UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 19 2019

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

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

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

The panel has voted to deny the petition for panel rehearing. Judge Murguia voted to deny the petition for rehearing en banc, and Judges Schroeder and Siler recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Doc. 139).

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

Appellant's pro se motion to stay and/or grant an extension of time to supplement his Petition for Rehearing and/or Rehearing En Banc is DENIED (Doc. 138).

Appellant's pro se motion to compel counsel to provide his case file is GRANTED in part (Doc. 140). Counsel shall provide to Appellant those materials in Appellant's case file that counsel deems necessary and appropriate for disclosure.

The Clerk shall serve a copy of Appellant's motion (Doc. 140) and this order upon Appellant's former counsel, Daniel Drake, Esq.

NOT FOR PUBLICATION

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AUG 31 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

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

Argued and Submitted August 14, 2018
San Francisco, California

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Julio Mario Haro-Verdugo, Petitioner, v. United States of America, Respondent.	CR-05-0125-TUC-DCB/ CV-11-0179-TUC-DCB **ORDER**

Petitioner/Defendant filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255. The Court will now resolve the motion without the need for oral argument or hearing.

BACKGROUND

On April 14, 2008, Petitioner was convicted by a jury on Counts 3, 4, 5, 6, 8, 9, 11, 12, 13 and 14 of the Indictment. He was found guilty of violating Title 21, U.S.C. § 841(a)(1), 841(b)(1)(A)(ii)(II) and 846 - Conspiracy to Possess with Intent to Distribute Approximately 188 Kilograms of Cocaine, a Class A Felony offense, as charged in Count 3 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(A)(ii)(II) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 41 Kilograms of Cocaine, Aid and Abet, a Class A Felony offense, as charged in Count 4 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(A)(ii)(II) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 37 Kilograms of Cocaine, Aid and Abet, a Class A Felony offense, as charged in Count 5 of the Indictment; Title

21, U.S.C. § 841(a)(1) and 841(b)(1)(A)(ii)(II) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 37 Kilograms of Cocaine, Aid and Abet, a Class A Felony offense, as charged in Count 6 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(A)(ii)(II) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 20 Kilograms of Cocaine, Aid and Abet, a Class A Felony offense, as charged in Count 8 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(A)(ii)(II) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 27 Kilograms of Cocaine, Aid and Abet, a Class A Felony offense, as charged in Count 9 of the Indictment; Title 21, U.S.C. § 841(a)(1), 841(b)(1)(A)(vii) and 846 - Conspiracy to Possess with Intent to Distribute Approximately 5,053.06 Kilograms of Marijuana, a Class A Felony offense, as charged in Count 11 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(B)(vii) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 323.18 Kilograms of Marijuana, Aid and Abet, a Class B Felony offense, as charged in Count 12 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(B)(vii) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 122.73 Kilograms of Marijuana, Aid and Abet, a Class B Felony offense, as charged in Count 13 of the Indictment; Title 21, U.S.C. § 841(a)(1) and 841(b)(1)(B)(vii) and Title 18, U.S.C. § 2 - Possession with Intent to Distribute Approximately 195.45 Kilograms of Marijuana, Aid and Abet, a Class B Felony offense, as charged in Count 14 of the Indictment. (CRDoc. 1079.).[1] On October 1, 2008, Petitioner was sentenced to prison for two hundred and ninety two months on Counts 3,

[1]CR-05-125-TUC-DCB (BPV).

4, 5, 6, 8, 9, 11, 12, 13 and 14, to run concurrently; twenty-four months to run consecutively, pursuant to Title 18, U.S.C. § 3147, with credit for time served. Upon release from imprisonment, the Petitioner will be placed on a term of supervised release. Petitioner appealed his convictions and sentences. The Ninth Circuit Court of Appeals affirmed Petitioner's convictions and sentences. *United States v. Burgos-Valencia*, Nos. 08- 10110, 08-10444, 10453, 10454, 10-10530 (9th Cir. Mar. 18, 2010) (CRDoc. 1305.) On October 12, 2010, a Petition for a Writ of Certiorari was denied. (CRDoc. 1317.)

On June 1, 2011, Petitioner, proceeding pro se, filed the instant motion. (Doc. 1.)[2] On June 7, 2011, the Court entered an Order that required service on and an answer from the Respondent on all five grounds raised in Petitioner's motion:

> In Ground One, he alleges that he was denied effective assistance of counsel because his attorney was not present at a settlement conference where the government extended a plea offer to [Petitioner]. In Ground Two, he claims that he was prejudiced by the Magistrate Judge's improper participation in plea negotiations. In Ground Three, [Petitioner] contends that he received ineffective assistance of counsel because his attorney did not discuss the plea offer with [Petitioner] and failed to advise [Petitioner] that accepting the plea offer was "strongly" in [Petitioner's] best interests. In Ground Four, [Petitioner] claims that his attorney's "unreasonable investigation into the strength of the government's discovery deprived [Petitioner] of counsel's informed opinion to accept the plea offer." In Ground Five, [Petitioner] claims that he received ineffective assistance of counsel at trial because agent reports were not effectively used to impeach the agents' credibility during cross-examination.

(Doc. 10.) That Order also denied Petitioner's motions for an evidentiary hearing and appointment of counsel. *Id.* The Government filed a Motion

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[2]CV-11-179-TUC-DCB.

for Discovery pursuant to Rule 6 governing Section 2255 proceedings to appropriately address the motion, which was granted, and the Government filed a Response on February 9, 2012 (Doc. 24.) Petitioner filed a Reply on March 5, 2012 (Doc. 25.)

STANDARD OF REVIEW

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Section 2255 provides four grounds under which a federal court may grant relief to a federal prisoner who challenges the imposition or length of his incarceration: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "that the court was without jurisdiction to impose such sentence;" (3) "that the sentence was in excess of the maximum authorized by law;" and (4) that the sentence is otherwise "subject to collateral attack." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on some constitutional error, jurisdictional defect, or an error resulting in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979). If the record clearly indicates that a petitioner does not have a claim or that he has asserted "no more than conclusory allegations, unsupported by facts and refuted by the record," a district court may deny a § 2255 motion without an evidentiary hearing. *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986); *see also United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000) ("When a prisoner files a § 2255 motion, the district court must grant an evidentiary

hearing 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" (quoting 28 U.S.C. § 2255)). *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994). The court may deny a hearing if petitioner's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Mejia-Mesa*, 153 F.3d 925, 931 (9th Cir. 1998). No hearing is required if credibility can be decided based on documentary testimony and evidence in the record. *Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989). Conclusory statements, taken alone, are insufficient evidence to trigger the requirement of a hearing. *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

DISCUSSION

In his § 2255 Motion, Petitioner alleges that his counsel rendered ineffective assistance in various ways, and that he was prejudiced by the magistrate judge's improper participation in plea negotiations.

A. Ineffective Assistance of Counsel Claims

In order for Petitioner to prevail on his ineffective assistance of counsel claims, he must show (1) "that counsel's performance was deficient" and (2) that "the deficient performance prejudiced" the Petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). More specifically, a petitioner must show that counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 697; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002). Conclusory allegations are

insufficient to state a claim for ineffective assistance of counsel. *Shah*, 878 F.2d at 1161.

In order to establish deficient performance, a petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" or that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 686-87. There is a strong presumption that counsel's performance falls "with the wide range of reasonable professional assistance." *Id.* at 689.

Petitioner must also show prejudice resulting from deficient performance by counsel. To show prejudice Petitioner must demonstrate a reasonable probability that "but for" counsel's deficient performance, the outcome of the proceedings would have been different. *Id.* at 694; *Luna v. Cambra*, 306 F.3d 954, 961 (9th Cir. 2002), *amended by* 311 F.3d 928 (9th Cir. 2002). A reviewing court can reject a claim based upon a failure to meet either part of the two-pronged test. *See Thomas v. Borg*, 159 F.3d 1147, 1151 (9th Cir. 1998); *United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir. 1994); *see also Strickland*, 466 U.S. at 687. The burden of proving ineffective assistance of counsel is on the petitioner. *Id.*

Petitioner alleges that he received ineffective assistance of counsel based on counsel's: 1) failure to attend a settlement conference where the government extended a plea offer to Petitioner; 2) failure to discuss the plea offer with Petitioner and failing to advise Petitioner that plea offer was strongly in his favor; 3) failure to fully investigate the strength of the government's discovery in order to give

Petitioner an informed opinion regarding acceptance of the plea; and, 4) failure to effectively use agent reports to impeach agents' credibility during cross-examination.

1. Settlement Conference

The Magistrate Judge's Minute Entry notes that although Petitioner's counsel of record was Mr. Matt McGuire, Petitioner was represented at the settlement conference of December 1, 2006 by Mr. Sean Bruner. (Doc. 24-2) The Government's position is that as Petitioner was represented by Mr. Bruner at the settlement conference, he was not denied effective assistance of counsel. (Doc. 24, p. 12.) Petitioner has filed a Reply refuting the Government's position that Mr. Bruner was in fact present at the settlement conference. (Doc. 25, p. 4.) Petitioner has also filed a Supplement to his Reply that includes an affidavit from Mr. Bruner. (Doc. 26.) In this affidavit Mr. Bruner states, "I do not believe I ever appeared at a settlement conference in [Petitioner's] case notwithstanding the minute entry of 12/1/2006 claiming that I did." *Id.* at 4. This factual discrepancy not withstanding, Petitioner's claim of ineffective assistance of counsel during the settlement conference still fails.

The differences between the Magistrate Judge's Minute Entry and Mr. Bruner's affidavit create a factual inconsistency. This inconsistency may represent deficient performance by Petitioner's attorney, however, it seems unlikely that the Minute Entry would be incorrect. It also seems unlikely that an experienced Magistrate Judge would participate in any type of proceeding with an in-custody defendant in the absence of that defendant's counsel of record. Petitioner's contention that the Government extended a plea during the settlement conference is also quite

doubtful. The Government contends that it was present only at the commencement of the proceeding and then "immediately excused without participating in any way." (Doc. 24, p. 12.) Petitioner also made no mention of his counsel's failure to appear at the settlement conference in his later Motion to Dismiss Counsel. (Doc. 477.[3])

Regardless of the factual inconsistency and the possibility that it represents deficient performance for the purposes of *Strickland*, Petitioner still fails to show that he was prejudiced by his claimed lack of counsel at the settlement conference. Mr. McGuire (Petitioner's first attorney) asserts by affidavit that "the offer remained open throughout the pretrial period." (Doc. 24-4, p. 2.) Petitioner's second attorney responds by affidavit that she discussed the plea offer with Petitioner well after the settlement conference. (Doc. 24-6, p. 4.) Because the United States likely tendered the plea prior to the settlement conference, and because the plea offer remained open after the conference, Petitioner was not denied the opportunity to discuss the plea with counsel or accept it. The Supreme Court has held that when a plea is offered, "a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, ---U.S.---, 132 S.Ct. 1376, 1387 (2012). As the plea remained available after the conference, Petitioner was not denied the right to effective assistance of counsel in considering whether to accept or reject the plea. Even if Mr. McGuire's failure to be present constituted deficient performance, Petitioner presents no evidence of "a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would

[3]CR-05-125-TUC-DCB(BPV).

have been different." *Strickland*, 466 U.S. at 694. In support of his claim, Petitioner offers no more than the bare allegations. Such bare accusations, without more, are insufficient to compel relief under § 2255. *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996). Petitioner's failure to show that prejudice occurred as a result of being without counsel at the settlement conference leaves at least one prong of the *Strickland* test unmet. Notwithstanding the factual inconsistency, Petitioner does not present evidence with sufficient materiality to meet his burden of proof to warrant an evidentiary hearing.

2. Plea Offer

Petitioner's allegation that his counsel did not inform him that the plea offer was strongly in his interest meets a similar fate. The affidavit from Mr. McGuire indicates that he never advised Petitioner to reject the plea (Doc. 24-4, p. 2), and Petitioner's second attorney, Leslie Bowman, informed Petitioner of her opinion that the offer was in his best interest. (Doc. 24-6, p. 4.)

Again, Petitioner offers no more than bare allegations in support of his claim, and is therefore unable to demonstrate that his counsel's performance was objectively unreasonable. In order to prove prejudice, Petitioner must demonstrate that he "would have accepted the . . . plea had [he] been afforded effective assistance of counsel." *Missouri v. Frye*, --- U.S. --- , 132 S.Ct. 1399, 1409 (2012). Trial counsel's response by affidavit that client rejected the plea because he "believed he would prevail at trial" and because "the offer exposed him to too much time in prison" (Doc. 24-6, p. 3) makes it unlikely that client would have accepted the plea regardless of the advice of his attorney. The Supreme Court has held that the right to effective assistance of counsel

in evaluating a plea offer is not contingent on whether a defendant ultimately accepts or rejects a plea. *Lafler*, 132 S.Ct. at 1376. When comparing the bare allegations made by the Petitioner with the affidavits and the Petitioner's knowledge of the evidence against him[4], it becomes evident that the Petitioner is unable to meet his burden to show that he did not receive effective assistance of counsel in regards to the advisability of accepting the plea, or that he was prejudiced in any way by the assistance he did receive.

3. Counsel's Informed Opinion

Petitioner's allegation that his counsel did not fully investigate the strength of the government's discovery and thus did not provide him with an informed opinion as to whether to accept the plea offer is also contradicted. Both of Petitioner's attorneys report that all discovery materials were read, and that most were discussed with the petitioner (Doc. 24-4, p. 2 and 24-6, p. 5.) Although Petitioner's first attorney did not provide Petitioner directly with an opinion on the strength of the government's case, he spent the majority of 35 visits with Petitioner discussing the strength and extent of the government's evidence. (Doc. 24-4, p. 2). Petitioner's trial attorney also discussed the discovery material, including "the number and names of witnesses and the exhibits and other evidence the government would produce at trial," with the Petitioner and reports that Petitioner understood the gravity of the situation and the amount of evidence the government had against him. (Doc. 24-6, p. 2.) And, as opposed to offering no informed opinion

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[4]Petitioner met with first attorney 35 times to discuss government's evidence (Doc. 24-4, p. 1) and was informed of the amount of evidence against him by his second attorney (Doc. 24-6, p.2.)

regarding the plea, Petitioner's trial attorney reports that she relayed her opinion to Petitioner that the plea was in his best interest. *Id.* at 3.

Here, Petitioner's allegations are directly contradicted by the affidavits. The burden still rests with the Petitioner to prove that his attorney behaved objectively unreasonably, and that he was prejudiced by such behavior. Petitioner puts forth no proof beyond his allegations that counsel did not provide effective assistance and, because of his stated reasons for rejecting the plea described above, Petitioner is unable to show he would have accepted the plea if counsel had acted differently.

4. Agent Reports

As noted, great deference is paid to counsel in regards to trial strategy decisions. Because of this great deference, Petitioner is unable to prove that his attorney's use of agent reports did not meet "an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Courts are reluctant to second guess an attorney's decisions at trial recognizing, "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Petitioner's trial attorney has significant experience and is certified by the State Bar of Arizona as a criminal law specialist[5] There are no independent doubts about counsel's professionalism and honesty, as might be considered in reconstructing the circumstances of counsel conduct in order to evaluate that conduct from counsel's perspective at the time. *Id.* at 689. Because Petitioner has put forth no evidence other than conclusory allegations that trial counsel's use of

[5]Document 24-6, p.1.

agent reports was unreasonable or resulted in prejudice, his claims of ineffective assistance of counsel are without merit.

B. Claim of Prejudice Caused by Magistrate Judge's Improper Participation in Plea Negotiations.

Petitioner alleges that he was prejudiced by the Magistrate Judge's improper participation in plea negotiations. The Petitioner reports that he and his family were prepared to accept the plea offer extended by the United States until the Magistrate Judge intimidated them into rejecting the plea during the settlement conference.

The purpose of a settlement conference is to "promote a fair and expeditious trial." Fed R. Crim. P. 17-1. During a settlement conference, the parties often discuss the charges, the weight of the evidence, and the plea offer tendered with the goal of resolving the case through a plea. Petitioner alleges that he was prejudiced by the Magistrate Judge's improper participation during the settlement conference.

Attorneys for the Petitioner's co-defendants addressed the conference from which the allegations stem by affidavit. These attorneys who were present at the settlement conference[6] report that no intimidating behavior occurred and that the Magistrate Judge conducted the conference in a professional and appropriate manner. (Doc. 24-4 and CV 11-245-TUC-DCB; CV 11-229-TUC-DCB; CR 05-0125-TUC-DCB.) As the settlement conference was held off the record at the request of defense counsel, there is no transcript detailing what was said during the conference. (Doc. 24-2, p. 2.) Other defense counsel present and representing other Haro family members responded by affidavit that the Magistrate Judge behaved

[6]CV 11-179-TUC-DCB at Doc. 24-2.

appropriately and professionally[7]; it is the accounts of some co-defendants that differ. In fact, only the motions filed by immediate Haro family members include any mention of such inappropriate behavior. Co-defendant, Leonardo Burgos-Valencia, participated in the same settlement conference and made no improper judicial involvement claim in his § 2255 Petition. (Motion to Vacate, Set Aside or Correct Sentence Sept. 22, 2011.)[8] In addition to the affidavits stating that nothing improper took place, it is incredibly unlikely that such experienced and capable attorneys-as were present at the settlement conference-would not have objected had the alleged behavior actually occurred. This lack of objection by defense counsel or any suggestion that the Magistrate Judge should recuse himself make Petitioner's allegations seem even less likely.

Petitioner makes accusations that cannot be verified by the record as no record was made of what was said or what occurred during the settlement conference. Petitioner's bare allegations are refuted by the affidavits of attorneys present at the conference, and Petitioner offers nothing more to meet his burden. As there is no factual support provided for the bare allegations of improper involvement, the Petitioner does not meet his burden of proof to show improper involvement by the Magistrate Judge or that he was prejudiced by any improper involvement.

Conclusion

Unsupported allegations alone are insufficient to meet Petitioner's burden to show he was prejudiced either by his counsel or the Magistrate

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[7]CV-11-229-TUC-DCB at Doc. 30-2 p. 5.

[8]CV-11-601-TUC-DCB at Doc. 1.

Judge. All of Petitioner's claims are either contradicted by the record and the affidavits provided by his attorney and other attorneys involved in the case, or allege facts insufficient to meet the required burden of proof. As Petitioner's allegations rely on seemingly incredible information not found in the record, a summary dismissal of the § 2255 motion is warranted. *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985). The district court is not required to hold a hearing before dismissing a postconviction petition if allegations are mere conclusions or are inherently unreliable. *Barker v. U.S.*, 7 F.3d 629, 633 n. 7 (7th Cir. 1993); *U.S. v. Burroughs*, 650 F.2d 595 (5th Cir. 1981); *U.S. v. Unger*, 635 F.2d 688 (8th Cir. 1980).

Accordingly,

IT IS ORDERED that the Petitioner's Motion to Vacate, Set Aside or Reduce Sentence (Doc. 1338, CR-05-0125-TUC-DCB; Docs. 1, 6, CV-11-179-TUC-DCB) is **DENIED.**

IT IS FURTHER ORDERED that CV-11-179-TUC-DCB is terminated and closed. The Clerk of the Court should enter Judgment accordingly.

IT IS FURTHER ORDERED that the Court declines to issue a certificate of appealability.[9]

DATED this 6th day of July, 2012.

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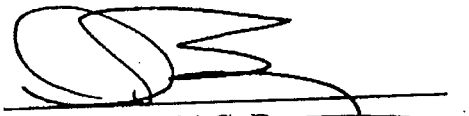
[9]This Court has authority to issue a Certificate of Appealability (COA), if the Petitioner has made a substantial showing that he was denied a federal constitutional right. 28 U.S.C. § 2253(c)(2). The COA shall indicate which specific issue or issues where there is substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(3)."Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *United States v. Martin*, 226 F.3d 1042, 1046 (9th Cir. 2000) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).) The Court finds that Petitioner has not so demonstrated.



David C. Bury
United States District Judge