APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14970-B

PEDRO PETE BENEVIDES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle 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. *See* 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PEDRO PETE BENEVIDES,

Petitioner,

v. Case No: 6:17-cv-1944-Orl-31LRH
(6:13-cr-234-Orl-31KRS)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Pedro Benevides' Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed by counsel pursuant to 28 U.S.C. § 2255. Respondent filed a Response to the Motion to Vacate ("Response," Doc. 11) in compliance with this Court's instruction. Petitioner filed a Reply and Supplemental Reply to the Response (Doc. Nos. 12, 15).

Petitioner asserts two grounds in his Motion to Vacate. For the following reasons, the Motion to Vacate will be denied.

I. PROCEDURAL HISTORY

A grand jury charged Petitioner by Indictment with conspiracy to commit bank fraud (Count One) in violation of 18 U.S.C. § 1349, bank fraud (Counts Two through Ten) in violation of 18 U.S.C. §§ 1344 and 2, and making false statements (Counts Eleven through Nineteen) in violation of 18 U.S.C. §§ 1014 and 2. (Criminal Case No. 6:13-cr-234-

Orl-31KRS, Doc. 1.)[1] Petitioner entered a plea of guilty to Count One pursuant to a plea agreement before Magistrate Judge Karla R. Spaulding. (Criminal Case, Doc. Nos. 58, 70, 71.) Magistrate Judge Spaulding filed a Report and Recommendation, recommending that the plea be accepted and that Petitioner be adjudicated guilty of Count One. (Criminal Case, Doc. 52.) The Court accepted the plea and adjudicated Petitioner guilty of Count One. (Criminal Case, Doc. 59.) The Court sentenced Petitioner to a 108-month term of imprisonment. (Criminal Case, Doc. 91). The Government dismissed the remaining counts. (*Id*.). Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed. (Criminal Case, Doc. 134.)

II. LEGAL STANDARD

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id*. at 687-88. The prejudice requirement of the *Strickland* inquiry is modified when the claim is a challenge to a guilty plea based on ineffective assistance. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To satisfy the prejudice requirement in such claims, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

[1] Criminal Case No. 6:13-cr-234-Orl-31KRS will be referred to as "Criminal Case."

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Ground One

Petitioner asserts counsel rendered ineffective assistance by advising him to stipulate to a forfeiture amount of $44,059,585. (Doc. 1 at 4.) In support of this ground, Petitioner complains that counsel never advised him that "(1) the statutory maximum for bank fraud is $1,000,000; (2) the stipulated forfeiture amount was an unconstitutionally

excessive fine; and (3) the forfeiture amount was not derived from the charged offenses, but originated from a separate action for which [Petitioner] was never criminally charged." (*Id.*) According to Petitioner, he would not have entered the plea had he been aware he would be forfeiting millions of dollars to which he was entitled. (*Id.*)

Petitioner has not established deficient performance or prejudice. The indictment charged that the property to be forfeited equaled "$44,059,565, which represents the proceeds of the conspiracy in Count One." (Criminal Case, Doc. 1 at 14.) The plea agreement indicated that the maximum penalty for Count One included "a fine of $1,000,000, or twice the gross gain caused by the offense, or twice the gross loss caused by the offense, whichever is greater. . . ." (Criminal Case, Doc. 58 at 1.) The plea agreement further provided:

> 15. Forfeiture of Assets
>
> The defendant agrees to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 982, whether in the possession or control of the United States, defendant or defendant's nominees. The assets to be forfeited specifically include, but are not limited to, a money judgment in the amount of $44,059,585.00, which amount represents the proceeds obtained as a result of the offense charged in Count One. . . .
>
> * * *
>
> The defendant also hereby agrees to waive all constitutional, statutory and procedural challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture described herein constitutes an excessive fine. . . .

(Criminal Case, Doc. 58 at 9, 15.) The factual basis for the plea stated *inter alia* that the conspiracy resulted in the affected financial institutions providing Petitioner loans,

mortgages, or credit "totaling approximately $44,059,565, which is the sum of the proceeds obtained as a result of the bank fraud conspiracy. . . ." (*Id*. at 26.)

At the plea hearing, the Court advised Petitioner that he could be fined $1 million or the greater of twice the gross gain or loss caused by the offense. (Criminal Case, Doc. 70 at 14.) Petitioner affirmed that he had read the plea agreement and understood it. (*Id.* at 13.) Petitioner further affirmed that he had reviewed the forfeiture provision of the plea agreement. (*Id*. at 11.) The Court advised Petitioner that "an argument can be made under the law that if the person is required to forfeit money or property and then is also sentenced in a criminal case, that the combination of the two can violate certain Constitutional, statutory rights, including the excessive fine clause of the Constitution." (*Id*. at 20-21.) The Court warned Petitioner that under the plea agreement, he would give up his rights and arguments that could be made based on the extensive forfeiture and criminal sentencing. (*Id*. at 21.) Nevertheless, Petitioner told the Court that he was willing to give up those rights. (*Id.*) Petitioner further agreed that the factual basis, which provided that the total amount of the gain from the conspiracy was $44,059,565, was true. (*Id*. at 31-32.)

Based on Petitioner's representations, when Petitioner entered the plea, he knew the maximum fine that could be imposed, agreed that he had obtained $44,059,565 via the charged conspiracy, agreed to the forfeiture amount of $44,059,565, and knew he was giving up his right to argue that the forfeiture was an unconstitutionally excessive fine. Petitioner's representations constitute "a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Furthermore, the Eleventh Circuit has affirmed a forfeiture that exceeded the statutory maximum fine by more than 400%. *See United States v. Holland,* 722 F. App'x 919, 930 (11th Cir. 2018). Consequently, counsel was not deficient, and a reasonable probability does not exist that Petitioner would have proceeded to trial but for counsel's purported deficient performance. Accordingly, ground one is denied.

B. Ground Two

Petitioner contends counsel rendered ineffective assistance by advising him that if he entered the plea agreement and stipulated to the forfeiture amount, then he would serve a minimal prison sentence and retain approximately $3,000,000 and a Lamborghini. (Doc. 1 at 5.)

This claim is refuted by the record. At the plea hearing, the Court reviewed the plea agreement with Petitioner and Petitioner affirmed he understood it. (Criminal Case, Doc. 70 at 11-28.) Petitioner acknowledged that he knew his guideline range would not be calculated until the Presentence Investigation Report was completed and that if his guideline range or sentence was different from what he expected it to be, he would not be allowed to withdraw his plea. (*Id.* at 26-27.) Moreover, nothing in the plea agreement indicated that Petitioner would be allowed to retain $3,000,000 or a Lamborghini. After reviewing the plea agreement with Petitioner, the Court asked Petitioner if there were any other promises made in exchange for his plea. (*Id.* at 24.) Petitioner responded negatively. (*Id.*) Petitioner, therefore, has not demonstrated that counsel was deficient or that a reasonable probability exists that he would have proceeded to trial but for counsel's

purported erroneous advice. Accordingly, ground two is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED,** and this case is **DISMISSED** with prejudice**.**
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:13-cr-234-Orl-31KRS and to terminate the motions (Criminal Case, Doc. 176) pending in that case.
4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional

right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[2] Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on October 18, 2019.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Party
OrlP-1

[2] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PEDRO PETE BENEVIDES,

Petitioner, **CASE NO: 17-cv-01944-GAP-KRS**

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

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

COMES NOW the Petitioner, Pedro Pete Benevides ("Benevides"), by and through undersigned counsel, and hereby submits this memorandum of law in support of motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. In support, Benevides states:

JURISDICTION AND VENUE

Benevides is currently in custody of the United States Bureau of Prisons at Williamsburg FCI under Register Number 27479-018 pursuant to the aforementioned judgment and commitment.

Benevides' motion is brought pursuant to 28 U.S.C. § 2255, et seq., and Article I, § 9, Clause 2, of the Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Benevides' motion was filed on November 13, 2017, within one year of the November 14, 2016 denial of his petition for writ of certiorari. Therefore, Benevides' motion is timely

pursuant to the Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2241(d)(1); *Kaufmann v. United States*, 282 F. 3d 1336, 1338 (11th Cir. 2002) ("To begin with, like every other circuit to have addressed the issue, this Court has held that where a prisoner *does* timely petition for certiorari, § 2255(1)'s limitation period 'begins to run when the Supreme Court denies certiorari or issues a decision on the merits.'") (citing *Washington v. United States*, 243 F. 3d 1299, 1300 (11th Cir. 2001)).

Benevides has filed no prior motion pursuant to § 2255 in this Court, or any other court of competent jurisdiction.

Venue is proper in the United States District Court of the Middle District of Florida as the judgment was entered by this Court.

BACKGROUND

A. Procedural History of Case

1. The 2008 Seizure of $41 Million

On October 31, 2008, the Government seized $41 million[1] from various bank accounts, including the accounts for all of the various companies Benevides owned and operated. Some of the funds seized were wired into accounts by a person suspected of forming a Ponzi scheme, who had entered into contracts to buy commercial properties owned by Benevides.

2. The Forfeiture Action for the $41 Million

On or about October 30, 2009, the Government filed a Verified Complaint for Forfeiture In Rem against several assets. On January 20, 2010, the Government amended the Forfeiture Complaint (Doc. 56)[2], and attached, inter alia, a "Master Affidavit" filed by Noel F. Martinez, Jr., a Deputy with the Osceola County Sheriff's Office. The Master Affidavit outlined an elaborate, international Ponzi/Pyramid scheme alleged allegedly carried out by Benevides and

[1] Where possible, Benevides will use round numbers.
[2] Entries relate to case number 6: 13-cr-234-Orl-31KRS.

Daniel Roho Filho, through the use of companies they owned and operated. Mr. Martinez explained he believed that funds located in bank accounts controlled by either Benevides or Mr. Filho were the product of the Ponzi scheme and wire fraud. (Doc. 56-4 at 39). At the same time, however, Mr. Martinez asserted that the funds in some of the bank accounts opened and controlled by either Benevides and/or Mr. Filho were previously seized by federal agents based on a drug and money laundering investigation out of the District of Arizona. (Doc. 56-4 at 28). Thus, the Master Affidavit alleged a wide-range of criminal activity and failed to clearly specify whether Mr. Martinez believed the contents of the bank accounts were the product of a Ponzi scheme or a drug and money laundering scheme. The Government used the sweeping allegations contained in Mr. Martinez's affidavit to justify seizing approximately $41 million of Benevides' money. Benevides and his various companies, from which the assets were taken, filed claims in the forfeiture proceedings. The forfeiture action was ultimately resolved six years later as part of the Plea Agreement in this case. *See infra*. No charges were ever filed against Mr. Benevides in connection with the alleged Ponzi scheme.

3. The False Drug Charges

Benevides was first arrested on September 16, 2009 in Orlando, Florida pursuant to a Northern District of Florida indictment on an alleged drug and money laundering scheme. Benevides was arrested in the Middle District of Florida, where he resided, and had a bond hearing. During the bond proceedings, the Government opposed Benevides' release. To support its position, the Government offered the testimony of Special Agent Keith Humphry's of the DEA in Pensacola, Florida. Agent Humphrys was the Government's sole witness. Agent Humphrys testified that, through his interview of two other defendants, he learned that Benevides was the "financial backer" for the drug conspiracy and the person who initiated the plan to smuggle cocaine into the United States. Critically, Agent Humphrys also testified that he was aware of Daniel Rojo, who was a target of a DEA, IRA and Customs investigation out of

Phoenix, Arizona. Agent Humphrys explained the Government seized $24 million from bank accounts owned and controlled by Mr. Filo, and $16 million from accounts owned and controlled by Benevides, because the funds came from identified "Mexican drug traffickers" (This is the same $41 million that Agent Martinez later claimed were proceeds of a Ponzi scheme).

Despite Agent Humphreys' testimony, Judge Spaulding granted Benevides' bond. Undeterred, the Government filed an appeal to the Northern District of Florida. In its appeal, the Government asserted, *inter alia*, that it had established that Benevides is a multimillionaire who has recently had approximately $16 million in bank account proceeds seized by the United States and that he was a risk of flight. Relying on Agent Humphrys' testimony, the Government stated Benevides' bank accounts were seized because they contained drug money, which was in direct conflict with what the same government was telling the district court in the forfeiture case.

Notwithstanding its previous passion for its argument and position, the Government voluntarily dismissed the Indictment in the drug case on February 11, 2010. In its motion to dismiss, the Government informed the district court that the witnesses had admitted to lying to the Government about Benevides and that it did not have sufficient evidence to sustain his conviction.

Despite the fact that the Government held Benevides for five months on false drug charges, despite that it argued for the denial of his bond, and despite that it admitted its case was premised on lies and deceit, the Government was steadfast in its pursuit of Benevides. At the same time the Government moved to dismiss the false drug charges, it urged the district court not to release Benevides because the DHS had filed an immigration detainer. Benevides was then held in custody of the Immigration and Naturalization Service ("INS") for another three months, based upon the false assertions of the DHS.

4. The Wrongful Detention by INS

Benevides was an American citizen at the time the DHS arranged for an immigration hold to be placed on him. Astoundingly, Benevides had the papers to prove his citizenship on him at the time of his arrest on the false drug charges.

The immigration hold was eventually lifted after the immigration court found that the "notice to appear was improvidently issued by DHS." However, Benevides was held in INS custody from February 11, 2010 until May 11, 2010.

Thus, following his September 17, 2009 arrest, Benevides was wrongfully held in federal custody – again – for approximately eight months.

5. The Wrongful Lake County Arrest

On September 16, 2010, after just being released from INS, Benevides was again arrested and held in custody on charges orchestrated by the DHS. Specifically, the DHS task force agent arranged for Benevides to be arrested by the Sheriff of Lake County, Florida for the alleged theft of an automobile. The Lake County case concerned a car the Benevides leased, but the lease went into default because Benevides was being held in federal custody. The State Attorney's Office determined that the matter was civil in nature and the case was dismissed.

6. The Petit Theft Case

On September 16, 2011, Benevides was again arrested on charges orchestrated by the DHS. This time, the DHS arrested Benevides on thirty-year old bad check charges from Massachusetts after his arrival home from a trip to Portugal.

Upon his arrest, Benevides was released by the Orange County Circuit Court when it determined that the thirty year old warrant was for a non-extraditable charges.

Nevertheless, the DHS arranged for Massachusetts to add an extraditable offense, an alleged failure to appear. DHS agents then arrested Benevides at a child custody hearing.

Benevides then remained incarcerated for approximately 45 days until restitution was paid and the Massachusetts case dismissed.

7. The Instant Case

On September 18, 2013, the Government filed a separate nineteen-count indictment charging Benevides with (1) conspiring to commit bank fraud; (2) bank fraud; and (3) making false statements to federally-insured financial institutions. (Doc. 1 at 1-9). The victims of the alleged scheme to defraud were: First Commercial Bank, M&I Bank, Orion Bank, Community Bank of Florida, Bank of Wyoming, Washington Mutual Bank, JPMorgan Chase Bank, and Whitney National Bank. (Doc. 1 at 1, 5-6).

On July 14, 2014, pursuant to a plea agreement, Benevides agreed to plead guilty to the conspiracy count in a plea agreement. (Doc. 48 at 28). Pursuant to part of the plea agreement, Benevides agreed "The assets to be forfeited specifically include, but are not limited to, a money judgment in the amount of $44,059,585, which amount represents the proceeds obtained as a result of the offense charged in Count One, including all relevant conduct as defined in United State Sentencing Guidelines §1B1.3(a)." (Doc. 58 at 9). Moreover, Benevides agreed to consent to the forfeiture of the previously seized $41 million, which was the subject of the alleged, but never charged Ponzi/drug conspiracy schemes. The Government agreed to credit the $41 million against the agreed to $44 million forfeiture amount in this case. Accordingly, by having Benevides agree to the above, the Government inextricably tied this case to an unrelated matter in order to end its six-year long effort keep the $41 million that it seized from Benevides in 2008, prior to any of the losses in this case.[3]

[3] At sentencing, the Government admitted that it could not have otherwise forfeited the $41 million in this case:

> We could not forfeit those funds in this case because we could not prove by a preponderance of the evidence that those funds were bank fraud proceeds. Otherwise, we would have forfeited them in this case.

On July 15, 2014, a magistrate judge conducted a change of plea hearing. (Doc. 49). The district court entered an order on July 21, 2014, adopting the magistrate judge's report and recommendation and accepting the guilty plea. (Doc. 59).

On August 26, 2014, the district court entered an order granting the Government's motion for forfeiture of forfeiture money judgment. (Doc. 61).

At sentencing, Benevides argued, in part, that he knew false documentation concerning his income and assets was submitted in connection with the multiple loans he obtained. Nevertheless, Benevides submitted that all or most of the losses occurred after he was wrongfully arrested on the false drug charges and that the losses would not have occurred but for the Government's continuous action. Specifically, Benevides argued that his unlawful arrest and detention virtually destroyed his businesses and legitimate income stream and, therefore, rendered him unable to pay the loans in question. Moreover, each time Benevides got his head above water after an arrest, he was promptly re-arrested and thus unable to recover financially. Benevides argued that the government created the losses that the financial institution were facing in the case.

The district court sentenced Benevides to 108 months of incarceration to be followed by three years of supervised release. (Doc. 98 at 19-20).

> And I think Mr. Greene has somehow confused the money judgment, which is a monetary judgment against the defendant for $44 million, which represents the proceeds he obtained from the bank fraud somehow with the Ponzi scheme money. And I just wanted the Court to be aware, two totally separate pots of money.
>
> We did agree in the Plea Agreement to allow the defendant to receive credit for the money that he forfeited in the civil forfeiture case, to credit against the forfeiture money judgment. So that's a huge amount. I think, as I said, its about 39.2 million that we have forfeited that will be credited against the $44 million money judgment. So Benevides is getting a huge benefit as a result of that agreement by the government.

(Doc. 85 at 270-271)

On April 28, 2015, Benevides filed a notice of appeal. (Doc. 94).

On July 9, 2015, the district court ordered Benevides pay $10 million in restitution. (Doc. 127). The restitution amount was based on the amount of loss actually suffered by the respective banks after it recovered a significant amount of money from foreclosing on assets subject to the loans. (Doc. 128 at 7-8). The district court declined to offset the ordered restitution with the forfeiture judgement. (Doc. 128 at 24).

The Circuit Court of Appeal affirmed Benevides' Judgment and Sentence on May 27, 2016. *Benevides v. United States*, 650 Fed. Appx. 723 (11th Cir. 2016).

On November 14, 2016, the United States Supreme Court denied Benevides' Petition for Certiorari.

Benevides filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. Benevides asserted two grounds. First, trial counsel provided ineffective assistance of counsel by advising Benevides to stipulate to a forfeiture amount of $44 million. Second, trial counsel provided ineffective assistance of counsel when he advised Benevides that if he entered the plea agreement and stipulated to the forfeiture amount than he would serve a minimal prison sentence and still retain approximately $3 million[4] and a Lamborghini.

[4] Benevides understood that he would receive the $3 million for the following reason:

> The government seized 40,288,151 according to what's listed in the plea.
>
> I was told by Mr. Greene that the $3,771,414 credit that I was to get back was actually interest earned on the moneys seized from 2008 till 2104 that's how he claimed that the government came up with the 44,059,565 listed in the indictment. He also told me that the government legally could not keep any interest earned since they did not own the money until July 14, 2014.
>
> If you add up the 3,771,414 and the 40,288,151 it will come out to the same amount listed in the indictment.

Benevides is presently incarcerated at the Federal Correctional Institution in Williamsburg.

B. Representation of Attorney Charles Greene Regarding the Plea Agreement

Attorney Charles Greene represented Benevides in case number 6:13-cr-234-Orl-31KRS. After receiving the proposed plea agreement, Benevides did not agree with several of its provisions including the forfeiture and restitution provisions. (Exhibit "1": Benevides' Original Plea Offer Notes). When Benevides expressed his displeasure, Attorney Greene counseled Benevides that he should agree to the forfeiture amount of $44 million because the amount equated to the alleged "intended loss" in the case and was a reasonable fine amount. Attorney Greene also advised Benevides that he would, under the agreement, ultimately be able to retain $3 million plus a Lamborghini. (Exhibit "2": Attorney Greene's Notes). Attorney Greene stressed the primary benefit of the agreement was that the Government agreed not to pursue additional charges. (Exhibit "3": Attorney Greene's June 12, 2015 Letter). In addition, Mr. Greene advised Benevides that he would serve a minimal amount of time in prison. (Exhibit "4": Attorney Greene's September 25, 2014 Email). Although Benevides remained reluctant to enter the terms of the plea agreement because he would be allowing the Government to keep millions of his legitimately earned money, Benevides eventually accepted Attorney Greene's advice and entered the plea agreement. (Exhibit "5": July 10, 2014 Email to Attorney Greene) (Exhibit "6": Attorney Greene's July 14, 2014 Email).

C. Unexpected Results of the Plea Agreement

Benevides was sentenced to a substantial prison sentence of 108 months. Benevides not permitted to keep $3 million and a Lamborghini.

I. BENEVIDES WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Under 28 U.S.C. § 2255, a defendant may move to vacate, set aside, or correct sentence if the sentence "was imposed in violation of the Constitution or laws of the United States[]…or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a). Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights that could not have been raised on a direct appeal but would result in a complete miscarriage of justice. *Lynn v. United States*, 365 F. 3d 1225, 1232 (11th Cir. 2004). A claim of ineffective assistance of counsel gives rise to such a cognizable constitutional issue under 28 U.S.C. § 2255. *United States v. Cronic*, 466 U.S. 648, 667 (1984); *Massaro v. United States*, 538 U.S. 500 (2003).

The Sixth Amendment gives each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const. amend. VI. The effective assistance of counsel has been described as diligent, competent legal representation that meets the minimum standards of due care expected of an attorney at every critical stage of a criminal case. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive due process of law in an adversarial system of justice. *Cronic*, 466 U.S. at 658.

The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland*, 466 U.S. at 686.

Under the *Strickland* standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient in that he or she made errors

so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id*. at 687. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id*. at 690.

> The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Strickland, at 690. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that were not the result of reasonable professional judgment. *Id*.

In the plea context, the *Strickland* test is slightly modified. To prove that counsel's ineffective assistance was prejudicial, a defendant must show that "but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

For instance, in *Lee v. United States*, 137 S. Ct. 1958 (2017), the defendant pled guilty to possessing ecstasy with intent to distribute. The defendant was a lawful permanent resident, and his attorney assured him that the government would not deport him if he pled guilty. *Id*. *at* 1962. However, the defendant was subject to mandatory deportation from his conviction. *Id.* The Supreme Court held that the defendant had demonstrated prejudice from his counsel's incorrect advice. *Id.* at 1969. The Supreme Court concluded that the defendant demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. *Id.* at 1967. The defendant asked his attorney repeatedly about whether there was any risk of deportation from his proceedings, and both the defendant

and his attorney testified at the evidentiary hearing that Lee would have gone to trial if he had known about the deportation consequences. *Id.* at 1967–68. Moreover, when the judge warned at the plea colloquy that a conviction could result in a deportation, and asked whether that affected the defendant's decision to plead guilty, the defendant answered "Yes, Your Honor." *Id.* at 1968. When the court inquired about how it affected his decision, the defendant turned to his counsel for advice. *Id*. Only when the defendant's counsel assured him that the judge's statement was a "standard warning" was the defendant willing to proceed to plead guilty. *Id.*

The Supreme Court recognized in *Lee* that a defendant's right to remain in the United States may be more important than any potential jail sentence. *Id.* In the defendant's case, the Supreme Court stated that it was not irrational for him to reject the plea offer, despite the strong case against him, since deportation was the determinative issue, the defendant had strong connections to the United States and no other country, and the consequences for proceeding to trial were not markedly harsher than pleading. *Id.* at 1968–69. Thus, because the defendant's claim, that he would not have accepted a plea had he known it would lead to deportation, was backed by substantial and uncontroverted evidence, the Supreme Court concluded that the defendant demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 1969.

1. Attorney Greene provided ineffective assistance of counsel by advising Benevides to stipulate to a forfeiture amount of $44 million.

Attorney Greene advised Benevides to accept the plea agreement and stipulate to the forfeiture amount of $44 million. Attorney Greene, however, never advised Benevides that (1) the statutory maximum for bank fraud is $1 million; (2) the stipulated forfeiture amount was unconstitutionally excessive fine; and (3) the forfeiture amount was not derived from the charged offenses, but originated from a separate action for which Benevides was never criminal charged

or convicted. Benevides would not have entered a plea had he been aware that he was forfeiting millions of dollars to which he was entitled.

The Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines." U.S. Const. amend. VIII. The Supreme Court has interpreted the word "fine" "'to mean a payment to a sovereign as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). "Forfeitures-payments," the Supreme Court explained, "are thus 'fines' if they constitute punishment for an offense." *Bajakajian*, 524 U.S. at 328.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id*. at 334. The *Bajakajian* Court explained that in order for a fine to be excessive, the imposed fine must be grossly disproportional to the gravity of the criminal offense. *Id*. at 336. The Court set forth factors to determine the gravity of a defendant's criminal offense. *Id*. at 337. First, it looked at the "essence" of the defendant's underlying criminal offense. *Id*. at 338. Next, it looked to whether the defendant's "violation was unrelated to any other illegal activities." *Id*. Third, it considered the maximum sentence and fine that "could have been imposed" under the Sentencing Guidelines. *Id*. Fourth, the Court looked to "the other penalties that the Legislature has authorized" under the statute. *Id*. at 339 n.14, 109 S. Ct. at 2038 n.14. Fifth, the Court considered whether the "harm that [the defendant] caused was . . . minimal." *Id*., 109 S. Ct. at 2039; *see United States v. Browne*, 505 F.3d 1229, 1282 (11th Cir. 2007) (citing *Bajakajian*, 524 U.S. 337-40, 118 S. Ct. at 2038-39) (setting forth

factors for consideration)[5] . This Court has explained that the "murkiness of these factors demonstrates the inherent difficulty of monetizing the gravity of an offense." *United States v. Chaplin's, Inc.*, 646 F.3d 846, 852 (11th Cir. 2001). It is a generally acceptable principle that forfeitures in excess of the statutory maximum will receive closer scrutiny, "[a] forfeiture far in excess of the statutory fine range … is likely to violate the Excessive Fine Clause." *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F. 3d 1304, 1309 n. 9 (11th Cir. 1999).

For instance, in *Bajakajian*, the Supreme Court held that forfeiture of an entire monetary amount involved in a simple reporting offense was an excessive fine under the Eighth Amendment. There, the defendant, who had a distrust for the government, was arrested in a Los Angeles airport while attempting to board a flight to Italy with $357,144 in undeclared cash hidden in his luggage. 524 U.S. at 24-26. He was arrested and charged with, inter alia, failure to report that he was transporting more than $10,000 outside the United States and one count which sought forfeiture of that money. *Id*. at 325. He pleaded guilty to the reporting offense and a bench trial was held on the forfeiture count. *Id*. The district court held that although the entire sum was involved in the offense and was thus subject to forfeiture, it would have been an excessive fine to forfeit that entire amount. *Id*. at 326. Instead, the district court determined that only $15,000 of the $357,144 should be forfeited. *Id*. The government appealed, seeking full forfeiture of the defendant's currency. Id. The Ninth Circuit and the Supreme Court subsequently affirmed. *Id*. at 327, 118 S. Ct. at 2033.

[5] The factors outlined by the *Browne* Court are as follows: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." 505 F.3d at 1281. This Court has explained that these factors are not, however, intended to be "an exclusive checklist." *Chaplin's, Inc.*, 646 F.3d at 851 n.18 (citing *United States v. 427 and 429 Hall St., Montgomery, Montgomery Cnty., Ala.*, 74 F.3d 1165, 1172 (11th Cir. 1996)). "The relevant factors will necessarily vary from case to case." *Id*. (internal quotation and citation omitted).

First, looking at the essence of the crime, the *Bajakajian* Court noted that the defendant's crime "was solely a reporting offense." *Id*. at 337. The Court also looked for a connection to other criminal activity, noting that the money involved in the reporting offense "was unrelated to any other illegal activities." *Id*. at 338. The Supreme Court explained that the reporting statute "does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader." *Id*. Furthermore, the Court explained that the maximum fine that could have been imposed was $5,000, which "confirm[s] minimal level of culpability." Id.

Moreover, the Supreme Court noted that the "harm that [the defendant] caused was also minimal." *Id*. at 339. The Court reasoned that the failure to report "deprived" the government "only of the information that $357,144 had left the country." *Id*. at 323. The Court explained, "There was no fraud on the United States, and respondent caused no loss to the public fisc." *Id*. at 339. Upholding the district court's decision ordering the forfeiture of only $15,000 and, in turn, rejecting the government's contentions, the Court held that forfeiture of the entire $357,144 would have been grossly disproportionate to the crimes committed. *Id*. at 344.

For the offense of conspiracy to commit bank fraud, Benevides faced a sentence of up to 30 years in prison. Pursuant to the Guidelines, the sentencing range was between 108 months to 135 months. Benevides could be ordered to pay a fine of up to $1 million per cout, with a Guidelines range of $15,000 to $1,000,000. Both in effect and in Congress's judgment as expressed through the applicable statutory penalties, Benevides' crime was extensive and grave. Nevertheless, there is a tremendous disconnect between the agreed to forfeiture amount of $44 million and the maximum statutory find of no more than $1 million (with a Guidelines range beginning as low as $15,000). In terms of statistics, the agreed to forfeiture amount was more

than 44 times greater than the maximum fine allowable and almost 3,000 times greater than the lower-end of the Guidelines range. Such a disproportionate forfeiture amount is not constitutionally permissible. *See, e.g., United States v. Beecroft*, 825 F. 3d 991 (9th Cir. 2016) (holding that a forfeiture amount 100 times greater than maximum fine would be unconstitutionally excessive)[6]; *$100,348.000 in U.S. Currency*, 354 F. 3d at 1123 (holding that a forfeiture amount between 3 and 20 times greater than maximum fine would be unconstitutionally excessive); *Thurman Street*, 164 F. 3d at 1198 (rejecting forfeiture amount "more than 40 times the maximum fine permitted under the Guidelines").

There can be no reasonable explanation for counsel to have Benevides agree to an unconstitutional forfeiture amount. Although the unconstitutional excessive forfeiture amount does not change whether Benevides is guilty of the offense, as in *Lee*, it would have been critical to his decision in entering a plea of guilty. Had Benevides known that the $44 million forfeiture amount was not a reasonable fine amount, he would not have entered into the plea agreement and

[6] More specifically, in *Beecroft*, the defendant took part in a multi-million dollar residential mortgage-fraud scheme. The defendant participated extensively in the conspiracy for four years by completing loans, handling false information, and directing to whom to false the fraudulent third-party disbursements would be made. The government believed that she made in excess of $400,000 from commissions and fees generated during the scheme. The scheme involved more than 400 straw-buyer transactions and 227 properties purchase for $107 million. After a jury trial, the defendant was convicted of conspiracy to commit bank, fail, and wire fraud and two subsidiary counts of wire fraud and mail fraud. At sentencing, the district court ordered a criminal monetary forfeiture order against the defendant in the sum of $107 million for the conspiracy count and additional forfeiture amounts totally $1.42 million for the remaining four counts. The district court ordered the defendant to pay restitution in the amount equal to the proven loss amount, $2,275,025. On appeal, the defendant challenged, in part, the $107 forfeiture amount. After noting the fine range of $20,000 to $1 million for the conspiracy to commit bank, fail, and wire fraud conviction, the appellate court concluded that the forfeiture amount was unconstitutionally excessive because it was more than 100 times the maximum statutory fine and 5,000 times the lower-end of the Guideline range. The appellate court noted that the have rejected forfeiture orders with far less disparity.

insisted on a trial so that he could, even if he lost at trial, prevent the forfeiture of millions of his legitimately earned money.

This Court should permit Benevides to withdraw his plea. At the least, this Court should grant Benevides the opportunity to fully develop his claims at an evidentiary hearing.

2. **Attorney Greene provided ineffective assistance of counsel when he advised Benevides that if he entered the plea agreement and stipulated to the forfeiture amount than he would serve a minimal prison sentence and still retain $3 million and a Lamborghini.**

Benevides entered the plea agreement with the stipulated forfeiture amount after being advised by Attorney Greene that he would serve a minimal prison sentence and still be able to retain $3 million and a Lamborghini. The information provided by Attorney Greene was inaccurate. After he entered the plea, Benevides was not permitted to retain $3 million and a Lamborghini. Moreover, this Court sentenced Benevides to a substantial prison sentence of 108 months.

Being able to retain some of his legitimately earned assets was critical to his decision in entering the plea agreement. Benevides would not have entered a plea had he been aware that he would be sentenced to a substantial prison sentenced and would not be able to retain $3 million and a Lamborghini.

This Court should permit Benevides to withdraw his plea. At the least, this Court should grant Benevides the opportunity to fully develop his claims at an evidentiary hearing.

CONCLUSION

Benevides is entitled to relief. This Court should permit Benevides to withdraw his plea. At the least, this Court should grant Benevides the opportunity to fully develop his claims at an evidentiary hearing.

DATED this 4th day of January, 2018.

Respectfully submitted,

/s/ Matthew R. McLain
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to opposing counsel via email on this 4th day of January, 2018.

/s/ Matthew R. McLain
Matthew R. McLain, Esquire

[redacted] **VERIFICATION**

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared Pedro Benevides, who first being duly sworn, says that: (1) he is the Petitioner in the above-styled proceeding; (2) he has read the foregoing memorandum; (3) he understands its content; and (4) under the penalties of perjury, hereby swears and affirms all of the facts stated therein are true and correct.

Pedro P Benevides

Name (Printed)

Name (Signed)

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PEDRO PETE BENEVIDES,

Petitioner, **CASE NO: 17-cv-01944-GAP-KRS**

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

SUPPLEMENTAL REPLY

COMES NOW Petitioner, Pedro Pete Benevides ("Benevides"), by and through undersigned counsel, and hereby submits this Supplemental Reply. In support, Benevides states:

1. On January 16, 2019, this Court provided Benevides 60 days to file a supplemental reply to the response in opposition to motion filed by the United States of America. (Doc. 13).

2. Benevides relies on the arguments presented in January 4, 2018 memorandum and November 9, 2018 reply. (Doc. 3 and 12).

3. Benevides supplements his reply with the attached declaration (Exhibit "A"), which disputes assertions contained within the Government's response and declaration by Attorney Charles Greene. Benevides would note that he would not have entered into the plea agreement had he known that he had no obligation to forfeit monies unrelated to the charged

offenses or pay the government an unconstitutionally excessive fine.[1] Benevides would also note that the Government's response incorrectly argues that $44 million forfeited is related to or derived from the bank fraud offenses. The argument is contrary to Judge Presnell's ruling at sentencing:

> Furthermore, it appears and I find that from the evidence that of the money seized, less than a million dollars has been traced to the fraudulent bank loans.

(Exhibit "B" at 4). Judge Presnell stated that seeking a set off using the forfeited money in this case is like "comparing apples and oranges." (Exhibit "B" at 3-4). The Government's argument is also contrary to its own representations at sentencing, "…only about $641,000 can be directly traced." (Exhibit "B" at 221) and the seized money could not be forfeited because it could not prove by a preponderance of the evidence that the funds were bank fraud proceeds:

> We could not forfeit those funds in this case because we could not prove by a preponderance of the evidence that those funds were bank fraud proceeds. Otherwise, we would have forfeited them in this case.
>
> And I think Mr. Greene has somehow confused the money judgment, which is a money judgment against the defendant for $44 million, which represents the proceeds he obtained from the bank fraud somehow with the Ponzi scheme money. And I just wanted the Court to be aware that these are two totally separate pots of money."

(Exhibit "B" at 270). Thus, as conceded by the Government at sentencing, the forfeited monies at issue are "totally separate" from the charged offenses. The forfeited money resulted in an excessive fine in violation of the Eight Amendment.

4. Finally, Benevides submits as supplemental authority the United States Supreme Court's recent decision in *Timbs v. Indiana*, 17-1091, 2019 WL 691578 (February 20, 2019). In *Timbs*, the Supreme Court held that the Eighth Amendment's Excessive Fines Clause is an

[1] The forfeited money was seized by the Government in a previous case, in 2009, which was dismissed by the Government in 2010 because of false statements by government agents and other witnesses. (Exhibit "A" at 2).

incorporated protection applicable to the States. The Supreme Court unanimous decision speaks to the importance of the protections provided by the Excessive Fines Clause:

> For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. See *Browning-Ferris*, 492 U.S., at 267, 109 S.Ct. 2909. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").
>
> In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S., at 767, 130 S.Ct. 3020 (internal quotation marks omitted; emphasis deleted).

Id. at *5.

WHEREFORE, based on the arguments made in previous filings and those contained herein, Benevides is entitled to relief. This Court should permit Benevides to withdraw his plea. At the least, this Court should grant Benevides the opportunity to fully develop his claims at an evidentiary hearing.

DATED this 13th day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to opposing counsel via email on this 13th day of March 2019.

/s/ Matthew R. McLain
Matthew R. McLain, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PEDRO PETE BENEVIDES,

Petitioner, **CASE NO: 17-cv-01944-GAP-KRS**

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

DECLARATION OF PEDRO PETE BENEVIDES

COMES NOW, Pedro Pete Benevides, and hereby declares under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the following facts are true and correct to the best of my knowledge and memory:

I am the Petitioner in this cause of action.

On January 4, 2018, by and through Attorney Matthew R. McLain, I filed for relief pursuant to 28 U.S.C. § 2255. The assertions contained therein are true and correct.

As previously outlined in my memorandum, Attorney Charles Greene represented me in case number 6:13-cr-234-Orl-31KRS. After receiving the proposed plea agreement, I did not agree with several of its provisions including the forfeiture and restitution provisions. (Exhibit "1": Benevides' Original Plea Offer Notes).[1] When I expressed displeasure, Attorney Greene counseled me that I should agree to the forfeiture amount of $44 million because the amount somehow equated to the alleged "intended loss" in the case and was a reasonable fine

[1] The exhibits referenced have been previously provided to the Court in my original memorandum.

amount. Attorney Greene also advised me that I would, under the agreement, ultimately be able to retain $3 million plus a Lamborghini. (Exhibit "2": Attorney Greene's Notes). Attorney Greene stressed the primary benefit of the agreement was that the Government agreed not to pursue additional charges. (Exhibit "3": Attorney Greene's June 12, 2015 Letter). In addition, Mr. Greene advised me that I would serve a minimal amount of time in prison. (Exhibit "4": Attorney Greene's September 25, 2014 Email). Although I remained reluctant to enter the terms of the plea agreement because I would be allowing the Government to keep millions of my legitimately earned money, I eventually accepted Attorney Greene's advice and entered the plea agreement. (Exhibit "5": July 10, 2014 Email to Attorney Greene) (Exhibit "6": Attorney Greene's July 14, 2014 Email). Contrary to Attorney Greene's counsel and representations, I was sentenced to a substantial prison sentence of 108 months. Moreover, I was not permitted to keep $3 million and a Lamborghini as Attorney Greene had represented.

I raised two claims of ineffective assistance of counsel. The first claim asserts that Attorney Greened provided ineffective assistance of counsel by advising me to stipulate to a forfeiture amount of $44 million. I raised this claim because Attorney Greene never advised me that (1) the statutory maximum fine for bank fraud is $1 million, (2) the stipulated forfeiture amount was an unconstitutionally excessive fine, and (3) the forfeiture amount was not derived from, or in any way related to, the charged offenses, but originated from a previous case, in 2009, which was dismissed by the government because of false statements by government agents and other witnesses. I would not have entered into the Plea Agreement had I known that I had no obligation to forfeit monies unrelated to the charged offenses or to pay amounts to the Government was unconstitutional and in excess of the maximum fine imposed by law.

Importantly, for purposes of the instant Motion and otherwise, the alleged Ponzi Scheme was not one of the charged offenses.

The second claim asserts that Attorney Greene provided ineffective assistance of counsel by misadvising me that if I entered the plea agreement and stipulated to the forfeiture amount than I would serve a minimal prison sentence and still retain $3 million and a Lamborghini. I raised this claim because I relied on Attorney Greene's representation. However, the information provided by Attorney Greene was inaccurate. After I entered the plea, I was not permitted to retain $3 million or a Lamborghini. I also received a substantial prison sentence of 108 months. Being able to retain at least some of legitimately earned assets was critical to my decision to entering the plea agreement. I would not have entered a plea had I been aware that I would be sentenced to a substantial prison sentence and would not be able to retain $3 million and a Lamborghini.

In response to my claims of ineffective assistance of counsel, Attorney Greene filed a declaration. In particular, I dispute the assertions contained therein as follows.

10-12 Attorney Greene did advise me that I would receive a minimal prison sentence. As substantiated by (Exhibit "4": Attorney Greene's September 25, 2014 Email), I was advised I would receive a prison sentence around two years by entering the plea agreement.

13-15 Attorney Greene advised me to stipulate to the forfeiture proposal made by the Government. He advised me it was a reasonable amount under applicable law. He did not advise me that I had no obligation to forfeit funds unrelated to the charged offense, to pay the Government amounts in excess of the maximum fine imposed by law, or that the forfeiture amount

was unconstitutional. Moreover, Attorney Greene provided me with no counsel or information regarding the maximum fine imposed for the charged offense.

16 I was not concerned with other prospective criminal charges. The Government would not have been able to pursue the criminal charges because the statute of limitations had elapsed.

17-18 Attorney Greene misadvised me that if I entered the plea agreement I would be able to retain $3 million and a Lamborghini. See Exhibit "2": Attorney Greene's Notes.

19 In light of the Attorney Greene's ineffective assistance, I did not make a knowing, intelligent, and voluntary decision to sign a Plea Agreement in the bank fraud case.

23 Attorney Greene did advise me that I would receive a minimal prison sentence. As substantiated by (Exhibit "4": Attorney Greene's September 25, 2014 Email), I was advised I would receive a prison sentence around two years by entering the plea agreement.

37 Any unknown charges relating to an alleged Ponzi Scheme did not factor into my decision to sign the Plea Agreement. Attorney Greene counseled me on this and advised that any such threats were scare tactics employed by the government and well outside the applicable statute of limitations.

38 I dispute Attorney Greene's recollection regarding this alleged conversation. This alleged conversation never occurred.

40 I dispute Attorney Greene's recollection regarding this alleged conversation. This alleged conversation never occurred.

42 Attorney Greene did not advise me that I would lose everything. Attorney Greene advised that I would be able to retain $3 million and a Lamborghini.

44, 46 Although found otherwise by the Court, I dispute that I materially lied during a proffer session.

48-49 In my opinion, Attorney Greene provided ineffective assistance of counsel.

I declare under penalty of perjury this 7 day of March, 2019 that the foregoing is true and correct to the best of my knowledge and memory.

Pedro Pete Benevides

Exhibit "B"

So the next order of business, I believe, is for me to determine the appropriate guideline score, which I'm prepared to do; and then after that, I'll entertain the defendant's allocution as well as any concluding comments that counsel feel that they would like to make in connection with the sentencing.

With respect to the guideline score, there are two issues in dispute: First, the calculation of the loss amount; and whether Mr. Benevides should receive a two-level reduction for acceptance of responsibility.

With respect to the first issue, the loss amount, the government and Probation have calculated that amount based on the net loss to the banks who were the subject of the bank fraud, and that amount is approximately $9 million, certainly in excess of $7 million.

The defendant argues that from the $44 million worth of fraudulent bank loans, for guideline scoring purposes, we should give Mr. Benevides credit for the approximate $40 million of forfeiture, thus resulting in a loss of less than $7 million, in which event the loss amount would be 18 rather than 20.

I find the defendant's calculation to be erroneous. Essentially, the defendant wants to pay for apples with oranges, so to speak, by using monies forfeited from other accounts, and then credit that against the bank's loss

amount; and the two just don't go together.

Furthermore, it appears and I find from the evidence that of the money seized, less than a million dollars has been traced to the fraudulent bank loans.

So I find that a preponderance of the evidence supports the government's and Probation's recommendation that the loss amount for purposes of scoring is appropriate at the 20-level number.

The other issue in dispute was the acceptance of responsibility; and in that regard, the government argues that Mr. Benevides should not receive acceptance of responsibility because of the lies or misunderstanding, however you want to characterize the September 16th proffer, at which time Mr. Benevides was confronted with the fact that he was using other inmates' PIN numbers and return addresses to communicate, apparently, with his girlfriend.

I have reviewed that matter thoroughly, and it seems to me -- I believe that, first of all, under the Plea Agreement, I think the government has the right and had the right to contest acceptance of responsibility based on its take on that proffer; but the fact that the government has the right to contest that and has contested it vigorously does not necessarily lead to the conclusion that I have to deny Mr. Benevides credit for acceptance of responsibility.

I think at this point it's my call; and in looking

for his arrest in this case about a few weeks after the filing of that lawsuit, that would have been his attempt to get this money from the government.

I think we've addressed somewhat the argument concerning the seizure of the loans, money from the loans at issue. That's Government's Exhibit Number 21. It's -- only about 641,000 can be directly traced. Other loan money was put into these accounts. That loan money was spent and then the money was replaced by Ponzi victim money during that time.

The vast majority of what the government seized, Ponzi victim money, only about $641,000 could be directly traced. And, Your Honor, that's conservative. That $641,000 is conservative because, of course, this money was all co-mingled. It was co-mingled. It was churned. It was spent down. It was replaced with Ponzi money.

So all we're saying is a mathematical calculation that's pretty straight forward, and that is the most defense-friendly, we would argue, number there.

There's some other issues that directly concern the P.S.R. scores that I want to bring to the Court's attention.

In the objections in the Sentencing Memorandum, it says that paragraphs 19, 20, 21, 24 and 25 were not part of the fraud. I don't think there could be any question that

THE COURT: I'll take your representation as an officer of the court.

MR. IRICK: Your Honor, Ms. Andrejko has an issue that she would like to address concerning forfeiture.

THE COURT: Sure.

MS. ANDREJKO: I'll be even quicker than these two, Your Honor. I think Mr. Greene had confused the forfeiture money judgment and the forfeitures that we did in the civil forfeiture action.

In the civil forfeiture action, there was about $39.2 million that was forfeited because Mr. Benevides did sign a consent to forfeiture. The basis of the forfeiture in that case was that they weren't proceeds of a Ponzi scheme, just wire fraud offenses.

We could not forfeit those funds in this case because we could not prove by a preponderance of the evidence that those funds were bank fraud proceeds. Otherwise, we would have forfeited them in this case.

And I think Mr. Greene has somehow confused the money judgment, which is a monetary judgment against the defendant for $44 million, which represents the proceeds he obtained from the bank fraud somehow with the Ponzi scheme money. And I just wanted the Court to be aware, two totally separate pots of money.

We did agree in the Plea Agreement to allow the