APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12057-F

RAMON ENRIQUE ACOSTA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:18-cv-20053-KMM

RAMON ACOSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Petitioner Ramon Acosta's ("Petitioner") Motion for Clarification. ("Mot.") (ECF No. 57). Therein, Petitioner states that the Court's Order (ECF No. 54) adopting in full Magistrate Judge White's Report and Recommendation ("R&R") (ECF No. 44) and denying Petitioner's § 2255 Habeas Petition (ECF No. 1) did not explicitly state whether the Court also denied Petitioner a Certificate of Appealability. Mot. at 1–2. Petitioner moves the Court to clarify whether the Court's adoption of the R&R–which recommended that the Court deny Petitioner a Certificate of Appealability–encompassed the denial of Petitioner's request for a Certificate of Appealability. *Id.* The Court agrees with Magistrate Judge White that Petitioner failed to make a "substantial showing of the denial of a constitutional right" necessary to earn a Certificate of Appealability. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, UPON CONSIDERATION of the Motion for Clarification (ECF No. 57), the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED that no Certificate of Appealability shall issue to Petitioner. The case remains CLOSED.

Done and ordered in Chambers at Miami, Florida, this 18th day of April, 2019.

K. Michael Moore

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K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:18-cv-20053-KMM

RAMON ACOSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Petitioner Ramon Acosta's ("Petitioner") Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 (ECF No. 1). The Court referred the Petition to the Honorable Patrick A. White, United States Magistrate Judge, who, after an evidentiary hearing, issued a Report and Recommendation ("Report") (ECF No. 44), recommending that the Court deny the Petition. Petitioner filed objections. ("Objections") (ECF No. 53). The Petition is now ripe for review.

The Petition asserts a single claim: that Petitioner's trial counsel, Michael Tarre, provided Petitioner with ineffective assistance of counsel by failing to adequately explain the Government's plea offers, which carried a far lower maximum sentence than the approximately eleven–year sentence Petitioner ultimately received. Mem. of Law (ECF No. 3) at 10–21. In the Report, Magistrate Judge White found that Tarre's performance as counsel was not constitutionally deficient because Tarre repeatedly communicated to Petitioner the Government's plea offers, the strength of the Government's case, and Petitioner's statutory sentencing range if he rejected the plea offers. *See* Report at 23–24. Magistrate Judge White also found that Petitioner failed to

demonstrate a reasonable probability that he would have pled guilty but for Tarre's alleged errors. *See id.* at 28–29.

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). Pursuant to Federal Rule of Civil Procedure 72(b)(3), the Court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3).

Petitioner makes several objections to the Report, none of which have merit.

First, Petitioner challenges Magistrate Judge White's finding that Tarre did not provide constitutionally deficient advice to Petitioner by failing to explain Petitioner's precise sentencing exposure under the Sentencing Guidelines. *See* Obj. at 3–7. However, Tarre could not predict Petitioner's precise guideline range prior to trial because, among other reasons, he did not know the quantity of drugs that could have been attributed to Petitioner's conduct. ("Evid. Hr'g Tr.") (ECF No. 51) at 89. Moreover, Tarre informed Petitioner of his statutory sentencing range, ten years to life, and the Government warned Petitioner that rejecting the plea could result in a twenty–year sentence. *Id.* at 73–74. Tarre also repeatedly told Petitioner that the Government's plea offer involved a maximum sentence of five years imprisonment, with the potential for an even further reduction conditioned upon his substantial assistance to the Government. *See id.* at 89; Email Rejecting Plea Offer (ECF No. 46) at 16. Knowing all of this, including the breadth of the evidence against him–the Government conducted a "reverse proffer" with Petitioner and Tarre, where it explained its theory of the case and urged Petitioner to take the plea and cooperate–Petitioner nonetheless rejected multiple offers of a substantial reduction to his potential sentence. Evid. Hr'g Tr. at 77–78, 112; Tarre's Summary of Reverse Proffer Meeting (ECF No. 46) at 14. Magistrate

Judge White therefore properly found that Tarre did not provide constitutionally deficient counsel to Petitioner during his plea negotiations.

Second, Petitioner argues that the Report improperly found that because Petitioner stressed his innocence throughout the criminal proceedings, he would not have agreed to plead guilty. Obj. at 8–9, 11–12. Although Petitioner's consistent proclamations of innocence are not dispositive of his willingness to take a guilty plea, they are nonetheless "relevant to any conclusion as to whether [a petitioner] has shown a reasonable probability that he would have pled guilty. . ." *See Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999). Here, Tarre testified that in addition to Petitioner's claims of innocence, Petitioner "again and again told him that he would rather spend the rest of his life in an American prison than free in Venezuela." Evid. Hr'g Tr. at 69–70. Magistrate Judge White thus had a reason completely independent of Petitioner's attestations of innocence to conclude that Petitioner would not have accepted the Government's plea offer: Petitioner's interest in avoiding deportation upon being convicted of a felony.

Third, Petitioner argues that the "wide discrepancy" between the sentence offered by the plea offer and the one faced by Petitioner after trial, coupled with the strength of the Government's case, provided sufficient evidence that Petitioner would have accepted the Government's plea offer "had counsel's advice been constitutionally adequate." Obj. at 9–10. Petitioner points to cases where the performance of trial counsel was held to be deficient because of "gross[] underestimat[ion]" of their clients' sentencing exposure. *See, e.g.*, *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (deficient performance of counsel where defendant rejected pretrial plea of eighty–four months because counsel mistakenly informed him that he faced 120 months were he to go to trial); *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (deficient performance of counsel where defendant rejected plea offer of five years because defense counsel mistakenly

assured the defendant that he faced an eleven year sentence if he proceeded to trial); *Riggs v. Fairman*, 399 F.3d 1179, 1193 (9th Cir. 2005) (deficient performance of counsel where defendant rejected a plea offer of five years because defense counsel erroneously advised him that his maximum exposure was nine years, but his actual exposure was twenty–five years to life).

These cases are inapposite, however, because Tarre did not grossly underestimate Petitioner's sentencing exposure. In fact, Tarre explicitly communicated to his client that his sentencing exposure without a plea agreement was ten years to life. Evid. Hr'g Tr. at 77–78. Petitioner's actual sentence–135 months–fell towards the very bottom of this range. Moreover, although there may have been a "wide discrepancy" between the *initial* sentencing range suggested within the PSI (360 months to life) and Tarre's initial hypothetical range (ten years to life), Petitioner's *final* Sentencing Guidelines range was 151 to 188 months, and Petitioner's actual sentence, 135 months, was ultimately closer to Tarre's hypothetical range than the range within the initial PSI. *See* R&R at 9; Evid. Hr'g Tr. at 112. Further, even if Tarre advised Petitioner of every potential sentencing enhancement or reduction applicable under the Sentencing Guidelines, Petitioner's claims of innocence and fear of deportation supported a finding that Petitioner would have nonetheless rejected the plea and gambled on a favorable verdict at trial. *See Missouri v. Frye*, 566 U.S. 134, 147 (2012) (requiring petitioners to demonstrate a "reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel").

Finally, Petitioner objects to the Report's finding that the Government renewed its earlier plea offer to Petitioner after the jury had convicted him. Obj. at 11. Petitioner argues that the Government's offer was not actually an offer for a plea, but an offer to file a motion under Fed. R. Crim P. 35 in exchange for "information regarding persons involved in the drug trade in Texas."

Id. However, Petitioner fails to explain why this purported error is material to Magistrate Judge White's finding that Tarre's performance was not constitutionally deficient. Moreover, even if Petitioner is correct that a post–verdict plea was not offered by the Government, Petitioner categorically rejected two earlier plea offers that would have exposed him to a five–year maximum sentence. As stated *supra*, Petitioner rejected these offers knowing both the depth of the Government's case and his maximum possible sentence of life in prison.

UPON CONSIDERATION of the Petition, the pertinent portions of the record, and being otherwise fully advised in the premises, Magistrate Judge White's thorough Report and Recommendation (ECF No. 44) is hereby ADOPTED, and the Petition for Habeas Corpus (ECF No. 1) is DENIED. The Clerk of Court is instructed to CLOSE this case and send a copy of the instant Order to Petitioner's address of record. All pending motions, if any, are DENIED AS MOOT.

Done and ordered in Chambers at Miami, Florida, this 31st day of March, 2019.

K. Michael Moore

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K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-20053-MOORE
(12-CR-20157-MOORE)
MAGISTRATE JUDGE P.A. WHITE

RAMON ACOSTA,

Movant,

vs.

REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

This matter is before the Court on Movant's pro se motion to vacate, filed pursuant to 28 U.S.C. § 2255, attacking the constitutionality of his convictions and sentence for conspiracy to import five kilograms or more of cocaine, in violation of 21 U.S.C. § 963; the importation of five kilograms or more of cocaine, in violation of 21 U.S.C. § 952; conspiracy to possess with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846; and possession with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841 entered following a jury trial in **case no. 12-cr-20157.**

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B),©; S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

For its consideration, this Court has reviewed the operative

§ 2255 motion[1] (Cv-DE#1)[2]; the government's response and its exhibits thereto; all pertinent portions of the underlying criminal file; the pre-sentence investigation report (PSR), its addendum, and statement of reasons (SOR); and the appellate record.

In addition, the undersigned conducted an evidentiary hearing on November 6, 2018. Movant testified on his own behalf and presented Marc Seitles, Esq., his counsel at sentencing and on direct appeal, as his witness. The government presented as its witness Michael Tarre, Esq., Movant's trial counsel. The government also presented a number of exhibits at the evidentiary hearing, which this Court reviewed.[3]

II. Claims

Construing the § 2255 motion liberally as afforded pro se litigants, pursuant to Haines v. Kerner, 404 U.S. 519 (1972), Movant asserts that his convictions should be vacated and raises just one claim: his trial counsel, Michael Tarre, failed to advise him of the extent of the evidence against him and failed to explain the sentencing guidelines so that he could make an informed decision on whether to plead guilty or proceed to trial. (DE#1:4; DE#3:18).

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[1]The court may take judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 7985 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts).

[2]Citations to "Cv-DE#__" reference the docket entries in the instant civil case number 17-cv-10015. Citations to "Cr-DE#__" reference the docket entries in the underlying criminal case number 13-cr-10029.

[3]References to the government's exhibits presented at the evidentiary hearing use the following citation: "Govt. Exh. ___."

Movant asserts that Mr. Tarre never discussed the extensive evidence the government would present, the potential of the testimony, nor the application of the guidelines regarding acceptance of responsibility and the safety valve provisions. (DE#3:25). According to Movant, this failure led to his inability to benefit from sentence reductions because the options was never explained to him. (DE#3:18). Movant asserts he was only aware of the lack of information which would have mitigated the overall sentence once he retained new counsel, Mr. Seitles, for sentencing. (Id.). Generally, Movant asserts that had he been properly advised of these matters he would not have proceeded to trial and would have accepted the government's plea offer.

III. Facts of the Offense and Procedural Background

A. Facts of the Offense

Movant, a Federal Aviation Authority (FAA) certified mechanic, was charged with various offenses for his role in a drug trafficking operation. Specifically, he used his specialized knowledge of how to load, conceal, and unload cocaine in the fuselage tank of Learjets. United States v. Acosta, 660 Fed. App'x. 749, 750 (11th Cir. 2016). The scent of gasoline would make it harder for drug-detecting dogs to smell the drugs. Movant also acted as a broker by acquiring planes used to smuggle drugs. (See generally, government's response, Cv-DE#10).

The Eleventh Circuit Court of Appeals, in its unpublished opinion affirming Movant's conviction, outlined the facts of the offense as follows:

Acosta's work as an airplane mechanic eventually brought

him into contact with Paul Cordoba, a pilot and drug smuggler. Cordoba was the head of a drug trafficking operation that smuggled drugs from Venezuela into Florida aboard his planes.

Acosta's first encounter with Cordoba's drug trafficking activities occurred in 2007, when Cordoba and Jefferson Castillo, one of Cordoba's associates, smuggled marijuana from Arizona to Florida aboard a small prop plane. While flying from Arizona to Florida, the two stopped in Dallas to refuel at the hanger where Acosta was employed. They decided to spend the night and stored the airplane, which still contained the smuggled marijuana, in the hanger with Acosta's permission. When Castillo expressed concern about leaving the plane in the hanger, Cordoba assured him that Acosta was a friend and that there would not be any problems; however, it is unclear from the record whether Acosta was aware that the plane contained marijuana.

Subsequently, Acosta became more directly involved with Cordoba's drug trafficking. Sometime after Cordoba and Castillo's visit, Acosta helped Cordoba modify the black box in one of Cordoba's planes so that drugs could be hidden inside. Cordoba used the modified black box to smuggle drugs into the United States on two occasions.

From there, Cordoba and Acosta continued to experiment with smuggling methods. Acosta proposed smuggling drugs in the reserve fuel tanks of Cordoba's planes. When Cordoba ultimately decided to implement this proposal, he recruited Acosta to remove the drugs from the fuel tanks upon the planes' arrival in the United States. The scheme also involved a number of other participants beyond Cordoba and Acosta, including Francisco Gamero Medina ("Gamero"), an airline mechanic in Venezuela; Cordoba's son Marlon Cordoba ("Marlon"); and Rediel Rodriguez, a drug distributor in Florida.

Cordoba flew a plane to Venezuela, where Gamero loaded a shipment of cocaine into the plane's reserve fuel tank, in May 2008. Cordoba flew the plane back to the United States and, after making several stops, brought the plane to Acosta in Dallas. There, Acosta removed the cocaine from the plane, placed the drugs in briefcases, and loaded them back onto the plane for transport to Florida, where Rodriguez sold the drugs.

> *Cordoba organized a similar smuggling operation in November of that year. This time, Marlon flew with a pilot to Venezuela, where Gamero loaded a shipment of cocaine into the plane's reserve fuel tank. Marlon then flew the plane to the Bahamas, where he met with Cordoba. There, the two switched planes and flew both to Fort Lauderdale, Florida. The next day, Cordoba, Marlon, Gamero, and a few others flew the plane carrying the smuggled drugs to Acosta's hanger in Texas. Once the plane arrived in the hanger, Acosta and Gamero removed the cocaine from the plane's reserve fuel tank. Cordoba and the other conspirators then repacked the cocaine in suitcases, loaded them aboard the plane, and flew back to Florida.*
>
> *Cordoba arranged a final smuggling operation in August 2009. In contrast to Acosta's role in the prior two smuggling operations, however, his role in this final scheme was limited. Although Acosta was aware that Cordoba was planning to bring a load of cocaine into the United States, he was excluded from the operation at Rodriguez's suggestion for charging too high a fee. Although Acosta did not directly participate in the final trip, Rodriguez offered to pay him $50,000 in "hush money." (Citing Trial Tr. at 158 (Doc. 442).*
>
> *Rodriguez planned to pay Acosta by selling one of the planes used in the conspiracy. The plane was owned, in name, by Rodriguez's girlfriend Kimberly Rosselle. But Rodriguez ultimately decided not to sell the plane after police began an investigation into the trafficking conspiracy. Police eventually arrested Rodriguez, at which time Cordoba tried to convince Rosselle to transfer ownership of the plane to him. When Rosselle refused, Acosta placed a mechanic's lien on the plane, presumably to encourage Rosselle to sell the plane to Cordoba and to secure for himself the payment Rodriguez promised. When Cordoba eventually acquired ownership of the plane, Acosta rescinded the lien.*

Acosta, 660 Fed. App'x. at 750-751.

B. Procedural Background

Movant was only indicted for the activities during the November 2008 trip. Acosta, 660 Fed. App'x. at 752. Movant was indicted on or about March 8, 2012, and was arrested on or about March 15, 2012. (Cr-DE#10). For each of the four offenses, Movant faced a sentence of life in prison. (Id. at 20). On or about May 2, 2012, Michael S. Tarre, Esq., entered his permanent appearance in Movant's criminal case. (Cr-DE#80). Thereafter, on July 9, 2012, Movant and Mr. Tarre met with the government to discuss a plea offer: plead guilty to a Travel Act violation with a five-year maximum sentence with the possibility of the filing of a § 5K1.1 motion if Movant cooperated with the government and provided substantial assistance. (Govt. Exh. 4, 11). Movant rejected the plea offer and sought to proceed to trial. A superseding Indictment was filed on July 12, 2012, without any change to the maximum penalties he faced. (Cr-DE#96:21).

On July 18, 2012, Movant entered a not guilty plea. (Cr-DE#105). On August 8, 2012, the government filed a notice of intent to use evidence. (Cr-DE#126). On August 16, 2012, the Court held a hearing, where Movant, represented by counsel, appeared telephonically (since he lived in Texas) only to waive his own personal appearance. (Cr-DE#163:8). At this hearing, where counsel was present, the government laid out further discovery material to be used in Movant's trial, in particular the testimony of government witnesses and the deposition of co-defendant Paul Cordoba. (Id. at 51-61). On August 21, 2012, the government provided a list of expert witnesses. (Cr-DE#169). In 2013, the government filed multiple notices of its intent to use various evidence. (i.e. Cr-DE#s298, 300). Movant filed his notice of

disclosing an expert witness, Mr. Clyde Elliot. (Cr-DE#314).[4]

On or about June 9, 2014, Mr. Tarre relayed to Movant that the government's plea offer was still available but Movant again rejected the offer claiming he had no information to offer and wanted to proceed to trial. (Govt. Exh. 15). Mr. Tarre then contacted the government and declined the plea offer formally by way of an email. (Id.). On July 14, 2014, the government provided a trial brief, an exhibit list, and a witness list outlining its case for trial. (Cr-DE#395, 396, 397).

Movant's trial commenced on July 23, 2014. (Cr-DE#402). Movant testified on his own behalf at trial and insisted on his innocence.[5] (Tr. T. 497-641). "Acosta's principal defense at trial was that he was unaware of and uninvolved in any of Cordoba's criminal ventures. He argued that his transactions with Cordoba were strictly above-board." Acosta, 660 Fed. App'x. at 754.

Despite Movant's assertions in his federal habeas petition that the evidence of his involvement was based on statements Cordoba made to other co-conspirators regarding his involvement, the Eleventh Circuit made clear there was more evidence presented at trial:

> *...In addition to testimony from Rodriguez and Castillo, the government presented evidence that Cordoba's flight records were consistent with the government's characterization of the trafficking conspiracy and Acosta's involvement. The government also introduced*

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[4]Mr. Elliot did not testify at trial since his testimony would corroborate the government's case. (See testimony of Michael S. Tarre, Esq., and Movant at Evid. Hear. T.).

[5]The trial transcript containing Movant's testimony is located on the criminal docket as Cr-DE#444.

> *testimony that Acosta received suspicious payments consistent with compensation for drug trafficking ... Castillo and Rodriguez testified as to Acosta's role in Cordoba and Castillo's 2007 layover and the modification of the black box in 2007. The government also presented testimony and documentary evidence of Acosta's placement of a lien on Rosselle's plane and his receipt of suspicious payments.*

Acosta, 660 Fed. App'x. at 752, 754.

A jury found Movant guilty of conspiracy to import five kilograms or more of cocaine, in violation of 21 U.S.C. § 963; the importation of five kilograms or more of cocaine, in violation of 21 U.S.C. § 952; conspiracy to possess with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846; and possession with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841. (Tr. T. 684-685; Cr-DE#430). Despite the verdict, according to Mr. Tarre, the government again presented the plea offer in exchange for Movant's substantial cooperation but Movant rejected the offer stating that he knew of no wrongdoing. (See testimony of Michael S. Tarre, Esq., Evid. Hear. T.).

Prior to sentencing, a pre-sentence investigation report (PSI) was prepared. When the initial PSI indicated Movant was facing 30 years to life in prison, Movant fired Mr. Tarre and hired Marc Seitles. (See Evid. Hear. T. generally). Ultimately, based on the guideline for the offense and since Movant was accountable for 387 kilograms of cocaine, his base offense level is 38; however, because Movant received an adjustment under § 3B1.2 for his mitigating role and because the base offense level is level 38, his base offense level was decreased by four levels making Movant's base offense level 34. (PSI ¶56). Because an aircraft other than a regularly scheduled commercial air carrier was used to unlawfully

import a controlled substance, the offense was increased by two levels pursuant to § 2D1.1(b)(3)(A). (PSI ¶57). Since Movant met criterion (5) of § 5C1.2, his offense level was reduced by two levels, pursuant to § 2D1.1(b)(17). (PSI ¶58). Because he was a minor participant, his offense level was decreased by an additional two levels pursuant to § 3B1.2(b). (PSI ¶60). For the obstruction of justice, pursuant to § 3C1.1, Movant received an increase of two levels. (PSI ¶61). Accordingly, his adjusted offense level was 34. (PSI ¶62). Movant did not receive any further enhancement nor credit for acceptance of responsibility; thus, his total offense level was 34. (PSI ¶65). Movant had no criminal history points (since he had no previous arrests or convictions) and a criminal history category of I. (PSI ¶68). Accordingly, the guideline sentence was **151 to 188 months** with a five-year term of supervised release. (PSI ¶¶108, 110).

At sentencing, Movant was able to receive the benefit of a safety valve reduction. (See SOR). On October 16, 2014, Movant was sentenced to **135 months**, a sentence reflecting the range according to the safety valve reduction. (Cr-DE#430). *This sentence is sixteen months lower than the low end of the guidelines estimated by the PSI.* Movant was represented by new counsel, Mr. Seitles, during the sentencing stage and **does not** challenge the effectiveness of sentencing counsel. Accordingly, this Report does not address any pleadings submitted during the sentencing phase on Movant's behalf as they are irrelevant to Movant's petition.

Next, Movant sought a direct appeal challenging the sufficiency and admissibility of the evidence:

> *specifically, [the testimony] ... concerning: (1) his overnight housing of an airplane containing smuggled marijuana, (2) his assistance in modifying an airplane*

> *black box to smuggle cocaine, (3) his placement of a mechanic's lien on the plane owned (at least on paper) by Rosselle, and (4) his receipt of suspicious payments from Cordoba. He contends that the district court should have refused to admit testimony about these events because the testimony was inadmissible either as (1) bad acts evidence under Federal Rule of Evidence 404(b) or (2) hearsay under Federal Rule of Evidence 802.*

Acosta, 660 Fed. App'x. at 752.

Nonetheless, Movant's sentence and conviction were affirmed on August 23, 2016. United States v. Acosta, 660 F. App'x 749 (11th Cir. 2016). The appellate court explained Movant's "principal defense at trial was the lack of criminal intent, and the evidence concerning [his] uncharged conduct spoke to his criminal intent. As such, the evidence was highly probative." Acosta, 660 Fed. App'x. at 755. Moreover, the appellate court held that:

> *...there was ample other evidence supporting the jury's guilty verdict. Rodriguez testified based on his personal knowledge of Acosta's involvement in the November 2008 trafficking operation and recounted personally observing Acosta remove cocaine from the reserve tank of Cordoba's plane. Beyond that testimony, the government presented evidence of the suspicious flight patterns of Cordoba's planes and how those flight patterns lined up with descriptions of the trafficking scheme in testimony provided by Rodriguez and Castillo. This evidence, which was uninfected by the purported errors Acosta identifies, is sufficient to support the jury's verdict. We cannot conclude that the evidentiary errors Acosta highlights on appeal, to the extent they are in fact errors, had a substantial effect on the verdict. Reversal is therefore unwarranted on that basis.*

Acosta, 660 Fed. App'x. at 755-756.

The Supreme Court of the United States denied certiorari. Acosta v. United States, 196 L. Ed. 2d 579 (2017). Thus, the

judgment became final on **January 9, 2017**, when certiorari was denied. Movant had until January 9, 2018, to timely file his federal habeas petition.

Movant filed this habeas petition on **January 2, 2018**. (Cv-DE#1). The undersigned determined that Movant's claim that his trial counsel, Mr. Tarre, failed to advise him of the extent of the evidence against him and his failure to advise him of the sentencing guidelines warranted an evidentiary hearing. As a result, this Court appointed counsel and set a date for the evidentiary hearing. (Cv-DE#5). The government filed a response to this Court's order to show cause along with exhibits. (Cv-DE#10). The evidentiary hearing was held on November 6, 2018. (See Cv-DE#42). This Report follows.

IV. Standard of Review of Section 2255 Motions

Section 2255 states in relevant part that "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution...may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255.

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to § 2255 are extremely limited. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. § 2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8

(11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn, 365 F.3d at 1232 (citations omitted). It is also well-established that a § 2255 motion may not be a substitute for a direct appeal. Id. (citing United States v. Frady, 456 U.S. 152, 165 (1982)). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent..."

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." Frady, 456 U.S. at 152; McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under §2255. This is because "[r]elief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Lynn, 365 F.3d at 1232-33 (quoting Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988)(internal quotations omitted)).

If a court finds a claim under § 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or Presentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255. To obtain

this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166 (rejecting the plain error standard as not sufficiently deferential to a final judgment). Under § 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 (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").

V. Threshold Issue - Timeliness

Parties correctly agree that Petitioner's habeas petition is timely filed.

VI. Applicable Principles of Law

A. Assistance of Counsel Principles

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). Essentially, the presumption is that counsel rendered adequate assistance and exercised reasonable professional judgment. See Chandler v. United States, 218 F.3d at 1305, 1313 (11th Cir. 2000). This presumption of reasonableness is even stronger when we are reviewing the performance of an experienced trial counsel." Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005). To overcome this presumption, the petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d at 1315.

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's, 480 F.3d 1092, 1100 (11th Cir. 2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000). "Surmounting Strickland's high bar is never an easy task." Harrington, 562 U.S. at 105 (quoting Padilla, 559 U.S. at 371).

B. Misadvice of a Plea

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. 356 (2010). "[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." Missouri v. Frye, 566 U.S. 134 (2012).

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 562 U.S. 115, 127 (2011); Padilla v. Kentucky, 559 U.S. 356, 362-363 (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)(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, 566 U.S. 134 (2012). Notwithstanding, the Sixth Amendment right to counsel does include effective representation during the plea negotiation process. Padilla v. Kentucky, 559 U.S. at 374. A "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'" Padilla, 559 U.S. at 370-371 (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, Frye, 566 U.S. at 145. 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.

Frye, 566 U.S. at 147; see Lafler v. Cooper, 566 U.S. 156 (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, 559 U.S. at 371 (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 Id. at 376. However, that does not end the inquiry.

The question then becomes whether Movant can demonstrate counsel's deficiency prejudiced him.[6] Movant must demonstrate: (1) there is a reasonable probability that the plea offer would

[6]Although Movant maintained his innocence during trial, sentencing, and appeal, this does not eliminate his ability to demonstrate prejudice here. See Lalani v. United States, 315 Fed. App'x. 858 (11th Cir. 2009) (an assertion of innocence does not preclude the movant from asserting he was prejudiced by counsel's misadvice regarding pleading guilty or pursuing a plea agreement).

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, 566 U.S. at 164.

VII. Discussion

Movant claims that counsel was ineffective for failing to explain the extent of the government's evidence against him and for failing to explain the sentencing guidelines so that Movant could make an informed decision about whether to enter a guilty plea or proceed to trial. (Cv-DE#1, 3). Movant asserts that he knew nothing about the extensive evidence and that his counsel did not explain to him that he could have received a reduction in his offense level based on acceptance of responsibility and the safety valve provisions of the sentencing guidelines. (Id.). He insists that if he knew, he would have accepted the government's plea offer. The government asserts that Movant was presented with a favorable plea offer (plead guilty to a Travel Act violation and face five years in prison or less). (Cv-DE#10). The government further asserts that Movant took part in the discovery process for approximately two years prior to his trial, was present for pretrial testimony, was provided with all of evidence, testified on his own behalf, insisted to his attorney that he was innocent, and refused to plead guilty or accept any plea offer. (Cv-DE#10; see also Evid. Hear. T.). Lastly, the government asserts that Movant's claim is refuted by the underlying criminal record. (Id.). For the reasons set forth, Movant's claim fails.

As a threshold matter, Michael S. Tarre has been a member of the Florida Bar since 1967. At that time of Movant's criminal case, Mr. Tarre had nearly five decades of experience as a criminal law attorney. (Cv-DE#10-2:1). Mr. Tarre testified at the evidentiary hearing that he maintains his practice of criminal through the present date. Accordingly, when reviewing Mr. Tarre's performance, the presumption that counsel's assistance was within the wide range of reasonableness is even stronger, per Callahan v. Campbell, supra.

After careful review of the exchange of discovery in the underlying criminal case, the evidence presented at the evidentiary hearing, and the testimony of Movant and Mr. Tarre, the sum of the evidence affirmatively demonstrates that Mr. Tarre properly consulted with Movant and explained the benefits of the proposed plea offer from the government, explained the full extent of the evidence, ensured that Movant understood the consequences of a trial conviction but that Movant maintained his innocence, refused to accept any plea offer, and insisted to counsel to proceed to trial.

At the evidentiary hearing, Movant testified that he hired Mr. Tarre approximately one month following his arrest. Movant asserted that, early on, he and Mr. Tarre presented for a meeting with the government. Movant claimed that he did not know that the meeting was for a formal plea offer. Still, he admitted that at the meeting, Mr. Gregorie, AUSA, told him that there was enough evidence to convict him and he could be sentenced to twenty years. According to Movant, Mr. Gregorie also told him that if he pled guilty and cooperated with the government, he could probably get him two to five years. Movant testified that, at this meeting, there were no explanations of guidelines by Mr. Gregorie or Mr.

Tarre, that he felt the offer by the government was more like a "threat," there was "no mention of a [plea to a] Travel Act" violation, the government did not show any evidence or transcripts of witness statements, and there was no written plea offer. At the evidentiary hearing, Movant insisted only generally that Mr. Tarre did not explain the plea offer, nor the benefits of a plea, nor the consequences of going to trial. Movant also claimed that at no point did Mr. Tarre discuss the sentencing guidelines.

In contrast, Mr. Tarre testified with detailed recollection. Mr. Tarre stated that he certainly explained nature of conspiracy and the charges at the outset of representation and that Movant could be charged if he knew the Cordobas were smuggling cocaine. Mr. Tarre stated that Movant "always" maintained his innocence. Mr. Tarre explained that the government was generous with Movant, including not arresting him until his chemotherapy was concluded. Movant lived in Texas and would travel to Miami for certain work with the permission of the government. Both Mr. Tarre and Movant met with the government to discuss a plea offer on July 9, 2012, a date confirmed in Mr. Tarre's digital calendar and a memo to the client file. Contrary to Movant's assertion that there was no mention of pleading guilty to a "Travel Act" violation, Mr. Tarre testified that because the government knew Movant was ill and was sympathetic to him, they were willing to offer Movant a plea to a Travel Act violation with a maximum sentence of five years plus a "5K" to make the sentence even lower but conditional upon Movant's cooperation. Mr. Tarre recalled that the government explained its case: Learjets were used to transport cocaine from Venezuela to the United States and, as an FAA certified mechanic, Movant suggested or was asked by Cordoba to remove the center fuel tank and fill it with the drugs. Mr. Tarre further explained that, as they understood it, the cocaine was wrapped very securely and the

fuel tanks were emptied and steam cleaned in order to avoid contamination. Mr. Tarre testified that he spoke with Movant afterward but, at the time, Movant maintained that he did nothing wrong and would not plea to any offense. Mr. Tarre recalled that the day after this "reverse proffer," on July 10, 2012, he and Movant met at his office where Movant insisted he did not commit the crime and that he was innocent. Mr. Tarre stated that he prepared a "memo" to Movant's client file on the day of the "reverse proffer." (Govt. Exh. 4). In part, the "memo" states:

> ...Mr. Gregorie told Mr. Acosta and me about the evidence the government would present...if convicted at trial he was facing a minimum of 20 years to life in prison. The government was, however willing to allow Acosta to enter a guilty plea to a one count Information charging him with violating "the Travel Act" (18 USC section 1952)...if Acosta cooperated with the government and provided substantial assistance - that the government might file a section 5K1.1 motion asking the court to reduce his sentence below the guideline range. Mr. Acosta told Gregorie and me that he understood the consequences of going to trial; the government's offer and the consequences of both. Acosta told me after the meeting that he was not guilty of the charges against him and would not plead guilty to anything.

Mr. Tarre testified that he always informs clients about plea offers but was doubly cautious here in light of a recent Supreme Court opinion.[7] Thereafter, Mr. Tarre decided to send a copy of the "memo" to Mr. Gregorie, "in case something ever happens to me." Mr. Tarre told Movant that he was facing a ten-year minimum sentence up to life in prison; and that Movant also knew of the maximum sentence because he saw the penalty sheet. Mr. Tarre explained it

[7]Mr. Tarre was referring to Missouri v. Frye, 566 U.S. 134 (2012).

is nearly impossible to predict sentencing prior to trial given all of the variables but was certain he explained to Movant that the "range" was "ten years to life."

Mr. Tarre recalled vividly that, in addition to his claims of innocence, "again and again" Movant told him that he would rather spend the rest of his life in an American prison than free in Venezuela. Mr. Tarre explained that Movant was in the United States pursuant to a "green card" that was up for renewal at the time of his arrest and that he "went to bat for him" on that issue to explain to immigration officials that Movant's green card should be renewed because there was only an indictment and not a conviction.

According to Mr. Tarre, the government extended the same plea offer *a second time*, approximately, one month before trial. Mr. Tarre stated that he presented the offer to Movant who rejected it, maintained he did not know anything about anyone, was innocent, and wanted to go to trial. On June 9, 2014, Mr. Tarre sent an email to Mr. Gregorie confirming that he presented the offer to Movant:

> *I spoke at length with Acosta about the government's offer of a plea to one Travel Act count (with a five year max) contingent on his cooperation with the government, including a full, complete and truthful debriefing about the Cordobas. I also explained the substantial downside risk of conviction at a trial and the minimum-mandatory sentence he would face. Acosta said he didn't know anything bad about the Cordobas and is going to trial.*

(Govt. Exh. 15).

During the evidentiary hearing, Mr. Tarre confirmed that the government was more than generous with discovery (tax returns, bank records, witness statements, etc.), that he gave all of the

discovery to Movant but that Movant always insisted he was innocent and that the witnesses were liars. Mr. Tarre testified, "I showed him every document" but Movant insisted that he was innocent.

With regard to the attempt to secure expert testimony for trial, Mr. Tarre described the scenario as "a disaster." Movant had expressed to Mr. Tarre that it was not possible to make the trip from Venezuela to the United States without refueling, which is a risk of finding the drugs. Movant gave Mr. Tarre the name of an expert that would support Movant's explanation, namely, Clyde Elliot. However, during the meeting with the experts, the witnesses said the trip was possible with just two tanks even though it was risky. The testimony from Mr. Elliot would not be helpful to the defense; and Movant agreed they should not call Mr. Elliot. Eventually, Mr. Tarre asked Movant to show him the airplane so that he could understand Movant's explanations. Movant met with Mr. Tarre at an airport, took him inside the jet, and maintained the impossibility of the government's case. Mr. Tarre recalled that he took pictures of the fuselage and tanks at the time, which he disclosed to the government.

Mr. Tarre recalled that he told Movant that if he testified he gives the jury the choice to believe him or the government. Mr. Tarre stated that Movant explained to him that he was paid in cash in amounts just under $10,000 for his work on Learjets. Together they reviewed the evidence of the bank statements in detail. According to Mr. Tarre, Movant had an explanation for all of the government's evidence. Movant told Mr. Tarre that he worked for Cordobas and knew them for years but there was no wrongdoing, and the only work he did was to service the planes.

At the evidentiary hearing, Mr. Tarre confirmed that the plea

offer was presented three times to Movant: the 2012 reverse proffer, another about one month before trial (June 9, 2014), and one post verdict presented at the courthouse. During this last presentation of the offer, Movant told Mr. Gregorie, face-to-face, that he did not know anything in order to accept the plea conditional upon providing information. In explaining the pros and cons of going to trial, Mr. Tarre admitted that a defendant must know the maximum possible sentence, which he maintains he explained to Movant. The maximum possible sentence, though unlikely, was life, with a range of ten years to life. Mr. Tarre testified that prior to trial he could not predict the guidelines because a number of variables including "the amount of drugs attributable to [Movant]." Mr. Tarre said he was unsure if he advised of any obstruction of justice enhancements and did not discuss safety valve. Mr. Tarre explained that Movant "went beserk" when the PSI recommended 30 years to life with enhancements for special skill, his role, the drug amount, and other conditions. Mr. Tarre stated that he tried to explain to him that the PSI was not final but did not get explain the guidelines since Movant fired him and hired Mr. Seitles.

Aside from his own testimony, Movant's "evidence" of his ignorance of the sentencing guidelines or the risks of going to trial was pinned upon the testimony of his sentencing counsel, Mr. Seitles, who testified that it was apparent to him during his meetings with Movant that he was "clueless," "was totally lost," and "didn't seem to know much about the guidelines or safety valve or really much about anything." Movant hired Mr. Seitles more than two months after the conviction and after the PSI was released. Mr. Seitles testified that it appeared to him that Movant was "surprised" at the PSI (30 years to life) and said, "if I would have understood all of this I would never have gone to trial."

Ultimately, with "begging and pleading," Mr. Seitles was able to reduce the drug quantity, eliminate the special skill and obstruction enhancements, get a minor role, and secure a safety valve reduction in order to get Movant a sentence of 135 months.

Movant attempts to rely on his willingness to give a written statement in exchange for a safety valve consideration as evidence of his willingness to assume responsibility and as evidence he would have accepted the plea offer from the government. Movant also attempts to support his claims of ineffective assistance of counsel by comparing his representation during sentencing by Marc Seitles with the representation he received from Mr. Tarre. According to Movant, Mr. Seitles explained the guidelines by writing it out on a piece of paper and explained that the amount of drugs, his skill as a mechanic, and that an airplane was used would increase his sentencing exposure whereas, Mr. Tarre explained "nothing." Putting things into perspective, however, by this point, Mr. Seitles was explaining a PSI that was already completed long before his representation and was explaining what avenues might yet be pursued.

Still, Mr. Seitles certainly was unable to testify as to the representation by Mr. Tarre. Mr. Seitles testified he had no interactions with Mr. Tarre. Mr. Seitles confirmed that Movant never told him about the government's plea offer although in his own conversations with the government, he recalled Mr. Gregorie's "mantra" that Movant should have pled guilty. Even still, Mr. Seitles had to admit that if a client insists on his innocence and the evidence is strong, he would still try to persuade him to plead guilty if it is in the client's best interest ... "but ultimately ... it's the client's decision." Mr. Seitles, a criminal trial attorney with 20 years experience, explained that he would tell the

client, "you have to make a choice. Plead guilty or go to trial." And if the defendant says he wants to go to trial, "then you have to go to trial." Mr. Seitles admitted that a plea offer to a Travel Act violation with a five year statutory maximum would be a better deal than any other sentence that could be negotiated for a Title 21 drug offense under the guidelines, "without question." Mr. Seitles reiterated that Movant never told him that he was presented with such an offer nor that he had rejected the offer.

Among Movant's greatest challenges in proving his claims are his very own contradictions during the evidentiary hearing. He admitted that Mr. Tarre gave him all of the discovery and CDs, told him to review the evidence, and to call with any questions. Still, Movant, in his own opinion, determined that the evidence the government had did not implicate him but rather the others in the conspiracy. Movant testified that he told his lawyer that the witnesses were lying and, in contrast, also knew that in order to plead guilty to any charge he would have had to admit that he knew Cordoba was smuggling cocaine. Movant admitted that he knew the substance and theory of the government's criminal case and his role in the conspiracy before he went to trial. He admitted he was paid for his role in the conspiracy and that he knew of the government's evidence of the deposits well before he went to trial. Movant admitted he knew who would testify against him at trial and admitted that he prepared an explanation for his attorney for as much of the government's evidence as he could. He admitted that Mr. Tarre gave him all of the discovery, the exhibit lists, and the trial brief outlining the government's case but that he insisted to Mr. Tarre that he was innocent and wanted to go to trial. To that end, Movant admitted that on a number of occasions during preparation for trial he sought to convince his attorney that storing cocaine in the fuselage and fuel tanks was an

impossibility; therefore, the government's case was not plausible. First, Movant presented his own handwritten notes to Mr. Tarre which contained various calculations and assertions that the trips could not have been made without refueling. (Govt. Exh. 7). Next, Movant recommended an expert witness, Mr. Elliot, who he claimed would support his explanation. Finally, Movant brought his attorney to a Learjet to show him how making modifications would not be possible. Movant's attempts to convince his attorney failed, most significantly, when the expert witness explained that the government's theory was plausible. As a result, Movant and counsel agreed to refrain from presenting Mr. Elliot. Movant also stated the Mr. Tarre had some discussion with him about the possibility of benefitting from a Rule 35. More importantly, during the evidentiary hearing, Movant admitted that he lied under oath during his trial testimony when he stated he did not know that Cordoba was smuggling cocaine into the United States when he knew otherwise.

In one breath, Movant claimed "I had no idea of the consequences...I was naive"; in another, he claimed that he decided to take his chances at going to trial because he told his lawyer he was innocent, believed he had a good chance at winning, and thought that he could get an easy sentence even if he lost. Movant conceded, "I told [Mr. Tarre] that we should go to trial because I thought we had a chance and that I was innocent" and that he never told Mr. Tarre anything different. He denied that his immigration status influenced his decision to go to trial even though he faced deportation.[8]

One thing is clear from the testimony of both attorneys, as

[8]Movant admitted he would have been deported to his native country, Venezuela, but did not fear deportation because his skills as an airplane mechanic would make him employable in Venezuela as well as his ability to speak English and because he still has family in Venezuela.

well as Movant, himself. Movant was less than candid with both of his attorneys. Movant intentionally misled his trial counsel, Mr. Tarre, about his innocence; and he failed to tell his sentencing counsel, Mr. Seitles, that he received and rejected plea offers from the government. In fact, Movant was so committed to his claim of innocence that he perjured himself during his criminal trial. Collectively, the evidence demonstrates that Movant never had any intent to tell the truth -- to his attorneys or the Court -- nor the intent plead guilty to any crime whatsoever in order to take advantage of a plea offer. Far from being "naive," Movant is, at a minimum, a calculated and savvy fabricator. In a high-stakes game, Movant rolled the dice in the hope that he would win at trial and, instead, lost. Every step of the way, for years (both pre-trial and post-conviction), Movant knew the extent of the evidence against him and the maximum sentencing penalties. It is only because he knows the consequences of his own decisions that he now regrets the decision to go to trial.

For the foregoing reasons, Movant has not demonstrated that counsel was ineffective for misadvice of a plea. Movant is required to "...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)(alterations in original). The evidence shows that Movant, in fact, had absolutely no interest in accepting any responsibility or guilt. See Id. To the contrary, Movant (eventually) admitted during the evidentiary hearing that he had, indeed, consulted with his attorney, understood the extent of the evidence against him and the maximum penalties but insisted to his counsel to proceed to trial, testified on his own behalf, and committed perjury at trial. Not only did he fail to demonstrate any error by counsel but the

testimony from the evidentiary hearing proves that he insisted on going to trial in spite of the extent of the evidence and disregarding the fact that he faced a life sentence as a maximum penalty. After all of his machinations, still, Movant received the lower sentence he had hoped for, much less than the twenty years the government initially estimated -- 135 months.

In light of counsel's interactions with Movant and the high level of deference afforded counsel's decisions, Mr. Tarre's actions were not unreasonable, especially, in light of Movant's adamant and repeated denials of knowledge and guilt and refusals to make any admission to any crime. Because Movant fails to establish that his counsel's performance was deficient, this Court need not determine whether counsel's performance prejudiced his case. In other words, Movant fails to satisfy the deficiency prong of Strickland.

Movant requests that the Court, in essence, accept his conclusory assertion that his failure to accept a guilty plea and his insistence on going to trial were caused by his trial counsel's ineffective assistance. However, in the absence of any evidence other than his own conclusory after-the-fact assertion -- and given the record evidence and testimony contradicting it -- such a conclusion is unacceptable. Movant's claim is, in one word, incredible. Movant is not entitled to relief; and the claim should be DENIED.

IX. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus had no absolute entitlement to appeal, but must obtain a certificate of

appealability ("COA"). See 28 U.S.C. §2253 (c)(1); Harbison v. Bell, 556 U.S. 180 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253 (c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show 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." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

X. Recommendations

Based on the foregoing, it is recommended that the motion to vacate be DENIED on the merits, that no certificate of appealability issue, and, that this case be 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 13th day of November, 2018.

UNITED STATES MAGISTRATE JUDGE

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A-5

660 Fed.Appx. 749
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Ramon Enrique ACOSTA, Defendant–Appellant.

No. 14-14928

Date Filed: 08/23/2016

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida of conspiracy to import cocaine into the United States, importing more than five kilograms of cocaine into the United States, conspiracy to possess cocaine with intent to distribute it, and possession of five kilograms or more of cocaine with intent to distribute it. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court did not abuse its discretion in admitting testimony concerning defendant's uncharged conduct, and

[2] district court's jury instructions did not constructively amend indictment.

Affirmed.

West Headnotes (4)

[1] **Criminal Law** ⇐ Conspiracy, racketeering, and money laundering

District court did not abuse its discretion in admitting testimony concerning defendant's uncharged conduct, as it was inextricably intertwined with evidence of charged cocaine smuggling offenses; testimony about marijuana smuggling and modification of airplane's black box helped explain the relationship between defendant and his co-conspirators as well as the goal of the conspiracy, and evidence of defendant's placement of a mechanic's lien on the plane and his receipt of suspicious payments helped explain how defendant was remunerated for his participation in the conspiracy. Fed. R. Evid. 404(b).

[2] **Criminal Law** ⇐ Conspiracy, racketeering, and money laundering

Even if evidence of defendant's prior bad acts, relating to marijuana smuggling and modification of airplane's black box at issue was not inextricably intertwined with the offenses charged in indictment, it was probative of defendant's intent, and was thus admissible at trial on cocaine smuggling charges. Fed. R. Evid. 404(b).

[3] **Criminal Law** ⇐ Evidence of other offenses and misconduct

Even if testimony concerning defendant's prior bad acts was inadmissible hearsay, defendant was not prejudiced by district court's failure to exclude it from evidence at trial for cocaine smuggling charges, in light of ample other evidence of defendant's guilt.

[4] **Indictments and Charging Instruments** ⇐ Conspiracy, racketeering, and money laundering

District court's instructions to jury that it could consider evidence of defendant's prior bad acts to convict him cocaine smuggling conspiracy charges did not constructively amend indictment, as instructions clearly referred to the charged conspiracy, not any conspiracy.

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:12–cr–20157–KMM–5.

***750** Before WILLIAM PRYOR and JILL PRYOR, Circuit Judges, and VOORHEES,* District Judge.

* Honorable Richard L. Voorhees, United States District Judge for the Western District of North Carolina, sitting by designation.

Opinion

PER CURIAM:

Ramon Acosta, an airplane mechanic by trade, participated in a scheme to smuggle cocaine into the United States by concealing it in the reserve fuel tanks of private airplanes. He was convicted by a jury of (1) conspiracy to import cocaine into the United States, in violation of 21 U.S.C. § 963; (2) importing more than five kilograms of cocaine into the United States, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2; (3) conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. § 846; and (4) possession of five kilograms or more of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

On appeal, Acosta challenges his convictions on numerous grounds. After reviewing the record and briefing, and with the benefit of oral argument, we find no reversible error in the underlying proceedings. Acosta raises two issues on appeal that we believe worthy of further discussion, however: (1) whether the district court abused its discretion in admitting evidence of Acosta's uncharged conduct because it constituted either inadmissible bad acts evidence or inadmissible hearsay and (2) whether the district court's jury instructions constructively amended his indictment by impermissibly broadening the possible bases for his convictions beyond what was contained in the indictment. Ultimately, though, these issues do not warrant reversal of Acosta's convictions; we therefore affirm.

I. BACKGROUND

At the time of his involvement in the charged drug trafficking conspiracy, Acosta was a Federal Aviation Authority-certified mechanic. He performed general maintenance and repair work for private aircraft. Acosta's work as an airplane mechanic eventually brought him into contact with Paul Cordoba, a pilot and drug smuggler. Cordoba was the head of a drug trafficking operation that smuggled drugs from Venezuela into Florida aboard his planes.

Acosta's first encounter with Cordoba's drug trafficking activities occurred in 2007, when Cordoba and Jefferson Castillo, one of Cordoba's associates, smuggled marijuana from Arizona to Florida aboard a small prop plane. While flying from Arizona to Florida, the two stopped in Dallas to refuel at the hanger where Acosta was employed. They decided to spend the night and stored the airplane, which still contained the smuggled marijuana, in the hanger with Acosta's permission. When Castillo expressed concern about leaving the plane in the hanger, Cordoba assured him that Acosta was a friend and that there would not be any problems; however, it is unclear from the record whether Acosta was aware that the plane contained marijuana.

Subsequently, Acosta became more directly involved with Cordoba's drug trafficking. Sometime after Cordoba and Castillo's visit, Acosta helped Cordoba modify the black box in one of Cordoba's planes so that drugs could be hidden inside. Cordoba used the modified black box to smuggle drugs into the United States on two occasions.

From there, Cordoba and Acosta continued to experiment with smuggling methods. ***751** Acosta proposed smuggling drugs in the reserve fuel tanks of Cordoba's planes. When Cordoba ultimately decided to implement this proposal, he recruited Acosta to remove the drugs from the fuel tanks upon the planes' arrival in the United States. The scheme also involved a number of other participants beyond Cordoba and Acosta, including Francisco Gamero Medina ("Gamero"), an airline mechanic in Venezuela; Cordoba's son Marlon Cordoba ("Marlon"); and Rediel Rodriguez, a drug distributor in Florida.

Cordoba flew a plane to Venezuela, where Gamero loaded a shipment of cocaine into the plane's reserve fuel tank, in May 2008. Cordoba flew the plane back to the United States and, after making several stops, brought the plane to Acosta in Dallas. There, Acosta removed the cocaine from the plane, placed the drugs in briefcases, and loaded them back onto the plane for transport to Florida, where Rodriguez sold the drugs.

Cordoba organized a similar smuggling operation in November of that year. This time, Marlon flew with a pilot to Venezuela, where Gamero loaded a shipment of cocaine into the plane's reserve fuel tank. Marlon then flew the plane to the Bahamas, where he met with Cordoba. There, the two switched planes and flew both to Fort Lauderdale, Florida. The next day, Cordoba, Marlon, Gamero, and a few others flew the plane carrying the smuggled drugs to Acosta's hanger in Texas. Once the plane arrived in the hanger, Acosta and Gamero removed the cocaine from the plane's reserve fuel tank. Cordoba and the other conspirators then repacked the cocaine in suitcases, loaded them aboard the plane, and flew back to Florida.

Cordoba arranged a final smuggling operation in August 2009. In contrast to Acosta's role in the prior two smuggling operations, however, his role in this final scheme was limited. Although Acosta was aware that Cordoba was planning to bring a load of cocaine into the United States, he was excluded from the operation at Rodriguez's suggestion for charging too high a fee. Although Acosta did not directly participate in the final trip, Rodriguez offered to pay him $50,000 in "hush money." Trial Tr. at 158 (Doc. 442). [1]

1 "Doc." refers to the docket entry in the district court record in this case.

Rodriguez planned to pay Acosta by selling one of the planes used in the conspiracy. The plane was owned, in name, by Rodriguez's girlfriend Kimberly Rosselle. [2] But Rodriguez ultimately decided not to sell the plane after police began an investigation into the trafficking conspiracy. Police eventually arrested Rodriguez, at which time Cordoba tried to convince Rosselle to transfer ownership of the plane to him. When Rosselle refused, Acosta placed a mechanic's lien on the plane, presumably to encourage Rosselle to sell the plane to Cordoba and to secure for himself the payment Rodriguez promised. When Cordoba eventually acquired ownership of the plane, Acosta rescinded the lien.

2 The conspirators put the plane in Rosselle's name because some already owned planes in their names, while others were not U.S. citizens and thus could not file the necessary paperwork to establish ownership.

Acosta was arrested and charged with conspiracy to import cocaine, importation of cocaine, conspiracy to possess cocaine with an intent to distribute, and possession of cocaine with an intent to distribute. Notably, although there was evidence of his involvement in several different smuggling operations, Acosta was indicted only *752 for his participation in the November 2008 trip.

At Acosta's trial, the government presented evidence of his involvement in Cordoba's trafficking operation. Both Castillo and Rodriguez testified as to Acosta's involvement. Their testimony covered Acosta's participation beginning with Cordoba and Castillo's layover in 2007 and through the final smuggling trip in August 2009. Both Castillo and Rodriguez testified in part based on their personal experiences and in part based on their conversations with Cordoba, who had fled the country and did not testify at trial. In addition to testimony from Rodriguez and Castillo, the government presented evidence that Cordoba's flight records were consistent with the government's characterization of the trafficking conspiracy and Acosta's involvement. The government also introduced testimony that Acosta received suspicious payments consistent with compensation for drug trafficking. The jury ultimately found Acosta guilty on all four counts. Acosta filed a motion for a new trial and a motion for acquittal. The district court denied both motions, and Acosta filed a timely notice of appeal.

II. ANALYSIS

A. Admission of Evidence Regarding Uncharged Conduct

[1] Acosta contends that the district court erred when it admitted testimony about his participation in several instances of uncharged and arguably criminal conduct. Specifically, Acosta takes issue with the admission of evidence concerning: (1) his overnight housing of an airplane containing smuggled marijuana, (2) his assistance in modifying an airplane black box to smuggle cocaine, (3) his placement of a mechanic's lien on the plane owned (at least on paper) by Rosselle, and (4) his receipt of suspicious payments from Cordoba. He contends that the district court should have

refused to admit testimony about these events because the testimony was inadmissible either as (1) bad acts evidence under Federal Rule of Evidence 404(b) or (2) hearsay under Federal Rule of Evidence 802. We conclude the district court did not abuse its discretion in admitting testimony concerning Acosta's uncharged conduct.

1. Standard of Review

To successfully challenge a verdict based on an incorrect evidentiary ruling, a defendant must establish that (1) his claim was adequately preserved; (2) the district court abused its discretion in interpreting or applying an evidentiary rule; and (3) this error affected a substantial right. *United States v. Stephens*, 365 F.3d 967, 974 (11th Cir. 2004). Although Acosta raised a Rule 404(b) objection at trial, he never raised a hearsay objection. We thus review his contention that the district court improperly admitted hearsay testimony for plain error. *United States v. Sorondo*, 845 F.2d 945, 948 (11th Cir. 1988). "Under plain-error review, the defendant has the burden to show that there is (1) error (2) that is plain and (3) that affects substantial rights." *United States v. Monroe*, 353 F.3d 1346, 1349 (11th Cir. 2003) (alteration adopted) (internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lejarde-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003) (alteration adopted) (internal quotation marks omitted).

2. Admissibility Under Rule 404(b)

Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible *753 to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Such evidence may, however, be admissible if it is inextricably intertwined with the evidence of the charged offense. *United States v. Cancelliere*, 69 F.3d 1116, 1124 (11th Cir. 1995). Stated differently, Rule 404(b) does not apply where bad acts evidence concerns the "context, motive, and set-up of the crime" and is "linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985). Evidence of uncharged conduct may also "be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

The bad acts evidence Acosta highlights was admissible because it was inextricably intertwined with the evidence of his charged offense. To begin with, testimony concerning the marijuana smuggling and the black box modification was necessary to help the jury "understand[ ] ... the context of the government's case" against Acosta because the evidence "explained the relationship" between Acosta and his co-conspirators as well as "the goal of the conspiracy." *United States v. McLean*, 138 F.3d 1398, 1404 (11th Cir. 1998). These two activities showed how Acosta met many of the participants in the trafficking operation, how he was integrated into the conspiracy, and the evolving sophistication of the trafficking operation as time passed.[3] *See United States v. Troya*, 733 F.3d 1125, 1132 (11th Cir. 2013) (evidence admissible because it "established the method by which Appellants obtained drugs to distribute"); *United States v. Lehder-Rivas*, 955 F.2d 1510, 1516 (11th Cir. 1992) (evidence was intrinsic when it concerned "the formation of the conspiracy" and "basic 'structural' evidence" concerning the roles and motives of the participants in the conspiracy).

3 Acosta also asserts that evidence concerning the marijuana smuggling and black box modification was inadmissible because there was insufficient evidence demonstrating that he participated in those incidents with knowledge of their criminal nature. But even granting that point, the evidence was nonetheless admissible because it concerned the actions of Acosta's co-conspirators. *See United States v. Meester*, 762 F.2d 867, 877 (11th Cir. 1985) (finding that evidence that "documented crimes committed by other members of the conspiracy" was "intertwined with the evidence of the ongoing conspiracies and so [could not] be labeled 'extrinsic' "); *see also United States v. US Infrastructure, Inc.*, 576 F.3d 1195, 1210 (11th Cir. 2009) (observing that "evidence that an unindicted co-conspirator had engaged in crimes similar to those charged against the defendants was admissible because it served to establish a background for the later substantive acts charged in the indictment and was therefore relevant to

prove the existence and purpose of the ongoing conspiracies" (internal quotation marks omitted)).

Evidence concerning the other two acts at issue—Acosta's placement of a mechanic's lien on the plane and his receipt of suspicious payments—was also inextricably intertwined with the charged conspiracy. That evidence helped explain how Acosta was remunerated for his participation in the conspiracy. Acosta's placement of the lien and his receipt of suspicious payments "arose out of the same transaction or series of transactions as the charged offense" and, as such, evidence concerning them did not constitute extrinsic evidence and was admissible under Rule 404(b). *United States v. Collins*, 779 F.2d 1520, 1532 (11th Cir. 1986). Nor does it matter that this conduct arguably occurred *754 after the conclusion of the conspiracy. "Carefully circumscribed evidence of criminal activity after the conclusion of the conspiracy may be admissible to 'complete the story' of the conspiracy." *Lehder-Rivas*, 955 F.2d at 1516.

[2] Even if the evidence at issue was not inextricably intertwined with the offenses charged in Acosta's indictment, it was probative of something other than Acosta's criminal propensity, and thus admissible nonetheless. For evidence of other crimes or acts to be admissible under such a theory, the evidence must meet three requirements: "(1) it must be relevant to an issue other than [the] defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy [Federal Rule of Evidence] 403." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007).

Evidence concerning all four of the acts at issue here passes muster under this test. First, the evidence was probative of something other than Acosta's criminal propensity—namely, his criminal intent. Acosta's principal defense at trial was that he was unaware of and uninvolved in any of Cordoba's criminal ventures. He argued that his transactions with Cordoba were strictly above-board. Thus, at trial the government bore the burden of proving that Acosta knowingly participated in the trafficking conspiracy. *See id.* at 1345 ("A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." (internal quotation marks omitted)). And evidence that Acosta willingly participated in a prior criminal activity makes it more likely that he intended to participate in the charged conspiracy. *See United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995) ("[B]ecause the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." (internal quotation marks omitted)); *see also United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003) (describing the relevancy element of the Rule 404(b) test as a "rule of inclusion").

Second, there was sufficient evidence to enable the jury to find that Acosta performed all four of the acts in question. Generally speaking, "the uncorroborated word of an accomplice ... provides a sufficient basis for concluding that the defendant committed extrinsic acts admissible under Rule 404(b)." *United States v. Dickerson*, 248 F.3d 1036, 1047 (11th Cir. 2001) (alteration in original) (internal quotation marks omitted). Castillo and Rodriguez testified as to Acosta's role in Cordoba and Castillo's 2007 layover and the modification of the black box in 2007. The government also presented testimony and documentary evidence of Acosta's placement of a lien on Rosselle's plane and his receipt of suspicious payments.

Third, and finally, the probative value of the contested evidence outweighed its prejudicial impact. In determining whether the probative value of evidence outweighs its prejudicial impact, a district court must apply "a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness." *Jernigan*, 341 F.3d at 1282 (internal marks omitted). We consider the evidence "in a light most favorable to its admission, maximizing its probative *755 value and minimizing its undue prejudicial impact." *Id.* at 1284 (internal quotation marks omitted). Indeed, we have explained that, even when this balancing test is close, "it is precisely these close questions that give rise to the deferential abuse of discretion standard of review." *Id.* at 1285.

As described above, Acosta's principal defense at trial was the lack of criminal intent, and the evidence concerning Acosta's uncharged conduct spoke to his criminal intent. As such, the evidence was highly probative. *See Delgado*, 56 F.3d at 1366 (observing that "[t]he greater the government's need for evidence of intent, the more likely that the probative value will outweigh any possible prejudice" (internal quotation marks omitted)). There was also minimal risk that its admission would unduly prejudice Acosta. The evidence all

concerned the charged conspiracy in one way or another, either because it established the modus operandi of the conspirators or the conspiracy's fallout and aftermath. Thus, it seems more likely that the jury used it for its proper purpose of establishing Acosta's knowing participation in the drug conspiracy and less likely that the jury used it to draw an improper inference about Acosta's general propensity to engage in criminal conduct. In fact, Acosta himself presents no compelling reason why testimony concerning these acts substantially prejudiced him. And, even if there was some risk that the jury could have drawn improper inferences from the evidence presented, "any unfair prejudice .. was mitigated by the district court's limiting instruction to the jury." *Edouard*, 485 F.3d at 1346. The district court therefore committed no abuse of discretion in declining to exclude the evidence under Rule 404(b).

3. Admissibility under Rule 802

Concluding that evidence of Acosta's bad acts was admissible under Rule 404(b) is insufficient to end our inquiry, however, because Acosta also contends that the evidence was inadmissible for a different reason: it was hearsay. He points to portions of Castillo and Rodriguez's testimony where they each described statements made by Cordoba about Acosta's involvement in various stages of the trafficking conspiracy. A statement constitutes hearsay if it was made out of court and a party offers it in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). And such hearsay is generally inadmissible. *See* Fed. R. Evid. 802.

[3] Even were we to agree that the testimony Acosta identifies constituted inadmissible hearsay and that the district court plainly erred in admitting it for that reason (or, for that matter, any other reason), we would nonetheless affirm his convictions because Acosta has failed to demonstrate the admission of that testimony affected a substantial right. *Stephens*, 365 F.3d at 974. "[W]here an [evidentiary] error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990).

Had the district court excluded the evidence Acosta identifies, there was ample other evidence supporting the jury's guilty verdict.[4] Rodriguez testified based on his personal knowledge of Acosta's involvement in the November 2008 trafficking operation and recounted personally observing Acosta remove cocaine from the reserve tank of Cordoba's plane. Beyond *756 that testimony, the government presented evidence of the suspicious flight patterns of Cordoba's planes and how those flight patterns lined up with descriptions of the trafficking scheme in testimony provided by Rodriguez and Castillo. This evidence, which was uninfected by the purported errors Acosta identifies, is sufficient to support the jury's verdict. We cannot conclude that the evidentiary errors Acosta highlights on appeal, to the extent they are in fact errors, had a substantial effect on the verdict. Reversal is therefore unwarranted on that basis. *Hawkins*, 905 F.2d at 1493.

4 Remember, Acosta was only charged and convicted of involvement in the November 2008 smuggling operation.

B. Jury Instructions

[4] The second issue we address also concerns the evidence of Acosta's uncharged conduct, albeit tangentially so. Acosta contends that the district court instructed the jury that it could consider the bad acts evidence to convict him of crimes that had not been charged in the indictment. In doing so, Acosta argues, the district court's jury instructions constructively amended the indictment.

"A fundamental principle stemming from [the Fifth A]mendment is that a defendant can only be convicted for a crime charged in the indictment." *United States v. Keller*, 916 F.2d 628, 633 (11th Cir. 1990). Altering or expanding the essential elements of an offense "to broaden the possible bases for conviction beyond what is contained in the indictment" constructively amends the indictment and constitutes per se reversible error.[5] *Id.* at 633–34. "[S]uch an instruction violates a defendant's constitutional right to be tried on only those charges presented in a grand jury indictment and creates the possibility that the defendant may have been convicted on grounds not alleged in the indictment." *Cancelliere*, 69 F.3d at 1121. "In determining whether an indictment was constructively amended, we must assess ... the court's instructions 'in context' to see whether the indictment was expanded either literally or in effect." *United States v. Castro*, 89 F.3d 1443, 1453 (11th Cir. 1996).

5 The government contends that any error arising out of the constructive amendment of Acosta's indictment is not per se reversible because Acosta never raised that issue before the district court;

> thus, plain error review applies. *See United States v. Madden*, 733 F.3d 1314, 1319 (11th Cir. 2013). Acosta responds that he objected to the jury instructions as a whole and that this general objection was sufficient to preserve the constructive amendment issue for appeal. We need not resolve the question of whether Acosta properly preserved an objection to the constructive amendment of his indictment, however, because we conclude that no constructive amendment occurred.

When instructing the jury on how it could consider evidence of Acosta's uncharged conduct, the district court stated:

> With respect to the conspiracy counts, the [bad acts] evidence that you have heard relates to and may be considered by you as evidence of whether the defendant—whether there was a conspiracy and whether this defendant willfully participated in that conspiracy.
>
> ....
>
> With respect to the conspiracy count, you may consider this evidence to establish, one, the existence of any conspiracy, whether it be the conspiracy to import with intent to distribute or the conspiracy to possess—conspiracy to import or the conspiracy to possess with intent to distribute, and whether the defendant was a willful participant in that conspiracy.

Trial Tr. at 189–91 (Doc. 443). Acosta reads the final quoted paragraph of the instruction as informing the jurors that they could use evidence of his uncharged ***757** conduct to convict him of "*any* conspiracy," presumably even those not charged in his indictment. *Id.* at 191 (emphasis added). But Acosta's narrow focus on that single phrase largely ignores the context in which it was used.

When we consider that context, it becomes clear that the district court was not instructing the jury that it could convict Acosta of any conspiracy under the sun; rather, the court was instructing the jury that it could use evidence of Acosta's uncharged conduct to convict him of any conspiracy charged *in the indictment*. The district court began the sentence in question with the qualifying phrase, "[w]ith respect to the conspiracy count"—that is, the conspiracy charged. Then, the court did not state that Acosta's bad acts could be used to establish his participation in "any conspiracy," it stated that the evidence could be used to establish Acosta's participation in "any conspiracy, *whether it be* the ... conspiracy to import or the conspiracy to possess with intent to distribute." *Id.* (emphasis added). Thus, despite the breadth of the words "any conspiracy" when read in a vacuum, the district court narrowed the universe of possible conspiracies to two: conspiracy to import cocaine and conspiracy to possess cocaine with the intent to distribute it, both of which were charged in Acosta's indictment. And, lest there be any doubt that this interpretation is correct, the court clarified that the jury could only convict Acosta of charges included in the indictment, stating, "I caution you that [Acosta] is on trial *only* for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether [Acosta] is guilty or not guilty of those specific crimes." Jury Instr. at 21 (Doc. 402). After considering the district court's instruction as a whole, "we do not believe the jury could have convicted [Acosta] based upon a charge not contained in the indictment" and thus conclude that the district court's jury instructions did not constructively amend his indictment. *Castro*, 89 F.3d at 1453.

III. CONCLUSION

We find no reversible error in the underlying proceedings and therefore affirm the judgment of the district court.

AFFIRMED.

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