IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12535-J

EDWIN DISLA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Edwin Disla's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12535-J

EDWIN DISLA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: JILL PRYOR and BRASHER, Circuit Judges.

BY THE COURT:

Edwin Disla has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's February 19, 2021, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Upon review, Disla's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-61569-CIV-ZLOCH

EDWIN DISLA,

Petitioner,

vs. **O R D E R**

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 21) filed herein by United States Magistrate Judge Patrick A. White and upon Petitioner Edwin Disla's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Petitioner Edwin Disla's Objections To Report & Recommendation (DE 27) be and the same are hereby **OVERRULED;**

2. The Report Of Magistrate Judge (DE 21) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted and ratified by the Court;

3. Petitioner Edwin Disla's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) be and the same is hereby **DENIED;** and

4. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of July, 2011.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

Edwin Disla, PRO SE
Reg. No. 31120-069
FCI - Petersburg
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 10-Cv-61569-ZLOCH
(07-Cr-60096-ZLOCH)
MAGISTRATE JUDGE P. A. WHITE

EDWIN DISLA, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

I. Introduction

This matter is before this Court on Edwin Disla's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence, entered following a guilty plea in case no. 07-Cr-60096-ZLOCH.

The Court has reviewed the motion (Cv DE# 1); the government's response and amended response (Cv DE# 9, 15), Disla's reply to the response (Cv DE# 20), the Presentence Investigation Report (PSI); and all pertinent portions of the underlying criminal file.

Construing the arguments liberally as afforded pro se litigants pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the movant asserts the following claims.

Claims 1-4: Trial Counsel provided ineffective assistance by presenting an entrapment defense to the exclusion of several other viable defenses.

Claim 5: Trial Counsel provided ineffective assistance by failing to properly address in the motion for new trial, the trial court's limitation of the defense case.

Claim 6: Trial Counsel provided ineffective assistance by failing to request a conference with the defendant immediately prior to the defendant's direct examination.

Claim 7: Trial Counsel provided ineffective assistance by failing to adequately respond to the court's limitation of Dr. Zayas-Bayan's testimony.

Claim 9:[1] Trial Counsel provided ineffective assistance by failing to request a jury instruction based upon outrageous government conduct.

Claim 10: Trial Counsel provided ineffective assistance by failing to lay an adequate evidentiary record to establish sentencing manipulation.

Claim 11: Trial Counsel provided ineffective assistance by failing to move to dismiss the indictment based upon the government's conduct during the reverse sting operation.

Claims 12 and 14: Trial Counsel provided ineffective assistance by failing to do all in his power to recall defense witness Mark Conrad.

Claim 13: Trial Counsel provided ineffective assistance by failing to dispute the sufficiency of the government's evidence with respect to intent.

Claim 16:[2] Trial Counsel provided ineffective assistance by failing "to address the attempted charges in the indictment" and did not object to the inclusion of this information in the PSI.

Claim 17: Appellate Counsel provided ineffective assistance by failing to challenge the sufficiency of the evidence.

Claim 18: Appellate Counsel provided ineffective assistance by failing to challenge the trial court's exclusion of psychiatric testimony.

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[1] Claim 8 is intentionally omitted, it is impossible to ascertain the basis of Disla's claim under this ground.

[2] Claim 15 is intentionally omitted, and was not mentioned by the government. Under this ground, Disla does not raise any new claims. He simply repeats various statements contained under the other claims raised in his motion.

Claim 19: Appellate Counsel provided ineffective assistance by failing to challenge the district court's failure to submit a jury instruction regarding outrageous government conduct.

Claims 20 and 23: Appellate Counsel provided ineffective assistance by failing to challenge trial counsel's performance.

Claim 21: Appellate Counsel provided ineffective assistance based on the cumulative effect of the multiple errors.

Claim 22: Appellate Counsel provided ineffective assistance by failing to challenge the adequacy of the entrapment jury instruction.

Claims 24-38: the prosecutor and the police violated his due process rights by failing to abide by Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

II. Facts and Procedural History

The Eleventh Circuit Court of Appeals provided the procedural history in United States v. Disla, 358 Fed. Appx. 121 (11th Cir. Dec. 23, 2009).

> On April 17, 2007, a federal grand jury in the Southern District of Florida issued a three-count indictment against Edwin Disla a/k/a Campeon ("Disla"), Josue Cruz ("Cruz"), and Ricardo Mejia-Martinez ("Mejia-Martinez"). Count I charged Disla, Cruz, and Mejia-Martinez with conspiracy to possess with the intent to distribute one (1) kilogram or more of heroin and five (5) kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(i) and (ii), and 21 U.S.C. § 846. Count II charged Disla and Cruz with knowingly and intentionally attempting to possess with the intent to distribute five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii), and 18 U.S.C. § 2. Count III charged Disla and Mejia-Martinez with knowingly and intentionally attempting to possess with the intent to distribute one (1) kilogram or more of heroin and five (5) kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(i) and (ii) and 18 U.S.C. § 2. The indictment also contained forfeiture allegations as to Counts I-III.

> On January 22, 2008, Disla proceeded to trial with his co-defendant Mejia-Martinez. At the time of trial, Cruz was still at large.

Id. at 124. The Eleventh Circuit next outlined the facts introduced at trial in detail.

> A. Disla's Employment
>
> Disla was initially employed with the U.S. Customs Service, and later with U.S. Customs and Border Protection ("CBP"), from 1994 to 2007. Disla worked mainly in the Miami International Airport ("MIA"), with job duties including passenger processing, baggage control, immigration checkpoint control, and making arrests. Disla wore a uniform and held a firearm and a badge.
>
> Around May of 2006, Disla was placed on administrative duty due to allegations that he had assaulted a passenger. Disla was not fired, but his service weapon was taken away, and he no longer had law enforcement authority. Disla continued to receive pay and perform desk work. Around June of 2006, Disla stopped reporting to work and told a supervisor he suffered from anxiety and depression. After Disla stopped reporting to work, CBP considered him to be absent without leave, or AWOL, and paid him no salary. In July 2007, Disla was suspended from his job.
>
> B. Special Agent Reddin's Investigation
>
> Special Agent John Reddin initially was employed by U.S. Customs Service, and by Immigration and Customs Enforcement (ICE) after the Department of Homeland Security was created. Reddin is currently employed with ICE as a special agent in the Office of Professional Responsibility (OPR). The OPR investigates criminal wrongdoing by ICE and CBP employees.
>
> Reddin first learned of Disla's involvement in narcotics trafficking on September 15, 2006 when his office received an allegation from another ICE employee who worked in Santo Domingo, Dominican Republic. This ICE employee stated that a source in the Dominican Republic had disclosed that Disla was importing heroin into the United States. Reddin traveled to Santo Domingo and interviewed an individual who advised Reddin that Disla was transporting heroin through carry-on luggage from the Dominican Republic to Miami.
>
> Reddin testified that another ICE officer learned through an investigation that in August of 2006, two confidential informants met with someone who was "recommended" by a narcotics trafficker in New York. This person was identified to them as "Campeon." The meeting concerned the

transportation of narcotics. "Campeon" did not reveal himself to be Disla at the meeting.

After the August 2006 meeting, there were several telephone calls between the informants (a husband-and-wife team) and "Campeon." On January 20, 2007, Disla met with the two informants at a restaurant in North Miami, Florida. As a result of that meeting, law enforcement officers determined that "Campeon" was Disla, and Special Agent Reddin was brought into the investigation.

The government then set up a controlled delivery of narcotics involving Disla. After a series of recorded telephone calls between the informants and Disla, another face-to-face recorded meeting between Disla and the informants took place at a public restaurant in Hallandale, Florida on February 3, 2007. During this meeting, Disla agreed to do a test run of 10 kilograms of cocaine from Puerto Rico to Miami. It was agreed that Disla would fly to Puerto Rico, meet with an associate of the informants named "Charlie," receive the drugs from "Charlie," and transport them to Miami. "Charlie" was actually Detective Carlos Vazquez Gomez of the San Juan Police Department, working in an undercover capacity and posing as a member of a drug trafficking organization. Disla was to be paid $1,500 per kilogram, or a total of $15,000, for the transportation of the narcotics from Puerto Rico to Miami.

On February 9, 2007, Disla met with "Charlie" (i.e. Detective Vazquez) in a mall parking lot in Puerto Rico. During that recorded undercover meeting, Disla took possession of 10 kilograms of sham cocaine. Later that same day, Disla flew from San Juan International Airport to Miami. Despite the fact that Disla was no longer on active duty, Disla identified himself as an armed officer at the San Juan airport and used his CBP credentials to bypass airport security with the sham cocaine.

At approximately 10:00 p.m. at the Gulfstream racetrack in Hallandale, Florida, Disla met with the informants, delivered the 10 kilograms of sham cocaine, and accepted payment of $15,000. Law enforcement officers photocopied the serial numbers on the money for potential evidentiary purposes.

After another series of recorded telephone calls, Disla again met with the informants at a Starbucks in North Miami on March 20, 2007. During this recorded meeting, Disla discussed transporting multiple kilograms of heroin and cocaine from Puerto Rico to Miami at rates of $1,500 per kilogram of cocaine and $3,750 per kilogram of heroin.

On March 28, 2007, Disla and his co-defendant Mejia-Martinez flew from Miami to San Juan, Puerto Rico. Disla

used an alias of "Francisco Rivera" for the flight and the rental car in Puerto Rico. Disla had a fake Florida driver's license using the name Francisco Rivera. Upon arrival, Disla called one of the informants, who instructed Disla to travel to the Plaza Del Sol Shopping Center in Bayamon, Puerto Rico. Disla and Mejia-Martinez were picked up at the airport by another associate, who drove them to a rental car agency within the airport. There Disla rented a Toyota Corolla. The three individuals then traveled to the Carolina Plaza shopping center, where Disla purchased three suitcases.

Next, the three individuals traveled to the Plaza Del Sol Shopping Center. At the time they arrived, Disla was driving the rented Toyota Corolla while his associate was driving his Chevy pick-up. Co-defendant Mejia-Martinez was riding as a passenger in the Chevy pick-up. Detective Vazquez and another informant were already present in the parking lot in a different Toyota Corolla. When the defendants arrived, Mejia-Martinez exited the Chevy pick-up truck and entered the rented Toyota Corolla, while Disla exited that Corolla and entered the Chevy pickup truck. Disla then entered the law enforcement Corolla and confirmed he was ready to proceed with the transaction. Co-defendant Mejia-Martinez backed up the rented Corolla next to the law enforcement Corolla. Then two additional undercover officers, posing as members of the narcotics organization, arrived in a sports utility vehicle ("SUV") and had a bag containing 20 kilograms of sham heroin and a bag containing 25 kilograms of sham cocaine. Mejia-Martinez carried the bags containing sham narcotics from the SUV to the rented Corolla in two separate trips. Mejia-Martinez then began walking away toward the shopping mall. At that time, law enforcement agents arrested Disla and Mejia-Martinez. Based upon the negotiated transportation fees and the amount of narcotics involved, Disla was due to be paid $112,000 for transporting these sham drugs from San Juan to Miami.

C. Special Agent Alahverdian's Investigation of Disla

Special Agent Ed Alahverdian of the DEA also testified about his investigation of Disla. Alahverdian encountered Disla in New York, New York on February 16, 2007. Alahverdian received a phone call from Ed Rapp with the Port Authority in New Jersey. Rapp informed Alahverdian that law enforcement had been following four individuals all day. Those four individuals later turned out to be Disla, Camellia Perralta, Rosario Rodriguez, and Josue Cruz.

Alahverdian was told that two of these individuals (Perralta and Cruz) were initially spotted in a New Jersey hotel because they were not acting like normal travelers, and law enforcement began to follow them at that point. Rodriguez picked up the two individuals in a Jeep, and the three of them

drove from New Jersey into the Washington Heights area of Manhattan and eventually entered an apartment building on 160th Street. Disla then showed up at the same apartment building. All four individuals came out of the building and took a black livery cab a couple of blocks away to where a red Toyota was parked. The livery cab driver parked the cab and the four individuals got into the Toyota and drove to John F. Kennedy Airport ("JFK"). At some point, Disla and Perralta split from Cruz and Rodriguez. Disla and Perralta got onto the "AirTrain," and the agents and officers were unable to follow them further. Officers continued to monitor the vehicle FN2 the individuals had left behind in Washington Heights.

The same day (February 16, 2007), Josue Cruz and Rosario Rodriguez were interdicted around 5:30 p.m. at JFK airport with a large amount of U.S. currency in a deli bag inside their luggage. Cruz told the officers he was trying to get a flight to Puerto Rico. The officers asked if they could look in Cruz's bag, and they found a black plastic "New York deli bag" holding a large amount of currency. The currency was wrapped up in black rubber bands and packaged in New York deli bags, which Alahverdian stated is a common way that drug money is packaged. When asked where he got the money, Cruz replied that he was in a hotel in New Jersey and had left his hotel room with the door open. Cruz came back to get his bags when a stranger in the hallway told Cruz, "I left something in the room for you." Cruz told the officers he "didn't pay any mind to it," closed up his bags and came to the airport with Rodriguez. The currency from Cruz's bag later was turned over to Alahverdian. A total of $3,000 of the seized currency matched the serial numbers of the money provided Disla at the first controlled delivery on February 9, 2007 in Miami.

After that seizure, Agent Alahverdian and his partner went to Washington Heights to assist with the investigation and discovered that Disla and Perralta had returned to the apartment building on 160th Street. When Alahverdian got to that location, he spoke with the officers there and then spoke with Perralta, who was inside a vehicle. Perralta told Alahverdian that he was traveling and that Disla had given him the bags he was carrying. After Perralta consented to a search of his bags, Alahverdian found in them women's clothing, a heat sealing machine, and heat sealing bags. Alahverdian testified that narcotics traffickers usually package narcotics or narcotics proceeds in heat sealed bags to protect against dogs detecting the drugs.

Perralta admitted to Alahverdian that he was in the apartment on 160th street earlier in the day with several people, including Disla. Perralta saw Disla in the apartment with a large amount of currency, and Disla divided up the money between Cruz and Rodriguez.

Alahverdian then approached Disla, who was also on the scene, and conducted a pat down search of Disla that led to the discovery of Disla's CBP badge. Disla told him he was a CBP inspector. A consent search of Disla's bag led to the discovery of approximately six cellular telephones, a black deli bag containing $8,000 wrapped with black rubber bands, a satellite phone, and "SIM" memory cards, which are used in cellular telephones. Disla acknowledged he was on unpaid leave from CBP at the time, and when asked where he got the money from, he stated "I'm doing a couple of things." Disla stated that he was visiting a relative in the apartment building on 160th street in New York earlier in the day.

The multiple cell phones, multiple "SIM cards," satellite phone, and the money rubber-banded and packaged in a deli bag indicated to Alahverdian that Disla was involved with drugs. Alahverdian testified that "narcotics traffickers like to switch out phones," and the SIM cards allow them to change the number on the phone they are using to avoid detection.

Law enforcement agents then went to the apartment on 160th Street where Disla was earlier, searched the premises with the consent of the individuals inside the apartment, and found a Glock firearm, approximately 30 rounds of ammunition, additional magazines for the firearm, and a safe.

Alahverdian later brought Disla to the apartment on 160th Street. Disla admitted that the Glock handgun was his, that he had driven the safe up from Florida, and that it might contain guns and money. Disla was taken into custody and processed, but prosecution was deferred by the United States Attorney's Office for the Eastern District of New York due to the open OPR investigation in Miami. Disla was released.

A few days later, Alahverdian searched the safe, pursuant to a federal search warrant and recovered four handguns, ammunition, magazines, "drug ledgers," deposit slips, and a deli bag and a heat-sealed bag containing $27,000 wrapped in black rubber bands. The serial numbers on $1,000 worth of currency in the safe matched the recorded serial numbers of money given to Disla during the first controlled delivery on February 9, 2007 in Miami. Based on Alahverdian's experience, the paper in the safe, which he referred to as "drug ledgers," "indicated the movement of money and narcotics." Alahverdian had seen similar records in past drug investigations.

The safe also contained receipts for about $24,000 worth of bank deposits. Three of the deposits were for $5,000, and one of the deposits was for $9,000. The deposits were made at two different banks. Alahverdian testified that the amounts of money on the slips and the receipts showing the movement of

> money among banks indicated that the deposits had been "structur[ed]" so as to prevent the bank from notifying the government of the transactions.

Alahverdian also testified as to the prices of drugs in various locations based on his prior investigations and information received through "intelligence centers." He described how drug prices increase as they are transferred through different locations.

* * *

F. Disla's Entrapment Defense

At trial, Disla also advanced an entrapment defense and sought to put up evidence that the government entrapped him in order to retaliate against him for racial discrimination complaints that Disla had made against CBP. The government moved at trial to exclude evidence related to retaliatory discrimination. The district court initially sustained the government's objection and prohibited Disla from presenting evidence regarding alleged retaliation by the government. Several witnesses testified on Disla's behalf, but much of their testimony as to discrimination and retaliation was excluded through government objections. While the district court later revised that ruling and admitted evidence of alleged discrimination and retaliation against Disla, the following colloquy took place before that revised ruling.

G. Colloquy Before Disla's Testimony

Just before Disla began to testify, the court called a five-minute recess in order to discuss matters with counsel outside the presence of the jury as follows:

> THE COURT: All right. Mr. Disla, if you will step up to the podium, please. Well, hold on for just a minute. Let's do this. You wanted to take up a matter?
>
> MR. PIZZI:[3] I do.
>
> THE COURT: Members of the jury, before we proceed let me ask you to return to the jury room, remain in the jury room, do not discuss this matter amongst yourselves. We will be in recess for less than five minutes. Let me take up this matter and then I will bring you back in.
> Disla's defense counsel then told the court that, since the defense was not permitted to put on evidence of retaliation in connection with the

[3] Michael Pizzi was Disla's defense counsel.

> entrapment defense, "I would like the opportunity to meet with Mr. Disla and go over some of the issues in his testimony so as not to run afoul of the court's ruling." The following exchange ensued:
>
> THE COURT: I do not think you will do that. You will not do that intentionally, and if the government has an objection to a question they will stand and state it.
>
> MR PIZZI: Okay, Your Honor.
>
> THE COURT: All right. Bring in the jury.

When the jury returned, Pizzi called Disla to the stand and Disla testified as to a variety of preliminary matters concerning his educational background, family background, and his training in law enforcement. Disla also testified that he met an individual named "Mitch" in June 2006 while he was on administrative leave in New York and that Mitch asked Disla to meet with two of his friends in the import / export business in Miami to help them with the process of importing and exporting. In Miami in August of 2006, Disla met a man and a woman (with a young child) at a Starbuck's who told him that they were from Colombia and had affiliations with people who would be importing cargo from Colombia. At that point, court was adjourned for the day and was scheduled to resume the following morning.

The next morning, the district court revised its earlier ruling in part and allowed Disla to testify as to his allegations of discrimination and retaliation, subject to the government's objections. Disla then testified in detail about the discrimination and retaliation he had experienced. While working at CBP in May of 2006, Disla was accused of striking a detained passenger and placed on administrative duty. Disla testified that his supervisor, Jan Jarrett, contacted the officers in Reddin's group to investigate him for the battery incident.

Disla testified that he believed he was put on administrative leave in May of 2006 partially due to his race and ethnicity. According to Disla, Jarrett directly made racial comments to him on four separate occasions. The district court sustained the government's hearsay objections to Disla's testimony as to what those exact comments were. Disla also testified that various previous disciplinary allegations were made against him in his job that were retaliatory and racially discriminatory. Disla contacted the Equal Employment Opportunity Commission ("EEOC") about the discrimination in May of 2006, although he did not file a formal complaint at that time.

Disla stated that after the passenger assault incident, he requested to go on leave from his position at CBP in May of 2006 because he felt traumatized and embarrassed. He began seeing Dr. Carmen Zayas-Bazan for psychological treatment. According to Disla, both he and Dr. Zayas-Bazan requested that he be given some form of paid leave, and those requests were denied by CBP. Disla testified that his former attorney, Mark Conrad, also drafted letters to CBP on Disla's behalf asking that he be allowed to return to work, to which the CBP did not respond.

Disla further testified that he traveled to the Dominican Republic several times to visit his family and deal with family matters. Disla denied that he took these trips to conduct drug deals. Disla further testified that he did not conduct any drug deals in the Dominican Republic in 2006. On one of these trips in June of 2006, when he returned to Miami, Disla was searched in the airport upon his return for contraband, which humiliated him. Disla stated that in July of 2006, he was cleared of any wrongdoing in connection with the assault incident.

Disla testified that he returned to his office in September of 2006 and asked why he was not being allowed to return to work. Jarrett instructed another CBP supervisor, Linda Smith, to tell Disla to leave the building and tell him that he was not allowed to return. Disla testified that he filed an EEOC discrimination and harassment claim against CBP on September 6, 2006. A copy of Disla's initial EEOC complaint for discrimination and harassment was admitted into evidence.

Disla believed that CBP, ICE, and OPR sought to frame him for the narcotics conspiracy due to the fact that he filed an EEOC complaint. According to Disla, the passenger assault incident was investigated by the same internal affairs group that later investigated him for narcotics trafficking, and that Reddin was working for internal affairs of U.S. Customs during the time that Disla was being investigated for the alleged battery incident.

As for his transportation of narcotics, Disla stated that in his first meeting with the informants in August of 2006, they offered to pay him $5,000 to help them smuggle drugs into the United States, and he refused. Disla claimed the informants called him about a week later and offered him $8,000 to help them import drugs. According to Disla, in early 2007, he was also threatened by Mitch in connection with an outstanding loan that Mitch had made to Disla of approximately $8,000. Disla claimed that he understood from Mitch that Disla owed the money to a drug organization affiliated with the informants. Following numerous additional phone calls with the informants, Disla agreed to meet the informants again and traveled to Puerto Rico to transport 10 kilograms of sham

cocaine to Miami. Disla claimed that he then wanted nothing further to do with the informants, but he was repeatedly solicited by the informants and was contacted between 10 and 15 times by the informants to conduct another narcotics transaction. Disla went to Puerto Rico for the second transaction because he felt threatened. He further testified that his driver's license was suspended because he had been unable to pay child support, and denied that he obtained a driver's license in another name so that he could do drug deals.

H. District Court Further Revises Ruling as to Retaliation Evidence

During a break in Disla's testimony, the district court revised its prior ruling further to allow Disla to introduce additional evidence of discrimination and retaliation. The court ruled that Disla could recall some of the witnesses who had already testified.

Disla then recalled several witnesses. Dr. Carmen Zayas-Bazan, Disla's psychologist during 2005 and 2006, testified that Disla came to her for psychological treatment and that she wrote three letters to CBP in June, July, and October of 2006 requesting that Disla be put on medical leave. She received no response.

The defense also called witness Linda Smith, a supervisory officer with the CBP. Smith encountered Disla at the Miami airport in September of 2006 when he attempted to return to work. Smith informed Disla that CBP had been trying to reach him since he had been absent from work on June 11, 2006. Disla advised Smith that he was going to return to work in two days, on September 18, 2006 and that he would provide a telephone number at that time. Smith told Disla to report to Marie Otara, a supervisor at CBP.

At the direction of Jarrett, Smith informed Disla that he was required to leave the Miami airport. During Smith's testimony, the district court sustained the government's hearsay objections as to what exactly Jarrett said to Smith when Disla showed up for work.

Carol Gladden, one of Disla's immediate supervisors at CBP, was also called by the defense to testify. Gladden had no problems with Disla. Defense counsel asked Gladden whether Jarrett ever asked Gladden to "provide extra scrutiny of Mr. Disla." The district court sustained the government's hearsay objection to this testimony.

The defense also called witness Mark Conrad, who was Disla's former attorney while Disla was on administrative duty, and who helped Disla file discrimination complaints with

> the EEOC. Conrad's initial testimony, given prior to the court's ruling allowing evidence of retaliation, was almost entirely disallowed by the government's objections on the basis of relevance. After Disla testified, Disla's attorney informed the court that he was unable to recall Mark Conrad to the stand because Conrad was unavailable, as he had left town to litigate a trial. Later, after all of the other defense witnesses were called, Disla's counsel again explained to the court that Conrad was not available. Disla's counsel requested that he be allowed to make a phone call to Conrad. The district court stated that it would not grant a continuance to allow the defense to obtain Conrad's testimony.

Id. at 124-133. After Disla presented his defense, the government presented a rebuttal case.

> [I]n its rebuttal case the government presented evidence about two proffer meetings between Disla and the government on May 22, 2007 and on June 21, 2007. A government agent, present during these meetings, testified that Disla told the government about various instances in which he transported narcotics. In October of 2006, Disla transported ten kilograms of cocaine as a "test run" for an individual named "Santi" from Puerto Rico to New York and received $2,500 per kilogram of cocaine. After that test run, Disla and an associate, Darnel Clash, chartered an airplane to transport 80 kilograms of cocaine to Fort Lauderdale. Clash retained 10 kilograms as payment for himself, and Disla and Cruz then flew to New York and delivered the remaining 70 kilograms to Mitch. Disla was paid $2,250 per kilogram of cocaine by Mitch, and he in turn paid Cruz $15,000.
>
> Disla and Clash then chartered another private jet and traveled to San Juan, Puerto Rico, where they met with Cruz, who had between 95 and 100 kilograms of cocaine. They transported the cocaine to New York. On another occasion, Disla flew a chartered jet to Puerto Rico and obtained 13 kilograms of heroin and transported it to New York. Disla was paid $6,500 per kilogram of heroin. Disla also put a woman named "Heidi" in touch with a man named "Biggs" in order to assist her in transporting cocaine from Haiti to Fort Lauderdale. Through this connection, 100 kilograms of cocaine were smuggled into Fort Lauderdale and Disla received a $25,000 commission fee.
>
> The government had already introduced documentary evidence earlier that Disla chartered private jets on five occasions between December of 2006 and February 2007. The documents showed that on each occasion, the charter jets were scheduled to fly a round trip first from Fort Lauderdale to San Juan, and then to fly a second round trip from Fort Lauderdale to either Long Island or New Jersey.

> The government had introduced Disla's travel records for January 1, 2005 through 2007. In 2005, Disla made five round trips from Miami to the Dominican Republic, most of which were for one night. In 2006, Disla made approximately six trips, five to the Dominican Republic and one to Canada. Agent Reddin testified that (1) a trip for a one-night duration normally alerted law enforcement to suspicious activity; (2) the Dominican Republic is a popular transport point for narcotics into the United States; and (3) Disla's one-night trips indicated that Disla was involved in smuggling heroin.

Id. at 128-29.

On January 31, 2008, the jury reached a verdict, finding Disla guilty on all three counts, with a special finding as to Counts I, II, and III that the cocaine weighed 5 kilograms or more, and a finding as to Counts I and III that the heroin weighed 1 kilogram or more. The jury acquitted Mejia-Martinez on all charges. Id. at 133.

Prior to sentencing, a PSI was prepared which revealed as follows. The PSI set the movant's base offense level at 36, pursuant to U.S.S.G. §2D1.1(a)(3), because the offense involved the possession with the intent to distribute the marijuana equivalent of at least 10,000 kilograms, but less than 30,000 kilograms, and the movant was accountable for 25,000 kilograms. (PSI ¶30).

According to U.S.S.G. §3B1.1(c), because the movant was an organizer, leader, manager, or supervisor in any criminal activity, the offense level was increased by two levels. (PSI ¶33). Because the movant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense, the offense level was increased by two levels pursuant to §3B1.3. (PSI ¶34). In light of the foregoing, the movant had a total offense level of 40. (PSI ¶38).

The probation officer next determined that the movant had a

zero criminal history points, resulting in a criminal history category I. (PSI ¶41).

The probation officer next calculated the appropriate sentence as follows: the statutory term of imprisonment as to counts 1, 2, and 3 was a minimum of ten years and a maximum of life. (PSI ¶69). Based on a total offense level of 40 and a criminal history category I, the movant's resulting guideline range was 292 months to 365 months imprisonment. (PSI ¶70).

Defense counsel filed written objections to the PSI and a motion for downward departure and/or reasonable sentence. (Cr DE# 160, 161). The state responded to both filings. (Cr DE# 162, 163). On December 23, 2009, the court sentenced Disla to 365 months imprisonment. (Cr DE# 168).

The Eleventh Circuit explained the sentencing proceedings as follows on direct appeal:

> In written objections, Disla objected to: (1) the drug quantities in the PSI; (2) the enhancements for his role in the offense and the abuse of trust; and (3) the lack of a "safety valve" recommendation pursuant to USSG § 5C1.2. As to drug quantities, Disla argued that he never possessed any real drugs, that the government controlled the quantity and price of drugs transported during the investigation, and that the government "inflate[d]" the penalties by waiting to arrest him until after the second controlled delivery. Disla contended that he "did not and was not capable of providing any amount of drugs."
>
> Disla also filed a motion for a downward departure based on the following: (1) pursuant to USSG § 5K2.13, his "diminished capacity" as outlined by the trial testimony of Dr. Zayas-Bazan and in the PSI; and (2) the alleged "sentencing manipulation" that occurred when the government waited to arrest Disla until after the second controlled shipment, which involved a greater quantity of narcotics than the first. In support of his sentencing manipulation argument, Disla repeated the arguments made in connection with his drug quantity objection and contended that the government

controlled the price and terms of the controlled transactions.

In Disla's pleadings and at the sentencing hearing, the overarching thrust of Disla's arguments in support of his objections, his request for safety-valve relief, and his motion for a downward departure was that the government had total control over the reverse-sting operation, setting the terms and providing the money and the drugs, and Disla merely transported the drugs as dictated by the government. As such, Disla argued that the government engaged in sentencing manipulation and that this was a case of "piling on by the government." Disla argued that either the sentencing manipulation or his depression, or a combination of both, warranted a downward departure. Disla also argued that these same factors should be considered by the court in imposing a reasonable sentence.

The district court overruled Disla's objections to the PSI. As to the role enhancement, the court found that Disla was a supervisor in the criminal activity, supervising Mejia-Martinez, Cruz, and other individuals. The district court also found that Disla abused his position of trust as a CBP agent because he used his credentials to go through airport security without being searched and therefore used his position of public trust to contribute in a significant way to facilitating the commission or a concealment of a crime. The court also noted that border protection "is one of the first lines of defense" in ensuring that the borders are secured from individuals wishing to do harm to the country, and, for that reason, "it is certainly a position of trust that Mr. Disla held and to say he abused it is simply an understatement."

The district court also overruled Disla's objection to the drug quantities attributed to him. The district court adopted the facts in the PSI that Disla agreed to transport 25 kilograms of cocaine and 20 kilograms of heroin into the United States, set the price for smuggling the drugs, agreed to do a test run with 10 kilograms of cocaine, was aware of the drug quantities he would be smuggling, and did in fact transport the sham cocaine and sham heroin. Finally, the district court found that Disla was not entitled to safety valve relief under § 5C1.2 given its findings outlined above.

The district court denied Disla's motion for a downward departure. The district court rejected Disla's claim of sentencing manipulation and found Disla failed to establish that he suffered from a diminished capacity as defined by § 5K2.13. The court found that despite his mental health difficulties, Disla appreciated the illegality of his conduct and retained the ability to control his conduct, as the trial evidence showed that he "managed to coordinate a sophisticated drug deal."

> The court adopted the PSI's calculations of an advisory guidelines range of 292 to 365 months' imprisonment. Prior to sentencing Disla, the court received arguments from both Disla and the government as to the appropriate sentence within the guideline range. The government requested a sentence of 360 months' imprisonment based on his failure to accept responsibility and his "efforts to mislead the jury and the court" during his testimony. Disla argued that he should receive a sentence in the low end of the advisory range because: (1) he was a first offender with no history of substance abuse or violence; (2) he was not a threat to the community; (3) he was caught up in a government sting; (4) he was only a transporter rather than a manufacturer or purchaser of drugs; (5) he was trying to get his job back at the time of the controlled deliveries; (6) he was a good employee and co-worker; (7) he had a young son to support; and (8) he was sorry for his offenses.
>
> The court sentenced Disla to 365 months as to each of Counts I, II, and III, to be served concurrently. The court stated that it had "considered the statements of all parties, the revised presentence report which contains the advisory guideline computation and range," as well as "all of the statutory factors," and that "[t]he sentence imposed reflects the seriousness of the offense, promotes respect for the law, provides just punishment, protects the public from further crimes by Mr. Disla, and hopefully affords adequate deterrence...."

Disla, 358 Fed.Appx. at 137-39.

Disla filed a timely notice of appeal. (Cr DE# 169). The Eleventh Circuit affirmed the movant's conviction and sentence in a written, but unpublished opinion. United States v. Disla, 358 Fed. Appx. 121 (11 Cir. December 23, 2009). Disla filed a petition for writ of certiorari in the Supreme Court, which was subsequently denied. Disla v. United States, 130 S.Ct. 2419 (May 03, 2010).

On August 22, 2010,[4] Disla filed motion to vacate his sentence pursuant to 28 U.S.C. §2255. (Cv DE# 1). The government filed a response and amended response (Cv DE# 9, 15) and Disla filed a reply to the response (Cv DE# 20).

[4] The government concedes that the motion was timely filed.

III. Standard of Review

The law is clear that section 2255 authorizes a prisoner to move a sentencing court to vacate, set aside, or correct a sentence where "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." See 28 U.S.C. §2255(a); see also, Hill v. United States, 368 U.S. 424, 426-27 (1962). "A sentence is otherwise subject to collateral attack where there is an error constituting a 'fundamental defect which inherently results in a complete miscarriage of justice.'" United States v. Jones, 56 F.3d 62 (4 Cir. 1995)(citations omitted).

In order for the movant to prevail on a claim of ineffective assistance of counsel, he must establish that 1) his counsel's representation fell below an objective standard of reasonableness; and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The standard is the same for claims of ineffective assistance on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11 Cir. 1995).

Review of counsel's conduct is to be highly deferential, Spaziano v. Singletary, 36 F.3d 1028, 1039 (11 Cir. 1994), and second-guessing an attorney's performance is not permitted. White v. Singletary, 972 F.2d 1218, 1220 (11 Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-

guessing with the benefit of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11 Cir. 1992). Because a "wide range" of performance is constitutionally acceptable, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." Rogers v. Zant, 13 F.2d 384, 386 (11 Cir. 1994).

IV. Discussion

Under **claims 1-4**, Disla asserts ineffective assistance of trial counsel by presenting an entrapment defense to the exclusion of several other viable defenses. In particular, Disla asserts that trial counsel should have developed a defense based on outrageous government conduct and should have presented witnesses in support of defenses other than entrapment.

Second-guessing of an attorney's performance is not permitted. White v. Singletary, 972 F.2d 1218, 1220 (11 Cir. 1992)("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11 Cir. 1992). Moreover, the Eleventh Circuit will not "second-guess counsel's strategy." Chandler, 218 F.3d at 1314, n.14. Strategic choices, even those "made after less than complete investigation," are evaluated for their reasonableness and "counsel's reliance on particular lines of defense to the exclusion of others--whether or not he investigated those other defenses--is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable." Chandler, 218 F.3d at 1318 (quoting Strickland, 466 U.S. at 690-91).

As indicated above in the Eleventh Circuit's recitation of the

facts, defense counsel presented several defenses at trial. First, defense counsel elicited testimony from Disla to show that he was coerced into committing the charged offenses. For example, Disla testified that he felt threatened by his dealings with the CIs and, as a result, he went to Puerto Rico to conduct the drug transactions. Defense counsel also presented evidence to show that the government possessed a motive to entrap Disla, namely, in retaliation for the harassment complaint, discrimination complaint, and EEOC claim Disla lodged against the CBP. In support of this position, defense counsel called Dr. Zayas-Bazan and presented letters from Disla's attorney in connection with the complaints, Mark Conrad. Finally, contrary to Disla's assertions, his counsel elicited ample testimony from Disla regarding the government's alleged outrageous conduct against him while working for CBP and in connection with the investigation into Disla's drug related activities. Disla does not establish that counsel's strategic decisions with respect to the presentation of his defense were unreasonable. Furthermore, Disla fails to specify what other defense trial counsel overlooked. Therefore, he is not entitled to relief under grounds one through four.

Under **claim 5**, Disla asserts ineffective assistance of trial counsel by failing to properly address in the motion for new trial, the trial court's limitation of the defense case. Disla appears to assert that defense counsel should have better argued that the trial court's handling of the discrimination/retaliation evidence issue limited Disla's ability to present his defense. In a motion for new trial, defense counsel did in fact assert that the district court impeded his ability to present a defense by first excluding testimony and later deeming such evidence relevant. (Cr DE# 148). Because defense counsel raised the specific issue Disla claims he overlooked, Disla's claim is refuted by the record.

Under **claim 6**, Disla asserts ineffective assistance of trial counsel by failing to request a conference with the defendant immediately prior to the defendant's direct examination.

On direct appeal, Disla argued that the district court erred in denying "Disla the opportunity to consult with his attorney just prior to taking the stand and testifying." See United States v. Disla, 358 Fed. Appx. 121 (11th Cir. Dec. 23, 2009). In affirming Disla's conviction and sentence, the Eleventh Circuit specifically found, "After careful review of the entire record in this case, reading the parties' briefs, and having the benefit of oral argument, we conclude that all of Disla's claims of error lack merit." Id. at 133. Therefore, the presentation of the claim in this §2255 proceeding adds nothing of substance which would justify a different result. See Hobson v. United States, 825 F.2d 364, 366 (11th Cir. 1987)(claim raised and considered on direct appeal precludes further review of the claim in a §2255 motion), vacated on other grounds, 492 U.S. 913 (1989); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Webb v. United States, 510 F.2d 1097 (5th Cir. 1975); Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992), overruled on other grounds by Castellanos v. United States, 26 F.3d 717 (7 Cir. 1994); Graziano v. United States, 83 F.3d 587 (2d Cir. 1996)(Collateral attack on a final judgment in a criminal case is generally available under §2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.). In light of the foregoing, Disla is not entitled to relief on this ground.

Under **claim 7**, Disla asserts ineffective assistance of trial counsel by failing to adequately respond to the court's limitation

of Dr. Zayas-Bayan's testimony. Specifically, the court sustained the government's objection to any medical findings or diagnoses resulting from her treatment of Disla on the grounds that such testimony was not relevant. Disla does not point to any actions taken by his attorney under this ground and appears to be arguing that the district court erred in sustaining the government's objections.[5] As a result, this ineffective assistance claim lacks merit.

Under **claim 9**,[6] Disla asserts ineffective assistance of trial counsel by failing to request a jury instruction based upon outrageous government conduct. Disla fails to propose a jury instruction in his §2255 motion, which counsel should have requested. In Disla's case, defense counsel requested, and obtained, an instruction on the entrapment defense. Accordingly, the jury considered Disla's predisposition to commit the crimes.[7]

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[5] Disla's entire argument under this ground is as follows: "The district court did not allow the line of questioning in this area. In entrapment cases, expert psychiatric testimony is admissible to prove a defendant's unusual susceptibility to inducement and lack of pre-disposition to commit the crime." (Cv DE# 1, p. 15).

[6] As was indicated above, it is impossible to understand Disla's claim under ground 8. Ground 8 consists of a single paragraph wherein Disla asserts the following: "Trial counsel was ineffective for failing to fully disclose and advise the defendant of the true and entire purpose/nature of the proceedings. The case/proceedings was indeed a transaction to obtain a judgment in order to secure credit/loans/bonds in a monetary value against 'my person,' the all capital letter classification, EDWIN DISLA (an unincorporated fictitious entity). I am Edwin Disla, flesh and blood being/individual. 'My person' is being utilized as collateral/principle against the monetary/credit and/or fine value acquisition as per the final judgment at sentencing." (Cv DE# 1, p. 16).

[7] The defense of entrapment consists of two elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, 485 U.S. 883, 886 (1988); Hampton v. United States, 425 U.S. 484, 489 (1976); United States v. Alston, 895 F.2d 1362, 1367 (11 Cir. 1990). The "principal element" in the entrapment defense is the defendant's lack of predisposition, United States v. Russell, 411 U.S. 423 (1973), which focuses in turn on whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of an opportunity to perpetrate a criminal act. Sherman v. United States, 356 U.S. 369 (1958). In order to raise the defense of entrapment,

In presenting the entrapment defense, Disla's counsel bolstered the position that Disla lacked a predisposition to commit the offenses by presenting evidence of the government's outrageous conduct. Defense counsel also argued in closing argument the theory of defense of outrageous government conduct. As a result, Disla cannot show prejudice as the jury was aware of the outrageous government conduct argument. In addition, no such jury instruction exists under these circumstances. The entrapment instruction was the proper instruction to request in Disla's case. Counsel was not ineffective under this ground.

Under **claim 10**, Disla asserts ineffective assistance of trial counsel by failing to lay an adequate evidentiary record to establish sentencing manipulation. Disla fails to point to the evidence omitted by trial counsel.

> Prior to the sentencing hearing, Disla's attorney
>
> > filed a motion for a downward departure based on . . . the alleged "sentencing manipulation" that occurred when the government waited to arrest Disla until after the second controlled shipment, which involved a greater quantity of narcotics than the first. In support of his sentencing manipulation argument, Disla repeated the arguments made in connection with his drug quantity objection and contended that the government controlled the price and terms of the controlled transactions.

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a defendant must prove more than that the government first solicited him or merely provided the opportunity for the crime. See United States v. Hill, 626 F.2d 1301, 1304 (5 Cir. 1980). The defendant has the initial burden and must make a prima facie showing of government inducement to commit the crime charged and the defendant's lack of predisposition to engage in criminal conduct. Mathews v. United States, supra; United States v. Andrews, 765 F.2d 1491, 1499 (11 Cir. 1985). To meet its burden, the defendant must come forward with more than a scintilla of evidence that the government's conduct created a substantial risk that a person, other than one ready to commit the offense, would in fact commit it. Andrews, 765 F.2d at 1499 (11 Cir. 1985). Only after the defendant meets the initial burden is a jury question on entrapment presented. United States v. Davis, 902 F.2d 860, 866 (11 Cir. 1990); see also United States v. Gates, 967 F.2d 497, 499 (11 Cir. 1992).

> In Disla's pleadings and at the sentencing hearing, the overarching thrust of Disla's arguments in support of . . . his motion for a downward departure was that the government had total control over the reverse-sting operation, setting the terms and providing the money and the drugs, and Disla merely transported the drugs as dictated by the government. As such, Disla argued that the government engaged in sentencing manipulation and that this was a case of "piling on by the government." Disla argued that either the sentencing manipulation or his depression, or a combination of both, warranted a downward departure.

Disla, 358 Fed. Appx. at 137-38. The district court,

> denied Disla's motion for a downward departure. The district court rejected Disla's claim of sentencing manipulation and found Disla failed to establish that he suffered from a diminished capacity as defined by § 5K2.13. The court found that despite his mental health difficulties, Disla appreciated the illegality of his conduct and retained the ability to control his conduct, as the trial evidence showed that he "managed to coordinate a sophisticated drug deal."

Id. at 138. Disla challenged this holding on direct appeal. In affirming his sentence, the Eleventh Circuit held,

> The district court did not abuse its discretion in not giving more weight to Disla's arguments of sentencing manipulation and his diminished mental capacity, particularly given the district court's findings that (1) Disla did not demonstrate that the government's conduct was fundamentally unfair, and (2) Disla's mental health issues did not interfere with his ability to control his actions.

Id. at 140.

Disla fails to point to any evidence to show that counsel was ineffective in arguing sentencing manipulation. As a result, Disla cannot show prejudice. Defense counsel presented a thorough argument on this issue, which the trial court simply rejected. The trial court's decision was reviewed and affirmed by the Eleventh Circuit. Disla is not entitled to relief on this ground.

Under **claim 11**, Disla asserts ineffective assistance of trial counsel for failing to move to dismiss the indictment based upon the government's conduct during the reverse sting operation. In

other words, defense counsel should have moved to dismiss the complaint on the grounds that his due process rights were violated based on the government's outrageous conduct. Disla is arguing that he was lured into agreeing to commit the crimes.

The Eleventh Circuit has recognized that government infiltration of criminal activity is a legitimate and permissible means of investigation and frequently necessitates the government agent's supplying something of value to the criminal. United States v. Puett, 735 F.2d 1331, 1335 (11th Cir. 1984); see also, United States v. Savage, 701 F.2d 867, 869-70 (11th Cir. 1983). "Government involvement in criminal activity constitutes a due process violation only where it violates 'fundamental fairness, shocking to the universal cause of justice.'" United States v. Gianni, 678 F.2d 956, 960 (11th Cir. 1982)(citations omitted). The Eleventh Circuit has repeatedly rejected "challenges to the 'reverse sting' method of police investigation." United States v. Sanchez, 138 F.3d 1410, 1413 (11th Cir. 1998).

The Supreme Court, however, has recognized the possibility that "the conduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431-32 (1973). "One example of such outrageous conduct is when the government instigates the criminal activity, provides the entire means for its execution, and runs the entire operation with only meager assistance from the defendant." Puett, 735 F.2d at 1335.

Notwithstanding, the Eleventh Circuit has found that the conduct of the government did not "approach that demonstrable level of outrageousness the case law suggests would be necessary for

reversal of the[] defendants' convictions" where: (1) federal agents contacted individuals suspected of being involved in home invasions; (2) the defendant were then informed by these individuals that large amounts of drugs could be stolen in a home invasion; (3) the defendants voluntarily agreed to participate; (4) the defendants were involved without any investigation from the government; (5) they had contact with the government only after they had already agreed to participate; and (6) the availability of the defendants, their weapons, and vehicles was not the result of any governmental activity." See Sanchez, 138 F.3d at 1413-14.

In this case, the conduct of the government did not approach a demonstrable level of outrageousness such that the movant's due process rights were violated. At the sentencing hearing, the trial court judge expressly concluded that the government's conduct was not fundamentally unfair. On appeal, after reviewing the entire record and listening to oral arguments, the Eleventh Circuit concluded that the trial court was correct. Had Disla's counsel moved to dismiss the indictment on this ground, it is unlikely that the motion would have been granted. As a result, Disla cannot show prejudice and is not entitled to relief on this ground.

Under **claims 12 and 14**, Disla asserts ineffective assistance of trial counsel by failing to do all in his power to recall defense witness Mark Conrad. Disla fails to explain what more counsel could have done.

As was indicated above,

> The defense also called witness Mark Conrad, who was Disla's former attorney while Disla was on administrative duty, and who helped Disla file discrimination complaints with the EEOC. Conrad's initial testimony, given prior to the court's ruling allowing evidence of retaliation, was almost entirely disallowed by the government's objections on the basis of

> relevance. After Disla testified, Disla's attorney informed the court that he was unable to recall Mark Conrad to the stand because Conrad was unavailable, as he had left town to litigate a trial. Later, after all of the other defense witnesses were called, Disla's counsel again explained to the court that Conrad was not available. Disla's counsel requested that he be allowed to make a phone call to Conrad. The district court stated that it would not grant a continuance to allow the defense to obtain Conrad's testimony.

Disla, 358 Fed. Appx. at 133. On appeal, Disla argued that the trial court erred when it denied trial counsel's motion for a continuance. In response to this argument, the Eleventh Circuit stated the following.

> We also conclude that the district court did not err by denying Disla's request for a continuance to call Mark Conrad as a witness, as Disla did not show that Conrad would be available to testify within a reasonable period of time, and Disla's proffer to the court as to Conrad's testimony demonstrated that it would have been cumulative of the other evidence presented at trial and of marginal benefit to Disla's defense. See United States v. Cross, 928 F.2d 1030, 1048-49 (11th Cir.1991).

Id. at 134.

Counsel cannot be deemed ineffective for failing to secure a witness whose testimony would have been cumulative to other evidence.[8] As a result, Disla fails to establish prejudice and is not entitled to relief on this ground.

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[8]The law is clear that prejudice under Strickland cannot be shown for a failure to introduce cumulative evidence. See, Chandler v. United States, 218 F.3d 1305, 1316 n.20 (11th Cir. 2000)(quoting Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995); Sullivan v. DeLoach, 459 F.3d 1097, 1109 (11th Cir. 2006)(quoting United States v. Guerra, 628 F.2d 410, 413 (5th Cir. 1980)); see also e.g., White v. Mitchell, 431 F.3d 517, 530 (6th Cir. 2005)("The presentation of Dr. Kandiko's findings to the jury would have been cumulative, and therefore, White cannot establish prejudice by relying on this affidavit."), Turner v. Crosby, 339 F.3d 1247, 1279 (11th Cir. 2003)(rejecting ineffective assistance of counsel claim where complained of unintroduced evidence was largely cumulative), Carriger v. Lewis, 971 F.2d 329, 332-34 (9th Cir. 1992)("The failure to raise Dunbar's felony convictions a second time does not amount to ineffective assistance."), Jones v. Smith, 772 F.2d 668, 674 (11th Cir. 1985) (rejecting claims of ineffective assistance for failure to introduce evidence where the same evidence was presented by other witnesses).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-61569-CIV-ZLOCH

EDWIN DISLA,

Petitioner,

vs. **FINAL JUDGMENT**

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon Petitioner Edwin Disla's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). For the reasons expressed in this Court's Order denying said Petition, entered separately, and pursuant to Federal Rule of Civil Procedure 58, it is

ORDERED AND ADJUDGED as follows:

1. Final Judgment be and the same is hereby **ENTERED** in favor of Respondent United States of America and against Petitioner Edwin Disla upon the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) filed herein. Petitioner shall take nothing by this action and said Respondent shall go hence without day; and

2. To the extent not otherwise disposed of herein, all pending

motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of July, 2011.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

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