NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JORGE MACLI,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

1. Whether the Petitioner was denied his Sixth Amendment right to effective assistance of counsel where the record was clearly established that defense counsel erroneously advised his client that he did not have a choice between entering a plea or going to trial?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Michael Davis, Assistant United States Attorney

Sandra Huarte, Co-Defendant

Antonio Macli, Co-Defendant

Jorge Macli, Appellant

Angela Noble, Clerk, United States District Court

Curt Obront, Esq., Attorney for Jorge Macli

Ariana Fajardo Orsham, United States Attorney

The Honorable Robert Scola, Jr., United States District Judge

Emily Smachetti, Assistant United States Attorney

David J. Smith, Clerk, Eleventh Circuit Court of Appeals

The Honorable Patrick A. White United States Magistrate Judge

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SUPREME COURT OF THE UNITED STATES

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JORGE MACLI,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT

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

Petitioner, JORGE MACLI, respectfully prays that a Writ of Certiorari issue to review the denial of his Certificate of Appealability by the United States Court of Appeals for the Eleventh Circuit in contravention of this Court's decisions in Missouri v. Frye, 132 S.Ct. 1399 (2012); LaFleur v Cooper, 132 S.Ct. 1376 (2012); and Strickland v. Washington, 466 U.S. 687, 104 S.Ct. 2064 as well as the

denial of his Motion for Reconsideration.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit Denying Jorge Macli's Certificate of Appealability dated December 17, 2019 and appears in Appendix "A". The Order of the United States Court of Appeals Denying Jorge Macli's Motion for Reconsideration dated January 31, 2020 and appears in Appendix "B". The Report and Recommendation and Order Adopting Report and Recommendation Denying Petitioner's Motion to Vacate Conviction and appears in Appendix "C" and Appendix "D".

JURISDICTION

The Court of Appeals Order in this matter was filed on December 17, 2019 pursuant to 28 U.S.C. §2253 and the Court of Appeals Order Denying Motion for Reconsideration was filed on January 31, 2020. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Six to the United States Constitution is set forth in Appendix "E". The United States District Court, Southern District of Florida has jurisdiction pursuant to 28 U.S.C. Section 2255. An appeal was brought from the Petitioner's denial of a Certificate of Appealability pursuant to 28 U.S.C. §2253 which was

affirmed by the United States Court of Appeals for the Eleventh Circuit. Petitioner also filed a Motion for Reconsideration with the United States Court of Appeals for the Eleventh Circuit which was also denied. This Petition for Writ of Certiorari follows.

STATEMENT OF THE CASE

The Petitioner was charged by Superseding Indictment with conspiracy to commit healthcare fraud and 12 counts of substantive healthcare fraud, one count of conspiracy to pay kickbacks, conspiracy to commit money laundering, and four counts of money laundering. The trial lasted from July 9, 2012 until August 23, 2012. The court granted a judgment of acquittal on eight of the substantive counts as to all Defendants and the Defendant was found guilty of conspiracy to commit healthcare fraud, substantive counts of healthcare fraud, conspiracy to receive or pay healthcare kickbacks, conspiracy to commit money laundering, and money laundering. The Movant filed a direct appeal of his conviction and sentence which were affirmed by the Eleventh Circuit on February 17, 2015. See, United States v. Moran, 778 F. 3d 942 (11th Cir. 2015). A mandate was issued on May 28, 2015 following the denial of timely filed rehearing motions. On August 9, 2016, the Movant timely filed his Motion to Vacate pursuant to 28 U.S.C. Section 2255, which was denied by the District Court and a Certificate of Appealability was

denied by the Eleventh Court on December 17, 2019. The Petitioner filed a Motion for Reconsideration with the Eleventh Circuit on January 7, 2020 which was denied by the Eleventh Circuit on January 31, 2020. This Petition for Writ of Certiorari follows.

FACTUAL BACKGROUND

The Petitioner retained attorney Melvin Black from the inception of his case. Petitioner further testified that his attorney never told him that in his professional opinion the evidence was sufficient to convict him nor did he ever recommend that he plead guilty rather than go to trial.

Rather, the Petitioner understood that the government wanted him to agree to a 17 ½ year sentence and over $50 million of "loss amount" under the sentencing guidelines[1]. It was explained that this was a "package deal" which meant that it must be accepted by both his sister and father or it would not be available. In other words, it was all or nothing.

Mr. Black never explained to him that the two level increase for

[1] The Petitioner always believed that the loss amount should be approximately $11.4 million which was the amount received versus more than $50 million which was the amount billed and proposed in the government's plea agreement. His attorney, Mel Black, however, never disagreed with the over $50 million loss calculation figure and always took the position that was the correct amount, which turned out to be incorrect.

sophisticated laundering in the proposed plea agreement would be double counting and was an incorrect application of the guidelines. Candidly, Mr. Black admitted that was also a mistake or oversight on his part.

The Petitioner told his lawyer he was willing to plead guilty but wanted a "5 year deal". Mr. Black advised him that since his sister and father were not willing to plead guilty and it was a "package deal", **that there was no choice but to go to trial. Mr. Black never, not even once, told Petitioner he could plead straight up and throw himself at the mercy of the court**. Mr. Black never told him that he would not be bound to forego his right to request a variance like the proposed plea agreement required if he were to plead straight up to the court. **Indeed, the Petitioner was never advised that all of the restrictions in the proposed plea bargain** (i.e., more than $50 million loss amount; appeal waiver; a double-counted sophisticated means and laundering guideline enhancement; agreement to a "high end" sentence; cooperation requirement; and foregoing his right to seek a variance) **would not have been applicable if he simply pled straight up. Finally, the Petitioner testified that if Mr. Black had told the Petitioner he could have pled straight up without those restrictions and enhancements, he would have pled guilty rather than going to trial.**

On cross-examination, the Petitioner testified he would have pled guilty if he

were given better guideline options than those conveyed in the government's plea agreement. He also would have pled guilty (as opposed to no contest) in 2011 and 2012 but did not do so not because he was innocent, but rather because he was not told he had that option since it was an all or nothing package deal and his sister and father were not on board.

The Petitioner testified that he thought he was innocent prior to being sentenced but then stated he was found guilty and he could not say what he thought at that time. The Petitioner agreed that in his pro se motion he stated that there was a "reasonable probability" he would have accepted the plea had he known his pre-substantial assistance sentencing range was 135 to 168 months imprisonment rather than stating that he absolutely 100% guaranteed that he would have pled guilty. Mr. Macli did not recall telling Mr. Black the only plea he would accept was the five years. Rather, the only plea he recalled being discussed was the government's plea offer which was presented to them in a "package plea" context. Mr. Macli denied that he knew what the witnesses were going to testify to but did receive the reports of interviews that Mr. Black had given him. On redirect examination, Mr. Macli confirmed that he was never told, not even once, that he could throw himself at the mercy of the court and plead straight up to the indictment. Mr. Macli was never told that the correct amount was $11 million and

not $54 million. Mr. Macli was never told that even if his father and sister didn't want to take the plea, he would not be bound to not seeking a variance if he pled straight up (V1:54). He was never told that if he threw himself at the mercy of the court, he wouldn't have to waive his right to appeal the sentence like the proposed plea bargain required. Further, the Petitioner was never told that the evidence was so strong against him that Mr. Black recommended him pleading guilty.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this petition presents an important issue which has directly been addressed by this Court, where the denial of Petitioner's Certificate of Appealability pursuant to 28 U.S.C. §2253 violated the Petitioner's Sixth Amendment right to effective assistance of counsel and the imposition of a 300 month sentence of imprisonment which Mr. Macli is currently serving, in direct contravention of Missouri v. Frye, 132 S.Ct. 1399 (2012); LaFleur v Cooper, 132 S.Ct. 1376 (2012); and Strickland v. Washington, 466 U.S. 687, 104 S.Ct. 2064 which held that a criminally accused has a Sixth Amendment right to effective representation by counsel which includes being adequately represented at the plea bargaining stage of the proceedings.

STANDARD OF REVIEW

A Certificate of Appealability ("COA") may issue "only if the applicant has

made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 1034 (2003); see, 28 U.S.C. Section 2253(c)(2). An applicant for a habeas petition meets this standard by showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04 (2000).

A COA must issue upon a "substantial showing of the denial of a constitutional right" by the Movant. 28 U.S.C. §2253(c)(2). To obtain a COA under the standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack, 529 U.S. at 484.

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. See, Barefoot, 463 U.S. at 893; Miniel v. Cockrell, 339 F.3d 331, 336 (5th Cir. 2003); Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001).

This Court applied this standard in Welch v. United States, 136 S.Ct. 1257 (2016), which arose from the denial of a COA. Id. at 1263-64. In that case, the Court broadly held that Johnson announced a substantive rule that applied retroactively in cases on collateral review. Id. at 1268. But, in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by

denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." Id. at 1264, 1268. In that case, the parties disputed whether his robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. See Id. at 1263-64, 1268. Accordingly, the Court held that a COA should issue.

As explained above, Mr. Macli has satisfied this standard. Mr. Macli has demonstrated that he has both a cognizable claim under Missouri v. Frye, 132 S.Ct. 1399 (2012); LaFleur v Cooper, 132 S.Ct. 1376 (2012); and Strickland v. Washington, 466 U.S. 687, 104 S.Ct. 2064. Accordingly, the Court should allow Mr. Macli to appeal the denial of his Certificate of Appealability.

DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD WAS CLEARLY ESTABLISHED THAT DEFENSE COUNSEL ERRONEOUSLY ADVISED HIS CLIENT THAT HE DID NOT HAVE A CHOICE BETWEEN ENTERING A PLEA OR GOING TO TRIAL

The Petitioner has satisfied his burden under the Strickland two-part test for determining whether or not there has been a sufficient showing of ineffective assistance of counsel ("IAC").

It is well settled within the plea bargain context the Strickland two-part test applies to counsel's performance in advising a defendant whether to plead guilty or

proceed to trial. See Missouri v. Frye, 132 S.Ct. 1399, 1405 (2012); LaFleur v Cooper, 132 S.Ct. 1376, 1384 (2012). In determining whether or not a defendant in a criminal case has been deprived his constitutional right to effective assistance of counsel, the following standard applies:

> [T]o meet the deficient performance prong of Strickland v. Washington, 466 U.S. 668, the defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. Id. at 687, 104 S.Ct. at 2064. There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. Id. at 689, 104 S.Ct. at 2065. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. Id.
>
> A defendant must show a reasonable probability that but for counsel's ineffectiveness: (1) "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) "the court would have accepted its terms"; and (3) "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." Lafleur, 132 S.Ct. at 1385; see Frye, 132 S.Ct. at 1409.

Frank v. United States, 522 Fed.Appx. 779, 780 (11th Cir. 2013). Of course, in the instant case, Mr. Macli did not have to seek permission of the government to agree to any plea bargain terms if he simply pled straight up to the indictment which he had every right to do.

Mr. Macli has shown through the testimony of his former counsel Mr. Black, as well as his own testimony, that he has met the two-part test required under

Strickland. In other words, he has shown cause and prejudice, since it has been established by a preponderance of the evidence that but for Mr. Black's failure to properly convey his right to plead guilty straight up to the court, he was completely deprived of making a knowing and informed decision of whether or not to enter a plea or proceed to trial. In other words, the record is clear both from the testimony of Mr. Black and the Movant that he was **never** told that he had the option to plead straight up to the court and essentially throw himself at the mercy of the court. Why this is critical to the instant analysis is because had Mr. Macli known that he could have pled straight up to the court without all of the restrictions contained in the proposed "package plea" presented to him, he would have entered a plea of guilty. Certainly, under a civil burden of proof which applies in a § 2255 context, there was a "reasonable probability" he would have entered a plea had he been properly advised that this was an option.

Further, there were serious deficiencies in his counsel's performance in failing to properly advise him of important guideline calculations including but not limited to the fact that the proposed plea agreement included double-counting provisions; that the loss amount should not be over $50 million as opposed to $11 million (a significant four-level guideline difference); and most importantly that if he pled straight up, he would not be subject to all of those limitations in the

proposed agreement. In other words, he would not have been forced to agree to a sentence at the "high-end" of the sentencing guidelines; he would not have to give up his right to appeal the sentence; he would not have to give up his right to seek a variance from the applicable guideline range; he would not have to give up his right to be subjected to double-counting of sophisticated means and sophisticated laundering; he would not have been obligated to cooperate which was a "difficult" task for him according to Mr. Black.

Hence, the deficient performance prong was compounded by the fact that (1) Movant was never told that he had the option to plead guilty straight up; (2) he was never advised of what the proper guideline range would have been if he did plead straight up; (3) he was erroneously advised that his guideline range was much higher than what it really was; and most importantly (4) he was told that since his father and sister were not willing to plead, the plea offer was off the table (due to the "package plea" condition precedent) and there was no other option but to go to trial.

This was simply not the case, and so it was impossible for Movant to make an informed decision about whether or not he should plead guilty or go to trial when that was not an option his attorney gave him.

> [U]nder the two-part test, a petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice – 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." Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2064, 2068. Where, as here, a petitioner rejects a plea offer, she must establish that there is a reasonable probability that she would have accepted that offer but for counsel's deficient performance, and that the plea would have resulted in a lesser charge or a lower sentence.

Gissendaner v. Seabolt, 735 F.3d 1311, 1317 (11th Cir. 2013).

Moreover, Mr. Macli testified that he would have pled guilty if he was simply apprised of his ability to do so and had Mr. Black provided him with the above information which he never did. In conclusion, one must ask how can a defendant in a criminal case make an informed/intelligent decision as to whether or not to plead guilty or go to trial when he does not even know that he has that option. In other words, if a defendant is told that it is a package deal (or "all or nothing"), and the other co-defendants that are part of the condition precedent to making the deal available have not come on board, it would defy logic and common sense to find the defendant made a knowing and intelligent decision on whether or not to plead guilty or go to trial where he was **never** informed he had that option. This is exactly the situation at bar, and the Movant was presented **no other option but to proceed to trial**.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the denial of Petitioner's Certificate of Appealability by the Court of Appeals for the Eleventh Circuit in this matter.

Dated: April 2, 2020.

Respectfully submitted,

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Miami, Florida 33131
Phone: (305) 373-1040
Fax: (305) 373-2040
E-mail: curt@obrontcorey.com

By: _____
CURT OBRONT, ESQ.

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to all counsel of record this the 2nd day of April, 2020.

_____
CURT OBRONT, ESQ.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 17, 2019

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 19-12809-H
Case Style: Jorge Macli v. USA
District Court Docket No: 1:16-cv-23421-RNS
Secondary Case Number: 1:11-cr-20587-RNS-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12809-H

JORGE MACLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Appellant's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 31, 2020

Curt Obront
Obront Corey, PLLC
100 S BISCAYNE BLVD STE 800
MIAMI, FL 33131-2305

Appeal Number: 19-12809-H
Case Style: Jorge Macli v. USA
District Court Docket No: 1:16-cv-23421-RNS
Secondary Case Number: 1:11-cr-20587-RNS-2

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12809-H

JORGE MACLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Jorge Macli has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's December 17, 2019, order denying a certificate of appealability in his appeal from the denial of his 28 U.S.C. § 2255 motion to vacate, correct, or set aside sentence. Upon review, Jorge Macli's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-CV-23421-SCOLA
(11-CR-20587-SCOLA)
MAGISTRATE JUDGE P.A. WHITE

JORGE MACLI,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE FOLLOWING EVIDENTIARY HEARING

I. Introduction

The Petitioner, **Jorge 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 father, Antonio Macli, and sister, Sandra Huarte, were also defendants in case no. 11-CR-20587. All three have filed §2255 motions, Antonio Macli in case No. 16-CV-23544-Scola/White and Sandra Huarte in case No. 16-CV-23720-Scola/White. Although this report focuses on Jorge 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# 34); the government's pretrial narrative (Cv-DE# 35); transcripts of the June 5-6, 2018 evidentiary hearing (Cv DE# 46, 47); movant's supplemental memorandum (Cv DE# 51); the government's post-hearing memorandum (Cv DE# 52); and the movant's reply thereto (Cv DE# 53).

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 ineffective 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; Antonio, 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; Antonio, 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 the jury instructions and as a result, the instructions were only reviewable for plain error on appeal. See (Sandra, 16-CIV-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 movants' convictions 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 Jorge Macli's actions as follows:

> Defendant Antonio Macli's son, defendant Jorge Macli, was the day-to-day manager of Biscayne Milieu and also a designated point of contact for Medicare. Both Antonio Macli and Jorge Macli had an ownership interest in Biscayne Milieu as well as managerial control of the company. In his day-to-day management role, defendant Jorge Macli oversaw almost every significant aspect of the fraud. He had ultimate oversight over the patient recruiters. He himself recruited patient recruiters and then paid kickbacks to those recruiters. In addition, Jorge Macli aided patient recruiters in financing the purchasing or lease of halfway houses used to board the patients recruited to attend the PHP at Biscayne Milieu. In 2010, defendant Jorge Macli initiated the plan to have the patient recruiters sign fraudulent "case manager" contracts and insisted that recruiters, including defendants Derek Alexander and Anthony Roberts, do so. He directed the recruiters to submit false invoices. Defendant Jorge Macli even paid hush money to certain patients to quiet their complaints. Defendant Jorge Macli directed the admission of patients he knew to be ineligible for PHP treatment, even over complaints from other staff. He overrode staff attempts to deny admissions to elderly patients with dementia who were recycled from other PHPs and Haitian patients who were not mentally ill and who came to Biscayne Milieu in order to obtain immigration benefits.
>
> Multiple witnesses testified to defendant Jorge Macli's centrality to the fraud scheme. Former clinical director John Jackson testified that defendant Jorge Macli agreed, during Jackson's hiring process, to pay Jackson $25 per day per client attending Biscayne Milieu. Further,

> Jackson testified to two details showing defendant Jorge Macli's clear awareness of the fraudulent nature of the enterprise. First, Jackson and Jorge Macli agreed that patients Jackson would recruit from another, then-closed facility should enter Biscayne Milieu over time rather than all at once to avoid suspicion of the Medicare billing. Second, concerned about how Jackson would account for the additional income, Jorge Macli suggested that Jackson be paid for the recruiting via a dummy corporation or under a different individual's name to avoid suspicion regarding Jackson's fluctuating paycheck. Jackson also testified that Jorge Macli agreed to loan Jackson, as well as other recruiters, funds to expand halfway houses which would then send their residents for PHP treatment at Biscayne Milieu.

Id. at 953-54.

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 **Jorge 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, 4, 7, 32, 33, 35 and 37, the term of imprisonment was 0 to 10 years, 18 U.S.C. §§1347 and 1957(b)(1); 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 ¶223).

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 ¶224).

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 Jorge to a total of 300 months' imprisonment as follows: 60 months as to each of Counts 1, 4, 7, 15-26, 32, 33, 35, and 37, to run concurrently; and 240 months as to Count 30, to run consecutively to the terms imposed on the other counts. (CR DE# 1281 & 1326).

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. By order dated **May 18, 2015**, the Court of Appeals denied the motion. Petitioner Jorge 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

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[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).

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 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 next filed this §2255 on **July 29, 2016,** the date he signed his petition.[5] (Cv DE# 1:13). The government correctly does

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[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 "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

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 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. (Cv DE# 46 & 47, Evidentiary Hearing Transcripts). Following the hearing, the movant filed a supplemental memorandum (Cv DE# 51), the government filed a post-hearing memorandum (Cv DE# 52), and the movant filed a reply thereto (Cv DE# 53).

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

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and delivered to prison authorities for mailing).

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**, movant 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:

> During the plea negotiation: 1) counsel repeatedly misinformed Mr. Macli that he faced a sentence of 210 months if he accepted the plea offer, when the accurately calculated guideline range triggered by the plea offer was 135-168 months' imprisonment; and 2) counsel failed to negotiate the Medicare loss under the plea agreement. If counsel had made the same argument that limited that loss at Mr. Macli's sentencing then the proposed plea should have contained a range of 87-108 months; and 3) counsel provided an incomplete assessment of the strength of the government's case against Mr. Macli.
>
> **Only counsel's misadvice caused Mr. Macli to proceed to trial; thereby receiving a greater sentence than if he would have pleaded guilty (with or without the specific formal plea agreement)**. If counsel had advised Mr. Macli that he faced only a pre-substantial assistance sentencing range of 135-168 months' imprisonment, there is a reasonable probability that Mr. Macli would have accepted the plea. If during the plea negotiations counsel had raised the same argument which prevailed at sentencing limiting the Medicare loss to the payments received by Biscayne Milieu then Mr. Macli's guideline would have been 87-108 months' imprisonment and he would have accepted the offer.
>
> Finally, if counsel had accurately conveyed the overwhelming strength of the government's case and disabused Mr. Macli of the notion that testimony from cooperating witnesses was evidence of a lesser caliber than tangible evidence, Mr. Macli would have pleaded guilty despite Mr. Macli's belief in his own innocence.

(Cv DE# 1:22) (emphasis added).

Because movant is afforded liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the words "with our without the specific formal plea agreement" seem to suggest that Petitioner is alleging that his counsel was ineffective for failing to advise him of the option to enter an open plea. An open plea is a plea "without a specific formal plea agreement." As a result, for purposes of the instant discussion, the Undersigned rejects the government's argument that the movant's open plea argument is untimely as it was first raised at the June 5, 2018 evidentiary hearing. See (Cv DE# 52).

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 entered an open plea. 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). Black asked Jorge why he was inquiring about a no contest plea and Jorge responded, "I didn't do anything wrong. I just wanted to save my father and my sister." (Cv DE# 46, p. 105).

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 **Jorge** in the context of this case and close observation of his demeanor, as well as careful attention to and review of the testimony of Jorge's defense counsel **Black** and taking into account the respective interests of the parties in the outcome of this proceeding, the Undersigned finds Jorge's testimony equivocal, inconsistent, and disingenuous. The Undersigned therefore rejects movant'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 Black's testimony regarding his discussions with Jorge credible. Black's testimony was supported by his hand-written notes made at the time of his meetings with Jorge. The Undersigned did not find **Antonio's** testimony credible, but believed the testimony provided by Antonio's trial counsel, **Sotorrio**.

Here, Jorge 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 Black failed to warn him that the government's evidence was overwhelming and advise him that he should accept the guilty plea. Black testified that he did warn Jorge, on multiple occasions, that the government had collected a massive amount of evidence. Specifically, informing Jorge that the government planned to call 13 witnesses to testify against Jorge. Jorge reviewed the witness statements and countered that they were all lying. Black explained that the cumulative impact of so many witnesses would be hard to overcome.

Even assuming, which the Undersigned does not, that Black failed to effectively advise Jorge regarding the plea offer, Jorge's testimony that he would have accepted the plea but for

counsel's ineffective assistance is not credible. The Undersigned accepts as true the testimony and evidence that Jorge repeatedly insisted that he would only accept a plea offer under which he would serve five years. The government specifically rejected this five-year counter offer. Black's credible testimony makes clear that nothing would have convinced Jorge to accept the government's plea offer. At one point, Jorge refused to entertain a ten-year offer, which was seven years less than the government's actual offer, even if it meant his mother, father, and sister went free.

In conclusion, the court rejects Jorge'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 involving more than five years' imprisonment, which the government would never have accepted. 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 Jorge had no intention of accepting the plea offer made by the government, regardless of whether his father and sister 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. Jorge 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 father's and sister'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 Jorge was not willing to admit his guilt until after he was actually convicted.

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

[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).

exculpatory statements, the court may resolve such doubts against acceptance of the plea. Id. at 1011.

As is evident from review of the record in the underlying criminal case, as well as Black's credible testimony 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. Black testified that Jorge asked him about a no contest plea. In so doing, Jorge explained he was willing to plead guilty to the charges without a plea agreement to save his father and sister, but **only** if he could maintain his innocence.

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, on the terms suggested by the movant. 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 claimed thirteen government witnesses were lying and went so far as rejecting the idea of a guilty plea agreement involving a ten-year sentence even if it meant his mother, father, and sister would go free.

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 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

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

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.

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[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.

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 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]

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[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)).

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 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©." 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

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APPENDIX D

United States District Court
for the
Southern District of Florida

Jorge Macli, Movant,	)	
	)	
v.	)	Civil Action No. 16-23421-Civ-Scola
	)	
United States of America, Respondent.	)	

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 Jorge Macli raises five 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, ECF No. 54.) Macli's counsel filed objections (ECF No. 59) and the Government filed objections to the report (ECF No. 58.) Macli then filed a motion to supplement his counsel's objections in a pro se capacity. (ECF No. 65.) According to the motion, Macli had been injured and hospitalized during the objection period and disagreed with his counsel's decision to file objections to certain aspects of the report and not others. (*Id.*) The Court granted the extension and Macli filed his supplemental objections on March 5, 2019. (ECF No. 67.) The Government responded to both sets of objections. (ECF Nos. 63, 70.)

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. (ECF No. 58.) The Court acknowledges these proposed corrections but at the same time notes that none of these findings affect the ultimate outcome in this case.

The facts of Macli's petition are set forth in extensive detail in Magistrate Judge White's Report and Recommendation, and further supplemented by parties multiple objections and responses. To summarize, Macli, along with his father and sister, was charged with a series of health care fraud and money laundering offenses related to the operations of Biscayne Milieu, a mental health center. (ECF No. 54 at 3.) After a 30-day trial, Macli was convicted of multiple counts of health care fraud, health care fraud conspiracy, payment of health care

kickbacks, conspiracy to pay health care kickbacks, money laundering, and conspiracy to commit money laundering. Macli was sentenced to 300-months in prison with a loss amount of $11 million. Macli appealed and the Eleventh Circuit affirmed his conviction. (*Id.* at 12.)

Before this Court, Macli raises five grounds for relief.

(1) Counsel misapprehended the governing law and how it applied to the evidence, resulting in a futile defense strategy.

(2) The government violated due process of law and its duty to ensure a faire trial when it engaged in pretrial discovery tactics designed to surreptitiously discovery the defense strategy.

(3) The government knowingly presented unreliable and false testimony in violation of due process.

(4) Federal fraud statutes are unconstitutionally vague and as applied constitute a bill of attainder or an ex post facto law.

(5) Counsel provided ineffective assistance in connection with the plea bargaining negotiations.

(*Id.* at 2.) Judge White determined that Macli's ineffective assistance of counsel claim warranted an evidentiary hearing. During the evidentiary hearing, the government called Macli's trial counsel and his father's trial counsel to testify. (*Id.* at 23.) Macli's counsel called Macli and his father, Antonio Macli, to testify. (*Id.*)

Judge White found that Macli is unable to show deficient performance or prejudice arising from counsel's failure to advise him regarding pleading guilty. (*Id.* at 37.) Judge White found that Macli's testimony that he would have pled guilty had he been advised of the strength of the government's case against him *or* if he had been advised that he could plead guilty in open court without being constrained to the government's plea offer were disingenuous. (*Id.* at 33.) The testimony presented during the evidentiary hearing revealed that Macli "repeatedly insisted that he would only accept a plea offer under which he would serve five years." (*Id.* at 34.) Therefore, Judge White rejected Macli's "self-serving, disingenuous" testimony that he would have accepted a plea offer had he been given proper advice. The Court agrees with Judge White's analysis.

With regard to the remaining four grounds, the Court has considered—*de novo*—Magistrate Judge White's Report, Macli's multiple objections, the Government's responses, the record, and the relevant legal authorities. For each of Macli's arguments, Judge White analyzed Macli's allegations and correctly found no deficiency or prejudice.

Accordingly, the Court **affirms and adopts** Judge White's report and recommendation. (**ECF No. 54**.) 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 May 23, 2019.

Robert N. Scola, Jr.
United States District Judge

APPENDIX E

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.