the Strickland standard. See Diaz, 930 F.2d at 835 ("[A]fter the fact testimony concerning [the] desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, [the defendant] would have accepted the plea offer."). See also Doe v. United States, 2010 WL 1737606, *6-7 (S.D.Ga.2010); Scott v. United States, 325 Fed.Appx. 822, 825, 2009 WL 1143179, *2 (11 Cir. 2009).

Consequently, for this alternative basis, the movant cannot satisfy Strickland's prejudice prong, as interpreted by the Supreme Court, and is thus entitled to no relief on this claim. See Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991)("[A]fter the fact testimony concerning [the] desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, [the defendant] would have accepted the plea offer."). See also Doe v. United States, 2010 WL 1737606, *6-7 (S.D.Ga.2010); Scott v. United States, 325 Fed.Appx. 822, 825, 2009 WL 1143179, *2 (11 Cir. 2009). In conclusion, the movant has failed to demonstrate either deficient performance or prejudice pursuant to Strickland, and is therefore entitled to no relief on claim 5.

B. Remaining Claims Re Ineffectiveness of Counsel

Under **claim 1**, Petitioner alleges counsel misapprehended the governing law and how it applied to the evidence, resulting in a futile defense strategy. (Cv DE# 1:14-15). The movant argues that counsel should have pursued a defense that he sincerely, if mistakenly, believed his conduct was legal. In support of this, defense counsel should have presented evidence that the practices that were allegedly fraudulent were actually sound business practices in any environment other than highly regulated industries like government subsidized health care. (Id.).

In the movant's reply to the government's response, the movant argues that counsel did not consider or explain Bradley v. United States, 644 F.3d 1213 (11th Cir. 2011). The movant provides little in the way of explanation of how Bradley applies to the instant case, however it appears that he is arguing that the method of compensating patient-recruiters has been found to be illegal. A reading of Bradley does not reveal any such finding.

The flaw in the movant's argument is that counsel did pursue

a good faith defense along with a defense that the movant had no knowledge of or did not participate in the fraud. Counsel also argued that the voluminous and confusing Medicare rules led to innocent mistakes as the defendants were unaware that they violated the Medicare rules. Counsel conceded that some mistakes in billing may have been made, but argued that this was a violation of the rules of Medicare, not proof of a conspiracy to defraud. Counsel argued that Biscayne Milieu was a legitimate PHP that provided services to qualified individuals.

The jury was instructed that good faith is a complete defense to health care fraud charges. As part of that instruction, the jury was advised that the movant did not need to prove good faith, because the government was required to establish that Petitioner acted with specific intent to defraud. This instruction complemented counsel's arguments to the jury. However, despite counsel's best efforts, the jury ultimately rejected these arguments. Counsel's pursuit of a good faith defense was not based on a misapprehension of the law and does not constitute deficient performance.

The petitioner's argument that counsel should have presented evidence that it was a proper business practice to tie compensation to performance is apparently directed to the charge of conspiracy to pay and receive kickbacks. While the movant may be correct that in an ordinary business, paying based on performance is acceptable, the Medicare rules forbid such a practice. See 42 U.S.C. §1320a-7b(b)(2)(A). Thus, any evidence about general business practices would have been irrelevant with regard to the kickbacks paid in this case. Even if such evidence had been presented, the outcome at trial was unlikely to be different and the petitioner cannot establish prejudice under Strickland.

Under **claim 2**, Petitioner alleges the government violated due

process of law and its duty to ensure a fair trial when it engaged in pretrial discovery tactics designed to surreptitiously discover the defense strategy. (Cv DE# 1:16). Petitioner points to the proceedings against a co-conspirator, Dr. Salo Shapiro, where he alleged the government process for providing discovery allowed them to "sneak a peak" at what defense counsel was using as evidence to build its case. Petitioner contends that the government engaged in similar tactics in his case.

This claim is pure speculation. The movant's claim that the government was able to discern his trial strategy and tactics relies on the fact that government inadvertently received CDs containing a duplicate of the evidence copied by defense counsel in a case involving a co-conspirator, Dr. Shapiro. There is no specific allegation that the same occurred in the instant case.

The government in its response has provided correspondence between it and defense counsel. (CV-DE# 13-4 through 13-7). The correspondence reflects that the copying of discovery material was a cooperative endeavor between the parties. The correspondence further reflects that at least one defense attorney used a personal scanner in reviewing and copying documents for the hundreds of boxes of files. Thus, the movant's claim that the same discovery procedure utilized in the Shapiro case was utilized here is unwarranted.

Even if the same discovery process was utilized, the movant has not identified how he was prejudiced. The movant merely alleges in conclusory fashion that the process of copying exhibits that was allegedly utilized violates due process. There is no allegation of what documents the government may have viewed or how such an alleged viewing may have provided the government an unfair advantage that violated due process. In the absence of any such concrete allegations, the movant's claim is nothing more than conclusory speculation. Tejada v. Dugger, 941 F.2d 1551, 1559 (11th

Cir.1991) ("A petitioner is not entitled to an evidentiary hearing ... when his claims are merely conclusory allegations unsupported by specifics ...." (internal quotations and citations omitted)); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir.1990) (en banc) ("The petitioner will not be entitled to an evidentiary hearing when his claims are merely 'conclusory allegations unsupported by specifics' ...." (quoting Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977))); United States v. Jones, 614 F.2d 80, 82 (5th Cir.1980) ("When claims for habeas relief are based on unsupported generalizations, a hearing is not required." (internal quotations and citations omitted)); Scott v. United States, 598 F.2d 392, 393 (5th Cir.1979) ("Contrary to [the movant's] assertions, ... the right to a hearing is not established simply by filing a petition under 28 U.S.C. §2255. When claims for habeas relief are based on unsupported generalizations, a hearing is not required."). Because the movant has failed to establish either misconduct by the government or prejudice, this claim should be denied.

Under **claim 3**, Petitioner alleges the government knowingly presented unreliable and false testimony in violation of due process. (Cv DE# 1:17-19). Petitioner alleges that John Jackson's testimony that he learned of improprieties at another clinic through the news was false. This claim is based on the allegation that Jackson testified that he learned of improprieties in June of 2010 when he was terminated from Biscayne Milieu while the news coverage of the other clinic did not occur until the fall of 2010. The movant is essentially presenting a Giglio[7] claim.

The Supreme Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair. Pyle v. Kansas, 317 U.S. 213 (1942).; Alcorta v. Texas, 355 U.S. 28 78 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Miller

[7]Giglio v. United States, 405 U.S. 150 (1972).

v. Pate, 386 U.S. 1 (1967); Giglio v. United States, 405 U.S. 150 (1972); Donnelly v. DeChristoforo, 416 U.S. 637 (1974). To be entitled to relief, the government must have knowingly used false evidence and that evidence must have been material. Tejada v. Dugger, 941 F.2d 1551, 1556 (11th Cir.1991) ; Jacobs v. Singletary, 952 F.2d 1282, 1287 n. 3 (11th Cir.1992). "In the absence of a showing that the prosecution knowingly and intentionally used material, perjured testimony to obtain a conviction, appellant is entitled to no post-conviction relief even where testimony is perjured." Elliott v. Beto, 474 F.2d 856 (5th Cir.1973) cert. denied, 411 U.S. 985 (1973), (citing Jackson v. United States,, 384 F.2d 375, 375-376 (5th Cir. 1967). "In order to prevail on a Giglio claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir.1999). "As far as Giglio materiality is concerned, the clearly established law of the Supreme Court is simply that reversal of a conviction is required when 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Ventura v. Attorney Gen., Fla., 419 F.3d 1269, 1279 (11th Cir. 2005)

In the instant case, the movant cannot establish either that the prosecutor knowingly presented perjured testimony or that the testimony was material. The complained of testimony was presented during the course of a lengthy direct and cross-examination of John Jackson. John Jackson was one of the "case managers" who directed patients to Biscayne Milieu. He was ultimately fired in June of 2010. He testified that he was fired because Antonio Macli did not want to expose Biscayne Milieu to the problems that American Therapeutic, a different PHP, was encountering. Jackson testified that he knew this other PHP was under investigation based on what he had read and seen on the news. However, at the time Jackson was fired, there had not yet been any news reports of the problems at American Therapeutic. A review of Jackson's testimony in this

regards shows the he volunteered that he was aware of the problems through the news media in response to a question asking "what sort of problems were you aware of that were involving American Therapeutic at the time." Jackson responded, "From what I heard in the newspaper and on TV . . ." (CR DE# 1150:145). One of the defense attorneys objected to this response, resulting in a sidebar conference.

At sidebar, the government explained that the testimony was relevant to show that Biscayne Milieu was aware of other federal investigations and was taking steps to insulate Biscayne Milieu from prosecution. The court permitted a colloquy outside the presence of the jury where the following occurred:

Prosecutor: When Antonio Macli told you that these steps had to be taken in response to what was happening at American Therapeutic, what did you understand him to be referring to?

Jackson: Meaning that I could not be paying patients for the treatment of services.

Prosecutor: What did you understand him to be referring to when he discussed American Therapeutic?

Jackson: That the facility could be under investigation and we could go to jail.

The court asked its own questions of Jackson as follows:

Court: Did Antonio Macli ever say anything more other than mentioning the name American Therapeutic?

Jackson: That is all. He just said we could not do this you know, anymore, and he said, JJ, I have to let you go.

Court: Did he say, I have read about American Therapeutic, or you just had read about

American Therapeutic?

Jackson: No, we had talked about American Therapeutic. He said you know American Therapeutic right now is under a lot of - you know, they are having a lot of problems and I understood that from what I had read in the newspaper and what I saw on TV.

Court: That?

Jackson: That they were under investigation.

Court: And they are another PHP?

Jackson: Yes, sir.

Court: So Mr. Antonio Macli acknowledged to you that he was aware that American Therapeutic was under some kind of investigation?

Jackson: Yes, sir.

The court found that the prosecutor could question Jackson in a similar manner before the jury. After the sidebar, the prosecutor continued his questioning of Jackson as follows:

Prosecutor: Going back to the discussion that you had with Antonio Macli in which he mentioned American Therapeutic, from that discussion, did you have the understanding that American Therapeutic was under investigation?

Jackson: Yes, sir, based on what I had read and saw on TV.

Later, Jackson testified that he had a number of conversations with Antonio Macli in which they discussed that Jackson had been paying patients to attend Biscayne Milieu. (CR-DE# 1150:155).

The allegedly perjured testimony was not elicited by the

government. The prosecutor asked Jackson if he understood from Antonio that American Therapeutic was under investigation. Rather than simply saying yes, Jackson interjected that he had heard about American Therapeutic in the news. Jackson's testimony about learning about American Therapeutic through news media was not responsive to the government's questioning as his answer exceeded the scope of the question asked and was not elicited by the government.

It must be remembered that the trial occurred in 2011 and the events about which Jackson testified occurred in June 2010. Both parties have acknowledged that during the intervening time there were news reports of the investigation and prosecution of American Therapeutic.[8] It is reasonably likely that rather than perjury, Jackson's testimony reflected his memory of his conversation with Antonio and his memory of reading of American Therapeutic in news reports. In any event, the gist of the testimony was that Antonio had discussed problems at American Therapeutic as a reason why he had to let Jackson go.[9] The mistaken testimony about the timing of the news reports was not material.

As noted above, false testimony warrants reversal of a conviction only if there is a reasonable likelihood that it affected the judgment of the jury. Here, there has been no such showing. Jackson's testimony spans over 700 pages of transcripts. In total, the trial spans over 25 volumes of transcripts and was conducted over 19 days. There was no further mention of Jackson's testimony about learning of the American Therapeutic investigation

---

[8]The government has attached a copy of a Miami Herald report published on October 21, 2010 announcing the arrests in the American Therapeutic case.

[9]The government notes that there was a civil action against American Therapeutic involving similar medicare fraud claims that had been pending since 2007 in case number 04-20255-CV-COHN. The civil complaint in that case was unsealed on September 26, 2007. The government contends that it is not unreasonable to assume the civil action against another PHP was known to others in the industry.

from the news media or that the investigation of American Therapeutic precipitated Jackson's firing. Rather, during closing argument the government referred to a document that indicated that the movant, his sister, and father were aware of the FBI investigation prior to the firing of Jackson. The government argued that Jackson, and other recruiters, were fired in an attempt to conceal that the movant and his family were aware of the kickbacks being paid by those recruiters. In short, there was sufficient additional evidence to support the government's argument in this regard. There is no reasonable likelihood that Jackson's testimony affected the judgment of the jury. This claim should be denied.

Under **claim 4**, Petitioner alleges federal fraud statutes are unconstitutionally vague and as applied constitute a bill of attainder or an *ex post facto* law. (Cv DE# 1:20-21). Petitioner argues that the legislative decision to allow the courts to define "scheme to defraud" constitutes a violation of the separation of powers doctrine in that it delegates legislative authority to the courts. He argues that allowing creation of legal duties by the court violates the Constitution's prohibition against bills of attainder and *ex post facto* laws.

The movant's claim is procedurally barred as it was not raised on direct appeal. See United States v. Moran, 778 F.3d 942 (11th Cir. 2015). Nothing prohibited the movant's challenge to the constitutionality of the health care fraud statute on direct appeal. The movant has provided no argument explaining the cause for failing to raise this claim on direct appeal. In the absence of the showing of both cause and prejudice, a claim, including a constitutional claim, that could have been raised on direct appeal is barred from presentation in a §2255 motion proceeding. See Lynn v. United States, 365 F.3d 1225, 1234 (11th Cir. 2004) ("Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct

appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding."). Petitioner is not entitled to relief under claim 4.

Finally, it should further be noted that this court has considered all of the movant's arguments raised in his §2255 motion. (Cv-DE#1). See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). This Court is mindful of the Clisby[10] rule that requires district courts to address and resolve all claims raised in habeas proceedings, regardless of whether relief is granted or denied. Clisby, 960 F.2d at 935-36 (involving a 28 U.S.C. §2254 petition filed by a state prisoner); see Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (holding that Clisby applies to §2255 proceedings). However, nothing in Clisby requires, much less suggests, consideration of claims or arguments raised for the first time in objections. Therefore, to the extent the movant attempts to raise arguments or new claims in objections to this Report, the court should exercise its discretion and refuse to consider the arguments not raised before the magistrate judge in the first instance.[11]

V. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the

---

[10]Clisby v. Jones, 960 F.2d 925, 936 (11th Cir.1992).

[11]The petitioner is cautioned that any attempt to provide due diligence in objections to this Report may not be considered in the first instance by the district court. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

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

VI. Conclusion

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

case closed.

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

Signed this 5th day of November, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Antonio Macli
Reg. No. 97278-004
Butner Medium I
Federal Correctional Institution
Inmate Mail/Parcels
Post Office Box 1000
Butner, NC 27509

Michael Gary Smith
Michael Gary Smith
633 South Andrews Avenue
Suite 500
Fort Lauderdale, FL 33301
954-761-7201
Fax: 764-2443
Email: smithlawdefend@aol.com

Michael Scott Davis
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
305-961-9027
Fax: 305-530-6168
Email: Michael.Davis2@usdoj.gov

APPENDIX "C"
Extension of Time from this Court

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 11, 2019

Mr. Antonio Macli
Prisoner ID 97278-004
Low Security Correctional Institution
P.O. Box 999
Butner, NC 27509

Re: Antonio Macli
v. United States
Application No. 19A397

Dear Mr. Macli:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on October 11, 2019, extended the time to and including December 16, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

APPENDIX "D"
Mr. Macli's § 2255 Motion

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Southern District of Florida
Name (under which you were convicted): Antonio Macli	Docket or Case No.:
Place of Confinement: Butner Medium	Prisoner No.: 97278-004
UNITED STATES OF AMERICA v. Antonio Macli	Movant (include name under which you were convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

   United States District Court
   Southern District of Florida

   (b) Criminal docket or case number (if you know): 1:11-cr-20587-SCOLA

2. (a) Date of the judgment of conviction (if you know): 4/5/2013

   (b) Date of sentencing: 4/5/2013

3. Length of sentence: 360 Months

4. Nature of crime (all counts): **Ct. 1** - Conspiracy to commit health care fraud - 18 U.S.C. § 1349; **Ct. 7** - Health care fraud - 18 U.S.C. § 1347; **Ct. 15** - Conspiracy to receive and pay health care kickback - 18 U.S.C. § 371; **Cts. 16-26** - Offering/paying health care kickbacks - 18 U.S.C. § 1320a-7b(b)(2)(A); **Ct. 30** - Conspiracy to money landering - 18 U.S.C. § 1956(h), 1957; **Cts. 31-32** - Money laundering (spending) - 18 U.S.C. § 1957.

5. (a) What was your plea? (Check one)

   (1) Not guilty ☒ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals for the Eleventh Circuit

(b) Docket or case number (if you know): 12-16056

(c) Result: Affirmed

(d) Date of result (if you know): 2/7/2015

(e) Citation to the case (if you know): United States v. Moran, 778 F.3d 942 (11th Cir. 2015)

(f) Grounds raised: **Ground One** - Whether sufficent evidence supports the conviction of Mr. Macli; **Ground Two** - Whether the individual defendant-appellants' sentences are procedurally and substantively reasonable.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Mr. Macli rasies six (6) grounds for relief which are listed on additional continuation pages and include supporting facts. Please refer to these continuation pages for all grounds raised.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Claims of ineffective assistance of counsel are disfavored on direct review and may be presented initially through a motion to vacate under 28 U.S.C. § 2255. See Massaro v. United States, 538 U.S. 500 (2003).

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☐
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Mr. Macli files this motion timely prior to the one year statute of limitations as he was denied a petition for rehearing from the Court of Appeals on May 18, 2015, and his conviction was final 3 months after that. Mr. Macli did not file to the Supreme Court for certiorari.

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on (month, date, year).

Executed (signed) on 08/12/2016 (date).

Antonio Medina by Frank Amodeo with express authority as next friend

Signature of Movant

Frank Amodeo 48883-019

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Next friend. Signed because Mr. Medina is not at this prison and he is too close to his deadline to depend on the mail.

Ground One: Trial counsel misapprehended the governing law and how it applied to the evidence. Consequently, trial counsel's strategy was futile; which in turn rendered counsel's assistance constitutionally ineffective.

Supporting Facts:

The defense team misunderstood the elements of the crime. Mr. Macli's only viable defense — and the defense that most closely reflects reality — was that he sincerely (if mistakenly) believed his conduct was legal. Although technically the government has the burden of proving mens rea; as a practical matter this strategy must be presented as an affirmative defense. Defense counsel failed to present evidence that Mr. Macli did not conceal or attempt to conceal the behavior. The crux of the government's case required not only that Mr. Macli knew of the events but that he did so intentionally. Intentional misconduct of this nature must include concealment as well as deception, otherwise the circumstances are indicative of mistake not fraud.

Further, counsel did not present evidence (including expert testimony) that modern business practice favors tying personal compensation to economic performance. If counsel had presented the business practice evidence, then more than a reasonable doubt would exist as to Mr. Macli's intent. The practices that were allegedly fraudulent were actually sound business practices in any environment other than highly regulated industries like government subsidized health care. In the highly regulated environment innocent (and sound) practices often appear fraudulent and often inadvertently violate technical statutes or rules.

Continuation of Ground One:

The jury needed a comprehensive exposition of what the rules were, and how the rules were violated in order to establish that Mr. Macli's "criminal" acts were innocently made; and that he lacked the requisite intent to commit the crimes. Notably, the government reminded this court in Dr. Shapiro's case of how jurists of reason viewed Mr. Macli's trial.

"As this court noted: in this case [Shapiro] the defense is 'actually putting on a case.'" (Doc. 184, p.32). The government then goes on to acknowledge that the "government agrees." (Id.). Because Shapiro's defense counsel as opposed to Macli's counsel was preparing an active defense the "government's approach has changed." Mr. Macli's counsel had the law wrong and thus counsel's strategy and tactics were naturally inadequate. This court should vacate the judgment and give Mr. Macli a new trial.

Ground Two: The government violated due process of law and its duty to ensure a fair trial when it engaged in pretrial discovery tactics designed to surreptiously discover the defense's strategy including attorney work product.

Supporting Facts:

In the criminal proceedings against an alleged co-conspirator Dr. Shapiro, the United States Attorney's Office employed an inherently unfair process for providing discovery to the defense. The government's process essentially allowed it to "sneak a peak" at what defense counsel is using as evidence to build its case. Thereby, giving the government advance notice of the defense's trial strategy and tactics. The government's agents received a duplicate of evidence copied by defense counsel. Even if disclosed, this process violates due process and requires vacatur of the conviction and a new trial.

But here the government concealed its illicit efforts, which were only discovered through unusually public proceedings in Dr. Shapiro's case. Sometimes a hypothetical scenario illuminates and guides analysis. Imagine in the midst of trial the government learned the defense had received a copy of the **Jencks** material by inadvertent subterfuse or plain mistake. The government would scream for a mistrial and likely seek to sanction counsel. How much worse is it that the defense's entire evidentiary foundation is given to the government before the trial.

This court should vacate the judgment and dismiss the indictment.

Ground Three: During the trial the government knowingly presented unreliable and false testimony; an action that violates due process of law.

Supporting Facts:

During the prosecutions's case-in-chief the government introduced John Jackson's testimony. John Jackson's testimony was false. Mr. Jackson testified that he was terminated because a patient reported that Mr. Jackson had been paying him to come to Biscayne Milieu for treatment. The government's attorney Mr. Davis then asked Mr. Jackson what Antonio Macli told him after his termination. Mr. Jackson stated that Antonio Macli told him "this was wrong" and "you know we can't — we can't do this here because there is [sic] a lot of problems since American Therapeutic had had their problems." After a brief clarification of the similarity between American Therapeutic and Biscayne Milieu, the testiminoy continued:

AUSA Davis: What sort of problems were you aware of that were involving American Therapeutic at the time?

Wit. Jackson: From what I had heard in the newspaper and on the TV ... (interrupted by objection)

After a sidebar to resolve the objection, the following testimony was allowed into evidence:

AUSA Davis: Going back to the discussion you had with Antonio Macli in which he mentioned American Therapeutic, from that discussion, did you have the understanding that American Therapeutic was under investigation?

Wit. Jackson: Yes, sir, based on what I had read and saw on TV.

(Trial Tr. Vol. __, p. 153)

Continuation of Ground Three:

The timing of the events demonstrate the testimony was false. Specifically, Mr. Jackson's testimony was that in June of 2010, when his employment at Biscayne Milieu came to an end, he had already seen coverage of the investigation into ATC, in the newspapers or on TV. Yet, there had been no media coverage of American Therapeutic until several months later in the fall of 2010. Thus, the testimony was false or unreliable or both.

The government knew the testimony was false. The same United States Attorney's Office and task force that prosecuted Mr. Macli also investigated and prosecuted American Therapeutic. Thus, they were aware of press coverage on the American Therapeutic investigation occurred months after the termination. Consequently, Antonio Macli could not have mentioned the coverage because the public did not know about it.

Mr. Jackson's false testimony is material, as it relates to Mr. Macli for two reasons. First, because it tends to rebut his good faith. At sidebar, AUSA Davis explained that was the importance and purpose of the testimony:

> What I want to get out is that the management at Biscayne Milieu was aware of other federal invstigations ongoing, which explains why it was they were taking the steps they were taking. They were trying to insulate themselves from prosecution. It is akin to consciousness of guilt-type actions.
>
> What I plan to do is ask Mr. Jackson the question in a different way which is: What did you understand Antonio Macli to be referring to when he was talking about problems at American Therapeutic?

(Trial Tr. Vol. __, p.147)

AUSA Davis then reiterated that rebutting the good faith showing that Biscayne Milieu fired Jackson because they were trying to comply with the law and Medicare rules was the value of the testimony:

> I think the jury is entitled to draw the conclusion that people at Biscayne Milier were raising their guard, particularly careful now, now knowing that federal law enforcement was focussing its attention on PHPs.
>
> **I think also the jury needs to be informed that this firing of John Jackson wasn't something that was done to — because it was concerned about the ethics of Mr. Jackson's actions, but, rather, was concerned that law enforcement was going to catch on and that is why what Antonio Macli said about the need to respond to American Therapeutic is very, very relevant. It puts Mr. Jackson's termination in its proper light.**

(Trial Tr. Vol. __, p.148)(emphasis added).

The second basis for the materiality of this false testimony to Mr. Macli is the fact that Jackson's testimony was some of the strongest evidence against Mr. Macli. That Jackson had perjured himself in this manner and thereby attempted to manipulate the jury's decision-making process by creating a false impression is information that could arguably have caused the jury to disbelieve all his testimony and affected the verdict, had the jury learned the truth.

Ground Four: Federal fraud statutes are unconstitutionally vague; as applied constitutes a bill of attainder or an ex post facto law.

Supporting Facts:

The legislative decision to permit the courts to define an element of the crime ("scheme to defraud") constitutes a violation of the separation-of-powers doctrine. The practical effect of Congress's action was to delegate its legislative authority to the courts thereby eviscerating one of the core principles animating the Constitution. In essence, the federal fraud laws permit the spontaneous creation of a legal duty and punish those that either have not or do not fulfill the duty. This court should vacate this conviction declaring the statute unconstitutional at least to the extent that a conviction relies on the judicial creation of an element of the crime.

A law that permits ad hoc and post hoc creation of legal duties, while simultaneously criminalizing violations of those duties, transgresses the Constitution's prohibitions against bills of attainder and ex post facto laws. In essence, first the jury, then the appellate court's interpretation of what the jury was thinking establishes whether the accused's conduct was fraudulent and illegal. Thus, what might ex ante have seemed creative or risky, but lawful; becomes criminal ex post. Of course, if Congress were to simply pass legislation criminalizing the conduct after the event occurred, then the courts would declare the law unconstitutional. Yet, by allowing the courts to create the after-the-fact definition, Congress escapes the Constitution's limitations. This court should vacate the criminal judgment as amounting to an unconstitutional bill-of-attainder; ex post facto law as applied; or both.

Continuation of Ground Four:

The use of an undefined term in the text of a criminal statute, the definition of which then depends on the composition of the jury and an appellate panel, renders the law inherently vague.

Congress explainably, but unreasonably, failed to define the key element of the federal fraud statute. Leaving the determination of what conduct is fraudulent to a jury and appellate panel. What is an ad hoc, ex post deterimination of whether the conduct is criminal. Since the time of Hammurabi, it has been beyond peradventure that in the absence of notice it is fundamentally unfair for the state to punish an individual without advance notice. A concept refined by our Constitution to ensure that the notice is sufficient to prevent arbitrary enforcement. The federal fraud statutes as practiced do not remotely meet these standards. This court should vacate Mr. Macli's conviction, dismiss the indictment, and declare the unfettered application of the federal laws unconstitutional.

Ground Five: Mr. Macli was denied effective assistance of counsel during the plea negotiations stage with respect to the strength of the government's case especially in the light of the current construction of the fraud laws.

Supporting Facts:

The government offered Mr. Macli a plea bargain that after departures would have likely resulted in a sentence of less than five years. Mr. Macli rejected the plea bargain because he believed he was innocent of the crime as the attorneys explained the elements to him. Mr. Macli still believes his conduct was innocent, but he understands that with so broad a legal net a prosecutor may persuade a jury that something is a fraud, even when the perpetrator believes it is not.

Under that expansive view of the law, Mr. Macli would have been inclined to accept a plea bargain if for no other reason than to save his children and their families the horror of trial and extended incarceration. Counsel's failure to explain the true nature of the charges rendered the not-guilty plea (i.e., the decision to reject the plea bargain) constitutionally, unintelligent and involuntary.

This court should vacate the conviction and return Mr. Macli to the status quo prior to trial.

Ground Six: Trial counsel failed to object to the jury instructions as such the instructions were only reviewable for plain error.

Supporting Facts:

This court's jury instructions failed to define either attempt or scheme to defraud. As a result of the unbound instructions, the jurors were able to expand the definition of the term beyond the limitation of those elements embedded in the statutes. By example, if the instruction had defined "attempt" as an attempt to agree on a specific course of action designed to deprive a government agency of money, then the jury could have aquitted.

Another example is that the district court did not specify that defraud requires more than deception, it has to be deception designed to harm someone. Here the government agency paid for services rendered. Thus, the fraud — if any fraud at all — was much less expansive than either court or jury perceived. If correctly instructed the jury would have found Mr. Macli's business tactics distasteful but not illegal.

Equally important, the district judge must have misapprehended (for good reason given the jurisprudence) the breadth of the fraud laws. Nevertheless, the standard on review is the law at the time of review rather than at the time of the (alleged) error. Under this circuit's recent jurisprudence (**United States v. Takhalov**, No. 13-12385 (11th Cir. July 11, 2016) the jury instructions were prejudicially incomplete.

If trial counsel had objected, then the trial court would have properly instructed the jury and the verdict would have been differnt. Alternatively, at sentencing, the court would have narrowed the scope of relevant conduct to comport with the more precise definition, and Mr. Macli's sentence should have shrunk under ten years.

This court should vacate the conviction and return Mr. Macli to the status quo prior to trial.

APPENDIX "E"
Coloma v. United States, 2019 U.S. APP LEXIS 3679
(11th Cir. 2019)

CHRISTIAN COLOMA, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee, ATTORNEY RONALD GAINOR, et al., Intervenors.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2019 U.S. App. LEXIS 3679
No. 18-14710-F
February 5, 2019, Decided

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Florida.Coloma v. United States, 2018 U.S. Dist. LEXIS 187313 (S.D. Fla., Oct. 30, 2018)

Counsel For Christian **Coloma**, Petitioner - Appellant: Paul D. Petruzzi, Law Offices of Paul Petruzzi, PA, Miami, FL.

For United States of America, Respondent - Appellee: Joanna K. W. Bowman, Angela Adams, U.S. Department of Justice, Washington, DC; Robert Benjamin Cornell, U.S. Attorney's Office, Fort Lauderdale, FL; Brooke Harper, U.S. Department of Justice, Long Beach, CA; Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL.

For Service: Amber Eve Donner, Gainor and Donner, Longmont, CO; Ronald Gainor, Ronald Gainor, Attorney at Law, Miami, FL.

Judges: Robin S. Rosenbaum, UNITED STATES CIRCUIT JUDGE.

Opinion

Opinion by: Robin S. Rosenbaum

Opinion

ORDER:

On February 21, 2017, Christian **Coloma**, a federal prisoner, filed an amended *pro se* 28 U.S.C. § 2255 motion, challenging the constitutionality of his convictions and 12-year sentence for (1) conspiracy to defraud the U.S. government and pay and receive kickbacks in connection with a federal health-care benefit program; and (2) 5 counts of payment of kickbacks in connection with a federal health-care benefit program. In his motion, **Coloma** raised four claims.**{2019 U.S. App. LEXIS 2}** The district court issued an order denying Coloma's § 2255 motion and denying a certificate of appealability ("COA"). **Coloma** now moves this Court for a COA.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quotations omitted).

In Claim 1, **Coloma** asserted that counsel was ineffective during the pretrial and trial process by

failing to investigate and ascertain whether the government was monitoring the defense's trial preparation and attorney work product. Here, there is no evidence in the record that Coloma's counsel performed deficiently. Specifically, the record indicates that, as soon as Coloma's counsel became aware that the government had received copies of defense's work product prior to trial, counsel moved for a new trial.

In Claim 2, **Coloma** asserted ineffective assistance of counsel during the plea process. Here, reasonable jurists would not debate the district court's denial of this claim. Even if**{2019 U.S. App. LEXIS 3}** counsel's performance were deficient during the plea process, there is no evidence in the record that **Coloma** would have accepted a plea. *See Missouri v. Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (holding that, to show prejudice where a petitioner rejected a plea offer allegedly as a result of counsel's deficient performance, the petitioner must show a reasonable probability that he "would have accepted the earlier plea offer had they been afforded effective assistance of counsel").

In Claim 3, **Coloma** argued ineffective assistance of counsel due to both the individual and cumulative impact of multiple deficiencies or errors by counsel. **Coloma** generally alleged that counsel failed to move for the suppression of material evidence, failed to investigate or present material exculpatory evidence and testimony at trial, failed to object to the unlawful admission of evidence by the prosecution, failed to timely request appropriate jury instructions or to object to insufficient ones, failed to object to improper argument by the prosecution and ask for a curative instruction. Here, reasonable jurists would not debate the district court's denial of this claim. This claim does not warrant a COA because Coloma's allegations are vague, conclusory,**{2019 U.S. App. LEXIS 4}** and unsupported. *See Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992).

In Claim 4, **Coloma** claimed that the government violated his Fifth and Sixth Amendment rights in the pretrial and trial process when it intentionally monitored, obtained, and used counsel's trial preparation and attorney work product. Here, a COA should be issued because **Coloma** made a substantial showing of the denial of his Fifth and Sixth Amendment rights. *See* § 2253(c)(2).

Accordingly, Coloma's motion for a COA is GRANTED on the following issue:

> Whether the government violated Coloma's Fifth and Sixth Amendment rights when it obtained duplicate copies of the defense team's work product from a government contracted copying service.

/s/ Robin S. Rosenbaum

UNITED STATES CIRCUIT JUDGE