

No: 20-6390

IN THE
SUPREME COURT OF THE UNITED STATES

RIGOBERTO CABRERA,
Petitioner,

ORIGINAL
PETITION

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether Cabrera made a sufficient showing that he received ineffective assistance of counsel as a result of his counsel's failure to challenge the loss amount at sentencing to entitle him to an evidentiary hearing and/or Certificate of Appealability?
2. Whether Cabrera made a sufficient showing that he received ineffective assistance of counsel due to counsel's failure to clarify the received date of the return on Count 2 and establish Cabrera could not have prepared or filed it to entitle him to an evidentiary hearing and/or Certificate of Appealability?
3. Whether Cabrera made a sufficient showing that the government violated his Due Process by twisting and manipulating witness testimony to confuse and mislead the jury to entitle him to an evidentiary hearing and/or Certificate of Appealability?
4. Whether the Magistrate's failure to inform that she had been a prosecutor in Cabrera's case and her failure to recuse herself from the proceedings tainted them, violated Cabrera's Due Process and introduced structural error all of which requires the reversal of the district court's denial of his claims?

Certificate of Interested Persons

Pursuant to Supreme Court Rule 14(1)(b), the following persons may have an interest in the outcome of these proceedings:

1. Dan Bernstein, Assistant U.S. Attorney
2. Evelyn Baltondano-Sheehan, Assistant U.S. Attorney
3. Richard Brown, Assistant U.S. Attorney
4. Rogoberto Cabrera, Petitioner
5. Honorable Ed Carnes, 11th Circuit Court of Appeals Judge
6. Honorable James I. Cohn, U.S. District Court Judge
7. Honorable Britt C. Grant, U.S. Circuit Judge, 11th Circuit
8. Jose Herrera, Trial Counsel
9. Honorable Patrick Hunt, U.S. Magistrate Judge
10. Honorable Beverly Martin, 11th Circuit Court of Appeals Judge
11. Honorable Lisette M. Reid, U.S. Magistrate Judge
12. Richard L. Rosenbaum, Appellate Counsel
13. Kathleen M. Slayer, Assistant U.S. Attorney
14. Honorable Barry S. Seltzer, U.S. Magistrate Judge
15. John Shipley, Assistant U.S. Attorney
16. Emily M. Smachetti, Assistant U.S. Attorney
17. Honorable Lurana S. Snow, U.S. Magistrate Judge
18. Alejandro Soto, Assistant U.S. Attorney
19. Honorable Donald E. Walter, U.S. Senior District Court Judge
20. Honorable Patrick White, U.S. Magistrate Judge

There is no parent or publicly held company that owned 10% or more of the corporate stock in this case.

List of Proceedings

United States v Rigoberto Cabrera,

Case No. 13:CR-20339 JIC

United States v Rigoberto Cabrera,

Case No. 14-10541-GG, 635 Fed. Appx. 801 (11th Cir. 2015)

Rigoberto Cabrera v United States,

Case No. 16-5085

Rigoberto Cabrera v United States,

Case No. 17-cv-23627-JIC

Rigoberto Cabrera v United States,

Case No. 20-10772-J

Table of Contents

	<u>Page</u>
Questions Presented for Review	ii
Certificate of Interested Persons	iii
Table of Contents	v-vi
Table of Citations and Authorities	vii-ix
Petition for a Writ of Certiorari	1
Opinion Below	1
Statement of Jurisdiction	1
Statutory and Other Provisions	2
Statement of the Case	3
Statement of the Facts	4-6

Reasons for Granting the Writ

I. Cabrera made a sufficient showing that he received ineffective assistance of counsel as a result of counsel's failure to challenge the loss amount at sentencing to satisfy the requirements of 28 U.S.C. §2253. The district court reversibly erred in denying an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA. 6-19

II. Cabrera made a sufficient showing that he received ineffective assistance of counsel as a result of counsel's failure to clarify the date the IRS received the tax return on Count 2 and establish that Cabrera could not have filed or prepared the same. The district court reversibly erred in denying him an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA. 20-29

Table of Contents (Cont.)

	<u>Page</u>
III. Cabrera made a sufficient showing that the government violated his Due Process by twisting and manipulating witness testimony to confuse and mislead the jury. The district court reversibly erred in denying him an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA.	30-34
IV. The Magistrate's failure to inform that she had been a prosecutor in Cabrera's case and recuse herself tainted the proceedings, violated Cabrera's Due Process and introduced structural error, all of which requires reversal of the district court's denial of his claims.	35-38
Conclusion	39
Appendix	
Order denying COA Case No. 20-10772-J	A-1
Order Adopting Report of Magistrate Judge	A-2
Report of Magistrate Judge	A-3
Order Requiring Movant to file Succinct Amended §2255 motion	A-4
Letter from Supreme Court Denying Certiorari Cabrera v United States, Case No. 1605085 (2016)	A-5
Order Denying Rehearing Case No. 14-10541-GG	A-6
United States v Cabrera, 635 Fed. Appx. 801 (11th Cir. 2015)	A-7
Amended Judgment Imposing Sentence	A-8
Superseding Indictment	A-9
Indictment	A-10
Email Between Calabrese and O'Brien (Ex I)	A-11
Statutory and Other Provision Involved	A-12

Table of Citations

<u>Cases</u>		<u>Page</u>
Aaron,		
291 F.3d at 715 n.6		17
Bates v United States,		
649 Fed. Appx. 971 (11th Cir. 2016)		14
Caperton v A.T. Massey Coal Co.,		
556 U.S. 868, 881 (2009)		36
Giglio v United States,		
405 U.S. 150 (1972)		31
Glover v United States,		
531 U.S. 198 (2001)		14
Gomez v Beto,		
462 F.2d 596 (5th Cir. 1972)		28
Gordon v United States,		
518 F.3d 1291 (11th Cir. 2008)		28
Griffith v United States,		
871 F.3d 1321 (11th Cir. 2017)		14
Guidry v Dretke,		
397 F.3d 306 (5th Cir. 306 (5th Cir. 2005)		16
In re Murchison,		
349 U.S. 133 (1955)		35
Martinez v United States,		
136 S.Ct. 1338 (2016)		15
McGee v McFadden,		
139 S.Ct. 2608 (2019)		28
Miller-El v Cockrell,		
537 U.S. 322 (2003)	6,18,28	
Montgomery v United States,		
469 F.2d 148 (5th Cir. 1972)		17
Mooney v Holohan,		
294 U.S. 103 (1935)		31
N. Mariana Islands v Bowie,		
236 F.3d 1083 (9th Cir. 2001)		32

Table of Citations (Cont.)

<u>Cases</u>		<u>Page</u>
Napue v Illinois,		
360 U.S. 264 (1959)		31
Pyle v Kansas,		
317 U.S. 213 (1942)		31
Rizo v United States,		
446 Fed. Appx. 264 (11th Cir. 2011)	17,28	
Slack v McDaniel,		
529 U.S. 473 (2000)		7
Strickland v Washington,		
466 U.S. 668 (1984)		20
United States v Cataldo,		
171 F.3d 1316 (11th Cir. 1999)		12
United States v Chapman,		
524 F.3d 1073 (9th Cir. 2008)		32
United States v Delaney,		
502 F.3d 1297 (11th Cir. 2007)		33
United States v Franks,		
230 F.3d 811 (5th Cir. 2000)		14
United States v Hunter,		
323 F.3d 1314 (11th Cir. 2003)		12
United States v Lawrence,		
47 F.3d 1559 (11th Cir. 1995)		11
United States v Moran,		
778 F.3d 942 (11th Cir. 2015)		11
United States v Newman,		
614 F.3d 1232 (11th Cir. 2010)		11
United States v Okenfuss,		
632 F.2d 483 (5th Cir. 1980)		31
United States v Pierre,		
825 F.3d 1183 (11th Cir. 2016)		12
United States v Saavedra,		
148 F.3d 1311 (11th Cir. 1998)		11

Table of Citations (Cont.)

<u>Cases</u>	<u>Page</u>
Williams v Pennsylvania, 579 U.S. ____ (2016)	35
Wolff v United States, 576 U.S. ____ (2015)	19
 <u>Statutes & Other Authorities</u>	
Title 28, United States Code,	
Section 455	2,10
Section 1254	1
Section 1291	1
Section 1746	C-1
Section 2253(c)	passim
Section 2255(b)	16,33
United States Sentencing Guidelines	
Section 1B1.3	12
United States Constitution	
Fifth Amendment	2
Sixth Amendment	2
Rules of the Supreme Court	
Rule 10	1
Rule 12(2)	iv
Rule 13(1)	1
Rule 14(1)(a)	iii
Rule 14(1)(b)	iii
Rule 29	C-1
ABA Rule 2.11(A)(1), (A)(6)(b)(2011)	36

PETITION FOR WRIT OF CERTIORARI

Rigoberto Cabrera respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the denial of his §2255 motion to vacate and certificate of appealability by the United States district court in Case No. 17-cv-23627-JJC on February 12, 2020, and by the Eleventh Circuit Court of Appeals in Case No. 20-10772-J on or about August 6, 2020.

Opinion Below

A copy of the order from the Eleventh Circuit Court of Appeals summarily denying a Certificate of Appealability is contained in Appendix (A-1). Also included in the Appendix are the order adopting report of magistrate (A-2), report of magistrate (A-3), denial of certiorari (A-5), order denying rehearing (A-6), unpublished opinion of Eleventh Circuit Court of Appeals (A-7), amended judgment imposing sentence (A-8), superseding indictment (A-9), indictment (A-10).

Statement of Jurisdiction

The decision of the court of appeals was entered August 6, 2020 (A-1). This petition is timely filed pursuant to Sup. Ct. R. 13.1.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254, S. Ct. R. 10.1 and Part III of the Rules of the Supreme Court of the United States. The district court had jurisdiction pursuant to 28 U.S.C. §2255. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §2253 and §1291 which gives the court of appeals jurisdiction over all final decision of the United States district courts.

Statutory and Other Provisions Involved

Petitioner relies upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

1. The Fifth Amendment to the United States Constitution
2. The Sixth Amendment to the United States Constitution
3. Title 28, United States Code, Section 455
4. Title 28, United States Code, Section 2253(c)
5. Other case law specified herein

Statement of the Case

Course of Proceedings and Disposition in the District Court

On or about September 29, 2017, Cabrera timely filed his initial §2255 motion. Upon order of the court, Cabrera filed an amended §2255 motion on October 23, 2017. The government filed a response on December 4, 2017, and Cabrera filed a reply to the same on January 2, 2018. The magistrate issued a report recommending that Cabrera's motion be denied without holding an evidentiary hearing. Cabrera filed objections to the report and on February 12, 2020, the district court adopted the magistrate's report without holding an evidentiary hearing. The district court denied a certificate of appealability. Cabrera timely filed a notice of appeal. On June 18, 2020 Cabrera filed an application for Certificate of Appealability and initial brief of appellant.

On or about August 6, 2020 the Court of Appeals summarily denied Cabrera's application for certificate of appealability without opinion, analysis, or explanation.

Rigoberto Cabrera remains incarcerated at FCI Miami Low in Miami, Florida.

Statement of Facts

Central to the government's case was the amended tax return of Jessica Delgado. Count 2 of the original indictment alleges that on 1/24/09, Cabrera and co-defendant Carlos Perez filed a 2008 amended individual income tax return for Jessica Delgado containing false claims in the amount to \$25,550. A superseding indictment filed 9/10/13 is virtually identical to the initial indictment, except the date of claim on Count 2 was changed from 1/24/09 to 5/7/09. Throughout both indictments 1/24/09 is used as the starting point of the conspiracy. Delgado's claim was the earliest and only claim filed on 1/24/09. All subsequent claims (counts 3-20) were filed between 3/17/09 and 3/30/10. See both indictment [DE:1] and [DE:50] of case no. 13-cr-20339. Agent Calabrese testified before the grand jury on 5/14/13. During her testimony, Calabrese stated that Jessica Delgado's amended return was received by the IRS on 1/24/09. See pp 25-26 of her grand jury testimony attached to the initial brief of appellant as "Exhibit C" (U.S.C.A. 11, pp 64-65).

At trial the government tried to elicit testimony from agent Victoria O'Brien that Jessica Delgado's amended return was received by the IRS on 5/7/09. In her testimony agent O'Brien identified 1/24/09 as the date the IRS received Jessica Delgado's return, 2/16/09 as the posted date, and 5/7/09 as not necessarily the date of receipt, but as the date in the IRS system and is processing [DE:138 pp 149-154]. O'Brien's direct examination was conducted using Exhibit 21, an IMFOLT form, a kind of spreadsheet with tax payers' returns information [DE:138 p 149]. Although the

actual amended return in question was available and in evidence, it was not used either in direct or cross-examination. An email communication from Calabrese to O'Brien states that the dates on the IMFOLT are very confusing and are not tying to the dates of filing on Jessica Delgado's return. See Appendix A-11.

Cabrera was released from an Immigration Detention Center on 1/24/09 at 4:00 pm after serving a long sentence at FCI Coleman and having gone through deportation proceedings. Cabrera's counsel did not clarify on cross examination that the IRS received the return on 1/24/09 using the actual amended return, and establish through evidence and witness testimony that Cabrera was in the custody of INS from 10/02/08 until 1/24/09, that he did not have the means and could not have prepared or filed the return; and that before 10/02/08 he had been in the custody of the BOP for six and a half years.

Another key witness to testify at trial was Revenue Agent Bill Ypsilantis. During his testimony, Ypsilantis explains that he is the Revenue Agent with specialized training, who is part of a special enforcement group in charge of determining the intended loss by examining returns. He also explains that he was asked to prepare an analysis of the intended loss of a number of tax returns in the indictment, that Calabrese provided him the false items and he re-computed and determined what the tax loss was. Ypsilantis' was the only testimony and evidence presented throughout all proceedings in this case concerning actual and intended loss. Agent Calabrese did not testify as to the actual or intended loss in this case. Ypsilantis' uncontested testimony

was that the intended loss attributable to Cabrera was \$1,526,622 and that the actual loss much less [DE:140, pp 732-740].

Email communications between Francis Weisberg, the U.S. Probation Officer in charge of preparing Cabrera's PSR, AUSA Alejandro Soto and Calabrese state that Cabrera is responsible for a loss of \$1,416,725 for the fraudulent returns he filed [DE:9-3, p 1].

At sentencing the government used Calabrese's, not Ypsilantis', calculations as the basis to assess Cabrera an intended loss of \$10,242,667. As a result 20 levels, instead of 16, were added to his base level offense. Cabrera's trial counsel did not object and his appellate counsel did not raise the issue on appeal.

Arguments In Support

ISSUE 1

Cabrera made a sufficient showing that he received ineffective assistance of counsel as a result of counsel's failure to challenge the loss amount at sentencing to satisfy the requirements of 28 U.S.C. §2253. The district court reversibly erred in denying an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA.

Cabrera avers that he has made a substantial showing of the denial of a constitutional right in compliance with §2253(c). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v Cockrell, 537 U.S. 322, 327 (2003)(quoting

Slack v McDaniel, 529 U.S. 473, 481 (2000)). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' on the existence of mere 'good faith' on his part. Id. at 338. Cabrera claimed that his counsel provided ineffective assistance when he failed to challenge the loss amount attributed to him at sentencing and that this resulted in a higher guideline range and a much longer sentence than he would have otherwise received. The trial testimony of IRS revenue agent Ypsilantis, the agent in charge of calculating both, the actual and intended loss in this case, as well as, email correspondence between members of the prosecution team contradicted the amount claimed by the government as Cabrera's intended loss at his sentencing. During his testimony at trial Agent Ypsilantis explains that he is the revenue agent, with specialized training, who is part of a special enforcement group in charge of determining the intended loss by examining returns. He further states that he was asked to prepare an analysis of the intended loss of a number of tax returns in this indictment. [DE:140, pp 729-731]. According to Ypsilantis' uncontested trial testimony, the total intended loss was \$1,526,622 and the actual loss amount less than that [DE:140, pp 732-740]. This figure is confirmed by email communications between Francis Weisberg the U.S. Probation Officer who prepared the PSR, AUSA Alejandro Soto and Agent Calabrese where Weisberg states in paragraph number 3 that "In compiling the numbers from the indictment, it looks like ... Cabrera is responsible for loss/restitution to the IRS of \$1,416,725." [DE:9-3, p1]. The govern-

ment's response to Cabrera's §2255 acknowledges that the PSI's intended loss figure was based on Agent Calabrese's calculations. A declaration attached to it explains her qualifications and methodology to reach this figure. The declaration states that she compiled a list of taxpayers "whose tax filing 'could' be linked to Cabrera." It goes on to state that she identified 147 tax returns that "[she] believe[s] were linked to Cabrera's fraud scheme" [DE:11]. Although she claims to have interviewed 44 taxpayers, copies of those interviews were not provided in discovery. And even if it were true that she did, that would leave over 103 other tax payers' returns included in her "loss calculation" whom she did not interview in order to ascertain a connection to Cabrera. Proof of her speculation and guess work in calculating the loss can be found in the spreadsheet attached to her declaration [DE:11]. It includes 13 returns filed from an IP address owned by Carlos Perez using an email that was clearly intended to appear as if it was Cabrera's email (rcabrera666@att.net). The spreadsheet also lists 12 returns filed from an IP address owned by "unknown" using rcabrera666@att.net, the same email address associated with Carlos Perez's IP address; 28 returns filed from an IP address owned by "unknown" with unknown email address; 1 return filed from IP unknown and N/A email address; 4 returns filed from IP address N/A and "unknown" email address; 28 returns filed from Marcello Boardman's IP address from alexfnarvaez or davemissy97@comcast.net; 4 returns filed from Gabriel Reynolds' IP address, from gabrielreynolds@comcast.net; 3 returns filed from Jose Vallejo's

IP address, from josevallejol3361@comcast.net; 8 returns filed from Oliver Chavarro's IP address, from chavarro.coliver@comcast.net; 20 returns filed from Chris Campos' IP address, from chris.campos@mastec.com email address; 13 paper returns including, coincidentally Carlos Perez's own return. Yet, out of all the returns listed on the spreadsheet, only 14 of them came from an IP address owned by Cabrera and from Cabrera's real email address: rigobertocabrera@comcast.net. Ninety three of these returns were filed in 2010 after Cabrera and Perez had a falling out around October 2009, as admitted by Agent Calabrese during her testimony [DE:141, p929], and not one of them was filed from Cabrera's IP address or email. Calabrese goes on to state that she reviewed bank records for the companies that Cabrera used to launder the fraud proceeds and found checks from the taxpayers being deposited into these accounts. However, she conveniently fails to mention that these companies she refers to were created and controlled by Carlos Perez and other co-conspirators; that the address used for those companies was a P.O. Box established by Carlos Perez in 2006, while Cabrera was in prison, that the P.O. Box was still open and active when Perez was served with the summons; and that the bank accounts she refers to were opened and controlled by Carlos Perez and other co-conspirators. Cabrera had not signing authority or control of any of them [DE:141, pp 853-859, 927-932]. This begs the question, how is it possible then for Cabrera to be responsible for returns originating from Perez's and others' IP addresses and user names, in particular the ones in 2010? Calabrese's speculation and guess work is far from the level of

proof necessary to use those tax returns as relevant conduct. The magistrate's report adopts almost verbatim the government's response, relies entirely and defends Calabrese's declaration and ignores Ypsilantis testimony. In fact her report reads more like a government adversarial response than an impartial analysis and evaluation of the facts. It makes reference to a number of things, all favorable to the government, that are not mentioned in any pleading in this case, that would only be known to someone who has prior personal knowledge of the disputed facts of the case. And there is a very good reason for this, Magistrate Reid was a member of the prosecution's team in Cabrera's case, has a personal bias and certainly an interest in the outcome of the case and should have never presided over the same. Cabrera was not aware of this until he began preparing this petition and looked at the petition for writ of certiorari in his criminal case as guidance to prepare this petition. In it Magistrate Reid is listed in the certificate of interested persons as an Assistant U.S. Attorney a member of the prosecution's team. Although obligated by 28 U.S.C. §455 and by the ABA Ethics Rules to inform of the conflict and recuse herself, she never did. The prosecutor never said a word either. The district court relied entirely upon the magistrate's finding without independent evaluation and adopted her report. There is a lot more to Cabrera's claim than his reference to Calabrese's use of the word "could." And he does claim that the government would be unable to prove the loss figure by a preponderance of the evidence. But due to its reliance on Magistrate Reid's report, like her, the court ignores all of the

other allegations and evidence adduced in support of Cabrera's claim. The government bears the burden of establishing "the pertinent facts by a preponderance of the evidence." United States v Moran, 778 F.3d 942, 973 (11th Cir. 2015). "When a defendant challenges one of the factual bases of his sentence as set forth in the [PSI], the government has the burden of establishing the disputed fact by a preponderance of the evidence." United States v Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995). Precedent authorizes a district court to consider relevant conduct in fashioning a defendant's sentence so long as the conduct has been proven by a preponderance of the evidence. United States v Saavedra, 148 F.3d 1311, 1314 (11th Cir. 1998). Calabrese's unsubstantiated allegations that 147 tax returns "could" be linked to Cabrera does not even come close to the standard of proof necessary to show that Cabrera had any knowledge of these returns, that they were within the scope of the criminal activity he allegedly agree to jointly undertake or that they were foreseeable to him. However, these allegations went unchallenged by Cabrera's counsel, so the court accepted them at face value. Had Cabrera's counsel challenged these figures, the government would have had to prove them. Given the circumstances and the evidence against it, the government would not have been able to do so. It is well established that the government is required to present reliable and specific evidence in support of a challenged sentencing enhancement. See United States v Newman, 614 F.3d 1232, 1238 (11th Cir. 2010) ("A District Court's factual findings used to support a sentencing enhancement must be based on reliable and specific

evidence and cannot be based on speculation"). Courts may not "speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines." United States v Cataldo, 171 F.3d 1316, 1321 (11th Cir. 1999). The commentary to U.S.S.G. §1B1.3 requires the district court to determine first "the scope of the criminal activity the particular defendant agreed to jointly undertake" in order to determine the relevant conduct for which a defendant may be held responsible. "[T]he scope of the criminal activity jointly undertaken by the defendant ... is not necessarily the same as the scope of the entire conspiracy." Id. "Once a district court makes 'individualized findings concerning the scope of criminal activity undertaken by a particular participant' it [then] can determine foreseeability." United States v Pierre, 825 F.3d 1183, 1198 (11th Cir. 2016) (quoting United States v Hunter, 323 F.3d 1314, 1319 (11th Cir. 2003)). Of course, Cabrera's counsel's failure to object to the loss amount rendered all of these invaluable laws and precedent, aimed at protecting his rights, useless to him and allowed the government to railroad him into a lengthy sentence based on mere speculation. But more importantly, and the essence of Cabrera's claim, which the magistrate and the court ignored, is the fact that agent Calabrese was not the person in charge of calculating the actual or intended loss. Agent Calabrese provided substantial and comprehensive testimony for the government concerning many aspects of this case at different proceedings and stages of the same. In spite of the broad nature of her testimony, Agent Calabrese was not asked by the government to testify as to the

actual or intended loss in this case, much less dispute agent Ypsilantis testimony as to the same. The fact is that, it was not for agent Calabrese to determine these figures, agent Calabrese provided the suspected returns to agent Ypsilantis so that he could make a determination of any actual or intended loss. In agent Ypsilantis' own words, "the special agent provided me the false items and I recomputed and determined what the tax loss was" [DE:140, p 737]. Yet, at sentencing, in order to increase the intended loss amount from 1.5 million to over 10 million dollars, the government foregoes the testimony of Ypsilantis, an experienced agent with specialized training, who is part of a task force in charge of calculating the losses in these type of cases, and uses the "calculations" of a totally inexperienced agent, who admits in her declaration that this is the first case she investigated [DE:141, pp 882-833], and bases her loss calculation on her "belie[f]" that these 147 tax returns "could be" linked to Cabrera because there were certain similarities between these returns and the ones in the indictment [DE:11]. The impermissible assumption being that since there are similarities, then either Cabrera participated in the preparation and filing of them or he knew about them and they were foreseeable to him. Yet, doesn't her own spreadsheet show that even after Cabrera and Perez had a falling out in 2009, Perez and other co-conspirators continued to file these type of returns, using the same accounts, corporations and methods originally created by Perez which they had used all along, albeit without Cabrera's knowledge and participation since they had parted ways? [DE:11]. This increase in

losses resulted in the addition of 20 levels to Cabrera's guidelines instead of 16. These 4 levels added a significant amount of time to his sentence and "any amount of actual jail time has Sixth Amendment significance," Glover v United States, 531 U.S. 198, 203 (2001), which constitutes prejudice for purposes of the Strickland test. See United States v Franks, 230 F.3d 811, 815 (5th Cir. 2000)(Three extra months equal prejudice). Given the specific and reliable evidence in favor of Cabrera, to wit, the testimony of Ypsilantis and the email communications between members of the prosecution team, Cabrera's counsel had an obligation to object to the loss amount, to put the government's case to the test and have them prove that Cabrera was responsible for these returns. Something they would not have been able to do. Cabrera's appellate counsel also had an obligation to bring it up on appeal. "[C]ounsel's failure to challenge the weight calculations amounted to deficient performance, particularly because the drug quantities were the basis of [the defendant's] mandatory minimum sentence and higher guideline range." Griffith v United States, 871 F.3d 1321 (11th Cir. 2017). See also Bates v United States, 649 Fed. Appx. 971 (11th Cir. 2016)(Defendant's "trial counsel performed deficiently by failing to object to the use of the 2011 guidelines as violative of the ex-post facto clause ... Counsel's failure to object to the miscalculation of [defendant's] offense level was an error sufficiently serious to label him as not functioning as the counsel guaranteed [defendant] by the Sixth Amendment"). "When a defendant is sentenced under an incorrect guidelines range - whether or not the defendant's

ultimate sentence falls within the correct range - the error itself can and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." Molina Martinez v United States, 136 S.Ct. 1338, 1345 (2016). Both the Magistrate in her report and the district court in its order omit all reference to Ypsilantis' testimony. There is no discussion of Ypsilantis' testimony, no attempt to reconcile the conflict between Ypsilantis' testimony and Calabrese's declaration, no findings or credibility determinations and there is no analysis of its implications. The court chooses to focus Cabrera's reference to Calabrese's use of the word "could" in his reply to the government's response and misses the essence of the argument that she was neither qualified nor in charge of calculating the loss and that her calculations were based on conjecture and supposition without a shred of specific and reliable evidence that these returns were attributable to Cabrera. And more importantly, that the essence of Cabrera's argument is that the only reliable evidence of Cabrera's intended loss is the undisputed testimony of Agent Ypsilantis, which the court completely ignores. As to the email communication between members of the prosecution team the magistrate adopts verbatim the government's ridiculous claim that the email did not concern Cabrera "because the emails related to his co-conspirator, Carlos Perez, as noted in the subject line." However, this misses the obvious, that regardless of what the subject line of the emails states, the email itself deals with the losses attributable to both Cabrera and Perez. A district court may not simply ignore evidence and testimony favorable to

a defendant without evaluating its veracity and weighing it against contradicting testimony. Guidry v Dretke, 397 F.3d 306 (5th Cir. 2005). In Guidry, the court found that the district court did not abuse its discretion when it chose to grant an evidentiary hearing where police, lawyers, and the defendant provided conflicting testimony, and the state court ignored the testimony favorable to the defendant. Id. at 315. "[T]he district court concluded that the trial court's decision was based on an unreasonable determination of the facts." Id. at 326. The court found that the state court made no attempt to evaluate the veracity of the attorney's testimony or analyze its implications in the case. The state court made no specific findings with respect to the inconsistent and contradictory testimony. It found that if the allegations in the defendant's habeas petition, as corroborated by the attorney's testimony were true, the reasonableness of the state court's decision was suspect. In this case, like in Guidry, the court ignored testimony and evidence favorable to Cabrera, failed to attempt to reconcile conflicting testimony and evidence, made no credibility determinations and failed to weigh the testimony and evidence against one another. The court summarily denied Cabrera's §2255 motion without an evidentiary hearing. "An evidentiary hearing must be held on a motion to vacate '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' 28 U.S.C. §2255(b). '[T]o be entitled to an evidentiary hearing, a [movant] need only allege - not prove - reasonably specific, non-conclusory facts, that if true, would

entitle him to relief. If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing.' Aaron, 291 F.3d at 715 n.6. '[C]ontested fact[ual] issues in §2255 cases must be decided on the basis of an evidentiary hearing, not affidavits.' Montgomery v United States, 469 F.2d 148, 150 (5th Cir. 1972)." Rizo v United States, 446 Fed. Appx. 264 (11th Cir. 2011). Cabrera did not need to prove his allegations. Cabrera alleged reasonable specific, non-conclusory facts that are not affirmatively contradicted by the record, but in fact, supported by it, are not patently frivolous, and that if proven true would entitle him to the relief he seeks. Cabrera has also made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel. Given agent Ypsilantis undisputed trial testimony as to the amount of the intended loss attributable to Cabrera, the email correspondence between members of the prosecution team regarding the amount of intended loss attributable to Cabrera, the qualifications of agent Ypsilantis as compared to Calabrese's concerning the loss calculation, the use by agent Calabrese of a method of calculation that can best be described as guesswork and speculation to determine Cabrera's intended loss and guideline range, Cabrera's counsel's failure to challenge the loss amount was not just inexcusable, but an unprofessional error that resulted in 20 levels added to Cabrera's guideline range instead of 16. A reasonable jurist would find the district court's disposition of Cabrera's claim wrong or debatable, or could conclude the issues

presented are adequate to deserve encouragement to proceed further. A reasonable jurist would also find the district court's ignorance of compelling contradicting testimony and evidence beneficial to Cabrera, the court's failure to make credibility determinations, weigh the evidence and testimony against one another and its failure to even attempt to reconcile the conflicting testimony and evidence to be wrong and/or debatable, or deserving of encouragement to proceed further.

The Eleventh Circuit Court of Appeals summarily denied the COA. The order states "Rigoberto Cabrera moves for a certificate of appealability as construed from his notice of appeal, in order to appeal the denial of his 28 U.S.C. §2255 motion to vacate. His motion 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)."

Cabrera filed a notice of appeal but also an application for certificate of appealability and a brief. The order makes no reference to the last two and a simple reading of it would indicate that the court based its decision to deny "his 28 U.S.C. §2255 motion to vacate" based upon the notice of appeal. The court provides no explanation or analysis for its denial, there is not even an indication that it reviewed Cabrera's application for a COA. In fact, it denies Cabrera's "motion" not his application for a COA. "A COA will issue only if the requirements of §2253 have been satisfied. 'The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal'" Miller-El v Cockrell, 537 U.S. 322, 336

(2003). "[T]he court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims ... a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right' 28 U.S.C. §2253 (c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El at 327.

It is unclear from the circuit court's order how Cabrera failed to make a substantial showing of the denial of a constitutional right or how the court arrived at its decision. Cabrera set forth on his §2255 motion sufficient facts, testimony and evidence to support his position that his attorney was ineffective for failing to challenge the loss amount and that his attorney's action resulted in a longer sentence for him. The record speaks for itself as to the district court's ignorance of evidence favorable to Cabrera in deciding that his claims had no merit, that he was not entitled to an evidentiary hearing, and/or the relief he sought. A jurist of reason could disagree with the district court's resolution of his claim or conclude the issues presented were adequate to deserve encouragement to proceed further. "When a court decides whether a COA should issue '[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." Wolff v United States, 576 U.S. ____ (2015). Based upon the facts and circumstances at bar, this matter warrants review.

ISSUE 2

Cabrera made a sufficient showing that he received ineffective assistance of counsel as a result of counsel's failure to clarify the date the IRS received the tax return on Count 2 and establish that Cabrera could not have filed or prepared the same. The district court reversibly erred in denying him an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA.

Cabrera avers that he has made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel in compliance with §2253(c) and is entitled to a COA. The Sixth Amendment right "is the right to the effective assistance of counsel" Strickland v Washington, 466 U.S. 668, 686 (1984). A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice. *Id.* at 687.

Cabrera alleged that agent Victoria O'Brien's testimony concerning the date the IRS received Jessica Delgado's amended tax return, which confirmed that the same was received January 24, 2009, was intentionally twisted and manipulated by the prosecutor in order to confuse and mislead the jury into believing that the amended return was received by the IRS on 5/7/09. Cabrera claimed that his counsel had an obligation to clarify during O'Brien's cross examination, using the actual paper 2008 amended return, that it was received by the IRS on January 24, 2009, as reflected by the stamp on the front of the same; to subpoena and question agent Calabrese about her testimony before the Grand Jury where she told the Grand Jury that Jessica Delgado's amended return was received by the IRS on January 24, 2009; to subpoena

records and witnesses from ICE and the BOP to demonstrate that Cabrera was released from Immigration's custody on 1/24/09 at 4:00 pm after having served a long sentence at FCI Coleman and having been through deportation proceedings; all of which proved that Cabrera was not and could not have been the person who prepared and filed this amended return. On 5/14/13 during her Grand Jury testimony, agent Calabrese testified that she had gone through each of the tax returns as set forth in Counts 2 through 20 of the indictment, and that she had access to and had reviewed the IRS records pertaining to the date each claim was received by the IRS, and that Jessica Delgado's 2008 amended tax return, requesting a \$25,550 refund, which forms the basis for Count 2, was received by the IRS on January 24, 2009. See pages 25 and 26 of Calabrese's Grand Jury testimony attached to the appeal's brief as "Exhibit C" (USCA 11, pp 64-65). Agent O'Brien's trial testimony confirmed January 24 as the date the IRS received Delgado's amended return before it was twisted and manipulated by the prosecutor in order to confuse and mislead the jury. O'Brien explained that an amended return "is filed on paper and it has to be input into the computer system, so that it can be inputted by the date that is stamped on the front of the amended return when the IRS receives it and then it has to go through processing so we have what is called a posted date, and the posted date would also be on the transcript of the account." [DE:138, p 149]. She then identified January 24, 2009, as the date the IRS received Jessica Delgado's amended tax return [DE:138, p 150]. O'Brien then reiterated that on an amended return, because it is on paper form, the date it is received by

the IRS is stamped in the front of it and identifies 2/16/09 as the "posted date when it starts processing," not the date it was received. [DE:138, p 151]. Not having yet received the answer he wants, the prosecutor then asked whether she would rely on the date of 5/7/2009 on Exhibit 21¹ for the date of receipt of Delgado's amended return. O'Brien responds "not necessarily the date of receipt, but the date in our system and is processing." [DE:138, p 152]. Since he cannot get O'Brien to say that 5/7/09 is the date Delgado's return was received, the prosecutor asks O'Brien "You would use what date in order to identify the date of receipt of posting by the IRS." O'Brien had made it clear that the receipt date and posted date are two different dates (see her explanation on p 149 where she identified 1/24/09 as the day it was received, 2/16/09 as the date it was posted, and on p 152 5/7/09 as the date it was processed). So when she responds she provides the two dates the prosecutor has asked for and says, "we would use the date that it is processed or the date that is stamped on the return." Then the prosecutor asked "what is the date processed here?" (not the date it was received, the date it was processed). O'Brien responds "5/7/09." So in order to confuse the jury the prosecutor asked if that is the date alleged in the indictment and O'Brien says "Yes." Id. at 154. She says yes

1/ Exhibit 21 is an IMFOLT, which is basically a spreadsheet generated by the IRS from the individual master file online transcript [DE:138, p 149]. An email from Calabrese to O'Brien acknowledges that "the IMFOLT isn't tying to the dates of filing stamped on the return of Jessica Delgado and that the dates are very confusing. See Exhibit I submitted herein as Appendix A-11. Cabrera's counsel could have used this to dispute the accuracy of the Exhibit. It certainly supports Cabrera's claim and the need for an evidentiary hearing.

because that is the date alleged in the indictment not because it is the date it was received. Her testimony was clear that she would not rely on that being the date it was received but rather "the date in our system and is processing." Id. at 152. This was enough to confuse and mislead the jury into believing it to be the date the return was received by the IRS. In fact, even the district court admitted that there was ambiguity in O'Brien's testimony. [DE:20, p 5]. The fact that O'Brien's testimony was confusing even to an experienced judge speaks volumes as to what it did to an inexperienced jury and certainly supports Cabrera's claim that his counsel was ineffective in failing to clarify the date of Delgado's claim on cross examination. The original indictment in this case alleges that on 1/24/09 Cabrera and co-defendant Perez filed a 2008 amended individual income tax return for Jessica Delgado containing false claims in the amount of \$25,550. At Cabrera's arraignment and his pre-trial detention hearing Cabrera's counsel argued that Cabrera could not have either prepared or filed Delgado's amended return because he was still in the custody of immigration when the return was received by the IRS. After this, on 9/10/13 the government filed a superseding indictment which alleged that Delgado's amended return was received by the IRS on 5/7/09. There is no evidence that the government did go back to the grand jury to seek an amendment or superseding indictment, there is no known transcript of the proceedings and there is no known record of any evidence or testimony presented to the grand jury to convince them to issue the said superseding indictment with a changed date. All of which

indicates that this may have been an impermissible amendment to the original indictment. It is important to note that both indictments are virtually identical except for the date of Delgado's claim. Throughout both indictments 1/24/09 is used as the starting date of the conspiracy. Delgado's claim was the earliest of the claims in the conspiracy and the only one filed on 1/24/09. All other claims in the indictment, counts 3-20, were filed between 3/17/09 and 3/30/10. See both indictments [DE:1] and [DE:50]. The date range of the conspiracy matches and tracks the dates of the claims. The sum of all the available evidence seems to confirm Cabrera's claim that Delgado's return was in fact received by the IRS on 1/24/09 and that he could not and did not prepare or file the same. The magistrate's report completely misrepresents, muddles and confuses Cabrera's claim. Cabrera did not claim that the government witness offered equivocal testimony in order to confuse the jury as the court states. Cabrera claimed that the prosecutor twisted and manipulated O'Brien's testimony in order to confuse and mislead the jury. [DE:14, p18]. The magistrate states that even if Cabrera's counsel "had introduced evidence that Cabrera was in custody at the time Delgado's return was filed, this is of no consequence and would not have affected the outcome of the trial, especially in light of the superseding indictment and evidence adduced at trial which established that J.D.'s fraudulent tax return was filed on or about May 7, 2009. Movant has not demonstrated that the government's witness, Victoria O'Brien, or any other witness provided incorrect testimony... O'Brien did not dispute that an original return for

J.D. was filed in January 2009, but the amended return, filed on May 7, 2009, would have had to have been mailed or filed as a walk-in." There are several problems with the magistrate's findings. First, O'Brien testified using an IMFOLT form which Calabrese admitted to be confusing and incorrect. See Ex(I)(Appendix A-11). Had Cabrera's counsel used J.D.'s actual 2008 paper amended return, which was in evidence [DE:99, p1], with 1/24/09 as the date of receipt by the IRS stamped on its front, to cross examine O'Brien, and then presented evidence and testimony that Cabrera was in custody at the time, it would have, at the very least, created in the jury's minds, the reasonable doubt necessary to find Cabrera not guilty on Count 2, and maybe other counts as well. Contrary to the magistrate's claim, the superseding indictment is not proof or evidence of guilt. As for evidence adduced at trial, as previously stated, O'Brien's initial testimony was that the return was received on 1/24/09 [DE:138, p 150]; Jessica Delgado testified that all her dealings were with Carlos Perez [DE:140, pp 494-505]. Which takes us to the standard of proof that she used to determine whether Cabrera was entitled to relief or even an evidentiary hearing. Cabrera did not need to "demonstrate" that the government witnesses provided incorrect testimony, that is not even Cabrera's claim. All Cabrera needed to do was allege reasonably specific non-conclusory facts, that are not affirmatively contradicted by the record and the files in the case, that if proven true, would entitle him to the relief he seeks. As expressed before, Cabrera did this. But the biggest problem with the magistrate's statements and, in fact, with the

entire case is the fact that, as previously explained, she should have recused herself and should never have presided over the case. The district court adopted, almost verbatim, the "arguments", as - they can't be called anything else, advanced by the magistrate and ignored the evidence favorable to Cabrera. There is nothing clear about O'Brien's testimony, it was made as confusing as it could be by the prosecutor in the case. As it did with Cabrera's first claim, here the court ignored Calabrese's grand jury testimony, which formed the basis for indicting Cabrera on Count 2, and Jessica Delgado's testimony in favor of the confusion created by the prosecutor out of O'Brien's testimony. As the court in Guidry stated, a court may not ignore testimony and evidence favorable to the defendant. *Id.* at 315. This issue could have been easily resolved by granting Cabrera discovery and an evidentiary hearing where the actual amended return with its date of receipt stamped on it was presented. In fact, at all material times herein, the government has been in possession of the actual amended return for Jessica Delgado. The amended return was submitted to, and admitted into evidence at trial [DE:99, p1]. The return was retrieved by the government in open court on 11/12/13 as evidenced by DE:100, p1. At any time throughout these proceedings the government could have produced the amended return and proven Cabrera wrong. The fact that it has not done so and has fought tooth and nail to quash Cabrera's claims and silence him without an evidentiary hearing should be, at the very least suspect if not outright telling. This should have been a red flag for the district court, instead it was ignored. What is more, the

court should have compelled the government to comply with its order to submit all relevant portions of the record by providing the actual paper amended return. Cabrera filed an initial §2255 motion with a number of Exhibits in support of his claims attached to it. The magistrate judge ordered Cabrera to file a succinct amended §2255 motion [DE:6], forbade him from submitting exhibits and ordered respondent to "submit, in conjunction with its answer, those portions of the record that it deems relevant." [DE:6, p 8]. The court's order can hardly be described as fair or unbiased. Needless to say, the government did not submit any exhibits/ portions of the record other than the declaration and spreadsheet prepared by Calabrese [DE:11]. It certainly did not submit Jessica Delgado's amended tax return, Agent Calabrese's Grand Jury testimony or any of the exhibits Cabrera wanted to use to support his claims. "[C]ontested factual issues in §2255 cases must be decided on the basis of an evidentiary hearing, not affidavits." Montgomery, *supra*. Cabrera's counsel had an obligation to clarify O'Brien's testimony during cross examination and establish that Delgado's return was received by the IRS on 1/24/09. Obviously Jessica Delgado's actual amended return was available for Cabrera's counsel to do so as evidenced by DE:99. He also had an obligation to subpoena witnesses and documents to establish that Cabrera was released from immigration's custody, after serving a long sentence at FCI Coleman, on 1/24/09 at 4:00 pm, and that based on this he could have neither prepared nor filed Delgado's return with the IRS. "[W]hen counsel fails to investigate his client's only ... possible defense [that defendant was in another

city when the crime was committed], although requested to do so by him, and fails to subpoena witnesses in support of the defense, it can hardly be said that the defendant received effective assistance of counsel." Rizo v United States, 446 Fed. Appx. 264 (11th Cir. 2011). Cabrera has met the threshold set forth in 28 U.S.C. §2255(b), Aaron, Montgomery, and Rizo supra in order for the court to be required to hold an evidentiary hearing. He has alleged reasonably specific, non-conclusory facts that are supported by the files and the record, not affirmatively contradicted by them, that are not patently frivolous and that if proven true would entitle him to the relief he seeks. "[A] hearing 'must' be held unless the motion and the files and records of the case 'conclusively' show that the prisoner is entitled to no relief." 28 U.S.C. §2255(b)(emphasis added).

Cabrera made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" Miller-El v Cockrell, 537 U.S. 322, 327 (2003). "This 'threshold' inquiry is more limited and forgiving than 'adjudication of the actual merits'" McGee v McFadden, 139 S.Ct. 2608 (2019). "The COA procedure should facilitate, not frustrate, fulsome review of potentially meritorious claims" Id. at 2608. Indications abound that Cabrera's claim of ineffective assistance of counsel deserved encouragement to proceed further. Even the

experienced judge of the district court admitted that agent O'Brien's testimony was confusing. DE:20, p 5. Yet Cabrera's counsel did nothing to clarify this confusion and establish that the IRS received Delgado's amended return on 1/24/09 at a time Cabrera was still in the custody of INS and could not have either prepared or filed the same. Cabrera's counsel had made the argument at a pre-trial hearing, so he was obviously aware of it; he had the actual paper return with the date of receipt stamped on its front available to him; according to both O'Brien's testimony on direct examination [DE:138, pp 149-150] and Calabrese's Grand Jury testimony [USCA 11, pp 64-65] the date stamped on the front of an amended return represents the date the IRS received the same, so he had all the proof he needed to demonstrate that Cabrera was not guilty of this Count and he failed to do. This inexcusable error resulted in Cabrera's being convicted on Count 2 and sentenced to 52 months to be served consecutive to his other sentence.

Reasonable jurists could find the district court's resolution of his constitutional claim debatable or wrong. Based upon the facts and circumstances at bar this matter warrants review.

ISSUE 3

Cabrera made a sufficient showing that the government violated his Due Process by twisting and manipulating witness testimony to confuse and mislead the jury. The district court reversibly erred in denying him an evidentiary hearing and COA. The Eleventh Circuit Court of Appeals erred in summarily denying his COA.

Cabrera re-states the allegations contained in Issue 2 as if fully set forth herein.

In spite of the evidence and testimony presented to the grand jury that Jessica Delgado's amended tax return was received by the IRS on 1/24/09, when the government realized that Cabrera was in custody at the time and could not have prepared or filed the return, it issued a superseding indictment that reflected 5/7/09 as the date the IRS received the amended return. Cabrera believes that the superseding indictment resulted from an impermissible amendment to the original indictment. An evidentiary hearing would provide the means to ascertain what, if any, evidence the government presented to the grand jury in order to secure the superseding indictment and whether, in fact, it went back to the grand jury to secure the same or simply did so impermissibly by other means. What is certain is that, as previously described, there is abundant evidence that points to 1/24/09 as the date the IRS received Jessica Delgado's 2008 amended return. Agent O'Brien initially testified it was received by the IRS on 1/24/09 [DE:138, p 150]. Then the prosecutor proceeded to twist and manipulate O'Brien's testimony in order to confuse and mislead the jury to believe that the IRS had received the amended return

on 5/7/09. Like with O'Brien the prosecutor twisted and manipulated Delgado's testimony to implicate Cabrera. Delgado testified that she used Carlos Perez to amend her 2008 tax return [DE:140, p 494-496, 499-500, 503-505]. She testified that all of her dealings and conversations were with Perez. Since this did not fit the government's theory of the case, the prosecutor asked Delgado to speculate as to whom actually prepared her return, to which she responded that based on conversations with other people Cabrera would be preparing her return [DE:140, p 501]. It is important to note that the government acknowledges that Delgado had not been 100% truthful in her testimony [DE:141, p 904-905]. The deliberate deception of the court and jury by the presentation of known false evidence has long been held to be incompatible with rudimentary demands of justice. Mooney v Holohan, 294 U.S. 103, 112 (1935); Pyle v Kansas, 317 U.S. 213 (1942). The scope of these cases was expanded by the Supreme Court in Giglio v United States, 405 U.S. 150 (1972). The Supreme Court reversed Giglio's conviction holding that a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. Giglio, 405 U.S. at 154. The prosecutor's actions are indicative of the government's willingness to ignore the truth and twist, bend and manipulate the facts to force them to fit their theory of the case in order to obtain a conviction. These lies and behavior infected other aspects of the case and ultimately resulted in Cabrera's conviction. "A prosecutor has a responsibility to strive for fairness and justice in the criminal justice system." United States v Okenfuss, 632 F.2d 483,

486 (5th Cir. 1980). "This 'sworn duty' requires the prosecutor to assure that the defendant has a fair and impartial trial, and the prosecutor's interest in a particular case is not necessarily to win, but to do justice." United States v Chapman, 524 F.3d 1073, 1088 (9th Cir. 2008)(quoting N. Mariana Islands v Bowie, 236 F.3d 1083, 1089 (9th Cir. 2001)). The prosecutor's actions call into question the validity of the jury's verdict. Like on issue number two, the court ignored the fact that the government presented evidence and testimony from Calabrese to the grand jury in order to indict Cabrera on Count 2, ignored the fact that the prosecutor twisted and manipulated Jessica Delgado's testimony to fit their theory of the case, ignored the fact that the prosecutor twisted and manipulated O'Brien's testimony in order to establish 5/7/09 as the date the amended return was received and that the prosecutor did this knowing it to be false and misleading, as well as, contradicted by the evidence and the testimony of Calabrese to the grand jury, all of it because otherwise he could not convict Cabrera on that count. Instead, the court adopted the government's argument almost verbatim. As previously explained, given the magistrate's enormous conflict of interest, especially concerning this claim, it is not surprising that the magistrate not only adopted the government's "argument" but seems to be advancing her own arguments as well. The district court, as with the other claims, simply adopted her findings without conducting its own inquiry into the claim. Like on issue number 2 the government could have easily settled this issue by providing the actual amended return but chose not to do

so to protect its own interests. The issue could and should have been resolved by means of discovery and an evidentiary hearing where the amended return with the date of receipt stamped on it, as well as, evidence and testimony of Cabrera's whereabouts prior to and on 1/24/09, was presented. Cabrera's sentence on Count 2 of the indictment was set to run consecutive to all other counts and therefore resulted in a substantial amount of time added to his prison sentence. "Factual findings are not clearly erroneous where the district court makes detailed credibility determinations that it does not believe a witness' claim at a hearing on a motion to suppress." United States v Delaney, 502 F.3d 1297 (11th Cir. 2007). When the district court ignores testimony favorable to the defendant ... the trial court's decision was based on an unreasonable determination. Guidry, 397 F.3d at 326. Cabrera did not need to prove these allegations to the court in order to be granted an evidentiary hearing. He only needed to allege reasonably specific, non-conclusory facts, that are not "affirmatively" contradicted by the records and the files of the case; that are not patently frivolous and that if proven true would entitle him to the relief he sought. He did. The files and records of the case do not conclusively show that he is not entitled to relief, therefore an evidentiary hearing "must be held." 28 U.S.C. §2255(b).

Cabrera avers that he has made a substantial showing that his trial and significantly long sentence were fundamentally unfair because the government twisted and manipulated witness testimony in order to confuse and mislead the jury into believing

that Jessica Delgado's 2008 amended return had been received by the IRS on 5/7/09 instead of 1/24/09 and that the same had been prepared and filed by Cabrera knowing all of this information to be false. There are plenty of indications that Cabrera's claim deserved encouragement to proceed further. There is no dispute that at all material times herein the government has been in possession of Delgado's 2008 amended return [DE:99, p1][DE:100, p1]. It is also indisputable that the government was ordered by the magistrate judge to submit all relevant portions of the record with its answer [DE:6, p8] and the government failed to submit the amended return when it filed its response [DE:11], and there is no question as to the relevance of the actual amended return or the government's obvious withholding of the same throughout trial and all subsequent proceedings in this case. The grand jury testimony of Calabrese indicated that Delgado's 2008 amended return was received by the IRS on 1/24/09 (USCA 11, pp 64-65), O'Brien's testimony, prior to being twisted and manipulated by the prosecutor, indicated 1/24/09 as the date the amended return was received [DE:138, p 149], and according to Jessica Delgado's trial testimony, before being twisted and manipulated by the prosecution, she used Carlos Perez to amend her 2008 tax return and all of her dealings concerning the same were with Carlos Perez [DE:140, pp 499-505]. Jurists of reason could find the district court's resolution of Cabrera's claim debatable or wrong. Cabrera has met the requirements of 28 U.S.C. §2253 and should not have been summarily denied a COA by both the district court and Eleventh Circuit Court of Appeals. Based upon the facts and circumstances at bar, this matter warrants review.

ISSUE 4

The magistrate's failure to inform that she had been a prosecutor in Cabrera's case and recuse herself tainted the proceedings, violated Cabrera's Due Process and introduced structural error, all of which requires reversal of the district court's denial of his claims.

Cabrera asserts that Magistrate Reid's failure to inform him of her conflict of interest and failure to recuse herself from the proceedings violated his due process, tainted the proceedings, and introduced a structural error, all of which requires that the district court's denial of his claims be reversed and remanded for an evidentiary hearing.

While preparing the instant petition for Writ of Certiorari, Cabrera looked for the petition for WOC, filed in 2016 in his case, to use as aid to guide him in the preparation of the one in this case. In reviewing the same he came across the name Lissette Reid, AUSA, as one of the interested parties in the case. Up until that point he had no idea that the magistrate presiding over his claims had been a member of the prosecution's team in his criminal case. "Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant personal involvement as a prosecutor in a critical decision regarding the defendant's case." Williams v Pennsylvania, 579 U.S. ____ (2016). "Due Process guarantees 'an absence of actual bias' on the part of a judge." Williams, at 141 (quoting In re Murchison, 349 U.S. 133, 136 (1955)). This Court's precedent applies an objective standard. "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an

objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." Williams, at 140 (quoting Caperton v A.T. Massey Coal, 556 U.S. 868, 881 (2009)). "[T]he court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See Murchison, 349 U.S. at 136-137. This objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." Williams, at 140. Magistrate Reid was a member of the prosecution team Cabrera is accusing of twisting and manipulating testimony; of failing to produce the 2008 amended return; of possible impermissible amendments to the indictment; of manipulating and exaggerating the losses attributable to Cabrera at sentencing and of prosecutorial misconduct, which may have infected all aspect of the case. Magistrate Reid's conflict and need to recuse herself could not be more clear. In fact, her failure to inform of her conflict and recuse herself from the proceedings, as well as, the government's failure to expose the conflict and ask for her recusal further confirms Cabrera's claims of unethical behavior and prosecutorial misconduct.

The 2011 ABA Model Code of Judicial Conduct, Rules 2.11(A)(1) and (A)(6)(b) clearly state that no judge may participate in any proceeding in which the judge's impartiality might be reasonably questioned, including where the judge served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the

proceedings. This is also codified on 28 U.S.C. §455, which states that "(a) any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned; (b) he shall also disqualify himself in the following circumstances: (1) where he has personal bias or personal knowledge of disputed evidentiary facts concerning the proceedings; (3) where he has served in governmental employment and in such capacity participated as counsel, advisor ... or expressed an opinion concerning the merits of the particular case in controversy; (4) he knows that he ... has any interest that could be substantially affected by the outcome of the proceedings; (c) A judge should inform himself about his personal and financial interest of his spouse and minor children residing in his household; (e) no justice, judge or magistrate judge shall accept from the parties to the proceedings a waiver of any ground for disqualification enumerated in subsection (b).

Magistrate Reid has violated every single one of these laws and rules, and in the process tainted the proceedings and violated Cabrera's Due Process. This Court has held that "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." Williams, at 145.

In this case, the district court did not conduct and independent inquiry as to the validity of Cabrera's claims. The district court relied upon and repeated the findings of Magistrate Reid in her report. This Court has made it clear that it "has

little trouble concluding that a due process violation arising from the participation of an interested judge is a defect 'not amenable' to harmless error review regardless of whether the judge's vote was dispositive." Williams, at 145 (quoting Puckett v United States, 566 U.S. 129, 141 (2009)). The participation and influence of Magistrate Reid's in the district court's decision constitutes structural error and is not amenable to harmless error review.

Cabrera was not aware of this conflict and could not have reasonably brought it up before. However, both Magistrate Reid and the government were fully aware of it and failed to act ethically and as required by the law and the rules.

Magistrate Reid's and the government's actions call into question the fairness, integrity and legitimacy of the proceedings in the district court. Based on the facts and circumstances at bar, this matter warrants review.

Conclusion

Based upon the foregoing grounds and authority, this Honorable Court should exercise its discretion and grant review in this case.

Respectfully submitted,



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