APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. GEZO GEONG EDWARDS, Defendant.

Criminal No. 11-00129-01 (CKK)
Civil No. 17-2778 (CKK)

MEMORANDUM OPINION
(November 21, 2019)

Presently before the Court is *pro se* Defendant Gezo Geong Edwards' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 ("Motion"). Defendant, Gezo Geong Edwards ("Mr. Edwards" or "Defendant") requests that this Court vacate, set aside, or correct his sentence based upon his claims of ineffective assistance of counsel. Mr. Edwards also includes a "Motion for Discovery" within his motion, seeking access to a code or program to open files and documents given to him by his former counsel.[1] Upon a searching review of the parties' submissions, the relevant authorities, and the record as a whole, the Court finds that Mr. Edwards is not entitled to the requested relief.[2] Accordingly, the Court shall **DENY** Mr. Edwards' Motion

[1] The Court will contact Mr. A. Eduardo Balarezo and instruct him to assist Mr. Edwards with accessing the materials.

[2] In connection with this Memorandum Opinion and the accompanying Order, this Court considered Def.'s Mot. to Vacate, Set Aside, or Correct Sentence ("Def.'s Mot."), ECF No. 975; the Government's Opp'n ("Gov't Opp'n"), ECF No. 1001; and Def.'s Reply, ECF No. 1017. Page references for documents filed with the Court refer to the pages assigned by the ECF system.

to Vacate, Set Aside, or Correct Sentence.

I. BACKGROUND

The facts in this case may be summarized as follows: Mr. Edwards was a member of a wholesale cocaine trafficking organization operating in the District of Columbia (the "District") metropolitan area from January 2009 through April 26, 2011, when he was arrested as a result of an investigation by the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department. The Government obtained evidence of Mr. Edwards' participation in the organization through various methods, including pen registers, arranged undercover drug buys, judicially-authorized wiretaps, physical surveillance, and surveillance videos. Mr. Edwards and his co-conspirators acquired large quantities of cocaine in California, shipped it to the District, and distributed it to mid-level and street-level dealers. Mr. Edwards was responsible for contacting suppliers in California, ensuring that the multi-kilogram quantities of cocaine were shipped from California to the District, and even cutting and processing the cocaine. Probation Pre-Sentence Investigation Report at 7-11, ECF No. 716. Mr. Edwards was initially represented by Mr. Harry Tun,[3] but was later represented by Mr. A. Eduardo Balarezo during his pretrial and trial proceedings.

In a Superseding Indictment filed on June 16, 2011, Mr. Edwards was charged with one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(A)(ii), 846, and two counts of using, carrying, and possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. §

[3] Mr. Tun was found to have engaged in a practice known as "double-billing" and was later suspended from the practice of law in the District. *In re Tun*, 26 A.3d 313, 315 (D.C. 2011). Mr. Tun is not the subject of Mr. Edwards' ineffective assistance of counsel claims.

924(c)(1). Redacted Superseding Indictment, ECF No. 440. The Superseding Indictment also included asset forfeiture provisions. *Id.* The two counts of using, carrying and possessing a firearm during a drug trafficking offense were consolidated into one count before the case went to the jury.

On November 18, 2011, the Government filed the first of two bills of particulars to supplement the forfeiture allegations in the superseding indictment. First Bill of Particulars for Forfeiture, ECF No. 131. The Government described items subject to forfeiture as falling into four categories: money judgment, real property, United States currency, and personal property. *Id.* at 1-3. On December 13, 2011, the Government filed its second bill of particulars. Second Bill of Particulars for Forfeiture, ECF No. 136. Stemming from both bills of particulars, and with regard to Mr. Edwards, the Government requested a money judgment equal to the value of any and all property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of the offenses charged, and listed the following assets as subject to forfeiture: $360,009.00 in U.S. currency; $6,380.00 in U.S. currency; $16,538.60 held at TD Bank NA, in the name of Lunar Funding Group, LLC; $6,064.90 held at TD Bank NA, in the name of The Gueong Edwards Family Trust[4]; one platinum ladies diamond engagement ring; and one ladies Rolex President, oyster perpetual datejust watch.

On February 22, 2012, Mr. Edwards, through counsel, filed a Motion for Release of Funds, ECF No. 192, alleging that without access to the funds the Government had seized from him, he could not retain counsel of his choice. Mr. Edwards sought a hearing to determine the validity of

[4] In the first bill of particulars, the Government gave different values for the amounts held at TD Bank NA, even though those amounts did not add up to the total amount stated. The Court will use these values as it appears the Government miscalculated the values.

the Government's seizure of assets as he wanted to use those assets to pay a retainer fee that he and Mr. Balarezo agreed upon should the case proceed to trial. *Id.* The Government filed a Memorandum in Opposition, ECF No. 194, arguing that Mr. Edwards did not make a threshold showing that he lacked sufficient assets to pay Mr. Balarezo. The Court agreed and denied Mr. Edwards' request without prejudice. Order (Feb. 29, 2012), ECF No. 196.

Mr. Edwards also filed pretrial suppression motions, two counseled and one *pro se*, contesting the authorization of the Government's use of wiretaps throughout the investigation. This Court denied each of those motions. *See, e.g.*, *United States v. Edwards*, 889 F. Supp. 2d 1, 18 (D.D.C. 2012); *id.* at 23-29; *United States v. Edwards*, 904 F. Supp. 2d 7, 9-11 (D.D.C. 2012).

During its case-in-chief, the Government presented an expert witness and a confidential informant to link Mr. Edwards to the cocaine sold by Mr. Edwards and his co-conspirators. The expert witness testified as to the purity of the cocaine, and the confidential informant ("CI") testified as to the controlled drug buys. The defense did not present any expert testimony refuting the Government's claims about the origin of the cocaine nor any testimony about the common practices drug dealers use to conceal drugs from detection. Instead, Mr. Edwards' defense at trial questioned whether Mr. Edwards and his co-conspirators entered into an agreement, to prove conspiracy, and cast doubt on the character of the Government's witnesses who testified as to the controlled drug buys. *See* Trial Transcript ("Tr."). 14, 16-33, Nov. 15, 2012 P.M. Session, ECF No. 713.

On November 20, 2012, following a month-long jury trial, the jury found Mr. Edwards guilty on the charge of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, and acquitted him of the charge of using, carrying, and possessing a firearm. Verdict Forms, ECF Nos. 651/653. Following a separate forfeiture hearing, the jury found that

the Government proved that the following items constituted or were derived from proceeds that Mr. Edwards had obtained, directly or indirectly, as a result of the conspiracy charged in count one of Superseding Indictment: $360,009.00 in U.S. currency; $16,538.60 held at TD Bank NA, in the name of Lunar Funding Group, LLC; $6,064.90 held at TD Bank NA, in the name of The Gueong Edwards Family Trust; and one ladies Rolex President, oyster perpetual datejust watch. Partial Forfeiture Verdict Form, ECF No. 595; Final Forfeiture Verdict Form, ECF No. 597. The jury found that the Government did not prove that $6,380.00 in U.S. Currency was subject to forfeiture. Partial Forfeiture Verdict Form; ECF No. 595. The jury was unable to reach a decision as to the platinum ladies diamond engagement ring. Final Forfeiture Verdict Form; ECF No. 597.

On January 7, 2013, the Government filed a Notice of Forfeiture, ECF No. 670, seeking to forfeit the ring and the $6,380.00 in U.S. currency as substitute assets pursuant to 21 U.S.C. § 853(p). It later filed a Motion for Preliminary Order of Forfeiture, ECF No. 677, requesting forfeiture of all assets. Mr. Edwards, through counsel, opposed the Government's motion, arguing that it failed to establish any nexus between the ring and the charged offense. Def.'s Opp'n to Gov't's Mot. For Preliminary Order of Forfeiture at 3, ECF No. 695. The Government filed a Second Motion for Preliminary Order of Forfeiture, ECF No. 771, seeking discovery authority to identify and locate assets subject to forfeiture, or substitute assets for such property. This Court granted the Government's Motion for Preliminary Order of Forfeiture. Preliminary Order of Forfeiture, ECF No. 779. The Court entered a Final Order of Forfeiture, ECF No. 867, on February 27, 2014, the day that Mr. Edwards had his sentencing.

The Court sentenced Mr. Edwards to life imprisonment and a ten-year term of supervised release. Judgment, ECF No. 876. Mr. Edwards filed a timely notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, which affirmed his conviction. *United States*

v. Williams, 827 F.3d 1134, 1141 (D.C. Cir. 2016), *cert denied sub nom. Edwards v. United States*, 137 S. Ct. 706 (2017). The Government moved subsequently to amend the Final Order of Forfeiture, ECF No. 947. Mr. Edwards, then represented by Mr. David B. Smith, filed his Response to the Government's motion, ECF No. 952. The Court entered an Order of Forfeiture for Substitute Assets, ECF No. 957, granting the Government's motion to amend.

Mr. Edwards filed the present Motion to Vacate Sentence under 28 U.S.C. § 2255. ECF No. 975. Prior to filing the instant Motion, Mr. Edwards did not file any previous petitions, applications, or motions with respect to the judgment after his direct appeal. Mr. Edwards' Motion is premised on allegations of ineffective assistance of counsel related to his trial counsel, Mr. Balarezo. Mr. Edwards' claims that Mr. Balarezo was constitutionally ineffective fall into six general categories: (1) Mr. Balarezo's handling of the criminal forfeiture aspect of the case both pre-trial and post-trial; (2) Mr. Balarezo's alleged actual conflict of interest; (3) Mr. Balarezo's failure to call an expert witness and to conduct independent testing to rebut the Government's claims regarding the source of the cocaine; (4) Mr. Balarezo's failure to accurately and adequately argue that the evidence obtained from the wiretaps should have been suppressed; (5) Mr. Balarezo's failure to challenge the sufficiency of the Superseding Indictment; and (6) the cumulative effect of Mr. Balarezo's ineffective representation of Mr. Edwards. The Government filed its opposition, ECF No. 1001, and Mr. Edwards filed his reply to the Government's Opposition, ECF No. 1017. With briefing concluded, Mr. Edwards' Motion is now ripe for determination.

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a federal prisoner may file a motion to vacate, set aside or correct his sentence if he believes that the otherwise final sentence was imposed "in violation of the

Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). The standard for granting such a motion is high, as courts generally respect the finality of judgments and note the opportunities already afforded prisoners to raise objections during trial or on appeal. "[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). The petitioner has the burden of proof to demonstrate his right to such relief by a preponderance of the evidence. *United States v. Basu*, 881 F. Supp. 2d 1, 4 (D.D.C. 2012). A court shall grant a hearing to determine the issues and make findings of fact and conclusions of law "[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).

With few exceptions, a prisoner may not raise a claim as part of a collateral attack if that claim could have been raised on direct appeal, unless he can demonstrate either: (1) "cause" for his failure to do so and "prejudice" as a result of the alleged violation, or (2) "actual innocence" of the crime of which he was convicted. *Bousley v. United States*, 523 U.S. 614, 622-23 (1998). However, "[w]here a petitioner raises claims of ineffective assistance of counsel in a § 2255 motion, he need not show 'cause and prejudice' for not having raised such claims on direct appeal, as these claims may properly be raised for the first time in a § 2255 motion." *United States v. Cook*, 130 F. Supp. 2d 43, 45 (D.D.C. 2000) (citation omitted), *aff'd*, 22 F. App'x 3 (D.C. Cir. 2001).

A defendant claiming ineffective assistance of counsel may raise it for the first time as a collateral attack, rather than on direct appeal, but must show (1) "that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms," and (2) "that

this error caused [him] prejudice." *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008) (citation omitted). For the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential" and defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (internal quotation marks and citation omitted). The Court must consider "counsel's overall performance," *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986), and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. It is the petitioner's burden to show that counsel's errors were "so serious" that counsel could not be said to be functioning as the counsel guaranteed by the Sixth Amendment. *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

Furthermore, the defendant must meet the second *Strickland* prong and "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 669. To find prejudice, the petitioner must show that there is "a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks and citation omitted). An ineffective assistance of counsel claim is defeated if the defendant fails to demonstrate either prong.

III. DISCUSSION

A district court may deny a Section 2255 motion without a hearing when "the motion and

files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Whether or not to hold a hearing is a decision "committed to the district court's discretion, particularly when, as here, the judge who is considering the § 2255 motion also presided over the proceeding in which the petitioner claims to have been prejudiced." *United States v. Orleans-Lindsay*, 572 F. Supp. 2d 144, 166 (D.D.C. 2008); *see also United States v. Agramonte*, 366 F. Supp. 2d 83, 85 (D.D.C. 2005), *aff'd*, 304 Fed. App'x 877 (D.C. Cir. 2008). "The judge's own recollection of the events at issue may enable him summarily to deny a Section 2255 motion." *Agramonte*, 366 F. Supp. 2d at 85 (citing *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1992)). To warrant a hearing, the petitioner's Section 2255 motion must "raise 'detailed and specific' factual allegations whose resolution requires information outside of the record or the judge's 'personal knowledge or recollection.'" *Pollard*, 959 F.2d at 1031 (quoting *Machibroda v. United States*, 368 U.S. 487, 495 (1962)).

Based on a review of the parties' pleadings and the entire record in the criminal proceeding, the Court finds that there is no need for an evidentiary hearing on the instant Motion.[5] As explained below, Mr. Edwards has not proffered detailed and specific factual allegations requiring this Court — which handled the trial and sentencing in this case — to look outside the record and hold a hearing on the issues raised in Mr. Edwards' Motion. Accordingly, the Court shall render its findings based on the parties' pleadings and the record in this case.

Mr. Edwards raises claims of ineffective assistance of counsel as it pertains to: (1) Mr. Balarezo's handling of the criminal forfeiture aspect of the case both pre-trial and post-trial; (2)

[5] Mr. Edwards also requests that counsel be appointed to him for an evidentiary hearing. Def.'s Mot. at 53. The Court denies Mr. Edwards' request because an evidentiary hearing is not warranted.

Mr. Balarezo's alleged actual conflict of interest; (3) Mr. Balarezo's failure to call an expert witness and to conduct independent testing to rebut the Government's claims regarding the source of the cocaine; (4) Mr. Balarezo's failure to accurately and adequately argue that the evidence obtained from the wiretaps should have been suppressed; (5) Mr. Balarezo's failure to challenge the sufficiency of the Superseding Indictment; and (6) the cumulative effect of Mr. Balarezo's ineffective representation of Mr. Edwards. The Court shall address each claim in turn.

A. Pre-Trial and Post-Trial Handling of the Criminal Forfeiture Aspect of the Case

The Court will first address the pre-trial handling of the criminal forfeiture by Mr. Balarezo. Mr. Edwards claims that Mr. Balarezo "failed to present assets known by the government to be untainted, and assets that the government could not reasonably meet [the] probable cause [standard] to continue to freeze [them] under an assumption of possible forfeiture for future purposes." Def.'s Mot. at 18. Mr. Edwards claims that Mr. Balarezo was ineffective in his attempts to secure the return of assets, later determined to be untainted by the jury, to pay the remaining balance of Mr. Balarezo's retainer fee. Def.'s Mot. at 18-19, ECF No. 975.

In its Order denying Mr. Edwards' Motion for Release of Funds, the Court found that Mr. Edwards "did not provide any additional information regarding his assets, liabilities, sources of income, or other information relevant to his ability to retain legal counsel" other than merely stating that he did not have any available funds to pay Mr. Balarezo's retainer. Order (Feb. 29, 2012) at 4, ECF No. 196. Mr. Edwards' motion stated that "Mr. Edwards has demonstrated that he cannot retain counsel of his choice without the assets that have been seized or retrained [sic]." Mot. to Release Funds at 2, ECF No. 192. Mr. Edwards noted on February 22, 2012, that Mr.

Balarezo was his counsel of choice,[6] Def.'s Aff. in Supp. of Mot. for Release of Funds, ECF No. 192-1, and upon questioning by this Court during a status hearing in late July 2012, Mr. Edwards affirmed again that he was satisfied with his counsel.

The Court found that Mr. Edwards failed to provide information regarding the amount of funds he needed to retain Mr. Balarezo to proceed to trial, and that it could not determine whether the seized assets were necessary for Mr. Edwards to retain counsel of his choice. Order (Feb. 29, 2012) at 5, ECF No. 196. Furthermore, Mr. Edwards could not demonstrate that certain assets seized by the Government "would [have] be[en] available to [him] to pay for legal services" because probable cause was lacking. *Id.* at 6.

Mr. Edwards acknowledges that his initial motion to have those assets returned to him was denied because he failed to make the threshold showing that he lacked sufficient assets to pay Mr. Balarezo. Def.'s Mot. at 14, ECF No. 975. Nonetheless, Mr. Edwards argues that Mr. Balarezo was ineffective in his handling of the pre-trial motion because "[Mr. Balarezo] should have known the meaning of a threshold presentations [sic] and its legal requirements as a presentation in the Court to succeed in a 853 Pre-trial hearing." *Id.* at 17. In particular, Mr. Edwards argues that Mr. Balarezo should have informed this Court that (1) Mr. Edwards owed $20,000 to Mr. Balarezo; (2) his wife had to pay for the retainer fee by "taking [it] out [of] her 401(k) and credit cards;" (3) he pays child support; and (4) he is "saddled with mortgage payments." *Id.*

Mr. Edwards states further that he "instructed Balarezo specifically to move the Court for the hearing to return the untainted assets so that he could pay for an attorney to proceed to trial."

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[6] Upon questioning by this Court during a status hearing in late July 2012, Mr. Edwards affirmed again that he was satisfied with his counsel.

Def.'s Reply at 6, ECF No. 1017. The record indicates that Mr. Balarezo did in fact move this Court for the return of these assets. Mot. for Release of Funds, ECF No. 192. Other than this, Mr. Edwards does not specify, with any degree of particularity, the exact circumstances of Mr. Balarezo's failure to include the now-identified financial information. The Court is left to speculate because Defendant does not indicate whether Mr. Balarezo asked Mr. Edwards for the financial information, whether that information was readily available at the time, or whether Mr. Edwards told Mr. Balarezo himself, amongst other relevant factors. Without this information, the Court will not engage in speculative arguments. *See United States v. Morrison*, 98 F.3d 619, 625-26 (D.C. Cir. 1996) (stating that summary denial is appropriate when an ineffective assistance claim is speculative).

Assuming, *arguendo* that Mr. Balarezo's omission of the now-identified financial information does constitute deficient performance, the Court finds that Mr. Edwards has failed to show that Mr. Balarezo's omission was prejudicial. It is not reasonably probable that, but for Mr. Balarezo's omission in the Motion to Return Funds, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 669.

The Government argues that Mr. Edwards was not entitled to use any of the seized assets to secure the services of Mr. Balarezo after it identified the property as subject to forfeiture. Gov't Opp'n at 17; ECF No. 1001. In addition, the Government argues that Mr. Edwards has failed to show exactly what Mr. Balarezo could have relied upon pre-trial to demonstrate that the Government lacked probable cause to seize those assets that were later determined by the jury to be untainted, i.e. $6,380.00 in U.S. currency and the platinum ladies diamond engagement ring. *Id.* at 18. There was not much more Mr. Balarezo could have done, given that a "probable cause [determination] had been found by the grand jury and the judicial officers who issued the search

warrants." *Id.*

The only evidence Mr. Edwards offers to demonstrate that he was entitled to use those assets is that the jury later concluded that the engagement ring and $6,380.00 in U.S. currency could not be tied to the conspiracy. Def.'s Mot. at 18. However, probable cause determinations require a significantly lower bar of proof than that employed by a jury at trial. *See United States v. Mechanik*, 475 U.S. 66, 72-73 (1986) (jury verdict renders harmless an error in a grand jury proceeding). Absent any evidence that probable cause was lacking as to the identified assets, which Mr. Edwards does not identify either in his Motion or Reply, Mr. Balarezo's failure to include Mr. Edwards' financial circumstances in the initial Motion to Return Funds did not prejudice him. Furthermore, even if Mr. Edwards intended to use those assets to pay the remaining balance of Mr. Balarezo's retainer fee, there is still no apparent prejudice to him because Mr. Balarezo continued to represent him throughout the trial. Defendant admits that his family paid the remaining balance of Mr. Balarezo's fees. Def.'s Mot. at 42.

The Court will now address Mr. Edwards' argument that Mr. Balarezo was ineffective in the post-trial criminal forfeiture proceedings. Mr. Edwards claims that Mr. Balarezo failed to move the Court to return the property that was determined by the jury not to be connected to the conspiracy. Def.'s Mot. at 49-50. The Government argues that Mr. Edwards' assertion is baseless. Gov't Opp'n at 19. It states that "there was nothing more that Mr. Balarezo could have done" because Mr. Balarezo challenged the Government's arguments regarding the property even though his argument did not persuade the Court. *Id.*; *see generally* Mem. in Opp'n to Mot. for Forfeiture of Property, ECF No. 695. The Government concludes that Mr. Balarezo's performance during this phase of the criminal forfeiture proceedings was neither deficient nor prejudicial. *Id.*

This Court ultimately granted the Government's request to forfeit the ring and the

$6,380.00 in U.S. currency as substitute assets. Order of Forfeiture for Substitute Assets at 3, ECF No. 957. The Court shall provide a brief account of how these assets became substituted. The Government first filed a Notice of Forfeiture, ECF No. 670, where it indicated that it would move to forfeit the ring and the $6,380.00 in U.S. currency as substitute assets pursuant to 21 U.S.C. § 853(p). In its subsequent Motion for Preliminary Order of Forfeiture, ECF No. 677, the Government sought discovery authority to identify and locate property to satisfy the money judgment. Mr. Edwards, through counsel, opposed the Motion for Preliminary Order of Forfeiture, arguing that the Government failed to establish a nexus between the later substituted assets and the charged offense. Def.'s Opp'n to Gov't's Mot. for Preliminary Order of Forfeiture at 3, ECF No. 695. The Government subsequently filed a Second Motion for Preliminary Order of Forfeiture, ECF No. 771, pursuant to a status hearing held on May 29, 2013. This Court granted the Government's Motion for Preliminary Order of Forfeiture, ECF No. 779, but the language of the Order proposed by the Government did not include any explicit authorization to substitute the ring and the $6,380.00 in U.S. currency as substitute assets.

This Court entered the Final Order of Forfeiture, ECF No. 867, on February 27, 2014. The Government then moved to amend the Final Order of Forfeiture pursuant to 21 U.S.C. § 853(p), to include the ring and $6,380.00 in U.S. currency, because after exercising due diligence in attempting to locate directly forfeitable property as direct proceeds from the conspiracy, it could not locate any property. Gov't's Mot. to Amend Order of Forfeiture to Include Substitute Assets at 6-7, ECF No. 947. The substitute assets would have partially satisfied a money judgment of $3,000,000, less amounts forfeited, instituted against Mr. Edwards. *Id.* at 1, 7. Mr. Edwards, then represented by Mr. David B. Smith, informed this Court that he would not consent to having the assets be substituted. Def.'s Resp. to Gov't's Mot. to Amend Order of Forfeiture to Include

Substitute Assets at 2, ECF No. 952. The Court granted the Government's motion to amend and concluded that the engagement ring and $6,380.00 in U.S. currency were subject to forfeiture as substitute property. Order of Forfeiture for Substitute Assets (Oct. 10, 2017) at 2, ECF No. 957.

While Mr. Balarezo was not the first to move this Court with regard to the assets, Mr. Balarezo did oppose the Government's position. Def.'s Opp'n to Gov't's Mot. For Preliminary Order of Forfeiture at 3, ECF No. 695. The Court does not see how the outcome would be different if Mr. Balarezo had moved to acquire the ring prior to the Government's filing if the Government had a sound basis to substitute the assets. Additionally, Mr. Edwards has not identified any other option available to Mr. Balarezo at the post-trial criminal forfeiture junction. Given Mr. Edwards' lack of specificity and/or detailed assertions about Mr. Balarezo's alleged misconduct and Defendant's failure to demonstrate a reasonable probability of a different result; *i.e.*, a return of ring versus the ring being used by the Government as a substitute asset, the Court shall deny Mr. Edwards' claims of ineffective assistance of counsel during the pre-trial and post-trial criminal forfeiture proceedings.

B. Alleged Actual Conflict of Interest

The Court will now turn to Mr. Edwards' argument that Mr. Balarezo had an actual conflict of interest.[7] Mr. Edwards argues that he is a "victim of fraud perpetrated by his original counsel, Harry Tun," and that Mr. Balarezo "submitted the [Motion for Release of Funds] in a fashion that he knew would not survive . . . to prevent [Mr. Edwards] from procuring an attorney who would

[7] Mr. Edwards specifically argues that Mr. Balarezo's alleged actual conflict of interest affected his performance during the pre-trial and post-trial criminal forfeiture phase, pre-trial wiretap suppression proceedings, and the trial. Def.'s Mot. at 20-24, 46-48, 50-51. For the sake of clarity, the Court will only address whether an actual conflict of interest existed as this argument is central to Mr. Edwards' three specific claims regarding conflict of interest.

pursue actions against [Mr.] Tun . . . ." Def.'s Mot. at 20, 22. Mr. Edwards claims that he and Mr. Tun initially agreed to a retainer fee of $40,000, and that after Mr. Tun filed his Motion to Withdraw, Mr. Tun was to transfer the full $40,000 to Mr. Balarezo. *Id.* at 21. According to Mr. Edwards, only $20,000 was paid to Mr. Balarezo. *Id.* Mr. Edwards states that he told Mr. Balarezo that "he wanted to take action against [Mr.] Tun for defrauding the money out of him," to which Mr. Balarezo responded that "he [would] not pursue any actions against [Mr.] Tun" and that "he had nothing to do with obtaining the remaining $20,000 from Tun," but rather, "[Mr. Edwards] was responsible for paying the remaining $20,000." *Id.* at 22. Based on his own representations, Mr. Edwards does not claim that he entered into a consolidated agreement with Mr. Tun and Mr. Balarezo nor were the two attorneys affiliated with a single law firm. Accordingly, it was not Mr. Balarezo's responsibility to attempt to obtain the remaining $20,000.00 from Mr. Tun instead of obtaining payment directly from his client, Mr. Edwards.

Mr. Edwards concludes that "[Mr.] Balarezo knew that [Mr.] Tun was accepting money from [him] under false representation" and that Mr. Balarezo then submitted the Motion for Release of Funds "in a fashion that he knew would not survive." *Id.* As a result of the denial of the Motion for Release of Funds, Mr. Edwards argues that Mr. Balarezo should have "notified the Court that [Mr.] Tun was [his] original counsel . . . and that since [he] could not afford to proceed with [Mr. Balarezo] that the Court should [have] appoint[ed] [him] [new] counsel." Def.'s Mot. at 23, ECF No. 975.

The Government argues that Mr. Balarezo did not labor under an actual conflict of interest. Gov't Opp'n at 19. As support, it points to Mr. Edwards' failure to explain how Mr. Balarezo rendered ineffective assistance of counsel on the issue of the retainer fee and to the logical fallacy of Mr. Edwards' claims that Mr. Balarezo intentionally omitted information from the Motion for

Release of Funds so as to prevent Mr. Edwards from pursuing an action against his former counsel. *Id.* at 22-23. The Government argues that it does not make any sense for Mr. Balarezo to purposefully sabotage his own client's pleading when payment of his retainer was allegedly conditioned on the success of that pleading. *See id.* at 23.

In response, Mr. Edwards claims that "[Mr.] Tun's and [Mr.] Balarezo's scheme to shift representation and manipulate [his] funds paid to [Mr.] Tun for his representation, hampered [his] Sixth Amendment right to counsel of choice." [8] Def.'s Reply at 10, ECF No. 1017. Mr. Edwards claims that "to pursue actions against [Mr.] Tun would mean pursuing [Mr.] Balarezo as well because he was clearly involved in the beginning phase with [Mr.] Tun." *Id.* at 11. As evidence of Mr. Balarezo's involvement in the alleged scheme, Mr. Edwards claims the following: Mr. Tun was his initial counsel of choice; Mr. Tun brought Mr. Balarezo to sit in on a meeting, where "it was never discussed why [Mr.] Balarezo was there . . . nor did [Mr.] Balarezo in put [sic] anything during the meeting;" Mr. Tun came to subsequent meetings without Mr. Balarezo; Mr. Tun then brought Mr. Balarezo to notify Mr. Edwards that Mr. Tun was suspended from practicing law and that Mr. Balarezo would be taking over the case; and Mr. Balarezo "would not tell [Mr. Edwards] what [Mr.] Tun was sanctioned for, [Mr. Edwards] later had someone pull it up." *Id.* at 10-11.[9]

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[8] It is not clear from the record if Mr. Tun was Mr. Edwards' original counsel of choice. Both Mr. Tun and Mr. Balarezo filed notices of appearance at the same time, and Mr. Tun even stated he was "representing Mr. Edwards as co-counsel." Notice of Attorney Appearance, ECF No. 5; Notice of Attorney Appearance, ECF No. 6; Mot. to Withdraw as Attorney ¶ 1, ECF No. 98.

[9] Mr. Tun was present and unaccompanied by Mr. Balarezo at Mr. Edwards' detention hearings and arraignments for the initial indictment. Apr. 29, 2011 Minute Entries for proceedings before Magistrate Judge Deborah A. Robinson, May 13, 2011 Minute Entry. On May 3, 2011, Mr. Balarezo filed a Notice of Consent to Detention, ECF No. 11. Mr. Balarezo was present and unaccompanied by Mr. Tun for the initial status conference and later for the arraignment on the Superseding Indictment. May 24, 2011 Minute Entry; June 22, 2011 Minute Entry for proceedings before Magistrate Judge Alan Kay. Both Mr. Balarezo and Mr. Tun were present for a status conference on the Superseding Indictment. July 27, 2011 Minute Entry. On September 9,

Mr. Edwards responds to the Government's illogical fallacy argument by stating that Mr. Balarezo was attempting to cover-up his own misconduct when he submitted the Motion to Release Funds. *Id.* at 11. Ultimately, Mr. Balarezo, according to Mr. Edwards, advanced his own and Mr. Tun's interests to the detriment of Mr. Edwards' interests. *Id.* Mr. Edwards proffers no evidence or further explanation for either of these generalized allegations.

Alleged conflict of interest claims "are a 'specific genre' of ineffective assistance of counsel claim." *United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (citation omitted). "In order to establish a violation of the Sixth Amendment, a petitioner who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). An "actual conflict of interest" exists when a defense attorney is required to make choices "advancing [someone else's] interests to the detriment of his client's interest." *United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998). The "possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler*, 446 U.S. at 350. Furthermore, when the conflict concerns the payment of fees, "courts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client." *United States v. Taylor*, 139 F.3d 924, 932 (D.C. Cir. 1998) (citations omitted).

The Court finds that Mr. Edwards has not shown that Mr. Balarezo had an actual conflict of interest. Mr. Edwards' statements regarding Mr. Balarezo's alleged involvement in a scheme to deprive him of funds that he initially gave to Mr. Tun are speculative and conclusory allegations.

2011, Mr. Tun moved to withdraw as an attorney for Mr. Edwards. Mot. to Withdraw as Attorney, ECF No. 98. The Court granted Mr. Tun's motion. Order (Sep. 12, 2011), ECF No. 104.

Relying on Mr. Edwards' own statements, there is no indication that Mr. Balarezo was a party to the agreement between Mr. Edwards and Mr. Tun, or that Mr. Balarezo should have affirmatively sought the $20,000.00 balance of his retainer fee from Mr. Tun as opposed to seeking payment directly from Mr. Edwards. Nor do the facts that Mr. Edwards cites prove anything nefarious. In fact, the record appears to contradict Mr. Edwards' version of how Mr. Balarezo came to represent him during trial. Again, Mr. Edwards' argument is further complicated by the fact that on February 22, 2012, five months after Mr. Tun withdrew from the case, Mr. Edwards signed and submitted an affidavit to the Court stating that Mr. Balarezo was his counsel of choice, Def.'s Aff. in Supp. of Mot. for Release of Funds, ECF No. 192-1, and Mr. Edwards subsequently affirmed his satisfaction with counsel in July 2012. Because Mr. Edwards has failed to show that an actual conflict of interest existed, the Court shall deny his claim that Mr. Balarezo operated under an actual conflict of interest that adversely affected his representation of Mr. Edwards. *See United States v. Smoot*, No. 18-3007, 2019 WL 1246313 at *4 (D.C. Cir. Mar. 19, 2019) (dismissal of alleged conflict of interest claim is appropriate when defendant has failed to show that an actual conflict existed).

C. Failure to Call Expert Witness and Conduct Independent Testing

The Court now turns to Mr. Edwards' contention that his counsel, Mr. Balarezo, was constitutionally ineffective for not obtaining a narcotics expert to testify and for failing to conduct independent testing of the cocaine offered at trial. Mr. Edwards first claims that "[his] counsel attempted to use the government's expert witness for his strategic and tactical defense without actually knowing whether that particular expert was capable or qualified or required to do the type of testing." Def.'s Mot. at 27-28; ECF No. 975. Mr. Edwards faults Mr. Balarezo's alleged misstep as the reason why "[Mr. Balarezo] attempted to use the government's expert witness for

his strategic and tactical defense." *Id.* "Clearly," according to Mr. Edwards, "[Mr. Balarezo] was insufficiently prepared for trial, and as a result did not call nor interview his own expert in support of his strategic and tactical decision." *Id.* at 28.

Second, Mr. Edwards claims that "[Mr. Balarezo] had reasons to support a strategic and tactical advance to cause the jurors to consider whether all the drugs that [were] sampled in the investigation came from [another co-conspirator in the case]." *Id.* "Had counsel conducted an independent investigation and consulted with his own expert, the next step of challenging the government's case under his defense would have been to present expert testimony concerning known tactics used by drug dealers and CI's [Confidential Informants] conducting controlled drug purchases." *Id* at 33. Ultimately, Mr. Edwards wanted Mr. Balarezo to have consulted with an expert on chemical profiling and another expert with knowledge on drug trafficking to illustrate the tactics that CI's employ when conducting controlled drug buys to contest the connection between the drugs found and the conspiracy. *See id.* at 34.

The Government argues that Mr. Edwards' argument fails to show that Mr. Balarezo's decision not to call an expert witness was either deficient or prejudicial under *Strickland.* Gov't Opp'n at 26. Specifically, the Government argues that Mr. Edwards has not shown that had the drugs been tested, the results would have revealed that the drugs seized were either not cocaine or from a co-conspirator. *Id.* Additionally, the Government claims that Mr. Edwards' argument is based purely on speculative thinking because he does not name a witness who could have testified nor provide the testimony that a hypothetical witness would have given. *Id.*

Under the *Strickland* test, a defendant "must overcome the presumption that, under the circumstances, a challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). A court "must indulge a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance[.]" *Id.* In addition, "strategic choices made after [a] thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *United States v. Morrison*, 98 F.3d 619, 623 (D.C. Cir. 1996) (citation omitted). When a defendant challenges his counsel's choice of a defense, he must show that the choice was unreasonable and not constitutionally adequate given the circumstances. *See Johnson v. Alabama*, 256 F.3d 1156, 1177-1178 (11th Cir. 2001).

Mr. Edwards' contentions regarding Mr. Balarezo's failure to establish the source of the cocaine references the testimony provided by two of the Government's witnesses. The first witness was Kittie Wong, a senior forensic chemist at the Drug Enforcement Administration. Trial Tr. 26:8-18, Oct. 25, 2012 P.M. Session, ECF No. 619. Ms. Wong testified that, to her knowledge, any chemical profiling that would reveal where the cocaine originated from geographically was not performed on the sample she tested. Trial Tr. 47:25, ECF No. 619. Mr. Balarezo attempted to elicit testimony from her on cross examination regarding the Drug Enforcement Administration's possible policies in place with regard to testing for chemical profiling. Trial Tr. 44:21-22, ECF No. 619. This Court sustained the Government's objection to Mr. Balarezo's question because Mr. Balarezo was attempting to make the Government's expert witness a witness for the defense. Trial Tr. 46:4-22, ECF No. 619. Mr. Balarezo candidly admitted to the Court at side-bar that he was attempting to elicit testimony that the Drug Enforcement Administration did not perform a test that conclusively shows that the sample it tested matched another sample in the case to show that it only came from one of the co-conspirators as opposed to Mr. Bowman. Trial Tr. 45:16-21, ECF No. 619.

The second witness was Special Agent Naugle, who testified to participating in the purchase of cocaine by a confidential informant. Trial Tr. 50:16-19. Special Agent Naugle

testified that the confidential informant drove her own personal vehicle to the site of the drug buy. Trial Tr. 51:10-12. He also testified that he searched the confidential informant's vehicle prior to the purchase. Trial Tr. 51:13-15.

Mr. Edwards' argument that Mr. Balarezo committed himself to develop a defense to cast doubt on the source of the cocaine, and that calling an expert witness was crucial to the development of that defense, is simply not supported by the record. In fact, the record indicates that Mr. Balarezo pursued a different defense. Mr. Balarezo, in his closing arguments, repeatedly cast doubt on the character of the Government's witnesses who testified as to the controlled drug buys and cast doubt on the Government's evidence proving that Mr. Edwards and his co-conspirators agreed to enter into a conspiracy. *See* Trial Tr. 14, 16-33, Nov. 15, 2012 P.M. Session, ECF No. 713.

A claim of ineffective assistance of counsel based on the failure to consult and call an expert requires "evidence of what a scientific expert would have stated" at trial in order to establish prejudice. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *see also Rodela-Aguiar v. United States*, 596 F.3d 457, 462 (8th Cir. 2010). Generally, courts will look to all of the evidence presented in the case and determine whether an expert witness could have altered the considerations and outcome of the jury. *See Dieter v. Florida*, 759 Fed. App'x 885, 891-892 (11th Cir. 2019). Mr. Edwards has not shown what any results of a chemical profiling analysis would reveal, nor has he demonstrated the relevance or significance that this potential evidence may have on establishing the defense he claims Mr. Balarezo should have pursued. Similarly, Mr. Edwards' claim that "[t]he jurors would have accepted the [drug trafficking] expert['s] opinion" is speculative and conclusory. Def.'s Mot. at 34.

The evidence presented at trial would have made the need for an expert witness or

independent testing insignificant. The Government presented video footage of Mr. Edwards opening a suitcase and counting what appeared to be kilograms of cocaine. Probation Pre-Sentence Investigation Report at 7, ECF No. 716. The video evidence also showed Mr. Edwards opening the packages and breaking them down into smaller quantities. *Id.* In addition, Mr. Edwards' fingerprints were found on the food processors recovered from the trailer and items recovered during the search of the storage unit, which would have been used in processing and packaging of the drugs. *Id.* at 9. Mr. Edwards does not demonstrate how an expert or independent testing would have made a difference.

The Court shall deny Mr. Edwards' ineffective assistance of counsel claims regarding Mr. Balarezo's failure to call an expert witness and conduct independent testing because Mr. Edwards has not shown that it constitutes "deficient performance" under *Strickland*. The record indicates that Mr. Balarezo's pursuit of a different defense than the one Mr. Edwards is now claiming that Mr. Balarezo should have employed was reasonable given the circumstances of the case. Mr. Edwards does not point to any evidence that the defense was unreasonable or not constitutionally adequate. Accordingly, because Mr. Edwards provides mere speculative arguments to support his claim, and his ineffective assistance of counsel claim based on counsel's failure to call an expert witness and conduct independent testing cannot proceed.

D. Failure to Argue Suppression of Evidence from Wiretaps

The Court now turns to Mr. Edwards' claim that Mr. Balarezo rendered ineffective assistance of counsel in the representations Mr. Balarezo made to this Court during Mr. Edwards' attempt to suppress information obtained by the Government through wiretaps. Mr. Edwards claims that he "continuously stressed to his counsel that the government and investigating agents were in violation of multiple, if not all, of the Title III requirements." Def.'s Mot. at 40. Mr.

Balarezo "addressed the Title III violation but narrowed the subsequent argument down to [18 U.S.C. §] 2518(1)(b)(iv) [the naming requirement]." *Id.* This was error, according to Mr. Edwards, because "[it] prevented the District Court from assessing the full scope of the deliberate violation perpetrated by the investigating agents [sic] omissions in their affidavits to procure the authority to wiretap." *Id.* at 41. Mr. Edwards stresses that "[this Court] was not privy to the information that was determined should have been provided to fully be aware of the circumstances based on Title III requirements for authorization," and that Mr. Balarezo is to blame. Def.'s Reply at 17, ECF No. 1017.

Mr. Edwards relies on the Court of Appeals' line of questioning during oral arguments on his direct appeal, its written opinion, and what Mr. Edwards' characterizes as the Government's policy change going forward with the naming requirement of 18 U.S.C. § 2518(1)(b)(iv). *See id.* at 42-43. Mr. Edwards claims that "the [D.C. Circuit] panel judges in their written opinion, stated that the government could have and should have included the omitted information in the wiretap affidavits . . . ." *Id.* at 42. He also states that the Government "since this investigation [changed] their policy and now name all persons believed to be involved in the crime." *Id.* Mr. Edwards concludes that, as a direct result of Mr. Balarezo's ineffectiveness in arguing that the Government did not meet the standards for the naming requirement, "neither this or the appellate Court provided an opinion with regard to the inclusion of the omitted information, [which violated Section] 2518(e)." *Id.* at 43.

Mr. Edwards' reliance on the Court of Appeals' decision as evidence that Mr. Balarezo was ineffective is misguided. This Court and the United States Court of Appeals for the District of Columbia Circuit found Mr. Edwards' arguments on the suppression of the wiretaps to be unconvincing. Gov't Opp'n at 30-31, ECF No. 1001. While the Court of Appeals did state that

"the Government did not provide the authorizing court with as complete a picture of its investigation as it could have," the court found that Government's omissions "were not material to Title III's necessity requirement" and that it "provided the bare minimum necessary to comply with Title III." *United States v. Williams*, 827 F.3d 1134, 1149-50 (D.C. Cir. 2016). To find that the Court of Appeals required the Government to provide more information than it did in its affidavits — from the Court of Appeals' language that it "could have" — would misstate its holding. Mr. Edwards does not point to anything that Mr. Balarezo could have done to warrant a different outcome other than the fact that it "was not until [Mr. Edwards'] *pro se* motions to the Court of Appeals that a judge considered the [Government's] deliberate omissions." Def.'s Mot. at 41.

Even if Mr. Balarezo failed to include the arguments — which Mr. Edwards claims he urged Mr. Balarezo to argue before this Court — in his pre-trial suppression pleadings, Mr. Edwards cannot prove that he was prejudiced. The Court of Appeals did consider this argument and rejected it. *Williams*, 827 F.3d at 1149-1150. Under the *Strickland* prejudice analysis, Mr. Edwards cannot prove that but for Mr. Balarezo's failure to include an argument on the omitted information in the wiretap affidavit, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 669. The Court of Appeals explicitly stated that it would not have been. *Williams*, 827 F.3d at 1149. Similarly, the fact that the Government changed its policy does not warrant a different outcome. Accordingly, the Court denies Mr. Edwards' claim of ineffective assistance of counsel during Mr. Edwards' attempt to suppress evidence obtained from the Government's use of wiretaps.

Failure to Challenge the Sufficiency of the Superseding Indictment

The Court will now address Mr. Edwards' contention that Mr. Balarezo was ineffective for

failing to challenge the sufficiency of his indictment. Mr. Edwards claims that the "indictment does not list any means and manner or overt acts to with [sic] [he] is alleged to have committed the offense[s]." Def.'s Mot. at 48. Mr. Edwards argues that "[t]he indictment should have listed a directive of notice of means and manner based on a conspiracy [and the Section 924(c) charges]" and that this defect in the indictment "blind-sided" Mr. Edwards and prohibited him from developing a defense. *Id.* at 49.

The Government interprets Mr. Edwards' argument as a claim that Mr. Balarezo should have asked for a bill of particulars. Gov't Opp'n at 31. It argues that a bill of particulars was not necessary because it provided Mr. Edwards with "extensive discovery." *Id.* at 32. Additionally, Mr. Edwards fails to "identify with any precision in what way he was prejudiced by the level of specificity contained in the indictment." *Id.* The Government also argues that Mr. Edwards does not show how Mr. Balarezo was deficient or demonstrate how his case was prejudiced for failing to request a bill of particulars. Gov't Opp'n at 32-22, ECF No. 1001.

Mr. Edwards responds by arguing that "there was no indication in the indictment that [he] was involved in the sale of crack cocaine nor involved in any of the processing of crack cocaine after being sold through the form of powder." Def.'s Reply at 18, ECF No. 1017. Mr. Edwards takes issue with the fact that he was charged, under the superseding indictment, with conspiracy to distribute cocaine, while the Government tied him to a conspiracy to distribute cocaine base at trial. *See id.* at 18-20. He proffers that powder cocaine, and not cocaine base, was seized during the time of his arrest. *Id.* at 19.

Mr. Edwards claims that [Mr. Balarezo] should have sought and procured statements of facts and circumstances directly that would have [allowed] [Mr. Edwards] to advance a defense . . . ." *Id.* at 19. Mr. Edwards explains that he "did not specifically identify the use of [the bill of

was clearly prejudiced by the cumulative impact of the multiple deficiencies." *Id.* at 51.

The Government argues that Mr. Edwards has "cumulat[ed] meritless arguments [that] does not transform them into something they are not." Gov't Opp'n at 34, ECF No. 1001. Specifically, the Government states that Mr. Edwards has not shown that Mr. Balarezo performed his duties under an actual conflict of interest or engaged in deficient representation that prejudiced Mr. Edwards. *Id.* It further states that "[Mr. Edwards is] unable to show how his lawyer could have been ineffective by aggregating meritless claims." *Id.*

In response, Mr. Edwards claims that he "has pleaded, presented evidence, and argued applicable law to demonstrate that his conviction and sentence is violative of his Sixth and Fifth Amendment constitutional right [sic]." Def.'s Reply at 21, ECF No. 1017. He goes on to state that "[t]he government offers no facts nor support [to] rebut the conflict [claim] and their contentions as to the remaining claims are without merit." *Id.* at 20.

The U.S. Court of Appeals for the District of Columbia Circuit has not yet had an opportunity to decide whether a cumulative prejudice analysis is appropriate under the *Strickland* standard on habeas review. Other sister circuits are split. *Compare Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) (cumulative prejudicial analysis allowed), *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1439 (9th Cir. 1995) (same), *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (same), *with Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (not allowed), *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (same).

The Court need not address whether a cumulative prejudice analysis is appropriate in this case because Mr. Edwards has not demonstrated that he was prejudiced by any of the claims he makes. Because Mr. Edwards has failed to show that even one of his claims of ineffective assistance of counsel involved prejudice to him, the Court shall deny Defendant's claim that the

cumulative impact of Mr. Balarezo's actions or omissions warrant Mr. Edwards relief.

IV. CONCLUSION

For all of the foregoing reasons, the Court shall **DENY** Mr. Edwards' [975] Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Furthermore, no Certificate of Appealability shall issue from this Court. To the extent Mr. Edwards intends to file an appeal, he must seek a Certificate of Appealability from the United States Court of Appeals for the District of Columbia Circuit in accordance with Federal Rule of Appellate Procedure 22.

An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3096 **September Term, 2019**

1:11-cr-00129-CKK-1

Filed On: August 7, 2020

United States of America,

Appellee

v.

Gezo Goeong Edwards, also known as Zo, also known as Gezo Edwards,

Appellant

BEFORE: Henderson, Tatel, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for a certificate of appealability ("COA"), the opposition thereto, the reply, and the supplement to the reply, it is

ORDERED that the motion for a COA be denied and the appeal be dismissed. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no COA is warranted. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

GEZO GEONG EDWARDS
Cr. No. 11 - 00129 - 1 (CKK)

PETITION FOR A CERTIFICATE OF APPEALABILITY
PURSUANT TO 28 USC 2253(c)(1) - (2)

Now comes, Petitioner - GEZO GEONG EDWARDS, in pro se capacity seeking this Honorable Court's authorization of a certificate of appealability for the denial of his issues contained in his petition pursuant to 28 USC 2255 from the, United States District Court for the District of Columbia, and avers the following in support:

It appears that the, United States District Court for the District of Columbia, is claiming that based on a merit review it denied Petitioner's claims of ineffective assistance of counsel that fell into six general categories, Petitioner actually numerated eleven issues. Date of denial, November 21, 2019. It further appears that on that said date, the District Court also denied a certificate of appealability.

LEGAL REQUIREMENT:

A habeas Petitioner's appeal may not be taken to the Court of Appeals unless he obtains a certificate of appealability. 28 USC 2253(c)(1). To obtain a COA, the applicant must make a substantial showing of the denial of a constitutional right. 28 USC 2253(c)(2). A substantial showing is a demonstration that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel 529 US 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quoting Barefoot v. Estelle 463 US 880, 895 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).)

After Slack v. McDaniel 529 US 473, the Supreme Court changed course, in part, on how courts were determining when to issue a COA, and found that many courts of appeal decisions had denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits. The Supreme Court put an end to that practice, declaring that a COA is a threshold question that should be decided without full consideration of the factual or legal bases adduced in support of the claims. Buck v. Davis 137 S.Ct. 759, at 773 (2017) quoting Miller-El v. Cockrell 537 US 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (emphases added); see also id. at 338 (the petitioner must demonstrate that reasonable jurist would find the District Court's assessment of the constitutional claim debatable or wrong. (emphasis added)); id at 348 (The COA inquiry ask only if the District Court's decision was debatable).

In Petitioner's case he will demonstrate that reasonable jurist would find the District Court's assessment of his constitutional claims debatable and wrong, and that the issues are adequate to deserve encouragement to proceed further.

ISSUE:

1) Petitioner presented a claim that his counsel was ineffective during the post-indictment pre-trial criminal forfeiture hearing of property seized subject of payment transferable for attorney fee. The motion filed by Petitioner's counsel was suppose to be presented for Petitioner to regain possession of untained assets that the government had illegally seized based on their allegations that the assets arrived from conduct alleged in their charging offense. The government's seizure was pursuant to 21 USC 853.

The Supreme Court has made clear that there are two probable cause findings required of 21 USC 853(f): (1) that the defendant has committed an offense permitting forfeiture; and (2) that the property at issue has the requisit connection to that crime. The courts have uniformly held pre-trial hearings via a threshold showing that probable cause is lacking as to the second requirement. Kaley v. United States 134 S.Ct. 1090 (2013) citing 21 USC 853(a) (the lower courts have generally provided a hearing to any indicted defendant seeking to lift an asset restraint to pay for a lawyer. In that hearing, they have uniformly allowed the defendant to litigate the second issue: whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment); also see: United States v. Jackson 415 F.3d 88, 91, 367 US App. DC 320 (D.C. Cir. 2005) (probable cause is an objective standard requiring an analysis of the totality of the circumstances).

(A) Petitioner-counsel's submission/motion to the Court in support of issuing a hearing for the return of Petitioner's assets:

Petitioner's counsel submitted a motion to the Court that in its context only presented a declaration that he had Petitioner sign stating that, beyond the money seized, I do not have any available funds to pay attorney Balarezo's

retainer.

(B) Assets originally seized by the government:

1) Petitioner's resident located at 1219 Elm Grove Circle; 2) $360,009.00 in US currency; 3) $6,380.00 in US currency; 4) $16,538.60 held at TD Bank NA, in the name of Lunar Funding Group, LLC.; 5) $6,064.90 held at TD Bank NA, in the name of The Gueong Edwards Family Trust; 6) One platinum ladies diamond engagement ring; 7) One ladies Rolex President, oyster perpetual datejust watch; 8) Petitioner's wedding ring; and 9) $1000.00 in cash from Petitioner's person.

(C) Petitioner presented in his motion pursuant to 28 USC 2255, to the District Court, two cases demonstrating a threshold review based on information provided to attorney:

United States v. E-Gold, Ltd. 521 F.3d 411 (DC Cir. 2007) held a 853 pretrial hearing and submitted information as a threshold review via; 1) status as a potential beneficiary of a trust, 2) his lack of other sources of income, 3) his liquid and non-liquid assets (including cars), 4) his wife's income, and 5) his dependents and assets held in the name of the dependants.
also,

United States v. Emor 794 F.Supp.2d 143 (D.D.C. 2011), even though its focus was in part based on prosecutorial misconduct by alleging that the government deliberately froze assets to prevent obtaining counsel of choice, Emor submitted information via; 1) lack of any income or investment, 2) that his spouse was not employed, 3) that he has six dependants, and 4) that he only has between $22,000 and $50,000 in cash on hand.

(D) Petitioner provided his counsel with information as a threshold review to return untainted assets, and provided that information in his motion pursuant to 28 USC 2255 to the District Court:

1) Petitioner's original counsel of choice was, attorney Harry Tun who required $40,000 retainment in event of a plea deal and $100,000 if the case went to trial. However, Tun took on Petitioner's case and was paid the $40,000 but

did not tell Petitioner that he was investigated for fraud, admitted responsibility, and stipulated to a santion whereas he could not practice law. For resons unknown to Petitioner at the time, Tun previously introduced Petitioner to Balarezo. After receiving the $40,000, Tun returned with Balarezo, again, and told him of the sanction and based on their (Tun and Blarezo) prearranged agreement, unknown to Petitioner, gave Balarezo $20,000 of the $40,000.

2) Petitioner's wife was employed, who paid for the retainer for Tun via taking out her 401K and credit cards. Petitioner and his wife were only married for 5 months and had no joint income or assets.

3) Petitioner has two children, one whom he pays child support in the amount of $290.00 per month, and the other he shares joint custody.

4) The government froze Petitioner's house located at 1219 Elm Grove Circle, that was purchased in the year 2005, which purchase is several years prior to the allege conduct charged in the indictment. The government did not set-forth a claim that the Elm Grove residence was subject to forfeiture based on the charges profited from the indictment's alleged conduct, they simply froze it. The Elm Grove residence has a mortgage of $1800.00 per month.

5) Petitioner owned 2867 Mayfield Ave. in Baltimore, and 5200 Dole St. in Capital Heights, prior to his arrest. Sometime afterwards, Petitioner no-longer owned those properties but was still saddled with mortgage payments of $500.00 and $1500.00 per month, respectively.

6) Petitioner had a trust fund set-up where his children were the beneficiaries of $6,000.00 in the account; and Lunar Funding Group, LLC account where Petitioner was the sole beneficiary of $16,000.00, which were both frozen.

7) The government seized at the time of arrest, Petitioner's wedding ring appraised at $6,000.00 and $1000.00 in cash, $6,380.00 in cash, and Petitioner's

wife's diamond engagement ring appraised at $29,400.00.

8) Petitioner's lack of other sources of income.

As to this information, Petitioner's presentation in his motion pursuant to 28 USC 2255, directly state that his counsel was aware of this information, as statements are found on pages 8 & 9, of the 2255, and directly state that he told his counsel of the entire circumstances of his financial status, as statements are found on pages 11 & 14 of the 2255. The residence at Elm Grove Circle was purchased six years prior to the indictment and four years prior to any act alleged in the indictment. Petitioner's wedding ring, $1000.00 found on his person, $6,380.00 found in his residence, and his wife's diamond engagement ring were all assets arrived via legal means at which Petitioner could show and provided his counsel with information of the legal resources to demonstrate that they were untainted assets.

(E) The District Court's conclustion pre-trial of the hearing pursuant to 21 USC 853:

The Court found that Petitioner failed to make the threshold showing that he lacks sufficient assets to pay his counsel.

(F) The District Court's conclusion denying this claim contained in his motion pursuant to 28 USC 2255 is debatable:

The District Court acknowldedge that its order denying the hearing during the pretrial 21 USC 853 inquiry was based on its contentions that Petitioner did not provide any additional information regarding his assets, liabilities, sources of income, or other information relevant to his ability to retain legal counsel other than merely stating that he did not have any available funds to pay Balarezo's retainer. However, Petitioner's counsel is the legally trained advocate who should have known what information is necessary to succeed in that type of hearing, and moreover, had the information to provide the Court for its evaluation but completely omitted the information. The District Court is conceding that

merely stating that Petitioner did not have any available funds to pay counsel's retainer was not enough information to succeed in that type of hearing where a defendant is moving the Court to have the government release its hold on untainted assets.

The Court's denial of this claim in the 2255 also state that subsequently, Petitioner noted, upon inquiry of the Court, that Balarezo was his counsel of choice. However, that observation has absolutely nothing to do with whether Balerzo was ineffective. The District Court, denial of this claim in the 2255 goes on and contend that Petitioner does not specify, with any degree of particularity, the exact circumstances of Balarezo's failure to include the now - identified financial information. And that, the Court is left to speculate because Petitioner does not indicate whether, Balarezo - counsel, asked Petitioner for the financial information, whether that information was readily available at the time, or whether Petitioner told Balarezo himself, amongst other relevant factors. The Court went on and stated that without this information, the Court will not engage in speculative arguments and supported its conclusion by case law in United States v. Morrison 98 F.3d 619, 625-26 (DC Cir. 1996), highlighting that summary denial is appropriate when an ineffective assistance claim is speculative. However, the District Court's reason for the denial of the claim is totally contrary to the facts contained in Petitioner's 2255 because, in fact, Petitioner stated that counsel was aware of the information, as statements are shown on pages 8 & 9 of the 2255, and directly states that he told his counsel about the information, as is shown on pages 11 & 14 of the 2255.

The District Court goes further, and contends that, assuming, arguendo that counsel's omission of the now - identified financial information does constitute deficient performance, Petitioner failed to show that counsel's omission was prejudicial. The District Court contended that it is not reasonably probable

that but for counsel's omission the result of the proceeding would have been different. However, the government originally seized Petitioner's residence located at, 1219 Elm Grove Circle, but later determined that it was untainted because Petitioner had purchased it six years prior to the indictment and four years prior to any allegation contained in the charging offenses. The government then abandoned their consideration of the residentce being tainted assets but never lifted the freeze on the property. The government had absolutely no legal grounds to hold the residence.

The Supreme Sourt in Sila Luis v. United States 136 S.Ct. 1083; 194 L.Ed.2d 256; 2016 US LEXIS 2272; 84 US L.W. 4159 (2016), held that untainted assets differs from the allege drug seller's proceeds, and went on to direct that it also rejected a notion that untainted assets are subject of pre-trial restraint so long as the property might some day be subject to forfeiture. And that, pre-trial restraint under what is forfeitable upon inquiry mostly depends on who has the superior interest in the property at issue; quoting Caplin & Drysdale, supra, at 626-628, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); Monsanto 491 US at 616, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989). There is a reasonable probability that but for counsel's omissions the results would have been different. A reasonable probability exist that the freeze on the Elm Grove Circle residence would have been lifted. Moreover, the District Court totally omitted the presentation of this residence from their evaluation of the claim contained in the 2255. Moreover, as evident, Petitioner's wedding ring that was appraised at $6,000.00 was given to him by his wife whom was gainfully employed and not subject to anything concerning the indictment. The government adamantly sought seizure of Petitioner's ring which was not purchased by him nor any source connected to the case, but was also abandoned by the government pursuant to the seizure of it along, with $1000.00 found on Petitioner's person after determining that they were untainted.

The Court's denial of this claim in the 2255, also reference the fact that the jury found the $6,380.00 in US currency found at the residence and the platinum ladies diamond engagement ring to be untainted. But, the Court contended that Petitioner failed to show exactly what his counsel could have relied upon pre-trial to demonstrate that the government lacked probable cause. It is hard to understand what procedure the District Court has analized or whether it read the entire contents of the 2255, but, again, Petitioner provided his counsel with legal varification of his and his wife's financial sources and listed them in the 2255 as an example, in that, he had two residences that were rental and that his wife had a steady substantial income of over $200,000.00 per year. This is clearly stated on page 11 of the 2255. However, Petitioner's counsel submitted a motion with a one sentence presentation for a hearing pursuant to 21 USC 853 to show that the government lack probable cause as to the requisite that the property seized is connected to the crime. The statement made is as follows: Beyond the money seized, I do not have any available funds to pay attorney Balarezo's retainer. That statement has absolutely nothing to do with a demonstration that the government lack probable cause that the property seized is connected to the crime. Petitioner's 2255 briefing demonstrates that his counsel could have relied on more credible information and was provided that information by Petitioner.

The District Court ended their review of this claim by stating; absent any evidence that probable cause was lacking as to the identified assets, which Petitioner does not identify either in his Motion or Reply, counsel's failure to include Petitioner's financial circumstances in the initial Motion to Return Funds did not prejudice him. That conclusion is totally contrary to what Petitioner presented in his 2255, Petitioner provided his counsel with information based on the totality of the circumstances to present a probable cause during the

inquiry of a hearing pursuant to a 853 seizure.

The court also referenced the fact that afterward, Balarezo continued to represent Petitoner and that his family paid the remaining balance. However, Petitioner's family had already spent $40,000 and did not initially have the funds to start back over with another attorney, did not know that Balarezo was functioning ineffectively, nor that Petitioner was the victim of fraud and that Balarezo was a participant in that fraud - which is briefed below. Moreover, Balarezo was not Petitioner's counsel of choice to proceed to trial. Petitioner specifically stated in the 2255, that he will need access to his assets to pay for his (Balarezo) pre-trial services and to pay for another attorney who will pursue actions against Tun and proceed to trial. See: Page 15 of 2255.

Petitioner has demonstrated that reasonable jurists could debate whether the petition concerning this issue should have been resolved in a different manner and that the issue presented is adequate to deserve encouragement to proceed further.

SECONDLY:

The District Court next addressed Petitoner's claim of counsle's ineffectiveness in the post-trial criminal forfeiture proceedings. The jury found that Petitioner was not guilty as to acquiring the $6,380.00 illegally, and hung as to whether the woman's engagement ring was procured from ill-gotten funds. Petitioner's counsel did not move the Court for return of the property after the jury's verdict. Moreover, Petitioner's counsel did not move the Court to return the assets seized by the government but not listed in their forfeiture nor release the property - the property is listed above.

The District Court addressing counsel's actions listed various occasions, and dates, that the government moved the Court via Motion for Preliminary Order of Forfeiture, a second order of forfeiture, and when the government could not

locate any property per due diligence that was directly forfeitable property as direct proceeds from the conspiracy, they then submitted an amended order of forfeiture to include substitute assets. The order stated that the government was amending the previous order granted by the Court to now include the ring and the $6380.00 as substitute assets. Apparently, the District Court had appointed an attorney for this proceeding under the consideration of whether Petitioner will concede to the forfeiture or oppose it. However, Petitoner's trial counsel was ineffective for not moving the Court post-trial for the return of that property, as well as Petitioner's wedding ring and $1000.00 seized from his person that was not listed as forfeitable property nor did he move the Court to lift the freeze on his residence located at Elm Grove Circle that was pruchased six years prior to the indictment and four years prior to any allegation contained in the indictment. This claim is contained in issue ten numerated in Petitioner's 2255 whereas it states that based on entering into representation based on the conflict of interest counsel continued with the pattern and failed to move the Court to order the return of property or request that the government release it.

2) The Conflict of Interest:

Petitioner presented a claim in his 2255 that he was the victim of fraud perpetrated by his original counsel, Harry Tun, via mis-appropriation of funds for legal representation, which he conspired with Petitioner's trial counsel to gain the initial payment of $40,000.00. Tun represented that he would be able to represent Petitioner conflict free in his criminal litigations for $40,000.00 in the event of a plea and $100,000.00 in the event that the case went to trial. Petitioner paid the initial $40,000.00 and was to pay the remaining $60,000.00 through the course of the proceedings, to Tun. Tun brought Balarezo - Peti-

tioner's trial counsel, to one of his meetings with Petitioner at a federal holding facility where he was being held pending trial. But at the time Petitioner did not know who Balarezo was nor why he was there. Tun came on subsequent meeting alone, but then brought Balarezo back again and notified Petitioner that he was sanctioned and restricted from practicing law and that Balarezo would be handling the up-coming proceeding. However, unknown to Petitioner, Balarezo and Tun knew that he was going to be sanctioned from practincing law, and Balarezo knew that Tun was accepting Petitioner's money under false representation. Balarezo conspired with Tun to obtain the $40,000.00 from Petitioner. Petitioner did not hire Tun as a scout for an attorney. Tun and Balarezo had been conspiring about the $40,000.00 from the beginning of Tun's initiation of the fraud - unknown to Petitioner at that time. It was not until after Tun informed Petitioner of his sanction, that he became aware of some sort of pre-arrangement between Balarezo and Tun involving the $40,000.00. Moreover, at that time Petitioner also did not know what Tun was sanctioned for.

Petitioner told Balarezo that he wanted to pursue actions against Tun, which Balarezo told Petitioner that he will not pursue any action against Tun, would not tell Petitioner what Tun was sanctioned for, and that Petitioner was responsible for the remaining $20,000.00. Petitioner then told Balarezo that he read a case whereas it stated that he could file a motion to have his untainted assets returned to him. Petitioner told Balarezo that he wanted him to file the motion so that he could pay his retainer fee, and hire another attorney to pursue actions against Tun and handle his trial proceeding. See: Page 15 of 2255. Balarezo told Petitioner that he would file the motion. Balarezo filed the motion in a fashion that he knew would not succeed because pursuing actions against Tun would mean pursuing actions against the fraud that he was involved in from the beginning. Balarezo did advance his interest to the detriment of Petitioner, as well as, advancing the interest of Tun. Later, Pet-

itioner conducted his own independant investigation into Tun and what occurred as to why he and Balarezo entered into the initial conspiracy concerning the $40,000.00 and found the following:

> Previously, Tun had filed an amendment affidavit to the Board on Professional Responsibility on March 10, 2011 for a negotiated dicipline. The parties had filed an earlier petition for negotiated discipline, no. 09-BG-804, that was rejected by the court and Board on Professional Responsibility. The earlier petition would have resulted with Tun being suspended for nine months, which was determined to be inadequate based on the number of violations and the extended time period during which the violation took place.
>
> After the March 10th submission, the Board held a hearing which Tun reaffirmed his admission to all factual allegations, acknowledged that his actions violated the Rules of Professional Conduct, and stated that he understood the ramifications of the proposed sanction. Tun had admitted his guilt of defrauding the courts by double billing during his tenure of court appointed representation. In violation of Rules of Professional Conduct: Rule 1.5(a) & (f), by charging a fee that was prohibited by law and therfore per se unreasonable; Rule 3.3(a)(1), by making false statement of material fact or law to a tribunal; Rule 8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(d), by engaging in conduct that seriously interfered with the administration of justice.
>
> Investigations revealed that Tun sought payment for the same period of time for two or more clients on 162 occasions.

The District Court's reasons for denying the claim:

The District Court reviewed Petitioner's initial 2255, the government's response and Petitioner's reply to the government's response and in short concluded the following:

> 1) It was not Balarezo's responsibility to attempt to obtain the remaining $20,000.00 from Tun instead of obtaining payment directly from his

client; 2) The District Court stated that the government argues that it does not make any sense for Balarezo to purposefully sabotage his own client's pleading when payment of his retainer was allegedly conditioned on the success of that pleading; 3) That Petitioner proffers no evidence or further explanation as to the claim that Balarezo was attempting to cover-up his own misconduct when he submitted the Motion to Release Funds nor that Balarezo advanced his own and Tun's interest to the detriment of Petitioner; 4) That there is no indication that Balarezo was a party to the agreement between Petitioner and Tun; 5) That five months after Tun withdrew from the case Petitioner signed and submitted an affidavit to the Court stating that Balarezo was his counsel of choice; 6) The Court also noted that it is not clear from the record if Tun was Petitioner's original counsel because he and Balarezo filed notices of appearance at the same time; and 7) The District Court also stated that the two attorneys were not affiliated with a single law firm.

The District Court assessment of this claim in totality is debatable, highly erroneous, and should have been handled in a different manner:

The District Court allege that it was not Balarezo's responsibility to attempt to obtain the remaning $20,000.00 from Tun instead of obtaining payment directly from his client. However, Balarezo at that time when he and Tun initially conspired to defraud Petitioner out of the $40,000.00, Balarezo was not Petitioner's counsel of choice -- he was Tun's counsel of choice. Tun and Balarezo had already made arrangements to defraud $40,000.00 from Petitioner, prior to Petitioner's discovery of the fraud. Tun and Balarezo's fraud had had already been completed. Petitioner did not know, in what capacity Tun and Balarezo were actually connected as lawyers, their initial objective was the $40,000.00 and the up-coming proceeding. The Court even noted that it was not until over five months after Tun withdrew from the case that Petitioner signed an affidavit to the Court stating that Balarezo was his counsel of choice. By that time Petitioner had already spent $40,000.00 and did not have anymore funds

to start over with another attorney, and, moreover, Balarezo was then communicating with Petitioner's family, whom had made the original payment, and was trying to come up with more funds for Petitioner's trial. Petitioner and his family did not at that time know that fraud was involved and how it was initiated.

The District Court also stated, relying on the government's contentions, that it does not make any sense for Balarezo to purposefully sabotage his own client's pleading when payment of his retainer was allegedly conditioned on the success of that pleading. However, Petitioner had already paid the $40,000.00 to the original attorney that he chose to represent him. Tun and Balarezo initial objective of the fraud was the $40,000.00, which the scheme's payment had been completed. Balarezo was suppose to file the motion so that Petitioner could retreive his untainted assets so that Petitioner could find another attorney who would pursue actions against Tun and handle Petitioner's trial. After that hearing Balarezo was suppose to be out of the picture, which was made clear to him by Petitioner. Clearly there was never any intention for Tun to give Balarezo the entire $40,000.00, there was no sabotage to that payment, it was completed. The District Court's adoption of the government's contention that it makes no sense that Balarezo would purposefully sabotage that particular proceeding is actually contrary to common-sense of an analogy to this issue. What makes no sense is how anyone could come up with a view that it was possible that Tun charged a client, $40,000.00 if the case resorted in a plea and $100,000.00 if it went to trial, make visits to the client in all efforts and contentions to proceed -- just to give up the $40,000.00 to another lawyer who the client did not know, nor hire. Balarezo knew that, at that time, he was not hired by Petitioner, that Petitioner did not know who he was, and that there was no additional $20,000.00 to be had from Tun. Balarezo had to know

about the position in its entirety that he was involved in and why.

The District Court further claimed that the two attorneys were not affiliated with a single law firm. However, nobody but the District Court is making that claim, and, therefore, it appears that the Court has inserted itself in the investigative process outside of what was presented for its evaluation. There has been absolutely no facts presented by the governemnt on the path taken by Tun to bring Balarezo into his scheme. The only facts presented are within Petitioner's claim in the initial 2255 and the reply to the government's response. In fact, the government motioned the District Court for an extension of time specifically to procure an affidavit from Balarezo, which the Court granted, but, the government did not provide the affidavit nor explain for the bases of the extension why it did not provide an affidavit. The Court also noted that it is not clear from their record if Tun was Petitioner's original counsel because he and Balarezo filed notices of appearance at the same time. However the Court's observation would indicate that Balarezo was involved at the beginning stage of the fraud, and, moreover, that the District Court has concluded in a serious litigation process without any opposing factual bases. The government thought that it could procure an affidavit from Balarezo to support an opposition but could not. Balarezo could not disclaim that Petitioner did not hire him originally, that it was Tun that brought him in because Tun was sanctioned and restricted from practicing law and that they conspired about the $40,000.00 which Petitioner knew nothing about. Balarezo also could not disclaim that he had the information about Petitioner's financial status to provide for the 853 hearing because the government had already disclosed the information in discovery concerning their seizure inquiries.

Petitioner provided the District Court with exhibits accompanying the 2255 of all relevant discovery in support of each factual bases of each level of his

claim oppose to the government's presentation of no facts in support of what occurred. This issue warranted an evidentiary hearing. Petitioner has demonstrated that reasonable jurist could debate whether the petition concerning this issue should have been resolved in a different manner and that the issue presented is adequate to deserve encouragement to proceed further.

3) Failure to Call Expert Witness and Conduct Independent Testing:

Petitioner presented a claim on the factual bases that his counsel attempted to pursue a strategy and tactical advance to challenge the government's case on the weight and origin of the cocaine seized, and that particular cocaine gathered could have been purchased from sources other than Petitioner's co-defendant, Bowman. Petitioner's counsel had evidence from discovery that some of the cocaine alleged in this case wasn't cocaine at all and was being synthetically manufactured here in the United States by Petitioner. The government also presented an informer (Brooks) who testified that powder cocaine that he purchased from Bowman was not usable, and that after notifying Bowman that he was aware that the alleged cocaine was not usable; Bowman was still selling it. Petitioner's counsel also had evidence that on an occasion, agents had a CI conduct a controlled drug purchase, using the CI's own vehicle; which was against their normal procedure of assuring that CIs do not switch or tamper with the drugs that agents seek to purchase. However, Petitioner's counsel failed to do his own independent testing or to call his own expert witness, but, instead, attempted to use the government's expert witness as his source of facts to present his stratgy and tactical advance to challenge the government's case. Also, to alleviate the government from going through the procedures of proving their witness's credentials as being an expert, Petitioner's counsel stipulated before-hand to the

witness being an expert based on what was provided in discovery.

The government immediately saw what Petitioner's counsel was attempting to do during trial on cross-examination and objected to his attempt of trying to use their expert witness as his own. The District Court in turn sustained the government's objection and told Petitioner's counsel that he cannot use the government's witness as his own and if he wanted to present his own witness he has the opportunity. A brief of the exchange is as follows:

Q: You're getting ahead of me. My question was if you were given two samples, could that be done?
A: Not by me.
Q: Can it be done by the DEA?

The Government: Objection, Your Honor. Again, we're getting quite far afield. It does seem relevant to what her testimony was in direct as to what she did.
The Court: It does seen to be getting a little farther afield at this point. In terms of the kind of case that we have, I mean, there might be issues if this was something where there was an issue of it being imported, but it isn't.

Q: Ms. Wong, is cocaine grown in the United States?
A: I'm --

The Government: Objection. Again, Your Honor, this is not relevant.
The Court: Counsel, can you approach on the side here. So, this is -- usually they do these testing if they're imported from Kenya or whatever, but you will presumably want to show is they didn't do a test to say that this sample matches up with some other sample in the case to show that it only came from Mr. Bowman, right?
Petitioner's Counsel: You read my notes.
The Court: So, the question is, you know, in terms of whether they were required to do this, I don't know. Keep your voice down.
The Government: Mr. Balarezo certainly has an opportunity to call an expert of his own and provide direct testimony of what wasn't done or what

was done, but this -- he's limited to cross-examination in the scope of what she did do.

The Court: I think we've gone as far as we're going to go in terms of the questioning that you have. If you want to have some body come in and do that sort -- you know, you have -- in terms of asking what you could have asked for your own person to basically take these samples, compared them to see -- I don't know how scientific it is that they can tell that it came precisely from the same sample as opposed to maybe from the same country. I frankly don't remember the testimony. But if you want to do that, you can, but you don't get to turn her into -- you have gone as far as I think I'm going to let you go in terms of why they didn't do it. et cetera. You got on the record what you want in terms of if they can tell the samples. And if that's not something they do routinely, I don't see going any further. If you want to call somebody else that takes if further than what is said, you know, you can do the magic things, you're again trying to make her your own expert and you can't:

In Petitioner's case, as stated above and further exemplified below, there was expert testimony that particular samples contained adulterants such as an algesci used to create the numbing effect that's consistant with cocaine, and substances used by veterinarians which could bulk up what would otherwise be cocaine. There was also testimony from an informer that when he attempted to turn the powder cocaine into crack cocaine he discovered that what was suppose to be the powder cocaine was not usable. The government also presented an expert to adduce how and why drug dealers use non-cocaine substances to rip off their unsuspecting customers. Expert witness Joseph Abdalla testified that drug dealers use substances that are the same color and texture of cocaine so the person buying it won't be able to tell the difference. And that they want to find something that is fine crystalline white powder which is very similar or mimics the appearance of cocaine.

Petitioner's counsel had previously raised the issue and presented to the jury that the government chemist cannot say that 9 of the kilos that were seiz-

ed from a storage unit and not tested were actually cocaine. If some of what was alleged to be cocaine was actually systhetically manufactured here in the United States by Petitioner, where the distribution is alleged to have taken place, and not an illegal substance, then it would not have effected the interstate commerce nexus for federal jurisdiction. This is why Petitioner's counsel asked the government's expert when he attempted to turn their witness into his own, whether cocaine is grown in the United States. Petitioner's counsel's statements to the jury was clear on what he would show and had attempted to try to show. Likewise, informer Brooks who testified that when he attempted to turn the powder cocaine purchased from Bowman, into crack cocaine, but discovered that the powder cocaine was not usable - then there would be no cocaine base as is defined as crack cocaine.

The District Court, precluded Petitioner's counsel from advancing his strategic and tactical defense, in this aspect, leading to challenging the government's assessment of the weight of cocaine seized in this case based on the information that he was aware of because Petitioner's counsel did not obtain and provide testimony from his own expert.

As to the CI who agents allowed to use her own vehicle in an alleged controlled drug purchase from Bowman, that particular CI was a well known drug dealer and long-time informant and her significant other was also a well known drug dealer, whom, she was cooperating with authorities under the status as a CI in part to gain her significant other's release from jail. During the alleged controlled drug purchases on several occasions agents lost visual of the CI, and at times did not see Bowman during the drug purchase. The CI did not testify and a vague description of her status was given to the jury as - she was in hiding at the time based on an unrelated case. The government presented their expert agent to describe the procedures taken when having a CI conduct a controlled drug pur-

chase, only as, searching the CI, providing the CI with a vehicle and searching it. However, it was absolutely no testimony as to why and how thorough those procedures are conducted, such as, CI's are often untrustworthy, drug dealer often modify their vehicles and have hidden compartments in their vehicles, secret substances in body cavities readying to switch drugs during controlled buys, purchasing drugs from sources other than the target - claiming that it came from the target, et cetera.

With that particular government witness/expert agent, Petitioner's counsel had the opportunity to elicit these facts through that witness as it was counsel's strategic and tactical advancement to draw doubt on the credibility of the CI, to draw doubt on the credibility of alleged controlled buys based on losing visual of the CI on drug purchases, and to draw doubt when agents violated their normal procedures and allowed the CI to use her own vehicle during one of the allege drug purchases. Petitioner's counsel failed to elicit these facts from the agent who had already ventured into the procedure precautions of controlled drug buys and failed to call his own witness.

The District Court assessment of this claim is debatable, highly erroneous, and should have been handled in a different manner:

The District Court, in short, acknowledge the above facts but claim that the record indicates that Petitioner's counsel did not commit himself to the defense that Petitioner is claiming. The District Court states that its assessment is based on Petitioner's counsel's closing arguments whereas he repeatedly cast doubt on the character of the government's witnesses who testified as to the controlled drug buys and cast doubt on the government's evidence proving that Petitioner and his co-conspirators agreed to enter into a conspiracy. However, the District Court during trial explicitely told Petitioner's counsel and the government that it acknowledge that Petitioner's counsel

was in fact attempting to use the government's witness as his own to show that the government did not do a test to say that samples match in order to prove that they only came from Bowman. The government and the Court also stopped Petitioner's counsel from eliciting from the same witness whether cocaine is grown in the United States when he attempted to pursue the defense claimed by Petitioner. On that same day it was lengthly testimony about the discovery that there was some synthetic manufacturing of cocaine being done with non-cocaine substances.

As to the District Court evaluating this claim based on Petitioner's counsel's closing argument that appeared contrary to Petitioner's claim, the District Court precluded Petitioner's counsel from pursuing the defense that he attempted to initiate unless he presented his own witness, therefore, the closing arguemtn changed to what counsel was only allowed to present.

The District Court also stated as its assessment to the claim that Petitioner has not shown what any results of a chemical profiling analysis would have revealed, nor has he demonstrated the relevance or significance that the potential evidence may have on establishing the defense he claims his counsel should have pursued. The District Court's assessment is completely off base. Petitioner's claim is that his counsel devised a strategic and tactical defense to demonstrate that purchases of cocaine could have come from sources other than Bowman and to demonstrate the origin of the cocaine. Petitioner's counsel made it clear that it was his defense but that he did not do his own independant investigation nor call his own witness. The District Court also used the language in its assessment (defense he claims his counsel should have pursued), however, it was Petitioner's counsel who devised and actually did pursue the defense but was precluded by the Court based on not being prepared to present his own defense. Moreover, the relevance and significance of the defense was made clear; the origin of cocaine and that there was synthetic manufacturing being done in the United States - in the area where the allege distribution took place. This

presentation would have been extremely relevant and significant as to the calculation of weight of the cocaine seized in this case to be determined by the jury - if it could be determined. Petitioner has demonstrated that reasonable jurist could debate whether the petition concerning this issue should have been resolved in a different manner and that the issue presented is adequate to deserve encouragement to proceed further.

4) Counsel's Failure to Effectively Represent Evidence to Suppress Information Gained Through Title III Wiretap Violations:

In Petitioner's case, during pretrial, Petitioner continuously stressed to his counsel that the government and investigating agents were in violation of multiple, if not all, of the Title III requirements. Petitioner explained to his counsel that investigating agents knew who he was years prior to directly initiating an investigation against Bowman - Petitioner's co-defendant. Agents in this case had been attempting to connect Petitioner to the supply side of other investigations prior to using Bowman to pursue him, the same agents had directly accost Petitioner with their accusations, picked up conversations through outher Title III wiretaps that mentioned Petitioner, and two unsuccessful Title III wiretaps had directly been initiated against Petitioner, all of which the government deliberately omitted in their Title III application, as well as omitted relevant pin registers. However, Petitioner's counsel narrowed his suppression attempts against the Title III violations down to the necessity requirements. Petitioner notified his counsel again that he was still approaching the Title III argument wrong and omitting the information of how the violations effected each particular Title III requirement jsut as the agents and government had done. Petitioner's counsel again addressed the Title III violation but narrowed the subsequent argument down to, 2518(1)(b)(iv), which would not require the government to disclose the prior Title III applications against Pet-

itioner, pursuant to 2518(1)(e). Petitioner-counsel's continued ineffectiveness prevented the District Court from assessing the full scope of the deliberate violation perpetrated by the investigating agents omissions in their affidavits to procure the authority to wiretap. However, Petitioner continued to pursue the issue pro se but the District Court continued to evade the issue.

Finally, during direct appeal in oral arguments, the issue was reviewed based on Petitioner's pro se information. All three judges during oral arguments found that the government could have and should have included the omitted information in the wiretap affidavits because it would be keeping with the strict adherence of the responsibilities imposed by Congress. Judge Pillard noted that, when you're in an ongoing investigation, the government wouldn't know what the authorizing judge would want to know. Judge Wilkins noted the government's approach in this case seems to read the words full and complete basically out of the statute's language provided by Congress. The Panel Judges also noted that they anticipate such information will be provided to the authorizing courts in the future. The government noted that since this investigation they changed their policy and now name all persons believed to be involved in the crime.

The District Court's assessment of this claim is debatable and should have been handled in a different manner:

The District Court allege that Petitoner's reliance on the Court of Appeals decision as evidence that Balarezo was ineffective is misguided. At the same time, the District Court acknowledge the Court of Appeals statements and conclusion that the government did not provide the authorizing court with as complete a picture of its investigation as it could have. It further noted that the Court found that the government's omissions were not material to Title III's necessity requirement and that it provided the bare minimum necessary to comply

with Title III. However, the District Court missed the point, the agents/government's omissions were deliberate, and to continue to get their extensions for the Title III wiretap they falsified their application and alleged that they had not discovered the supply side of Bowman's drug distribution which they knew and had evidence was Petitioner.

Petitioner's counsel had the evidence of the deliberate falsehoods and omissions but did not present it to the District Court during the suppression inquiry. The Court of Appeals during oral argument told the government that they wouldn't know what the particular authorizing judge would want to know about the ongoing investigation. The Court of Appeals also noted during oral argument that when applying for a Title III wiretap Congress did not intend for the government to only give a statement of necessity to obtain the wiretap. The District Court stated that it would misstate the Court of Appeals language that the government "could have" provided more information in its affidavits, if, it found that the government was required to provide more. However, it appears that the District Court is picking what it wants to read. The Court of Appeals in their written opinion and during oral argument stated that the government:

> could have and should have included the omitted information in the wiretap affidavits because it would be keeping with the strict adherence of the responsibilities imposed by Congress.

In that context, the same awareness would apply to Petitioner's counsel who knew what the Title III requirements were, but, moreover, was notified by Petitioner on numerous occasions about the omitted information but failed to provide it during the wiretap violation inquiry.

The District Court also claim that even if Petitioner's counsel failed to include the arguments Petitioner cannot prove prejudice based on its allegation that the Court of Appeals rejected the argument. The District Court's assessment is misleading. The Court of Appeals did not address whether Petitioner's counsel

was ineffective for his failure to provide the information. Moreover, during oral argument the pannel explicitly noted that the government would not know all of what the authorizing judge would want to know when authorizing the wiretap in an open investigation.

In Petitioner's case, had the authorizing judge knew "at that time" that the agents actually falsified information in their applications and deliberately omitted relevant information in their applications and the results of the proceeding would have been different. Here, in order for the agents to obtain extensions for their wiretaps, they falsified their applications by claiming that they had not yet discovered the supply side to Bowman's distribution and was still searching, when in fact they did know. The agents knew that it was Petitioner, had pen registers connecting him to Bowman as well as an informant who had known Petitioner for many years, had investigated him as the supply side to the other investigations, had prior accost Petitioner about their contentions, heard his name through other wiretaps, and two wiretap authorizations had been lodged against Petitioner prior, with failed results, which the prior application s were also omitted from the information in the isstant applications.

Had the authorizing judge knew at that time that the agents were deliberately falsifying and omitting the information in their applications, the extensions to the Title III wiretaps would not have been granted. It was through information gained via the wiretap extensions that lead to the location of the storage unit and seizure of cocaine. Petitioner can and did prove prejudice through his briefs that his counsel was ineffective for not presenting the evidence. Petitioner has demonstrated that reasonable jurist could debate whether the petition concerning this issue should have been resolved in a different manner and that the issue presented is adequate to deserve encouragement to proceed further.

5) Counsel's Failure to Challenge the Sufficiency of the Superseding Indictment:

In Petitioner's case, the indictment charged Petitioner with conspiracy to, unlawfully, knowingly and intentionally distribute and possess with intent to distribute mixtures and substances containing a detectable amount of cocaine and the amount of said mixtures and substance was five kilograms or more; The indictment does not list any means and manner or overt acts to which Petitioner is alleged to have committed the offense.

In this case, the government had charged several alleged conspirators with cocaine base, also known as crack cocaine. After presentation during trial the government moved the Court to hold Petitioner accountable for distribution of crack cocaine that was testified to. However, based on the defective indictment, Petitioner was blind-sided and was not able to develope a defense based on the distribution of the crack cocaine alleged against others who were charged with it in the indictment. Nothing in this case or allegations suggested that Petitioner sold or was involved in the sale of crack cocaine. All evidence and allegations were toward Petitioner being involved with the supply of powder cocaine.

The District Court's assessment of this claim is debatable and should have been handled in a different manner:

The District Court, claims that the indictment's language that Petitioner was being charged with having to, distributed and possessed with intent to distribute mixtures and substances containing a detectable amount of cocaine, was notice that he was being held accountable for the distribution of crack cocaine which no evidence was presented in the indictment, discovery or at trial, that he was involved with. Petitioner hadn't even sold powder cocaine to the infor-

mer who testified as to selling crack cocaine. Moreover, if what the District Court is claiming, was notice of being charged with the sale of crack cocaine, then the government would not have had to move the Court, after presentation of the trial, to hold Petitioner accountable for the testimony of the crack cocaine.

Petitioner's counsel was ineffective for not challenging the efficiency of the indictment. Petitioner has demonstrated that reasonable jurist could debate whether the petition concerning this issue should have been resolved in a different manner and that the issue presented is adequate to deserve encouragement to proceed further.

CONCLUSION:

Petitioner has demonstrated that reasonable jurist could debate whether the issues presented to the District Court which are contained in this application whould have been resolved in a different manner and that the issues presented are adequate to deserve enouragement to proceed further. The COA should be issued in this case on all issues presented.

Date: _____

Respectfully Submitted,

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