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4) Petitioner's Amended Motion and Brief in Support of §2255 Application.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3056

Jose Federico Almeida-Olivas

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-00973-DGK)

JUDGMENT

Before SHEPHERD, ERICKSON, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 19, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSE FEDERICO ALMEIDA-OLIVAS,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 18-0973-CV-W-DGK-P
	)	(Crim. Case No. 14-00063-01-CR-W-DW)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255

In the above-cited criminal case, Movant was convicted by a jury of two crimes related to the distribution of methamphetamine, and the Honorable Dean Whipple sentenced him to serve 258 months in prison. Crim. Doc. 104.[1] The United States Court of Appeals affirmed the convictions. *United States v. Almeida-Olivas*, 865 F.3d 1060 (8th Cir.), *cert. denied*, __ U.S. __, 138 S.Ct. 529 (2017). In this case, Movant requests that the Court vacate his sentence pursuant to 28 U.S.C. § 2255. Doc. 1. For the reasons explained below, relief pursuant to § 2255 is **DENIED**.

Movant filed his original motion on a Court-approved form, asserting two grounds for relief: (1) he was denied effective assistance of counsel, and (2) "the Court misapplied . . . 18 U.S.C. § 2510 *et seq.*," (Wire and Electronic Communications Interception, Definitions). Doc. 1, pp. 4-6. Subsequently, the Court granted Movant leave to file an amended or supplemental motion on a Court-approved form. Docs. 6 and 9. The Clerk of the Court provided Movant with

[1] "Crim. Doc." refers to filings in Movant's criminal case. "Doc." refers to filings in this § 2255 case.

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the required form. Movant filed a pleading entitled "Amended Motion and Brief in Support of § 2255 Application," however, and contrary to the Court's instructions, this pleading is not on a Court-approved form. Doc. 12. Therefore, the Court will consider Movant's "Amended Motion" only insofar as it relates to and provides briefing for the two grounds Movant presented in his original motion. Given this determination, the Court will not address Respondent's arguments regarding timeliness. *See* Doc. 14, pp. 4-6 (response).

As his first ground for relief, Movant claims he suffered ineffective assistance of counsel because his attorney failed to conduct adequate investigation and trial preparation due to his poor health. Doc. 1, pp. 4-5. To prevail on this claim, Movant must show that counsel's performance was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) (§ 2255 movant has the burden of proof). Respondent argues: "Almeida-Olivas provides no evidence that defense counsel failed to uncover during the pretrial investigation, and certainly no evidence that established prejudice – that the jury would have acquitted Almeida-Olivas because of the evidence. Almeida-Olivas simply provides a conclusory allegation of error . . . ." Doc. 7, p. 6 (response). The Court agrees with Respondent's characterization, *see* Doc. 18, pp. 8-10 (reply), and concludes that Movant has failed to show that he was prejudiced by counsel's performance. Relief is denied on Movant's first ground.

As his second ground for relief, Movant claims "the Court misapplied . . . 18 U.S.C. § 2510 *et seq.*," (Wire and Electronic Communications Interception, Definitions), citing *Dahda v. United States*, 584 U.S. __, 138 S.Ct. 1491 (2018). Doc. 1, p. 6. However, "[a] motion under § 2255 is not a substitute for direct appeal . . . and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (citations omitted).

Following *Anderson*, relief is denied on Movant's second ground.

The Court has reviewed Movant's ancillary claims and finds that none has merit. For the reasons set out above, the Court denies Movant relief pursuant to 28 U.S.C. § 2255. Further, the Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right"). The Clerk of the Court shall enter judgment accordingly and dismiss this case.

So **ORDERED.**

/s/ Greg Kays
GREG KAYS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: July 26, 2019.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

NO. _____
U.S.D.C. NO(S): CIV. 18-0973-CV-W-DGK-P
CRIM. 14-00063-01-CR-W-DW

JOSE FEDERICO ALMEIDA-OLIVAS
Plaintiff - Appellant

-vs-

UNITED STATES OF AMERICA
Respondent - Appellee

JOSE FEDERICO ALMEIDA-OLIVAS'S BRIEF IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

JOSE FEDERICO ALMEIDA-OLIVAS
REG. NO. 17162-408
FCI-BEAUMONT-LOW
P.O. BOX 26020
BEAUMONT, TX 77720-6020

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STATEMENT OF THE CASE

RELEVANT PROCEDURAL HISTORY

5) Jose Federico Almeida-Olivas ("JFAO") was convicted by a jury of two (2) offenses related to distribution of methamphetamine. The United States Court of Appeals for the Eighth Circuit affirmed the convictions. United States v. Almeida-Olivas, 865 F.3d 1060 (8th Cir., cert. denied, ____ U.S. _____, 138 S.Ct. 329 (2017)).

6) JFAO timely filed an application on a court approved form, asserting two (2) grounds for relief: Sixth Amendment, ineffective assistance of counsel, and violations of 18 U.S.C. §2510-2518. JFAO complained about his trial counsel, Lozano Jr. Specifically, that Lozano was absent pre-trial due to medical issues and failed to adequately prepare for trial.

7) The Court denied his application (Doc. 19) on July 26, 2019. This appeal is timely.

REASONS FOR GRANTING CERTIFICATE OF APPEALABILITY

8) Three (3) sets of analyses inform the decision on the trial court's denial of COA. The Supreme Court teaches in Slack v. McDaniel, 529 U.S. 473, 146 L.Ed. 2d 542, 120 S.Ct. 1595 (2000), that when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition, the right to appeal is governed by the certificate of appealability (COA) requirements found at 28 U.S.C. §2253(c). Id. at 478.

Additionally, Justice Kennedy, writing for the Court, instructs that "when the district court denies a habeas petition on procedural grounds without reading the prisoner's underlying constitutional claim, a COA should issue if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

9) A COA under §2253(c) must issue where a habeas prisoner makes a "substantial showing" of a denial of a constitutional right, which under Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed. 2d 1090 (1983), includes showing that reasonable jurists "could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were" "adequate to deserve encouragement to proceed further."

10) Where the district court has denied relief on the constitutional claims themselves, JFAO must show that reasonable jurists would find the Court's constitutional analysis debatable or wrong.

STRICKLAND V. WASHINGTON

11) JFAO raises a constitutional claim of ineffective assistance of counsel for two (2) issues: (1) Failure to investigate; and (2) Failure to investigate Title III issues.

12) To prevail under Strickland, JFAO must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) show that "the deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984). In making this demonstration, JFAO must demonstrate by a preponderance of the evidence that his trial counsel(s) made errors so serious that he was not functioning as a counsel guaranteed by the Sixth Amendment. Id. JFAO must also show that "there is a measurable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-694.

JFAO'S GROUNDS FOR RELIEF

13) With regard to JFAO's Motion under §2255 there was overarching issue, Lozano's failure to adequately prepare for trial. His failure was due to his medical issue (heart problems, resulting in a mistrial--delay and retrial under medical stres).

14) JFAO documents all the manners in which counsel's failure to prepare prejudiced him in his §2255 (see attached Appendix 2)

COURT'S DENIAL

15) The Court considered "Movant's 'Amended Motion' only insofar as it relates to and provides briefing for the two grounds Movant presented in his original Motion." See (Doc. 19, p.2) (attached) (Appendix 1)

16) The Court thereafter urges that "Almeida-Olvais provides no evidence that defense counsel failed to uncover during the pretrial investigation, and certainly no evidence that established prejudice--that the jury would have acquitted Almeida-Olivas because of that evidence" (Doc. 19, p.2) (Appx 1) (This is not the standard.)

17) Next, the Court summarily dismisses JFAO's §2510-2518 claims, opining that "[a] motion under §2255 is not a substitute for direct appeal ... and is not the proper way to complain about simple trial errors." Relying on and citing Anderson v. United States, 75 F.3d 704, 706 (5th Cir. 1994) (citations omitted)

18) The Court thereon denies the Certificate of Appealability (COA).

19) Respectfully, the Court applied the wrong standard for COA, and the wrong standard for analysis.

STANDARDS

20) JFAO's claims lie in counsel's failure to investigate. As documented in JFAO's §2255, counsel collapsed during the first trial and a mistrial was declared. After months of being incapacitated, counsel, just prior to trial and heavily medicated, appeared for trial. The record indicates that counsel had to undergo an hours long medication routine prior to each day's trial activities. See JFAO's §2255, specifics infra, Appx. 2.

evidence standard, it is uncontroverted. There is no dispute that counsel did not investigate the Title III issues and other issues raised in the §2255. The Court then, in its analysis, concludes that JFAO does not demonstrate prejudice, supra.

21) A failure to investigate the facts [applications, affidavits, Title III evidence, etc., under §2510-2518] is objectively unreasonable because a lawyer has an overarching duty to "make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." West v. United States, 994 F.2d 510, 513 (8th Cir. 1993) (internal quotation marks omitted); see also United States v. Tucker, 603 F.3d 260, 264-65 & n.5 (4th Cir. 2010) (failure to investigate in the sentencing context...i.e., failure to investigate a P.S.R.)

In fact, in the P.S.R. context, much less the trial context, the Eighth Circuit has concluded that when the record is unclear [as it is here] as to whether an investigation into the substance of a P.S.R. occurred [post plea], remand to the district court for a hearing on the issue is appropriate. West v. United States, 994 F.2d 570, 573 (8th Cir. 1993) (remanding for an evidentiary hearing when a petitioner's allegation that his trial counsel did not investigate errors in the P.S.R. was sufficient to create a question of fact as to whether the petitioner's trial counsel's representation fell below an objective standard of reasonableness); c.f. Ryder v. Morris, 752 F.2d 327, 332-33 (8th Cir. 1985).

22) In clarifying the "failure to investigate" standard, the Eighth Circuit writes that Strickland notes: "The failure of counsel to adequately investigate a petitioner's mental health history and background can necessitate an evidentiary hearing." Parkus v. Delo, 33 F.3d 933, 939 n.6 (8th Cir. 1994). Strickland sets forth the framework for evaluating counsel's actions in a failure-to-investigate claim:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. 466 U.S. at 690-91. "[F]ailing to present mitigating evidence may be ineffective assistance if, due to inadequate trial preparation and investigation, 'counsel has through neglect failed to discover such evidence.'" Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991) (quoting Laws v. Armontrout, 863 F.2d 1377, 1385 (8th Cir. 1988)). "[S]trategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." Id.

23) In evaluating JFAO's charge that counsel failed in his duty to "conduct a thorough investigation of Title III claims," Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000), our focus is on whether the investigation was reasonable, see Wiggins v. Smith, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003). This is an objective review, measured against the prevailing professional norms at the time of the investigation. See id. It is "a context-dependent consideration of the challenged conduct as seen from counselor's prospective at the time" without "the distorting effects of hindsight." Id. (quoting Strickland, 466 U.S. at 689) (internal quotation marks omitted).

24) For purposes of the JFAO analysis, as discussed more infra, the prosecution's case was made primarily off of telephone conversations. Ergo, counsel's failure to investigate the removal of telephone calls from the evidence (Motion to Suppress) could meet the Strickland standard. The fact that a course of conduct, or line of questioning could defeat the prosecution's case is the preliminary indicator that investigation by counsel was warranted (to determine the merits of the defense or strategy or the rule it out). This is what the Supreme Court teaches. When, as here, a federal petitioner seeks habeas review, he can only prevail if the decision not to investigate was "contrary to, or involved an unreasonable application of" Strickland and its progeny, or rested "on an unreasonable determination of the facts in light of the evidence presented in the trial court (here,

primacy of phone calls and testimony off of the phone calls). 166 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674. "We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his ... proceeding [standard the trial court used], but rather that he established a probability sufficient to undermine confidence in that outcome." Porter v. McCollum, 588 U.S. 30, 44, 130 S.Ct. 447, 175 L.Ed. 2d 398 (2009) (per curiam) (internal quotation marks and alternations omitted).

25) As noted in the §2255--(see attached Appx 2; ¶4, 8, 9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 72, 25, 26) the Title III compliance under Dahda's clarification or Giordino (infra) was not done, and no basis for not doing so is proffered by trial counsel. In fact, the government offers no defense for trial counsel's negligent pre-trial and trial conduct. The record, however, reveals that Lozano suffered greatly from medical problems, both before and during trial. (See Appx. 2; ¶5, 6, 21, 24; 26, 31, 33)

26) For example, the record reveals that Lozano offered no limiting instructions on third-party plea agreements entered into evidence, no objections during government's improper closing arguments, no objection to the government's improper explanation regarding JFAO's alleged "involuntary entering a conspiracy," nor any objections through an objectively unfair trial.

27) It is axiomatic that Strickland analysis is a contextual analysis. And under the totality of the circumstances, Lozano was ineffective because of his wholesale failure to investigate.

28) Issue I and Issue II are best addressed concurrently:

ISSUE I

> WHETHER UNDER SLACK V. MCDANIEL, 529 U.S. 473, 146 L.ED. 2D 542, 120 S.CT. 1595 (2000) JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS RULINGS.

ISSUE II

> WHETHER UNDER BAREFOOT V. ESTELLE, 463 U.S. 880, 893, 103 S.CT. 3383, 77 L.ED. 2D 1090 (1983), REASONABLE JURISTS "COULD DEBATE [THAT THE] PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER OR THAT THE ISSUES PRESENTED WERE" "ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER."

The Court's wholesale failure to analyze trial counsel's abandonment of his duty to investigate pre-trial (due to his medical issues) is problematic.

29) As noted supra, JFAO's case is like Wiggins, where "counsel abandoned their [pre-trial] investigate ... after having acquired only rudimentary knowledge "of the Title III evidence and circumstances." Wiggins, 539 U.S. at 524-525. There was no controverting evidence challenging counsel's failure to

investigate. In fact, the Court did not even analyze that issue. Wiggins, supra.

30) The Supreme Court further teaches that the focus [which the trial court did not do] is on whether the investigation supported counsel's decision. Here, counsel made no investigation into the Title III wire taps--and rather sought to object during trial--and was reminded that he failed in his pre-trial preparation by the AUSA and the Court. (See Appx. 2) (See infra ¶35).

31) In assessing counsel's investigation, the Court instructs that an "objective review of the performance measured for "reasonableness under prevailing professional norms." Which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." Williams v. Taylor, supra, at 415, 146 L.Ed 2d 389, 120 S.Ct. 1495 (O'Connor, J., concurring) (citing Strickland, 466 U.S., at 688, 80 L.Ed. 2d 674, 104 S.Ct. 2052. "Every effort [must] be made to eliminate the distinctive effects of hindsight." Id. at 689, 80 L.Ed. 2d 674, 104 S.Ct. 2052. This was not done by the trial court.

§2510-2518 -- TITLE III

32) Title 18 U.S.C. §2510(11) provides that JFAO qualified as an "aggrieved person." It is defined as:

> (11) "aggrieved person" means a person who has a party to any intercepted wire, oral, or electronic communication or a person to whom

the interception was directed"; (18 U.S.C. §2510(11)

33) Had trial counsel even investigated, in particular the requirements to obtain a Title III, pre-trial or researched case law (Supreme Court, Eighth Circuit, or sister circuits--the D.C. Circuit in particular), counsel would, in the reasonable performance of his task of representing JFAO, have filed a Motion to Suppress the contents of the wire intercepts and the evidence derived therefrom. See 18 U.S.C. §2510(11); 18 U.S.C. §2516(1); 18 U.S.C. §2518(a)(1); 18 US.C. §2518(4)(d); United States v. Giordano, 416 U.S. 505, 525 n.14, 91 S.Ct. 1829, 40 L.Ed. 2d 341 (1974); Dahda v. United States, 138 S.Ct. 1491; 200 L.Ed. 2d 842 ____ U.S. _____ (2018) (Dadha was decided post-trial but the issues were prevalent during trial); United States v. Chavez, 416 U.S. 562, 573-74, 911 S.Ct. 1849, 40 L.Ed. 2d 380 (1974); United States v. Glover, 736 F.3d 509, 407 U.S. App. DC 189 (D.C. Cir. 2013), and United States v. North, 735 F.3d 212, 2013 U.S. App. 21656 (5th Cir. 2013).

34) The Title III issues have been clarified in Dahda, but were being argued throughout the U.S. As noted in the record, (Appx. 2) (See infra, ¶35) both the Court and the AUSA noted that Lozano was not prepared pre-trial and did not object pre-trial to Title III issues, and admissability problems, and as the record demonstrates, (See Appx. 2) (see infra, ¶35) Counsel was medically unavailable pre-trial, and was medically unavailable even pre-trial each morning to consult with JFAO.

35) Counsel was unavailable and did not investigate. The record is clear and denotes that (see Appx. 2, ¶¶ 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37.) It is uncontroverted.

36) Under these standards, and the uncontroverted record, JFAO should be allowed to fully brief because reasonable jurists could disagree as to the issues in debate.

ISSUE III

37) JFAO was not offered an expansive reading of his pleadings in accordance with Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 288, 50 L.Ed. 2d 251 (1976). In fact, the Court summarily dismissed JFAO's substantive pleadings. (See Appx. 1) (Doc. 19) ("...the Court granted Movant leave to file an amended or supplemental motion on a court-approved form. Doc. 6 and 9. [JFAO filed a form and brief in support] The clerk of the court provided Movant with the required form. Movant filed a pleading entitled "Amended Motion and Brief in Support of §2255 Application; [along with its §2255 Form] however, and contrary to the Court's instructions, this pleading is not on a court-approved form. Doc. 12. Therefore, the Court will consider Movant's "Amended Motion," only insofar as it relates to and provides briefing for the two grounds Movant presented in his original motion"). This is exactly the type of restrictions Estelle was to prevent. JFAO filed a Court-approved form and Brief.

38) Finally, JFAO does not need to demonstrate that he would prevail (the standard used by the trial court) but only that "jurists could disagree." Here, given the uncontested nature of the record that Counsel did not investigate either Title III or other underlying issues as noted in the §2255, a full brief is in order.

PRAYER

For these reasons, JFAO requests a Certificate of Appealability. JFAO requests such other and additional relief to whether he may be entitled whether in equity or in law.

Respectfully submitted,

Jose Almeida Olivas

Jose Federico Almeida-Olivas
Reg. No. 17162-408
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P.O. Box 26020
Beaumont, TX 77720-6020

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the page number requirements of the F.R.A.P.

9/11/2019
Date

Jose Almeida Olivas
Jose Federico Almeida-Olivas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was placed in the BOP legal mail system, properly addressed with postage to the Court and opposing counsel noted below on 9/11, 2019. I make this declaration pursuant to 28 U.S.C. §1746 and under penalties of perjury.

AUSA Joseph M. Myers
400 East 9th St.
Room 5510
Kansas City, Missouri 64106

9/11/2019
Date

Jose Almeida Olivas
Jose Federico Almeida-Olivas

VERIFICATION

I hereby assert that the material factual allegations herein are true and correct to the best of my knowledge and belief. I make this verification pursuant to 28 U.S.C. §1746 and under penalties of perjury.

9/11/2019
Date

Jose Almeida olivas
Jose Federico Almeida-Olivas

APPENDIX

1) Court's Order

2) JFAO's §2255 Brief

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSE FEDERICO ALMEIDA-OLIVAS,	§	
	§	Case # 18-0973-CV-W-DGK-P
Petitioner,	§	Crim # 14-00063-01-CR-DGK
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

AMENDED MOTION AND BRIEF IN SUPPORT
OF § 2255 APPLICATION

TO THE HONORABLE JUDGE:

COMES NOW, JOSE FEDERICO ALMEIDA-OLIVAS (JFAO) and files this Brief in Support of § 2255 Application and would show unto the Court as follows:

QUESTION BEFORE THE COURT

Whether Lozano and/or Crane were ineffective under Strickland v. Washington by failing to prepare for tiral, and properly investigate, and/or due to medical issues.

BACKGROUND

1) JFAO was convicted of consipracy to distribute 500 grams or more of a mixture containing methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 and use of communication device to facilitate the distribution of methamphetamine in violation of 21 U.S.C. § 843(b), (d).

2) JFAO was represented at trial by Counsels Lozano, Jr.,

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and Adam Crane on direct appeal. Initially, this case was a nuanced case, in which the defendant JFAO was subsequently charged in a consipracy. For example, 31 other defendants were charged in a 27 count indictment (not this case). The individuals pled guilty and in turn, pursuant to a cooperation agreement three testified against JFAO. The defendants who testified (discussed infra) at other times mis-identified JFAO. Additionally, JFAO's nephew implicated JFAO along with his brother Jesus. (See, United States v. Jose Federico Almeida-Olivas, Case No. 16-3790) (R.R. Day 1, p. 9:12 - 10:1).

3) The foundation of the case therefore turns on the testimony of the witnesses and the alleged inclupatory telephone conversations.

4) The docket sheet reveals no contest to the admissibility of the testimony off of the Title III warrants, no challenge in competence thereof regarding 18 U.S.C. § 2510 - 2518. In fact, at a bench conference the government pointed out that Lozano could have filed a Motion to Suppress pre-trial, but did not, thereby waiving objections to admissibility (perhaps a local rule or standing order of the court). But in any event Lozano was unprepared for trial and pre-trial (actually in the hospital for most of the six months prior to trial).

5) The case was called to trial in August 2015. After the first day of trial, trial counsel Lozano had a heart attack in court and a mistrial was declared. See, Reporter's Record, Day 1, p. 4:25 - 5:24) (Reporter's Record hereinafter "RR").

6) Mr. Lozano reveals that his medical condition had

improved with the implantation of a stint following the heart attack. Specifically, Mr. Lozano notes ongoing (prior to trial) medical issues (RR Day 1, p. 5:8 - 12). Next, Lozano notes that he was "released from St. Luke's on Thanksgiving Day" and went in for a pet scan the Friday before trial because he had a "spot on his lungs" (RR Day 1, p. 5:14 - 18). The Court noted he would be replaced if his health issues caused any more delay (RR Day 1, p. 5:19 - 22).

7) Jurors were selected or deleted for speaking Spanish which would be a Batson issue as well. Although requested, no voir dire record was provided to JFAO.

8) The total testimony on the procedural application of 18 U.S.C. §§ 2510 - 2518 consists of Cliffard Howard (RR Day 1, p. 22:25 - 25:25).

9) Interesting, and demonstrative of Lozano's failure to properly investigate, is the failure to cross examine Howard on his false statements in Court. For example, Howard testified that he set up equipment in the Kansas City area (RR Day 1, p. 23:21 - 15). That is in fact false. All Title III wiretaps are routed through a centralized "listening post" in Virginia and subsequently re-routed to a terminal that is located and operated in the Kansas City area. This re-routing is a procedural work around employed by agents to establish the jurisdictional requirements under 18 U.S.C. § 2510 - 2518. See discussion below. No cross by Lozano of the basic procedures for the acquisition of the "aural" transmissions, and whether those "acquisitions" were first recorded in the Kansas City, MO

district, or whether they followed procedure and re-routing making the initial intercept in Virginia or alternatively at the base of the cell tower from which the cell phone call was transmitted. In fact, no investigation by Lozano at all.

In the United States v. Dominique Jackson case, No. 10-199, in the United States District Court of Western PA (see attached), Special Agent Shane Countryman testifies under oath about "Voice Box" the system that the government uses to effect the Title III wiretaps and pen, trap and trace orders (See, Exhibit 1, p. 60:2 - 62:15). Agent Countryman discusses "capturing" the Wiretap signal in Virginia (Exhibit 1, p. 62:12 - 15). That the phone re-routes the signal to Virginia and then sends it out to the local field offices. Agent Counrtyman clarifies that Quantico does not have an authorization to do so, but the local field office [in this case Kansas City, MO] has the warrant and that the signal is routed to [Kansas City] from Virginia, making the wiretap unlawful as a matter of law. But, in any event, no questioning or investigation into the wiretap by Lozano (RR Day 1, p. 59:3 - 60:2).

10) Next, none of the predicate testimony of Howard is sufficient to establish a foundation for admission of Title III warrants, but nevertheless—Lozano did not object.

11) Gisela Contijo testifies in confirmation of the re-routing of the intercepted phone calls. Calls re-routed in Virginia, first intercepted in Virginia (or Washington DC) are re-routed to a "listening station" which are located in the district (part of the procedural workaround). Ms. Contijo

testifies that she "actually [would] sit at a station and ... wait for phone calls to be generated." (RR Day 1, p. 27:23 - 28:2). The listening station has an attached computer which can monitor multiple case—Title III wiretaps. The operator activates the particular line to review, and can mute (called minimization in the statute 18 U.S.C. §§ 2510 - 2518) portions of the phone call that are not the subject of the wiretap. The "listening station" is a permanent fixture and phone calls previously intercepted in Virginia or Washington DC are re-routed (defined by statute and case law as intercepted) to Kansas City, MO listening station (see, infra).

12) Next, Ms. Contijo testified that she listened to phone calls on this case for 8 months (RR Day 1, p. 29:5 - 8). In that the statute allows for wiretaps for only up to 30 days, this case would have had at least 8 Title III applications (19 actually noted), affidavits, and orders issued by an Article III Court, in order to monitor the phone calls.

Lozano, perhaps because of health issues or otherwise, did not investigate any of the Giordino issues, 18 U.S.C. §§ 2510 - 2518 issues, or **Dahda** issues. While **Dahda** was issued post trial, the underlying issues regarding the statutory application of wire taps (wire tap orders in substantial compliance with §§ 2510 - 2518) and the court orders and applications being in strict compliance with the statute were already present; and Lozano did not investigate.

13) Next, Ms. Contijo, was allowed as an interpreter, not merely to translate from Spanish to English, but to translate

alleged code—and no foundation was laid or predicate that Ms. Contijo was being offered as an expert in "code" but was never-the-less allowed to opine on same (RR Day 1, p. 35:6 - 21). It is routine, but not lawful, for agents to testify about the meaning of particular phrases and words. In this case for instance, there were phone calls about numbers such as 14 or 13. Testimony from persons on the call indicated that 14 or 13 actually referred to 14,000 or 13,000. But as it pertains to Ms. Contijo, she was not a participant in the phone calls, was not an alleged expert in "drug communications." She did not have by training, work, experience, or any expertise in "code talk" whereby it is alleged that drug conspirators discuss drug dealing over the phone by using covert words. Here she was allowed to testify about code talk as an interpreter—and there was no basis in the record for such testimony. Lozano did not object.

14) Even further, without any predicate being laid, Lozano agreed to the admission of the wiretaps at a sidebar at the bench (RR Day 1, p. 36:13 - 37:4). The phone calls were not offered under any rule of evidence, no factual basis for their admission, and contained allegedly co-conspirator statements prior to the establishment of the existence of a conspiracy.

They were not admitted conditionally on an offer that the government would independently prove a conspiracy. To allow such an admission by counsel was error. Had counsel properly prepared to impeach and cross on the procedural requirements to admit Title III phone calls and the requirements under the Rules of Evidence, the calls would not have been admitted (as they were

obtained illegally, outside of the jurisdiction, re-routed into the jurisdiction, and opined upon by a translator regarding "code words" without any foundation for any of it) (RR Day 1, p. 29:10 - 16).

15) Next, the pre-textual traffic stop based on the uncorroborated information from an informant, without the particulars of time, place, case, driver, etc., makes the traffic stop—as testified to, illegal. No pre-trial hearing to surpress under the Fourth Amendment. Had Mr. Lozano not had medical issues, perhaps he would have investigated the Fourth Amendment issues that led to the stop, that led to the Title III and other investigative techniques (RR Day 1, p. 7:31 - 35) (RR Day 1, p. 80:10 - 12) (RR Day 1, p. 83:22 - 84:18).

16) Next, Agent Yoshikawa testifies that the government failed to follow the requirements of 18 U.S.C. §§ 2510 - 2518 to obtain a Title III wiretap. In particular 18 U.S.C. §§ 2518(3)(c). No testimony that other techniques were tried or would not work or were too dangerous. And as noted under Dahda, the specifics of the application and order are mandatory. Lozano, by not investigating the Title III requirements and properly objecting, was ineffective.

17) Agent Yoshikawa identifies 19 wiretaps that were not challenged—pre-trial or at trial by Lozano.

18) Next, the government listed a statement that Cosme-Ortiz' Miranda was changed in this case (JFAO's case), which is false. He was charged and pled in a companion case. This would lead a jury to more easily infer a conspiracy (as the

Appellate Court concluded). Lozano, perhaps due to medical issues, perhaps due to his failure to investigate, failed to object. (See, infra, arguments on plea agreements.)

19) Next, Agent Yoshikawa reveals that they were unlawfully tracking alleged co-conspirators (GPS tracking on a cell phone) without a warrant. A violation, see infra of the Fourth Amendment. Had counsel been informed or investigated he could have objected to same under Jones which was expanded and clarified under Carpenter by the U.S. Supreme Court.

20) Next, Agent Yoshikawa goes into a litany of unlawful tracking by GPS. For example (RR Day 1, p. 55:21 - 57:6) Agent Yoshikawa testifies about GPS tracking of an "unknown phone going to a ranch in Tumey, Missouri." (RR Day 1, p. 55:23 - 24). Initially, prior to Carpenter, 18 U.S.C. §§ 2702 - 2708 requires providers to obtain an "order, subpoena, or warrant" to track someone's cell phone. Carpenter has made clear that a warrant is required. See, infra. But the statute itself requires particularities in order to "GPS track" someone. See, 18 U.S.C. §§ 2702, 2703, et seq. Tracking an "unknown" phone was unlawful at the time. Had Lozano properly prepared for Title III or Stored Communications Act (SCA) or investigated, none of the case could have proceeded.

21) Next, Agent Yoshikawa discloses another violation, a pretext traffic stop—not for a traffic violation—but solely to identify the occupants of the vehicle. Had Lozano properly investigated this further evidence would have been excluded (RR Day 1, p. 56:14 - 21)(RR Day 1, p. 73:10 - 25)(RR Day 1, p. 83:22

- 84:18) (noting that Lozano did not file any Motion to Suppress the traffic stop or any suppression motions pre-trial, either because he did not investigate, prepare, or because of his health. But in any event the court precluded any further investigation during trial because Lozano did not investigate and file a motion to suppress pre-trial) (RR Day 1, p. 84:10 - 18).

22) Next, Agent Yoshikawa discloses that the informant did not know JFAO, but further still, he reveals sufficient information about the "alleged informant" to obtain Jencks, Giglio and/or Brady evidence from the informant. Had Lozano been properly prepared he could have pursued this line of questioning.

23) Further, the government, without objection illicits that JFAO's brother was in this case. Again false. (RR Day 1, p. 57:7 - 11). This further allowed an improper inference regarding the conspiracy.

24) Next, the government improperly bolsters the testimony and inference by discussing the volume of phone calls (RR Day 1, p. 60:7 - 17). No objection by Lozano to the improper bolstering. As the Appellate Court sustained by "inference" that JFAO was in a conspiracy, the number of phone calls were significant. Had Lozano prepared properly and been in better health he would have objected.

25) Further, Agent Yoshikawa testifies that the recordings were sealed after they were recorded (RR Day 1, p. 24:2 - 5). (The disc with phone calls are "sealed by the judge and put into evidence"); (RR Day 1, p. 59:19 - 25) (after recording disc is "sealed into evidence"). But we now know that is false. Agent t

testifies that the sealed dics were used with the informant during the investigation to broaden the investigation (RR Day 1. p. 60:18 - 22). The then existing case law and statute (18 U.S.C. §§ 2510 - 2518) specifically requires the sealing of the discs for use in trial and failure to do so requires that the wiretaps be excluded. Here the agent testified to same. Had Lozano properly prepared to handle a wiretap case, he could have objected and all wiretaps would have had to be excluded. Lozano did not object.

26) Even at this trial stage Mr. Lozano is going through an hour long medicine administration procedure prior to trial each day (RR Day 1, p. 87:10 - 12). Even by the end of the first day of trial Lozano had not prepare a trial strategy, or prepared witnesses or prepared to put on a case (RR Day 1. p. 88:4 - 12). In fact, Lozano made no opening, called no witnesses, offered substantively no evidence. Put on no case in chief. In fact he barely put on a closing argument—he stopped midway to go take heart medication. He simply was not physically healthy enough to prepare and try this case and should have removed himself or been removed by the court.

27) There are two brothers, Jesus Almeida-Olivas and Jose Frederico Almeida-Olivas. Government again confuses the two and who is alleged to do what (RR day 2, p. 105:10 - 25) (What's his name? Frederico Almeida. And that's the brother of Jose? Yes.) Jose is Frederico, he is not the brother of Frederico—witness identification is wrong. And no objection by Lozano.

28) Lozano's complete cross examination inculpated JFAO,

when the government's direct had not done so (RR Day 2, p. 139:18 - 142:22).

29) There is testimony about drugs that do not involve this conspiracy (RR Day 2, p. 165:12 - 21). Lozano did not object, initially about evidence (photographs) that were taken prior to the date of the conspiracy—which were alleged to be involved in drug trafficking. Had he not been ill and properly prepared an objection would have been forthcoming.

30) Court made a finding of a limited conspiracy of four people, not the 31 who were indicted (RR Day 2, p. 192:6 - 8). Nevertheless, Lozano repeatedly allowed evidence of a far ranging conspiracy of 31 individuals to come into trial. Lozano did not object throughout. Lozano did not move for limiting instructions. Clearly Lozano has substantive skills as an attorney, but his health interfered with his preparation and trial practice—and this was not his finest hour and his representation did not meet the basic standards under Strickland.

31) Lozano waived opening and offered no defense, no evidence or witness of any kind (RR Day 2, p. 197:19 - 21).

32) No proper foundation for the establishment of a conspiracy, no proper objections by Lozano (RR Day 3, p. 204:23 - 208:4). No proper motion for acquittal on the failure to estblishe the elements of a conspiracy. See, infra.

33) In the middle of closing argument Lozano has to stop to take a heart pill (RR Day 3, p. 231:15 - 23).

34) Government asks the jury to infer that a conspiracy existed in this case because the three testifying witnesses

(incarcerated witnesses) pled to a conspiracy in their plea agreements (RR Day 3, p. 236:5 - 237:19). In fact the government points out that Lozano noted (Lozano actually admitted) the plea agreements which has the underlying basis for the conspiracy (RR Day 3, p. 233:2 - 19) (RR Day 3, p. 236:16 - 237:19) (RR Day 3, p. 236:16 - 22).

35) Lozano actually admitted the plea agreements into evidence (RR Day 2, p. 134:17 - 18) (RR Day 2, p. 162:16 - 17). And when the government moved to admit the plea agreement of Martin Tavizon Mr. Lozano did not object (RR Day 2, p. 168:1 - 6).

36) No limiting instructions on the plea agreements at the time of admission. No objections to the government's improper arguments during closing statements. Perhaps Mr. Lozano would have done so if not focused on stopping mid close to go take heart medicine (RR Day 3, p. 231:15 - 23).

37) Government urges that a conspiracy can be voluntarlily entered into, even against someone's will—if they are forced (RR Day 3, p. 216:11 - 22).

INEFFECTIVE ASSISTANCE

38) Counsel was ineffective under Strickland because of his errors and the prejudice that resulted therefrom.

39) Counsel's ineffectiveness falls into the following categories:

39.1—failure to properly move to suppress the GPS information (orders-subpoenas) in violation of United States v.

Jones.

39.2—failure to suppress Title III warrants for violations of 18 U.S.C. §§ 2510 - 2518.

39.3—failure to properly prepare for trial—perhaps due to medical conditions.

39.4—failure to be properly informed of the rules of evidence regarding Title III admissibility.

39.5—failure to be prepared regarding the plea agreements to the extent that counsel believed admission was part of an acceptable trial strategy, counsel should have offered them for limited purposes—not general purposes—and thereafter objected to the government's improper arguments.

39.6—failure to properly prepare for a pretextual traffic stop.

COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS GPS AND EVIDENCE THEREFROM

40) A series of cases up to and including Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507, 584 U.S. ___ (2018) addresses the use of tracking devices to surveil individuals in vehicles. Here the government testified to using telephone GPS to track an unknown phones (that in and of itself would require a sting-ray—a drone or airplane that intercepts cell phone signals without warrant, order, or subpoena, as required (at the time) under the SCA, 18 U.S.C. §§ 2702 et seq.). See supra a ¶¶ 18 - 19 (RR Day 1, p. 55:23 - 24) (RR Day 1, p. 55:23 - 56:13). As established by the Supreme Court in 2012 GPS tracking by phone required a warrant. As the Court noted in

Carpenter, 201 L. Ed. 2d at 519, "five justices agreed [in United States v. Jones, 565 U.S. 400, 404 - 405, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)] that related privacy concerns would be raised ... conducting GPS tracking of [a] cell phone." Id. at 426, 428, 132 S. Ct. 945, 181 L. Ed. 2d 911 (Alito, J., concurring in judgment); Id. at 415, 132 S. Ct. 945, 181 L. Ed. 2d 911 (Sotomayor, J., concurring in judgment).

41) Part of the application process at that time under 18 U.S.C. §§ 2702 et seq. for an order or subpoena or warrant required specific identification of the owner of the phone, the phone number, etc. ... all specified under the statute. We know from the testimony (unknown phone) that GPS tracking (even under the law pre-Jones) in this case was unlawful. And post-Jones, a warrant was required. Warrants are not issued without particularity required under the Fourth Amendment (place to be searched, items to be seized) on "unknown phone." This was most likely an unlawful "sting-ray" device used to track the alleged drug traffickers. But in any event, counsel was woefully unprepared for cross, did not file a motion to suppress pre-trial, or was generally unaware (RR Day 1, p. 84:10 - 11) ("If the defense wanted to file a motion to suppress, they're welcome to do that ... not in front of the court." "Objections sustained. Don't go into it anymore.").

COUNSEL FAILED TO SUPPRESS PHONE CALLS

42) The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. allows a federal judge to issue a

a wiretap to help prevent, detect, or prosecute serious federal crimes. The statute requires a finding of probable cause supporting the wiretap order and sets forth other detailed requirements governing both the application for a wiretap and the judicial order that authorizes it.

43) The statute further provides for the suppression of "the contents of any wire and aural communication" that a wiretap "intercepts" along with any "evidence therefrom" if:

"(i) the communication was unlawfully intercepted;

(ii) the order of ... approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

§ 2518(10)(a).

44) In this case, the Title III wiretap raises jurisdictional issues regarding potential listening post in the district; failure to properly seal the wiretaps on a disc; the failure to provide probable cause; the failure to establish that other reasonable investigation tactics were tried or unlikely to yield results; among other failures regarding Title III requirements.

45) In particular the statute only allows interception within the trial court's territorial judicial district. § 2510(3). But here, the lines were redirected in Virginia—constituting an interception outside the territorial jurisdiction of the court. Counsel failed to investigate the operation of "Voice Box," that governs wiretap equipment and

discover same (supra, ¶ 9).

46) Next, the statute requires sealing of the disc. That was actually testified to in trial. See, supra, ¶ 24. But the unsealed disc was used with the informant to "expand the investigation" violating the wiretap statute § 2510 et seq. Counsel failed to object.

47) The orders do not conform to the requirements under Title III. See, Dahda v. United States, 138 S. Ct. 1491, 1494 - 1499, 200 L. Ed. 2d 842 (2018).

48) The orders/warrants and their applications violate the requirements of United States v. Giordano, 416 U.S. 505, 527, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974) as to "statutory requirements that directly and substantively implements the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." Id. at 527, 94 S. Ct. 1820, 40 L. Ed. 2d 341. Those two core concepts are (1) protecting the privacy of wire and oral communications, and (2) delineating a uniform basis the circumstances and conditions under which the interceptions of wire and oral communications may be authorized.

Here, counsel failed to properly inform himself, investigate, and move to suppress. Supra.

IMPROPERLY ADMITTED PLEA AGREEMENTS

49) Courts have generally held that evidence of a witness's guilty plea and/or plea agreements is admissible subject to a Federal Rule of Evidence (FRE) Rule 403 anlysis. See, United S

States v. Gaey, 24 F.3d 473, 478 (3d Cir. 1994). The Eighth Circuit explains that a co-defendant's guilty plea is admissible during the government's direct examination as evidence of the witness credibility and of his acknowledgement he participated in the offense. See, United States v. Hutchings, 751 F.2d 230, 237 (8th Cir. 1984), cert. denied, 474 U.S. 829, 88 L. Ed. 2d 75, 106 S. Ct. 92 (1985).

50) As the Third Circuit noted "the most frequent purpose for introducing such evidence is to bring the jury's attention facts bearing upon a witness's credibility." See, United States v. Werne, 939 F.2d 108, 113 (3d Cir. 1991) (citing United States v. Gambino, 926 F.2d 1355, 1363 (3d Cir. 1991).

51) This thinking is further elucidated by the Supreme Court in Old Chief v. United States, 519 U.S. 172, 136 L. Ed. 574, 117 S. Ct. 644 (1997). There the Supreme Court ruled a court abuses its discretion by allowing evidence of a conviction in if equally probative evidentiary alternative is available. Id. at 186. Such as when a defendant stipulates to a conviction in felon in possession of a firearm case.

52) The solution courts have found for this conundrum (balancing prejudice and probative evidence under FRE 403) is by requiring courts to give specific jury instructions at the time of the admission of the plea agreements and/or plea testimony as well as written juror instructions at the time the case is submitted to the jury. See, 1A Kevin F. O'Malley et al., Federal Jury Practices & Instructions (Criminal), § 15.01 at 350 (5th ed. 2000) ("You, as jurors, are the sole and exclusive judges of the

credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves.") But a plea or plea conviction is not admissible for the facts underlying the conviction.

53) The Third Circuit in United States v. Turner, 173 F.2d 140 (3d Cir. 1949) wrote this way: "The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. The defendant had a right to have his guilty or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against somebody else." Id. at 142.

54) As a result, when, as here, the bald introduction of a witness's guilty plea concerning facts or events similar to that for which the defendant is on trial [see ante at ¶ 33] could have the prejudicial effect of suggesting to the trier of fact that the defendant should be found guilty merely because of the witness's guilty plea. And this is exactly what the government urged in closing arguments (RR Day 3, p. 236:23 - 237:9). Court, nontheless, have typically held that a prejudical effect is typically cured through a curative instruction to the jury. Werme, 939 F.2d at 113; Gov't of the Vir. Islands v. Mujahid, 28 V.I. 284, 99 F.2d 111, 116 (3d Cir. 1993); United States v. Prawl, 168 F.3d 622 (2d Cir. 1999); United States v. Tse, 135 F.3d 200, 207 (11th Cir. 1998); United States v. Sanders, 95 F.3d 449, 454 (6th Cir. 1996); Pennington, 168 F.3d 1060 (8th Cir. 1999)(generally). When there is doubt about probative v.

prejudice "it is generally better practice to admit the evidence, taking necessary precautions by way of contemporanoues instructions to the jury followed by additional admonitions in the charge." See, Weinstein's Federal Evidence, § 403.02(2)(c) at 403 - 16 (Joseph M. McLaughlin, ed., 1999).

Here counsel's errors and prejudice are manifest: (1) Counsel admitted the plea agreements generally without requesting any limitations instructions from the judge (error); (2) Government urged the jury to find guilt from the plea agreements; and (3) Defense counsel neither objected nor asked for any curative instructions.

55) This is even more so in a conspiracy. The danger of unfair prejudice when admitting a guilty plea of a co-defendant is more acute if the charge in question is conpsiracy because a conspiracy requires an agreement between two or more individuals. See, United States v. Davis, 183 F.3d 231, 244 (3d Cir. 1999). In United States v. Thomas, the Third Circuit considered the issue of plea and plea agreements admission without a specific purpose. There the court explained that balancing the danger of unfair prejudice associated with the admission of the guilty pleas against their probative value pursuant to Rule of FRE 403 "in the absence of a proper purpose for the admission of the guilty pleas, the curative instructions of the district court [here there were none] were not sufficient to remove the prejudice ... presented by the evidence of his co-conspirators's [sic] guilty pleas." 998 F.2d 1202, 1207 (3d Cir. 1993). See also, United States v. Jennotti, 729 F.2d 213,

219 - 20 (3d Cir. 1984).

Where the discussion is regarding court error the discussion might be slightly different. Here the issue is ineffective assistance of counsel. And counsel was ineffective and prejudice attached at admission without a curative instruction and was exacerbated with the government's urging during closing arguments.

COUNSEL DID NOT PROPERLY PREPARE FOR CROSS ON A TERRY STOP

56) As testified to during trial (RR Day 1, p. 73:15 - 25) (RR Day 1, p. 80:10 - 12) (RR Day 1, p. 83:22 - 84:18) the case involved a pre-textual traffic stop. The law is clear that a pre-textual traffic stop violates the Fourth Amendment. United States v. Pereira-Munoz, 59 F.3d 788, 790 (8th Cir. 1995). It is also well established that any traffic violation, no matter how minor, provides an officer with probable cause to stop the driver of the car. Id. If the officer is legally authorized to stop the driver, any additional underlying intent or motivation does not invalidate the stop. United States v. Bloomfiled, 40 F.3d 910, 915 (8th Cir. 1994)(en banc), cert. denied, 514 U.S. 1113, 131 L. Ed. 2d 859, 115 S. Ct. 1920 (1995).

Here the officer testifies that no citation was issued that the stop must have been based on a traffic stop, but generally didn't know.

Had counsel been properly prepared and properly investigated (he did not due to medical issues) he would have been able to properly cross and move to dismiss the evidence from the

pre-textual stop. More importantly, he should have done this in a motion to suppress pre-trial. Counsel's failure to investigate, failure to suppress, failure to properly cross allowed improperly gathered evidence to be admitted at trial. It was error, prejudice was manifest.

THE GOVERNMENT URGED THE JURY TO CONVICT BASED ON HERITAGE AND CULTURE

57) The government urged " ... He called him "the sir". He called them "the owners." That's their culture. That's what they're used to. That's what they do. That's what they see." (RR Day 3, p. 240:2 - 6) (emphasis added).

58) The Supreme Court in Darden v. Wainwright, 477 U.S. 168, 91 L. Ed. 2d 144, 106 S. Ct. 2464 instructs that the question of whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 477 (citing Donnelly v. DeChristofero, 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974).

Here there are two standards because of a habeas corpus challenge, Initially under habeas the challenge to due process is a narrow one. But under ineffectiveness of counsel (to object, and/or ask for a curative instruction) is the broad supervisory power of the court. Id. at 642, 40 L. Ed. 2d 431, 94 S. Ct. 1686.

In Darden, the prosecutors inflammatory remarks were in response to the opening summation of the defense. Not so here. There was no "invited response." See, United States v. Young,

470 U.S. 1, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985). Were there several curative instructions as there were in Darden the matter would be clearer. But here, where there were no curative instructions and where counsel did not object (perhaps due to his medical condition—he had to stop his own close to take heart medication after suffering a heart attach in court just months previously) "the broad exercise of supervisory power" is more properly the standard under an ineffective assistance of counsel challenge.

Counsel was ineffective for failing to object for failing to get a curative instruction or move to strike. Under the totality of the circumstances, counsel was ineffective and prejudice attached.

INEFFECTIVENESS OF COUNSEL

59) In Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) the Court teaches that an ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id. at 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

In this case, as in Strickland, JFAO's claims stem from counsel's decision to limit the scope of their investigation and preparation for trial (in Strickland, investigation into mitigating evidence).

In fact, the Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are

> virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty make reasonable investigations [as to law and/or facts] or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances ... (emphasis added)

Id. at 690 - 691, 80 L. Ed. 2d 674, 104 S. Ct. 2052. See also, McCoy v. Louisiana, 584 U.S. ___ (2018) and the Supreme Court's modification of the ineffectiveness standard—structural error—regarding following the defendant's trial objectives and trial strategy.

60) In Williams v. Taylor, the Court noted that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not "fullfill[ed] their obligation to conduct a thorough investigation..." 529 U.S. at 396, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). This duty to investigate applies more so to the law (Jones case law on GPS; 18 U.S.C. §§ 2510 - 2518—re: wiretaps under Title III; the SCA under 18 U.S.C. §§ 2702, et seq.; and basic rules of evidence errors committed by counsel throughout).

61) The Court reminds that the record itself provides the proof of counsel ineffectiveness. Here, as noted supra, counsel did not file any motions to suppress, did not move or object to use of a "sting-ray"; violations of the SCA (18 U.S.C. §§ 2702, et seq.); violations of Title III (18 U.S.C. §§ 2510 - 2518);

failure to follow Supreme Court precedent. See, Porter v. McCollom, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam) (courts have a duty to look to the whole record when considering whether a defendant has met his burden).

Significant here, JFAO requested a series of documents from the pre-trial docket, which were denied by the court to urge additionally in his Amended § 2255. That request was denied and JFAO's arguments are made from the trial record. For example, the trial record reveals an attempt to exclude jurors who "spoke Spanish." That in and of itself is a structural error (if it occurred). However, JFAO mentions it herein in passing—because he has no records from voir dire. JFAO notes this as a single instance among many.

62) In Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) and here there is evidence that "trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." Id. at 508, 123 S. Ct. 1690, 155 L. Ed. 2d 714. Here as in Massaro a challenge could have been made without any further evidence than the record. That did not occur and appellate counsel was ineffective.

63) The failure to investigate is ineffective assistance. See, Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); c.f. Williams v. Taylor, 528 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (finding error where "counsel did not fulfill their obligation to conduct a thorough investigation"): Porter v. McCollom, 558 U.S. 30, 40 , 130 S.

Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam) ("The decision not to investigate did not reflect reasonable professional judgment"). This is true as to the facts in a case and as to the law.

64) In sum, the Ineffective Assistance Claim is examined under whether the investigation of law and facts was reasonable. Wiggins, 539 U.S. at 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471. Here it was not.

INCORPORATION

65) JFAO hereby incorporates each and every paragraph into each other paragraph to fully assert and argue counsel's ineffectiveness. To the extent that any of the positions taken by JFAO conflict, JFAO argues in the alternative.

PRAYER

For these reasons, JFAO prays that the government be required to respond and the court conduct a hearing if necessary and on conclusion thereof reverse due to counsel's ineffectiveness. JFAO request such other and additional relief in equity or in law to which he may be entitled.

Dated: 2/21/2019

Jose Almeida Olivas

Jose Federico Almeida-Olivas
Reg. # 17162-408
FCI Beaumont Low
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Beaumont, TX 77720-6020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served on the court on this 21st day of February, 2019, by placing the same in the outgoing inmate legal mail system, properly addressed, with proper first class postage affixed. I make this declaration pursuant to 28 U.S.C. § 1746 and under the penalties of perjury.

Dated: 2/21/2019

Jose Almeida Olivas
Jose Federico Almieda-Olivas

VERIFICATION

I hereby certify that the foregoing material factual statements contained herein are true and correct to the best of my knowledge and belief and are within my personal knowledge. I make this declaration pursuant to 28 U.S.C. § 1746 and under the penalties of perjury.

Dated: 2/21/2019

Jose Almeida Olivas
Jose Federico Almieda-Olivas