APPENDIX TABLE OF CONTENTS

App. 1

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 18-10755

FABIO OCHOA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 1:07-cv-22659-KMM,
0:99-cr-06153-KMM-7

(Filed Aug. 18, 2022)

Before WILLIAM PRYOR, Chief Judge, BRASHER, Circuit Judge, and ALTMAN,* District Judge.

---

* Honorable Roy K. Altman, United States District Judge for the Southern District of Florida, sitting by designation.

BRASHER, Circuit Judge:

This appeal requires us to consider whether a criminal defendant's Sixth Amendment right to counsel is violated when multiple attorneys represent him in plea negotiations with the government and one of them labors under a conflict of interest. In 1999, Fabio Ochoa-Vasquez, a Colombian native, was arrested in Colombia on drug trafficking charges and ultimately convicted in federal court. Ochoa now appeals the denial of both his amended 28 U.S.C. § 2255 motion to vacate his convictions and sentence and his subsequent motion to alter or amend the judgment. He claims that one of his pre-extradition attorneys, Joaquin Perez, was ineffective due to a conflict of interest. According to Ochoa, Perez tried to convince him to pay a thirty-million-dollar bribe or kickback as part of a plea agreement, which would redound to the benefit of one of Perez's other clients. But Ochoa was represented by other attorneys, and he does not allege that they were conflicted or otherwise deficient in pursuing legitimate plea agreements on Ochoa's behalf. The district court held that the allegations in Ochoa's motion would not establish a Sixth Amendment violation even if true. After careful consideration and with the benefit of oral argument, we affirm.

I.

In 1999, Ochoa and thirty-one co-defendants were charged with conspiring to possess with the intent to distribute and import five or more kilograms

of cocaine, in violation of 21 U.S.C. §§ 846 and 963, respectively. The charges resulted from a joint investigation into Colombian narcotics trafficking between the Drug Enforcement Administration and Colombian National Police known as "Operation Millennium."

Colombian authorities arrested Ochoa in October 1999. After he was arrested and the United States sought his extradition, Ochoa "vehemently argued that the information" in the extradition affidavits "concerning him was inaccurate and false." He went so far as to circulate a pamphlet to the public entitled "Soy Inocente" (I am innocent).

Soon after his arrest, Ochoa retained attorney Joaquin Perez. Although it is unclear exactly when this representation ended, the record shows it ended sometime in early 2000. While in Colombia, Ochoa also retained attorney Jose Quinon, who represented him "[f]rom the time [he] was charged through the time of his extradition from Colombia." In total, he was represented by "around twenty" lawyers in early 2000. Ochoa was extradited to the United States in September 2001.

Both Perez and Quinon pursued plea agreements on Ochoa's behalf prior to his extradition. On March 1, 2000, Perez met with prosecutors, who suggested the possibility of a global plea deal if Ochoa agreed to cooperate with the government and forego the extradition process. Ochoa contends that Perez also tried to convince him to pay a thirty-million-dollar bribe or kickback as part of the plea negotiations. Quinon separately

pursued plea negotiations sometime between Ochoa's arrest and October 2000; the government offered Ochoa a reduced sentence in exchange for pleading guilty and waiving the formal extradition process. Ultimately, Ochoa rejected all plea offers and was extradited.

After Ochoa was extradited, new lawyers took over his defense. Based on allegations that Perez attempted to facilitate the payment of a bribe or kickback, they filed a motion to dismiss the indictment and to disqualify Perez from representing any co-defendant. After an evidentiary hearing, the district court denied the motion. Ochoa's new lawyers also pursued multiple plea deals on his behalf and secured an offer for a twenty-year sentence in exchange for pleading guilty. Again, Ochoa rejected that offer.

At trial, Ochoa was convicted and sentenced to two concurrent terms of 365 months' imprisonment. We affirmed his conviction, sentence, *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), and the denial of a motion for a new trial based on the Perez allegations, *United States v. Ochoa-Vasquez*, 179 Fed. Appx. 572 (11th Cir. 2006).

In 2008, Ochoa filed a Section 2255 motion to vacate his conviction and sentence. In his motion, Ochoa argued that his first attorney, Perez, had labored under a conflict of interest. Relevant to this appeal, Ochoa claimed that the conflict stemmed from Perez's representation of Nicholas Bergonzoli, a person who had not been charged in the conspiracy but who had aided the

government in its investigation. According to Ochoa, Bergonzoli and Perez tried to convince him to pay thirty million dollars in exchange for a plea agreement as part of a fraudulent scheme that would benefit Bergonzoli. Ochoa alleged that Perez did not pursue a legitimate plea agreement with the government to further the scheme. Ochoa also alleged that he had refused to cooperate with the government and pleaded not guilty solely based on the outlandish price tag attached to the offer. In his motion, Ochoa requested an evidentiary hearing.

The district court denied the motion without an evidentiary hearing. Addressing Ochoa's argument that Perez failed to solicit a legitimate plea deal because he represented Bergonzoli, the district court concluded that this claim was "laden with assumptions and inferences, . . . short on specifics and lack[ing] evidentiary support." The court determined that Ochoa had not established a conflict of interest or adverse effect under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Specifically, the district court reasoned that "Ochoa's other lawyers also tried to negotiate a plea agreement, yet Ochoa would not agree to one."

The district court also denied Ochoa's request for discovery because his amended Section 2255 motion "lack[ed] specific allegations, relying instead on assumptions and conjecture." Based on Ochoa's sustained engagement with the Perez issue at trial, "there [was] no justification for Ochoa's failure to support his request for discovery with specifics."

Ochoa later moved to alter or amend the court's denial under Federal Rule of Civil Procedure 59(e), arguing that: (1) the district court applied the wrong standard of proof, as he needed only to allege—not prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief; and (2) that he had alleged conflicts of interest that rendered Perez's representation constitutionally ineffective, pointing to Perez's failure to negotiate a legitimate plea agreement because of his participation in the kickback scheme. The district court denied the motion. In doing so, the court clarified that, although it had employed language suggesting that Ochoa was required to prove a conflict of interest to secure discovery and an evidentiary hearing, it had set forth the correct standard and properly found that he was entitled to neither.

Ochoa appealed and moved for a certificate of appealability. We granted a certificate of appealability limited to the issue of "[w]hether the district court erred in denying under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), without an evidentiary hearing and without allowing discovery, Ochoa's claim that his attorney failed to pursue a legitimate plea agreement due to a conflict of interest."

II.

We review the denial of a federal habeas petitioner's claim of ineffective assistance of counsel *de novo*. *Chandler v. United States*, 218 F.3d 1305, 1312 (11th Cir. 2000) (en banc).

We review a district court's denial of an evidentiary hearing or request for discovery in a Section 2255 proceeding for abuse of discretion. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014) (evidentiary hearing); *see also Bowers v. U.S. Parole Comm'n, Warden*, 760 F.3d 1177, 1183 (11th Cir. 2014) (discovery). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures[,] . . . or makes findings of fact that are clearly erroneous." *Winthrop-Redin*, 767 F.3d at 1215 (quotation omitted).

III.

As an initial matter, we note that the scope of our review is limited to the issue specified in the certificate of appealability. *See McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). That issue is "[w]hether the district court erred in denying under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), without an evidentiary hearing and without allowing discovery, Ochoa's claim that his attorney failed to pursue a legitimate plea agreement due to a conflict of interest." Specifically, Ochoa's argument that "Perez was ineffective because he delayed in negotiating in order to help Bergonzoli extort Ochoa" and did not pursue a legitimate plea agreement. To the extent Ochoa raises any arguments that fall outside this issue, we do not consider them.

Having defined the scope of our review, we now consider whether the district court erred in denying

Ochoa's conflict of interest claim or abused its discretion in denying Ochoa's requests for discovery and an evidentiary hearing. For the reasons below, we conclude that it did not in either respect.

A. Conflict of Interest

The Sixth Amendment guarantees the right to the assistance of a lawyer who is not laboring under an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To succeed on his conflict-of-interest claim, Ochoa must establish: (1) a conflict of interest that (2) adversely affected Perez's performance. *Herring v. Sec'y, Dept. of Corrs.*, 397 F.3d 1338, 1356-57 (11th Cir. 2005) (citing *Cuyler*, 446 U.S. at 348 and *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002)). To establish an adverse effect, Ochoa must show "some 'plausible alternative defense strategy or tactic that might have been pursued' " but for the alleged conflict—that is, Perez's loyalty to Bergonzoli. *United States v. Williams*, 902 F.3d 1328, 1332-33 (11th Cir. 2018) (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc)); *United States v. Novaton*, 271 F.3d 968, 1011 (11th Cir. 2001). Ochoa is required to show only that the alternative strategy was "a viable alternative," not that it "would necessarily have been successful." *Williams*, 902 F.3d at 1332-1333 (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (1999)).

Ochoa argues that Perez failed to pursue a reasonable plea negotiation because of his loyalty to

Bergonzoli in attempting to extract thirty million dollars from Ochoa in exchange for a plea deal. According to Ochoa, if Perez operated under a conflict of interest that adversely affected Perez's performance, his ineffective-assistance-of-counsel claim would succeed.

We disagree. Even assuming a conflict of interest existed, Ochoa's claim ultimately fails because he does not sufficiently allege that the "conflict adversely affected his representation." *Novaton*, 271 F.3d at 1011. Other attorneys represented Ochoa during and after Perez represented him, so it is not enough to allege that Perez alone operated under a conflict of interest. Because the record establishes that Ochoa was represented by other attorneys who Ochoa does not allege were conflicted, the district court did not err by denying Ochoa's motion.

Although Ochoa criticizes Perez, he does not allege that his other attorneys suffered under a conflict of interest. The Sixth Amendment ensures the right to effective assistance of "*an* attorney." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis added). That is, the Sixth Amendment confers "an affirmative right (the right to effective assistance of counsel at critical proceedings), not a negative right (the right to be completely free from ineffective assistance)." *Logan v. United States*, 910 F.3d 864, 870 (6th Cir. 2018). The Sixth Amendment does not "include the right to receive good advice from every lawyer a criminal defendant consults about his case." *Clark v. Chappell*, 936 F.3d 944, 968-69 (9th Cir. 2019) (quoting *United States v. Martini*, 31 F.3d 781, 782 (9th Cir. 1994)).

We have explained that "an adverse effect resulting from a conflict is not the same thing as prejudice in the run-of-the-mill *Strickland* sense." *Williams*, 902 F.3d at 1335. Nonetheless, to show an adverse effect, a petitioner must still establish that his attorney's conflict denied him the opportunity to pursue a "plausible alternative defense strategy or tactic." *Id.* at 1332 (quoting *Freund*, 165 F.3d at 860). "The right to defend is personal." *Faretta v. California*, 422 U.S. 806, 834 (1975). It is thus not enough that a particular conflicted attorney failed to pursue a strategy; *the defendant* must have lost the opportunity to pursue it.

In light of these principles, we and other courts have recognized that an attorney's conflict does not necessarily violate the Sixth Amendment if the defendant also receives the assistance of conflict-free counsel. In *Novaton*, we assessed whether a defense attorney who was allegedly under investigation by the United States Attorney's Office suffered from a conflict that adversely affected the defendant's trial. 271 F.3d at 1009-10. We noted that the presence of additional conflict-free counsel at trial made it "less likely that [the defendant's] representation was adversely affected by the alleged conflict." *Id.* at 1012 n.11. In *Stoia v. United States*, the Seventh Circuit declined to reverse a conviction because the "defendant [wa]s adequately represented by several lawyers and the defendant's overall representation [wa]s not impaired by any actual conflict." 109 F.3d 392, 398 (7th Cir. 1997). It reasoned that "[t]o hold otherwise would allow defendants represented by multiple lawyers to take two bites at the

apple." *Id.* at 399. Likewise, in *Logan*, the Sixth Circuit considered whether a criminal defendant received effective assistance of counsel at the plea negotiation stage when he was represented by two attorneys, one of whom was constitutionally ineffective. 910 F.3d at 869. There, the court concluded that the defendant's overall representation was not impaired because he was simultaneously counseled by an effective attorney, "who provided all that the Sixth Amendment requires." *Id.* at 872.

Turning to the facts of this appeal, we conclude that Ochoa does not allege sufficient facts to establish that Perez's alleged conflict deprived Ochoa of effective assistance of counsel. *Novaton*, 271 F.3d at 1012 n.11. Perez's representation lasted at most a few months, beginning soon after Ochoa's arrest in October 1999 and ending in early 2000. And for the entirety of that "very limited representation," Ochoa was simultaneously represented by Quinon, whom he does not allege was conflicted.[1] After Perez withdrew, Ochoa was represented through trial by yet more lawyers, who are also not alleged to have been conflicted.

---

[1] In his briefing, Ochoa disputes the timing of Quinon's representation, arguing that it began only after Perez's representation had ended. But he does not point to anything to support this assertion, which is contradicted by the record. Specifically, a witness testified at the pre-trial evidentiary hearing that Quinon represented Ochoa "[f]rom the time [he] was charged through the time of his extradition."

B. Evidentiary Hearing

Because we conclude that Ochoa's claim fails on the merits, we cannot say the district court abused its discretion in denying his request for an evidentiary hearing. A Section 2255 petitioner is entitled to an evidentiary hearing "if he alleges facts that, if true, would entitle him to relief." *Winthrop-Redin*, 767 F.3d at 1216 (cleaned up). "A petitioner need only allege—not prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Id.* (cleaned up). "However, a district court need not hold a hearing if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record." *Id.* (cleaned up); *see also Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) (district court need not conduct an evidentiary hearing if the record conclusively shows petitioner is not entitled to relief).

Ochoa argues that the district court incorrectly required him to prove his conflict of interest claim before granting his request for an evidentiary hearing. We disagree. It is true that the district court used loose language in its first order, suggesting that Ochoa lacked evidentiary support for his assertions. But the district court later clarified that it required only that Ochoa allege facts that, if true, would entitle him to relief. *Winthrop-Redin*, 767 F.3d at 1216. Ochoa's petition does not fail because he lacks evidentiary support for his allegations. It fails because, as explained above, his allegations are insufficient to support his theory that Perez's conflict of interest affected his defense.

C. Discovery

Lastly, Ochoa argues that the district court abused its discretion in denying him discovery. Again, we disagree.

Unlike typical civil litigants, habeas petitioners are "not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Instead, it is within the discretion of the district court to grant discovery upon a showing of good cause. *Id.* at 904. "Good cause is demonstrated where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Arthur v. Allen*, 459 F.3d 1310, 1310-11 (11th Cir. 2006) (internal quotation marks and alterations omitted). In sum, "a habeas case is not a vehicle for a so-called fishing expedition via discovery, in an effort to find evidence to support a claim." *Borden v. Allen*, 646 F.3d 785, 810, n.31 (11th Cir. 2011).

We have held that "good cause for discovery cannot arise from mere speculation" or "pure hypothesis." *Arthur*, 459 F.3d. at 1311. The district court denied Ochoa's request for discovery because his motion "lack[ed] specific allegations, relying instead on assumptions and conjecture." And there was "no justification for Ochoa's failure to support his request for discovery with specifics" because of the significant litigation on this issue at trial.

Ochoa cannot establish good cause for discovery. As explained above, even if Ochoa's specific allegations

could be proven with the aid of discovery, there is no "reason to believe" that he "may . . . be able to demonstrate that he is entitled to relief" because he has not alleged a Sixth Amendment violation. *See Arthur*, 459 F.3d at 1310-11. So, the district court did not abuse its discretion in denying Ochoa's request for discovery on a futile claim.

IV.

The district court is **AFFIRMED**.

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

Case No. 1:07-cv-22659-KMM

FABIO OCHOA,

Petitioner,

v.

UNITED STATES
OF AMERICA,

Respondent. /

ORDER DENYING MOTION TO ALTER OR AMEND

(Filed Dec. 27, 2017)

THIS CAUSE came before the Court upon Petitioner Fabio Ochoa's Motion to Alter or Amend (ECF No. 181), which challenges the Court's denial of Claim VI of Ochoa's Amended § 2255 Motion (the "§ 2255 Motion"). The Government responded in opposition. (ECF No. 182). For the following reasons, the Motion is DENIED.

I. BACKGROUND

Ochoa filed an Amended Motion under 28 U.S.C. § 2255, attacking his conviction on several grounds. (ECF No. 10). This Court denied the § 2255 Motion and, as relevant here, declined to review Ochoa's sixth claim—that Joaquin Perez, counsel for Ochoa during his detainment in Colombia, rendered constitutionally

ineffective assistance due to alleged conflicts of interest—reasoning that the Eleventh Circuit had already denied that claim on direct appeal. (ECF No. 145 at 12). Ochoa appealed from the Court's denial of the § 2255 Motion, and the Eleventh Circuit remanded the matter to this Court to decide Claim VI on the merits. (ECF No. 167).

In a July 2017 Order, this Court adopted Magistrate Judge McAliley's Report and Recommendation ("R&R") and rejected Claim VI on the merits. (ECF No. 180). The Court also declined to issue a Certificate of Appealability ("COA"). (*Id.* at 13).

Ochoa now moves, pursuant to Federal Rule of Civil Procedure 59(e), to alter or amend the July 2017 Order. (ECF No. 181). Ochoa argues that the Court erred in denying discovery and an evidentiary hearing because (1) the Court applied the wrong standard of proof; and (2) he alleged conflicts of interest that rendered Perez's representation constitutionally ineffective. (*Id.* at 1-7). Ochoa also argues that the Court erred in declining to issue an independent COA ruling due to Ochoa's failure to object to the COA recommendation contained in the R&R.[1] (*Id.* at 7-8). The Government opposes the Motion. (ECF No. 182).

---

[1] Additionally, Ochoa invites the Court to review every claim raised in the § 2255 Motion. (ECF No. 181 at 2). This request is misplaced. Ochoa sought to challenge the Court's denial of the § 2255 Motion and the Eleventh Circuit issued a COA only as to Claim VI. (ECF Nos. 165, 167). To the extent that Ochoa raises new arguments, Rule 59(e) is not the appropriate vehicle. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).

II. DISCUSSION

"The only grounds for granting a [Rule 59(e)] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A manifest error is "one that amounts to a wholesale disregard, misapplication, or failure to recognize controlling precedent." *Shuler v. Garrison*, ___ F. App'x ___ No. 17-cv-11287, 2017 WL 6016343, *2 (11th Cir. Dec. 5, 2017) (internal citation omitted). A litigant cannot use a Rule 59(e) motion to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur*, 500 F.3d at 1343 (internal citation omitted).

A. Discovery and Evidentiary Hearing

Ochoa argues that the Court erred by denying discovery and an evidentiary hearing based on Ochoa's failure to prove ineffective assistance when "[t]he law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege—not* prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief." (ECF No. 181 at 1-2 (citing *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasis in original))). It is correct that "Mil deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Although the Court set forth

the correct standard, both the R&R and the July 2017 Order adopting the R&R employ language suggesting that Ochoa was required to prove a conflict of interest to secure discovery and an evidentiary hearing. (ECF Nos. 176, 180). But Ochoa was entitled to neither discovery nor an evidentiary hearing. Indeed, as stated in the R&R, Ochoa failed to allege "specific allegations, relying instead on assumptions and conjecture." (ECF No. 176 at 27).

Nonetheless, Ochoa insists that he alleged constitutionally ineffective assistance based on two specific conflicts of interest: (1) a conflict of interest arising from Ochoa's refusal to participate in a "pay to play" scheme—whereby Perez allegedly encouraged Ochoa to pay the Government in exchange for a favorable plea agreement, thus discouraging Perez from negotiating a favorable plea agreement on Ochoa's behalf and (2) a conflict of interest arising from Perez's alleged representation of Hector Londoño—who later pleaded guilty and testified against Ochoa at trial. (ECF No. 181 at 3-7). Contrary to Ochoa's arguments, the Court properly rejected these claims as speculative.

Ochoa's first claim—that Perez's alleged participation in a "pay to play" scheme created a conflict of interest by discouraging Perez from negotiating a favorable plea agreement—fails to allege a claim of constitutional ineffective assistance. As stated in the R&R, even assuming that Perez's participation in the scheme created a conflict of interest, any adverse effect or prejudice is purely speculative and hinges on conjecture: that Perez could have secured from the

Government a plea agreement that the Court and Ochoa, who maintained innocence throughout trial, would have accepted. (ECF No. 176 at 16-18, 24-25).

Ochoa's second claim—that Perez's alleged representation of Londoño created a conflict of interest because Londoño later testified against Ochoa at trial—also fails to allege a claim of constitutional ineffective assistance. With the benefit of hindsight, Ochoa argues that Perez's advice may have inspired Londoño to testify for the Government at Ochoa's at trial. (ECF No. 181 at 5-6). But as stated in the R&R, "the proper focus, in evaluating whether a conflict of interest had an adverse effect, is on what the petitioner's lawyer did or refrained from doing on the petitioner's behalf because of the alleged conflict." (ECF No. 176 at 20). Moreover, as stated in the R&R, Ochoa failed to allege prejudice given that he did not allege facts plausibly suggesting "that the result of his trial would have been different but for Perez's conduct." (ECF No. 176 at 26). Consequently, Ochoa has failed to identify, as required by Rule 59(e), any manifest error in the Court's denial of discovery and an evidentiary hearing.

B. Certificate of Appealability

Ochoa also argues that the Court erred in declining to issue a COA, contending that the Court was required to issue an independent COA ruling regardless of whether he objected to the R&R on that basis. (ECF No. 181). A district court shall grant a COA if reasonable jurists would find debatable or wrong the district

court's assessment of the constitutional claims. *Dean-Mitchell v. Reese*, 837 F.3d 1107, 1112 (11th Cir. 2016). Here, although the Court's Order does acknowledge Ochoa's failure to object to the COA recommendation contained in the R&R, the Court's COA ruling was independent of that acknowledgment. (ECF No. 180 at 13). In any event, in light of the COA standard, the Court concludes that no COA was warranted.

III. CONCLUSION

For the reasons set forth above, Petitioner's Motion to Alter or Amend (ECF No. 181) is DENIED. No certificate of appealability shall issue. The case shall remain CLOSED. All pending motions, if any, are DENIED AS MOOT. Done and ordered in Chambers at Miami, Florida, this 26th day of December, 2017.

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsdu.uscourts.gov,cn= Kevin Michael Moore
Date: 2017.12.26 10:11:50 - 05'00'

/s/ Kevin Michael Moore
K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

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

Case No. 07-cv-22659-KMM

FABIO OCHOA,

Movant,

v.

UNITED STATES
OF AMERICA,

Defendant. /

ORDER ADOPTING
REPORT AND RECOMMENDATION

(Filed Jul. 26, 2017)

THIS CAUSE came before the Court upon Movant Fabio Ochoa-Vasquez's Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence pursuant to 28 U.S.C. § 2255 ("Amended Motion") (ECF No. 10). This matter was referred to the Honorable Chris M. McAliley, United States Magistrate Judge, who issued a Report (ECF No. 176) recommending that the Court dismiss Ochoa's Amended Motion. Ochoa timely filed Objections to the Report (ECF No. 179). For the reasons that follow, the Court adopts Judge McAliley's Report.

I. BACKGROUND

A. Operation Millennium

On August 26, 1999, a grand jury charged Ochoa in a Superseding Indictment with one count of conspiracy to possess with intent to distribute cocaine and one count of conspiracy to import cocaine. *See* Criminal Case No. 99-6153 (Cr. Dkt. 10). Ochoa was alleged to have engaged in the conspiracies between December 1997 and August 1999. *Id.* Forty-two defendants were ultimately charged in these conspiracies along with Ochoa. See Cr. Dkt. 106.

This case stems from a joint investigation of the United States Drug Enforcement Agency (DEA) and Colombian law enforcement that took place from 1999 to 2000, and was known as "Operation Millennium." *See United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1022 (11th Cir. 2005) ("*Ochoa I*"). During the course of the investigation, agents acquired audio surveillance tapes from wiretaps that documented Ochoa's involvement in the narcotics conspiracies. *Id.* Colombian authorities arrested Ochoa in October of 1999; he was detained in a Colombian prison until early September 2001, when he was extradited to the United States. *See* Cr. Dkt. 537.

Ochoa retained Joaquin Perez as counsel shortly after his arrest. *See* Amended Motion at 113. It is unclear precisely when Perez's representation of Ochoa ended, but it is clear from the record that Perez did not represent Ochoa after his extradition in September of 2001. *See* Cr. Dkt. 1473 at 44. While he was in

Colombia, Ochoa also retained Jose Quinon, who represented Ochoa both before and after his extradition. *See* ECF No. 169-2 at 2; Cr. Dkt. 508, 783.

During the course of Perez's representation of Ochoa, Perez was also representing Nicolas Bergonzoli, who was facing drug trafficking charges in the Southern District of Florida. *See United States v. Nicolas Bergonzoli*, 99-cr-00196-SEITZ ("Bergonzoli Cr. Dkt."). Perez had begun representing Bergonzoli a year before Ochoa in December 1998, and he stayed on as Bergonzoli's counsel for years afterward until the conclusion of his case.

While in Colombian custody, Ochoa was solicited to participate in the Rehabilitation Program of Narcotics Traffickers ("the Program"). *See Ochoa I*, 428 F.3d at 1022; *see also* Amended Motion at 113. The Program was a fraudulent scheme in which DEA informant Baruch Vega "solicited drug traffickers to surrender to the U.S. government by promising to arrange phony cooperation deals." *Ochoa I*, 428 F.3d at 1022. The traffickers were told that as part of the Program, the Government would grant them credit so they could obtain better plea deals from prosecutors if they paid the Government large sums of money and surrendered drugs to U.S. authorities through staged drug busts. *Id.* U.S. authorities would then confiscate the drugs and attribute them to other traffickers; it is unclear whether participants in the Program did in fact obtain more favorable plea bargains. *Id.*

Vega apparently suggested to Ochoa that he pay $30 million and surrender drugs in return for Government leniency. *Id.* at 1023; *see also* Amended Motion at 113. Bergonzoli also encouraged Ochoa to join the Program. Ochoa argues that Perez's simultaneous representation of Ochoa and Bergonzoli under these circumstances created a conflict of interest that deprived Ochoa of the effective assistance of counsel.

Although Perez and Quinon both pursued plea agreements for Ochoa while he was imprisoned in Colombia, Ochoa never accepted an offer. *See* ECF No. 169-2; Cr. Dkt. 1141 at 28-34. Ochoa also refused to accept any plea agreements the Government offered to his trial counsel—in fact, Ochoa was the only Operation Millennium defendant to take his case to trial. *Id.*

B. Hector Londoño

Ochoa's Claim IV also involves Hector Londoño, one of Ochoa's codefendants who ultimately pleaded guilty. Londoño, like Ochoa, had been arrested in Colombia in October 1999 and had been detained in the same Colombian prison until his extradition to the United States. Londoño had retained Jorge Ivan Gomez Ramirez, a Colombian attorney, to represent him upon his arrest in 1999. Soon thereafter, as early as December 1999, Londoño began attempting to secure a deal with the Government in exchange for his cooperation. *See* Cr. Dkt. 1578 at 2, 5-6, 25.

Londoño would later testify at Ochoa's trial. Londoño testified that the only advice he received from

Perez upon their meeting in the Colombian prison on February 25, 2000, was that Perez should "see if [he could] make a deal with the Government" once he arrived in the United States—"cooperate and see what happens in the end." Cr. Dkt. 1578 at 30. Londoño testified that he had already been trying to strike a deal with the Government in exchange for his cooperation. *Id.* at 25, 30. Perez provided an affidavit stating that at this February 2000 meeting, he did not discuss any details of the case with Londoño. *See* ECF No. 169-1 at 2.

Perez Jorge Ivan Gomez Ramirez, a Colombian attorney who represented Londoño for a time, also provided a declaration corroborating that Londoño and Perez met on this date. *See* ECF No. 174-1 at 2. Gomez Ramirez alleges that on this date, Londoño and Ochoa provided Perez with documents regarding Operation Millennium. *Id.* at 3. Gomez Ramirez alleges in his declaration that after the February 2000 meeting Perez continued communicating with Londoño's wife about Londoño's case and represented "that he was going to be Mr. Londoño's defense attorney in the United States." *Id.* at 2-3.

On or about December 19, 2000, Londoño was extradited to the United States, at which point attorney Glenn B. Kritzer entered his appearance as Londoño's attorney. Kritzer would remain Londoño's attorney until the conclusion of his case. On April 19, 2001, Londoño pleaded guilty pursuant to a plea agreement that documented his cooperation with the Government. This cooperation included testifying for the

Government at Ochoa's trial. In exchange for his cooperation, Londoño received a reduced sentence.

C. Ochoa's Criminal Proceedings

Quinon's representation of Ochoa in the United States concluded in April 2002, when Roy Black and Howard Srebnick entered appearances on Ochoa's behalf. Black and Srebnick represented Ochoa through his trial, his sentencing, and his appeal. Prior to the start of Ochoa's trial, Black and Srebnick filed a Motion to Dismiss the Indictment and Suppress Evidence on the basis that the Indictment had been filed in retaliation for Ochoa's refusal to pay a $30 million bribe in order to participate in the program. *See* Cr. Dkt. 987. In the alternative, the Motion to Dismiss requested that the Court suppress certain evidence, unseal certain documents, and disqualify Perez (as well as another attorney) from representing any codefendant, witness, or potential witness due to Perez's alleged involvement in the Program and the alleged conflict of interest resulting from Perez's prior representation of Ochoa and others. Perez intervened in the case for the limited purpose of responding to these claims against him. Following an evidentiary hearing, the Court denied Ochoa's Motion to Dismiss.

During the course of Ochoa's trial, his attorneys filed a motion to unseal the court file in Bergonzoli's criminal case; they argued that they needed to review the file's contents before determining whether to call Bergonzoli as a witness. *See* Bergonzoli Cr. Dkt. at 50.

Perez, as Bergonzoli's counsel, opposed this motion. *Id.* at 53. The Court granted the motion in part, ordering that the file be unsealed with the exception of certain documents that, if unsealed, could endanger Bergonzoli or his family and friends in Colombia. *Id.* at 54.

As noted above, the Government and Ochoa's attorneys had discussed potential plea agreements prior to trial, but Ochoa did not accept one. The Government's evidence at trial included wiretap recordings, documents, and testimony from cooperating witnesses, including Londoño. Bergonzoli did not testify at Ochoa's trial.

After the jury convicted Ochoa of both charges, Ochoa filed a motion for a new trial and a renewed motion to dismiss the Indictment, again on the basis that Perez's representation of Bergonzoli violated his Sixth Amendment right to a fair trial. The Court denied the motions in part because Ochoa "failed to sufficiently allege any facts that point to an actual conflict which would entitle him to relief." *See* Cr. Dkt. 1551 at 2. Ochoa was subsequently sentenced to 365 months in prison. *See* Cr. Dkt. 1562.

D. Ochoa's Habeas Petition and the Eleventh Circuit's Remand

In October 2007, Ochoa timely filed the instant habeas petition pursuant to 18 U.S.C. § 2255. On February 13, 2008, Ochoa filed the operative Amended Motion. In his Amended Motion, Ochoa claims that he was deprived of the effective assistance of Perez's

counsel due to Perez's representation of Bergonzoli and Londoño. *See* ECF No. 10, 112-127 ("Claim IV"). In March 2011, this Court found that the Eleventh Circuit had already disposed of Claim IV on the merits and denied the Amended Motion on that basis. However, upon Ochoa's appeal of the decision, the Eleventh Circuit found that the Court had erred in failing to evaluate the merits of Claim IV and remanded to this Court for further proceedings.

On December 9, 2016, Judge McAliley issued a Report in which she considered the merits of Claim IV. Judge McAliley's Report recommends that (1) Claim IV of Ochoa's Amended Motion be denied and (2) no certificate of appealability be issued.

For the reasons discussed herein, the Court adopts Judge McAliley's Report.

II. LEGAL STANDARD

Section 2255 authorizes a prisoner to move a court to vacate, set aside, or correct his or her 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." 28 U.S.C. § 2255(a).

The Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel "in all criminal prosecutions." U.S. Const. Amend. VI. Sixth

Amendment claims of ineffective assistance of counsel are typically considered under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* standard, a petitioner must demonstrate that (1) his counsel's performance was deficient because it "fell below an objective standard of reasonableness" and (2) the lawyer's deficient performance prejudiced petitioner's defense. *Id.* at 687-88. To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Supreme Court has offered further guidance on how courts should evaluate ineffective assistance of counsel claims that arise from an alleged conflict of interest. The Court held in *Cuyler v. Sullivan* that in such cases, the petitioner "must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. 335, 350 (1980). The Court clarifies that the "actual conflict" and the "adverse effect" factors are to be considered jointly; an actual conflict exists when a conflict adversely affects the counsel's performance. *See Mickens v. Taylor*, 535 U.S. 162, 172, n.5 (2002).

The Eleventh Circuit has determined that a conflict of interest exists where the attorney has "inconsistent interests." *Aguilar-Garcia v. United States*, 517 Fed. Appx. 880, 882 (11th Cir. 2013). This is a fact-specific inquiry that requires specific examples of inconsistent interest, not merely conclusory allegations. *See*

McCorkle v. United States, 325 Fed. Appx. 804, 808 (11th Cir. 2009); *Jean v. United States*, 2011 WL 6202286, at *2 (S.D. Fla. Dec. 5, 2011). To establish that there has been an adverse effect on the petitioner, the petitioner must demonstrate (1) that his attorney "could have pursued a plausible alternative strategy," (2) "that this alternative was reasonable[,]" and (3) that his attorney did not follow the alternative strategy "because it conflicted with the attorney's external loyalties." *See Aguilar-Garcia*, 517 Fed. Appx. at 882 (citation omitted).

A petitioner who fails to meet the *Sullivan* standard may nonetheless still prevail under the *Strickland* standard, as under *Strickland* a petitioner need not establish that there was an actual conflict. The Court considers both standards in evaluating Ochoa's claim.

The Court reviews *de novo* any part of the Magistrate Judge's report that has been properly objected to. Fed. R. Civ. P. 72(b)(3).

III. DISCUSSION

A. Ochoa's Ineffective Assistance of Counsel Claim Fails Under the *Sullivan* Standard

In her Report, Judge McAliley applies the *Sullivan* standard in evaluating three arguments raised by Ochoa in his Amended Motion. First, Ochoa argues that Perez failed to solicit a "legitimate" plea bargain for Ochoa due to his representation of Bergonzoli in

Colombia. Second, Ochoa argues that Perez's representation of Londoño while in Colombia created a conflict of interest. Third, Ochoa argues that Perez's representation of Bergonzoli throughout Ochoa's criminal trial created a conflict that deprived Ochoa of the effective assistance of counsel. Judge McAliley concludes that Ochoa has not established that an actual conflict existed with regard to all three of these scenarios. The Court agrees.

As to Ochoa's first argument, Ochoa claims that Perez "help[ed] his other client [Bergonzoli] attach an unlawful $30 million kickback to any agreement between [Ochoa] and the government." *See* ECF No. 10 at 113-121. Ochoa argues that because Perez was focused on helping Bergonzoli with his scheme, Perez failed to seek a "legitimate" plea agreement from the Government that did not involve a kickback, thereby preventing Ochoa from obtaining a favorable deal.

However, the Court agrees with the Report's finding that Ochoa's evidence of a conflict of interest under these circumstances is insufficient. Ochoa does not offer proof that Perez attempted to aid Bergonzoli with regard to the Program, but rather makes vague and general allegations to hundreds of pages of transcripts. *See* Report at 15 (citing ECF No. 173 at 5). "A petitioner has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation." *See Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001). The Court agrees with Judge McAliley that the transcripts nevertheless do not contain evidence that Perez aided Bergonzoli in

a scheme and damaged Ochoa's chances of striking a plea. Ochoa must do more than raise general allegations of a conflict—he must show "specific instances of inconsistent interests." *Jean v. United States*, 2011 WL 6202286, at *2 (S.D. Fla., Dec. 5, 2011).

Furthermore, even if Ochoa could demonstrate inconsistent interests, there is no evidence that he was adversely affected by Perez's representation of Bergonzoli. The Court agrees with Judge McAliley that Ochoa did not demonstrate the three requirements established in *Aguilar-Garcia.* 517 Fed. Appx. at 882. Ochoa does not explain how Perez might have obtained a more favorable plea agreement on his behalf. In fact, this argument is undercut by the evidence that Ochoa's other lawyers also tried to negotiate a plea agreement, yet Ochoa would not agree to one. *See* ECF No. 169-2 at 3.

The Court also agrees with the Report that Perez's representation of Londoño did not amount to a conflict of interest. There is insufficient evidence to establish that Perez was actually retained by Londoño once he was in the United States. Once again, Ochoa does not identify specific examples of how Perez's representation of Londoño in Columbia resulted in inconsistent interests. Furthermore, as with Perez's representation of Bergonzoli, Ochoa does not demonstrate that he suffered an adverse effect from the Londoño representation. The record shows that Perez continued his attempts to secure Ochoa a plea agreement with the Government even after his February 2000 meeting with Londoño. It is unclear what Perez could have done

that he did not do in the course of his brief representation of Ochoa.

Finally, the Court adopts the Report's findings with regard to Ochoa's third argument that Perez's representation of Bergonzoli during the course of Ochoa's criminal trial created an actual conflict. As the Report explains, the "fundamental flaw" in this argument is that Perez was not Ochoa's lawyer at the time that the events of this alleged conflict of interest occurred. *See* Report at 23. Here, Ochoa's Sixth Amendment claim is based on events in the lead up to and during the course of his trial, when Ochoa was represented by new counsel. By this point in time, Ochoa no longer had a Sixth Amendment right to effective counsel with regard to Perez. *Id.*

For the reasons above, all three of the conflict of interest arguments raised by Ochoa fail under the *Sullivan* analysis.

B. Ochoa's Ineffective Assistance of Counsel Claim Fails Under the *Strickland* Standard

As noted above, the *Strickland* standard does not require that Ochoa establish that Perez had an actual conflict of interest. In addition, the Eleventh Circuit has held that a habeas petitioner raising an ineffective assistance of counsel argument must "carry his burden on both *Strickland* prongs"—he must demonstrate *both* that his counsel's performance was deficient and that he suffered prejudice—"and a court need not

address both prongs if the defendant has made an insufficient showing on one." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). The Court agrees with the Report's finding that Ochoa has failed to establish prejudice and therefore need not evaluate Perez's performance under *Strickland*.

As discussed above, Ochoa claims that Perez's alleged attempts to aid Bergonzoli in convincing Ochoa to join the Program "ruined [Ochoa'] real opportunities for legitimate plea bargaining" and "result[ed] in a lost opportunity to negotiate a plea." *See* Ochoa's Response at 6 (ECF No. 137). In order to show prejudice with regard to plea negotiations, a defendant must establish a reasonable probability that *but for* counsel's ineffectiveness (1) "the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)[,]" (2) "the court would have accepted its terms[,]" and (2) "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 123 S. Ct. 1376, 1385 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1403 (2012).

Ochoa does not point to any evidence to suggest the kind of deal he would have been offered if not for Perez's alleged behavior, nor does the record suggest he would have accepted such a deal. Ochoa continued to maintain his innocence up until the trial and did not accept a deal brought to him while he was represented by different counsel. *See Motion to Dismiss Indictment*

at 62-63 (Cr. Dkt. 987); ECF No. 169-2 ("Sometime in the early months of 2003, prior to trial, attorneys Roy Black and Howard Srebnic, who were the new counsel of record for Defendant Ochoa, met with the prosecution. . . . During one such meeting, an offer was extended calling for Defendant Ochoa to enter a guilty plea in exchange for the recommendation by the United States of a sentence of no more than twenty years. This offer was also rejected by Defendant Ochoa.").

Ochoa also fails to provide evidence that Perez's conversation with Londoño was the cause of Londoño's decision to cooperate against him. However, even if Perez's conversation was the cause, the Court is unconvinced that the jury's guilty verdict depended upon Londoño's testimony. Throughout the trial, the Government provided ample evidence to support Ochoa's conviction, including wiretap recordings, other cooperating witnesses, and documentary evidence. *See* ECF No. 169; *see also Ochoa I*, 428 F.2d at 1022. Ochoa does not meet his burden of demonstrating that he was prejudiced by Perez's interaction with Londoño.

Finally, as previously discussed, Perez's conduct while he was not Ochoa's counsel cannot serve as the basis of a Sixth Amendment claim, under either the *Sullivan* or *Strickland* standard.

C. Ochoa's Discovery and Evidentiary Hearing Requests Are Denied

The Court denies Ochoa's request for further discovery and an evidentiary hearing. A habeas petitioner

"is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, he must establish good cause, which exists where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Vanholten v. United States*, 2016 WL 1170981, at *5 (M.D. Fla., March 25, 2016) (quoting *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006)). Rather than demonstrate that good cause exists to warrant further discovery and an evidentiary hearing, Ochoa merely offers speculation. Furthermore, "a district court need not hold an evidentiary hearing [on an ineffective assistance of counsel claim] if it can be conclusively determined from the record that petitioner was not denied effective assistance of counsel." *See Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir.1999) (citation omitted).

D. Ochoa's Objections

While Ochoa filed Objections (ECF No. 179) to the Report, these Objections amount to reiterations of Ochoa's prior arguments without sufficient support from the record. Although Ochoa once again requests further discovery and an evidentiary hearing, it is clear from the record that Ochoa's ineffective assistance of counsel claim fails on the merits for the reasons discussed above.

E. Certificate of Appealability

In her Report, Judge McAliley determined that based on the record, "Ochoa cannot make [a] substantial showing of a denial of a constitutional right" so as to warrant the issuance of a certificate of appealability pursuant to 18 U.S.C. 2253(c)(2). *See* Report at 28. However, Judge McAliley directed Ochoa to raise any challenges to this finding in his Objections. *Id.* Ochoa did not do so. Accordingly, the Court adopts the Report's finding. No certificate of appealability shall issue in this case.

IV. CONCLUSION

UPON CONSIDERATION of the Amended Motion, the Eleventh Circuit's Remand Order, the Report, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Movant Ochoa's Amended Motion (ECF No. 10) is DENIED. It is further ORDERED AND ADJUDGED that Magistrate Judge McAliley's Report and Recommendation (ECF No. 176) is ADOPTED and that no certificate of appealability shall issue.

The Clerk of Court is instructed to CLOSE THIS CASE. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of July, 2017.

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsdu.uscourts.gov,cn= Kevin Michael Moore
Date: 2017.07.26 14:44:08 - 04'00'

/s/ Kevin Michael Moore
K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-CIV-22659-MOORE/MCALILEY

FABIO OCHOA-VASQUEZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant. /

REPORT AND RECOMMENDATION ON AMENDED MOTION TO VACATE, SET ASIDE, OR CORRECT JUDGMENT AND SENTENCE

(Filed Dec. 9, 2016)

Petitioner, Fabio Ochoa-Vasquez, filed an Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence and Memorandum of Law pursuant to 28 U.S.C. § 2255 ("Amended Motion"). [DE 10]. The Court denied the Amended Motion, and Ochoa appealed that decision to the Eleventh Circuit Court of Appeals. [DE 145, 150]. The Eleventh Circuit granted a Certificate of Appealability on one issue: "[w]hether the district court erred by failing to reach the merits of Ochoa's claim in his 28 U.S.C. § 2255 motion to vacate, that his initially retained counsel, Joaquin Perez, was constitutionally ineffective due to a conflict of interest, based on its finding that the claim was barred from review by this Court's decision on direct appeal." [DE 165]. This issue was set forth in Claim VI of the Amended Motion.

The Eleventh Circuit answered that question in the affirmative, and remanded the matter to this Court to consider the merits of Ochoa's claim that Perez did not provide Ochoa the effective assistance of counsel, as required by the Sixth Amendment, due to a conflict of interest. The Honorable K. Michael Moore referred the Amended Motion to me for a Report and Recommendation on that issue. [DE 172]. The United States filed a Supplemental Memorandum of Law and Ochoa a Reply. [DE 169, 173]. I have thoroughly reviewed the parties' memoranda of law, the relevant portions of the record and the applicable law. For the reasons that follow I recommend that the Court deny Ochoa's claim.

I. Background

The factual and procedural history of this case is extensive and largely summarized in two decisions of the Eleventh Circuit that reviewed Ochoa's conviction: *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005) ("*Ochoa I*") and *United States v. Ochoa-Vasquez*, 179 Fed. Appx. 572 (11th Cir. 2006) ("*Ochoa II*"). I set forth only those facts relevant to this Report and Recommendation.

On August 26, 1999, a grand jury returned a Superseding Indictment that accused Ochoa and 32 other defendants with drug trafficking. Ochoa was charged in two counts, with conspiracy to possess with the intent to distribute cocaine, and with conspiracy to import cocaine. Ochoa was alleged to have engaged in these conspiracies between December 1997 and

August 1999. [CR DE 10].[1] The Court issued a warrant for Ochoa's arrest the same day. [CR DE 37]. The grand jury returned subsequent superseding indictments, the last of which was the Fourth Superseding Indictment filed on November 22, 1999.[CR DE 106]. The Fourth Superseding Indictment (hereafter, "the Indictment") increased the total number of defendants to 43, but brought the same charges against Ochoa.

The Indictment was the result of a joint United States Drug Enforcement Agency (DEA) and Colombian law enforcement investigation, in 1999 and 2000, known as "Operation Millennium." *Ochoa I*, 428 F.3d at 1022. Wiretaps documented Ochoa's involvement in the charged narcotics conspiracies. *Id.* Colombian authorities arrested Ochoa in October 1999 on this Court's warrant, *Id.* and he was extradited to the United States a year later, in early September 2001. [CR DE 537]. Ochoa was held in a Colombian prison from the time of his arrest until his extradition. [DE 10, pp. 2-3].

At some point not long after Ochoa's arrest, Joaquin Perez was retained to represent Ochoa. [DE 10, p. 113]; [DE 169, p. 3].[2] It is unclear precisely when

---

[1] Docket entries for Ochoa's underlying criminal case, *U.S. v. Bernal-Madrigal et al*, 99-06153-KMM, are referred to herein as "CR DE __."

[2] There is no evidence of a formal retainer agreement and it is unclear whether Perez was compensated for his representation of Ochoa or whether Ochoa directly, or someone on his behalf, arranged for Perez' representation. Regardless, Perez has

this representation ended, but his trial counsel stated that it ended in early 2000, [CR DE 1473, p. 44], and it is clear that Perez did not represent Ochoa when he was extradited in early September 2001. While he was in Colombia, Ochoa also retained attorney Jose Quiñon, who represented Ochoa longer than Perez did, both before and after his extradition. [DE 169-2, p. 2]; [CR DE 508, 783].

a. Nicolás Bergonzoli and the Program

Perez' representation of Ochoa occurred at a time when Perez also represented Nicolas Bergonzoli, who had drug trafficking charges pending against him in this District in a different case. *See U.S. v. Nicholas Bergonzoli*, 99-CR-00196-Seitz.[3] Perez entered his appearance as counsel for Bergonzoli a year earlier, in December, 1998, [Bergonzoli CR DE 2, 3] and remained his counsel over a period of years, until the conclusion of Bergonzoli's case.

When he was in Colombian custody, Ochoa was solicited to participate in a fraudulent scheme known as the Rehabilitation Program of Narcotics Traffickers (the "Program"). *Ochoa I*, 428 F.3d at 1022; *see also* [DE 10, p. 113]. The Program was the brainchild of DEA informant Baruch Vega and the Eleventh Circuit described it this way:

---

acknowledged his "very limited representation" of Ochoa. [CR DE 1087, p. 6, n.4].

[3] Citations to that case are to "Bergonzoli CR DE __."

> . . . Vega solicited drug traffickers to surrender to the U.S. government by promising to arrange phony cooperation deals. The traffickers were told that they could join the Program by paying large sums of money and surrendering drugs to U.S. authorities through phony drug busts. The confiscated drugs would then be attributed to other traffickers. The Program's recruits were told that they would receive credit for their "cooperation," enabling them to obtain favorable plea bargains from U.S. prosecutors. It remains unclear whether any of these promises were ever carried out, and the prosecutors in Ochoa's cases disavow any knowledge of Vega's scheme prior to Ochoa's indictment.

Ochoa I, 428 F.3d at 1022.

Vega apparently proposed that Ochoa participate in the Program by paying $30 million and "confiscated" drugs in return for Ochoa receiving some sort of government leniency. *Ochoa I*, 428 F.3d at 1023; [DE 10, p. 113].[4] Bergonzoli promoted Vega's proposal by encouraging Ochoa to join the Program.[5] Ochoa contends that this created a conflict of interest for Perez and caused Perez to not provide Ochoa the effective assistance of counsel to which Ochoa was entitled. To support this

---

[4] The vagueness of this proposal is striking. Ochoa offers no details, such as who was to receive the payment and confiscated drugs, or what type of leniency Ochoa was promised.

[5] Ochoa again lacks specifics, providing no coherent explanation of how and when Bergonzoli promoted the Program, or how and why Bergonzoli would benefit if Ochoa joined.

claim, Ochoa references transcripts of two meetings, that his brother Jorge secretly recorded, in which Ochoa was purportedly solicited, through his brother Jorge, to join the Program. The first meeting, on January 22, 2000, was between Perez and Jorge. [CR DE 989, pp. 421-74, *Transcript of January 22, 2000 meeting*]. The second meeting, on January 29, 2000, was between Jorge, Berganzoli and Perez. [CR DE 989, pp. 476-530; *Transcript of January 29, 2000 meeting*]. Ochoa maintains that these transcripts document Perez' solicitation of Ochoa – on behalf of his other client Berganzoli – to join the Program but, as is explained below, that is not evident from the transcripts. The record is clear, however, that Ochoa declined to join the Program. *Id.* [DE 10, p. 113].

While Ochoa was in Colombian custody, both Perez and Quiñon discussed with the U.S. Government the possibility of Ochoa entering into a plea agreement in which Ochoa might cooperate with the government and possibly waive his right to extradition hearings. [CR DE 1141, pp. 28-34]; [DE 169-2]. Ochoa did not accept any of the plea offers the government made.[6] [DE 169-2]. In the end, Ochoa was the only Operation Millennium defendant who went to trial.[7]

---

[6] This includes plea agreements the government later offered to Ochoa via his trial counsel. [DE 169-2, p. 3].

[7] The indictments against defendants Sepulveda-Rios, Sanchez, Echeverry and Esquiva Sotelo were dismissed for reasons unrelated to a plea agreement. [CR DE 487, 2045, 2167, 2105, 2109].

b. Hector Londoño

Hector Londoño was a codefendant of Ochoa, who ultimately plead guilty. Like Ochoa, he was arrested in Colombia in October 1999 and was detained in the same Colombian prison as was Ochoa, until his extradition. [DE 174-1, pp. 1-2]. At the time of his arrest, Londoño retained a Colombian attorney, Jorge Ivan Gomez Ramirez, to represent him. [DE 174-1 p. 1]; [CR DE 1578, p. 26]. Soon after his arrest, at least as early as December 1999, while still in Colombian custody, Londoño began trying to negotiate a deal with the U.S. Government that included his cooperation. [CR DE 1578, pp. 2, 5-6, 25]. He testified that he began his cooperation by sending communications to the government through his wife. [*Id.* at p. 6].

Ochoa claims that Perez represented Londoño at the same time that Perez represented Ochoa. The only evidence on this subject is the declaration of Jorge Ivan Gomez Ramirez. He wrote that in February 2000 in Colombia, he met with Bergonzoli who said he had hired Perez to represent Londoño *in the United States*, and that he would pay those legal fees. [DE 174-1, p. 1, ¶ 3]. Gomez Ramirez also wrote that on February 25, 2000, he escorted Perez to the Colombian prison to meet Londoño, and the two met for about an hour, after which Perez met with Ochoa in his cell. [DE 174-1, p. 2, ¶4]. Both Perez and Londoño confirm that they met on that date. [CR DE 1578, p. 30]; [DE 169-1]. Londoño testified that the only advice he got from Perez at the meeting was "to see if you can make a deal with the Government. Wait until you get there, cooperate and

see what happens in the end." [CR DE 1578, p. 30]. Londoño testified this was something he was already trying to do. [*Id.* at p. 25 (testifying that in December of 1999 he "start[ed] attempting to negotiate a deal with the prosecutors . . . ")]; [*Id.* at p. 30 ("From the very first moment when I approached the U.S. Government my intention was always to cooperate.")]. In his affidavit Perez writes that at that meeting with Londoño, Perez "did not discuss with [Londoño] any details about the case." [DE 169-1, p. 2].

According to attorney Gomez Ramirez, Perez obtained documents regarding Operation Millennium from Londoño and Ochoa at the February 25, 2000 meetings. [DE 174-1, p. 2, ¶ 5]. No information is provided about the nature of those documents, or what Perez did with them. Gomez Ramirez wrote that after the February meeting Perez communicated with Londoño's wife about Londoño's case and that "Perez continued to convey the understanding that he was *going to be Mr. Londoño's defense attorney in the United States."* [DE 174-1, p. 2-3, ¶5] (emphasis supplied).

Londoño was extradited to the United States on or about December 19, 2000, and at that time attorney Glenn B. Kritzer entered his appearance as Londoño's attorney, and represented him until the conclusion of the case. [CR DE 305, 308, 339]. Londoño pled guilty on April 19, 2001, pursuant to a plea agreement that documented his agreement to cooperate with the Government. [CR DE 407, 408]. As part of his cooperation, Londoño testified for the government at Ochoa's trial, after which the court reduced Londoño's sentence.

c. The criminal proceedings

As mentioned above, Ochoa was extradited to the United States in early September 2001, and had his initial appearance before this Court represented by Mr. Quiñon. That representation ended in April 2002, when Roy Black and Howard Srebnick entered their appearances on his behalf. [CR DE 508, 509, 783, 784]. They were Ochoa's lawyers through his trial and sentencing and on appeal.

Ochoa's trial attorneys filed a Motion to Dismiss the Indictment and Suppress Evidence. In it they argued that the Indictment was filed in retaliation for Ochoa's refusal to pay a $30 million bribe and participate in the Program, and they urged the Court to dismiss the Indictment as a sanction for the government's outrageous misconduct. [CR DE 987]. Alternatively, they asked the Court to suppress certain evidence, unseal certain documents, and disqualify Perez (and another lawyer) from representing any co-defendant, witness or potential witness because of his alleged complicity in promoting the Program and the conflict of interest this created during their earlier representations of Ochoa. [*Id.* at pp. 119-124]. Perez intervened in the case for the limited purpose of addressing the claims raised in that Motion regarding his alleged misconduct and conflict of interest. [CR DE 1087, 1102]. The Court held an evidentiary hearing on that Motion and denied it. [CR DE 1141, 1163, 1339].

In another motion filed after Ochoa's trial had begun, Ochoa's trial attorneys asked the court to unseal

the court file in Bergonzoli's criminal case. [Bergonzoli CR DE 50]. Ochoa argued he needed to review the sealed documents before he could decide whether to call Bergonzoli as a witness at his trial. [*Id.*]. Perez, as Bergonzoli's counsel, opposed this, contending that the files needed to be sealed to protect the safety of Bergonzoli and his family and friends in Colombia. [Bergonzoli CR DE 53]. The Court granted Ochoa's motion in part and ordered that the file be unsealed, with the exception of certain documents. [Bergonzoli CR DE 54]. After Ochoa's trial concluded, the Court unsealed most of the remaining documents. [Bergonzoli CR DE 86].

Before his trial, Ochoa's trial attorneys spoke with government counsel about a possible guilty plea agreement. [DE 169-2, p. 3]. Ochoa did not accept the government's plea offer and he went to trial. [*Id.*]. The Government's evidence included wiretap recordings, documents and the testimony of cooperating witnesses, including Londoño. Bergonzoli did not testify. In May, 2003, the jury found Ochoa guilty of both charges. [CR DE 1442].

Ochoa filed a Consolidated Motion for New Trial and Renewed Motion to Dismiss the Indictment, and again argued that Perez' representation of Bergonzoli violated Ochoa's Sixth Amendment right to conflict free counsel. [CR DE 1473, pp. 43-46]. Ochoa also urged the Court to reconsider his Motion to Dismiss based upon the newly unsealed documents in Bergonzoli's criminal case. [*Id.* at pp. 46-47]. The Court denied Ochoa's Motion, in part because it found that Ochoa

"failed to sufficiently allege any facts that point to an actual conflict which would entitle him to relief."[8] [CR DE 1551, p. 2]. Ochoa was sentenced to serve 365 months imprisonment [CR DE 1562], and he is now serving that sentence.

d. The habeas corpus petition

Ochoa timely filed the section 2255 motion now before the Court.[9] As noted, the Amended Motion included a claim that Ochoa had been deprived the effective assistance of Perez' counsel, because Perez operated under conflicts of interest that arose from his representation of Bergonzoli and Londoño. [DE 10, pp. 112-127, *Claim VI*]. In March, 2011, the Court concluded that the Eleventh Circuit, in *Ochoa I*, had already rejected that claim on the merits, and on that basis denied the claim. [DE 145, p. 12]. As already noted, the Eleventh Circuit disagreed and remanded the claim for this Court's consideration. [DE 167] ("*Ochoa III*").

---

[8] Ochoa appealed the Court's denial of his motion for a new trial to the Eleventh Circuit. *See Ochoa II*, 179 Fed. App'x. 572. As relevant to this Report and Recommendation, the Eleventh Circuit found that Ochoa's conflict of interest claim "would be more appropriately addressed in a § 2255 motion." *Id.* at 575.

[9] Ochoa first filed his motion in October, 2007. [DE 1]. In February, 2008, before the government filed its response, Ochoa filed the Amended Motion, which is addressed in this Report and Recommendation. [DE 10].

II. Legal standards

a. Pleading requirement

"[H]abeas corpus petitions must meet heightened pleading requirements." *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (citations omitted). Unlike other civil actions, where notice pleading is acceptable, a habeas corpus petition must identify evidence that supports the claim. *Id.* at 810. This heightened pleading requirement recognizes that habeas petitions (unlike other civil lawsuits) follow completed criminal actions and that "the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim. . . ." *Id.*

Ochoa had considerable opportunity to gather evidence to support the ineffective assistance of counsel claim now before this Court. He was represented throughout the trial phase (a nearly two year period) by very able counsel, who repeatedly asserted that Ochoa's first lawyer, Perez, had various conflicts of interest that unfairly disadvantaged Ochoa. Ochoa's trial counsel actively developed these claims.

Claim VI of the Amended Motion, however, wholly fails to meet the expected pleading standard. Instead, it is a confusing series of mostly conclusory allegations that are unsupported by evidence. Ochoa makes some effort in his Reply to better explain his claims, and I have fully considered both his Amended Motion and Reply, and the evidence cited therein, in my review of Claim VI.

b. Sixth Amendment right to the effective assistance of counsel

The Sixth Amendment guarantees a criminal defendant the assistance of counsel "in all criminal prosecutions." U.S. CONST. AMEND. VI. This right attaches "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001) (citation omitted). Ochoa was first charged in this case, by Superseding Indictment, on August 26, 1999. [CR DE 10]. He thus had a Sixth Amendment right to the effective assistance of counsel as of that date, and certainly during the brief period when Perez served as his lawyer.[10]

Most often, Sixth Amendment claims of ineffective assistance of counsel are considered under the standard set forth by the Supreme Court in *Strickland v. Washington*. This requires a habeas petitioner to show that: (1) his counsel's performance was deficient because it "fell below an objective standard of reasonableness" and (2) that the lawyer's deficient performance prejudiced the defense. *Strickland*, 466

---

[10] In its response, the Government emphasizes that Ochoa received the effective assistance of counsel from the time of his initial appearance through the conclusion of trial, which is no doubt true. [DE 169]. The government, however, ignores the fact that Ochoa had a Sixth Amendment right to effective counsel while he was in custody in Colombia and briefly represented by Perez. The government does not address whether Ochoa received the effective assistance of Perez' counsel when Perez represented him in Colombia.

U.S. 668, 687-88 (1984). To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

c. When counsel is ineffective because of a conflict of interest

The Supreme Court has modified the standard for claims of ineffective assistance of counsel that arise from a conflict of interest. In *Cuyler v. Sullivan*, the Court held that to establish a Sixth Amendment violation under these circumstances, the petitioner "must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. 335, 350 (1980). The Supreme Court later clarified the *Sullivan* standard in *Mickens v. Taylor*, 535 U.S. 162 (2002), in this way:

> [T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

Mickens, 535 U.S. at 172 n.5. Thus, to establish a constitutional violation under *Sullivan*, a criminal defendant must demonstrate that his attorney had an actual conflict, meaning (1) a conflict of interest that (2) adversely affected his lawyer's performance. *See Herring v. Secretary, Dept. of Corrections*, 397 F.3d

1338, 1357 (11th Cir. 2005) (recognizing that in *Mickens*, the Supreme Court "rephrased the analysis somewhat and stated an 'actual conflict' is what a defendant must establish under *Cuyler* to prove a Sixth Amendment violation.").

A conflict of interest exists when an attorney has "inconsistent interests." *Aguilar-Garcia v. U.S.*, 517 Fed. Appx. 880, 882 (11th Cir. 2013). The inquiry is "fact-specific," *id.*, and the conflict "cannot be merely possible, speculative or hypothetical." *McCorkle v. U.S.*, 325 Fed. Appx. 804, 808 (11th Cir. 2009). It is not enough for a petitioner to make conclusory allegations of a conflict of interest; rather, proof of "specific instances of inconsistent interests or specific impairment of [p]etitioner's interests" is required. *Jean v. U.S.*, No. 09-23134-CIV, 2011 WL 6202286 at *2 (S.D. Fla. Dec. 5, 2011).

To establish an adverse effect, the petitioner must prove three elements: (1) that his attorney "could have pursued a plausible alternative strategy," (2) "that this alternative was reasonable" and (3) that his attorney did not follow the alternative strategy "because it conflicted with the attorney's external loyalties." *Aguilar-Garcia*, 517 Fed. Appx. at 882 (citation omitted). Unlike the standard under *Stickland* which requires proof of actual prejudice, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Sullivan*, 446 U.S. at 349-50.

Ochoa claims that conflicts of interest arose for Perez from his dual representation of Ochoa, Bergonzoli and Londoño in three instances. I first consider those claims under the *Cuyler v. Sullivan* standard, and find that they are without merit.

The *Sullivan* standard is an exception to the rule established in *Strickland*, and a petitioner who fails to establish that his lawyer had an actual conflict of interest under *Sullivan* may still be entitled to relief if he can show that his counsel was ineffective within the meaning of *Strickland.*[11] I therefore consider whether Ochoa's three claims satisfy the *Strickland* standard, and find that they do not.

For the reasons explained below, I conclude that Ochoa has failed to prove a constitutional violation under the *Sullivan* and *Strickland* standards.

III. First claim: because of his representation of Bergonzoli in Colombia, Perez failed to solicit a "legitimate" plea bargain for Ochoa

Ochoa's first argument focuses entirely on events that occurred in Colombia during Perez' brief representation of Ochoa. Specifically, Ochoa contends that Perez was conflicted at that time by his concurrent representation of Bergonzoli, and because of Perez' loyalty

---

[11] *See e.g.*, *U.S. v. Orantes-Arriaga*, 213 F.3d 644, at *1 (9th Cir. 2000) ("If the defendant cannot prove an actual conflict [under *Sullivan*], the defendant must meet the performance and prejudice prongs of the *Strickland* test.").

to Bergonzoli he did not solicit the government to offer Ochoa what he calls a "legitimate" plea bargain. [DE 10 at pp. 113-121]. This claim is laden with assumptions and inferences, is short on specifics and lacks evidentiary support.

Although Ochoa does not state this so clearly, he appears to complain that Bergonzoli worked in concert with Vega to try to shake down Ochoa for $30 million and convince Ochoa that this was the price tag for any plea agreement with the U.S. government. Ochoa claims Perez "help[ed] his other client [i.e., Bergonzoli] attach an unlawful $30 million kick back to any agreement between [Ochoa] and the government." [*Id.* at p. 120]. Ochoa further claims that because Perez was intent on Bergonzoli succeeding in this scheme, Perez did not actively solicit from the government a plea agreement for Ochoa that did not involve the shakedown, and thus was hamstrung from securing a favorable plea agreement for Ochoa.[12]

[12] Ochoa also makes this conclusory assertion: that Perez did not "attempt[ ] to obtain a legitimate plea bargain for [Ochoa] in order to help his client Bergonzoli get cooperation credit with the government for Fabio Ochoa's surrender and cooperation." [DE 10, p. 120]. Ochoa never explains how Bergonzoli was in a position to persuade Ochoa to surrender and cooperate, or how the government would supposedly credit Bergonzoli for Ochoa's cooperation. He also provides no evidence to support this statement.

a. No proof of a conflict of interest

As noted, an attorney has a conflict of interest when he has "inconsistent interests." *Aguilar-Garcia.*, 517 Fed. Appx. at 882. Ochoa must show this with proof of "specific instances of inconsistent interests." *Jean*, 2011 WL 6202286 at *2. He has not done so.

Ochoa cites the transcript of the hearing on Ochoa's motion to dismiss the Indictment as support for this claim, but that transcript offers no proof that Perez tried to help Bergonzoli promote the Program. [*See* DE 10, p. 120, citing DE CR 1132, p. 77]. Ochoa also references the transcripts of tape recorded meetings that his brother Jorge had with Perez and others, while Ochoa was in Colombian custody. He makes a general citation to hundreds of pages of transcripts and states they "speak for themselves." [DE 173, p. 5].[13] It is Ochoa's job to tell the Court *where* in those transcripts is proof of Perez' complicity in Bergonzoli's scheme, but he has not done this. *See Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) ("A petitioner has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation.").

The only recorded meetings that Ochoa specifically references are the January 22, 2000 meeting between Jorge and Perez, and the January 29, 2000 meeting between Jorge, Bergonzoli, Perez and others.

---

[13] These transcripts were filed with the Court in the underlying criminal case, in support of Ochoa's Motion to Dismiss the Indictment. [CR DE 989].

[DE 10, pp. 115-16]. Ochoa again does not identify where in those transcripts is support for his claim. The Court has nonetheless reviewed those transcripts and finds that they do not show that Perez assisted Bergonzoli in his efforts to promote the Program. In fact, Perez repeatedly told Jorge that Ochoa could not buy his way out of his legal problems, and that Ochoa's best option would be to enter into a cooperation agreement with the government. [*See* CR DE 989, pp. 421-473].[14]

Ochoa has provided this Court with no evidence that Perez sought to help Bergonzoli solicit Ochoa to join the Program. He thus fails to satisfy the first element of an actual conflict, that Perez had inconsistent interests because of his representation of Bergonzoli.

b. No proof of adverse effect

Ochoa also fails to show that Perez' alleged conflict of interest had an adverse effect on his representation of Ochoa. As mentioned above, to prove an adverse effect Ochoa must show that (1) Perez could have

---

[14] For example, during that conversation, Perez says he told Vega "with money and with that amount, it is not feasible", and Perez told Jorge to "forget about [it] even if you had the $30 million." [CR DE 989, p. 438]. Perez emphasized to Jorge that "the solution has to be more of a judicial and political combination" and it was not "a matter of money." [*Id.* at pp. 439-441]. Perez also emphasized that he was not suggesting Ochoa could buy his way out of the situation. Perez told Jorge that "I want you to understand, because I don't come here . . . to give . . . [the impression] that something is going to be bought, that doesn't work like that, because if it is like that, I don't want you to even think that I'm here to suggest that to you." [*Id.* at 451].

pursued a plausible alternative strategy, (2) this alternative was reasonable and (3) the alternative strategy was not followed because it conflicted with Perez' external loyalties. *Aguilar-Garcia*, 517 Fed. Appx. at 882.

Ochoa does not clearly explain what alternative strategy Perez could have pursued but did not because of his alleged conflict. Ochoa may be arguing that Perez could have convinced the government to offer Ochoa a more desirable plea bargain, but he never explains how Perez might have accomplished this. The evidence shows that Perez did speak with government counsel about the possibility of Ochoa entering into an agreement that would resolve all pending prosecutions of him. One of the lead prosecutors, Theresa Van Vliet, testified (at the 2003 hearing on Ochoa's Motion to Dismiss the Indictment) that she and Perez discussed – at Perez' urging – the possibility of a global plea agreement for Ochoa.[15] [CR DE 1141, pp. 28-34, 44-45]. Van Vliet also testified that she had "absolutely no reason to believe" that Vega's scheme played any role in her plea discussions with Perez. [CR DE 1141, p. 31].[16] Ochoa acknowledges that these discussions took place and assumes that such an agreement, with terms to his liking, was his to be had, but for Perez' alleged

---

[15] At that time, Ochoa had other indictments pending against him in the Southern District of Florida and elsewhere in the United States and they discussed the possibility of a guilty plea that would resolve all those charges. [CR DE 1141, p. 31].

[16] In fact, it was never shown that the government lawyers knew of the Program, or Vega's and other's promotion of it. *See Ochoa I*, 428 F.3d at 1022.

conflict. [*Id.* at p. 119-120]. He offers no evidence to support this.

Ochoa also offers no proof of the second element: that it was reasonable to expect that Perez might have secured a plea agreement to his liking. Rather than provide evidence, Ochoa makes a passing reference to the plea agreements of other defendants, and theorizes that "but for the conflicted and improper representation of Perez," he "could have received the same type of plea deal that other defendants with major involvement in the case received." [DE 173, pp. 6-7]. Once again, we have only this conclusory assertion based on pure speculation. Ochoa does not identify those codefendants, provide any information about the terms of their agreements or show that the government considered Ochoa comparable to those codefendants. Simply because a plea bargain was offered to a co-defendant does not mean the government would have made the same offer to Ochoa.

Moreover, Ochoa's other lawyer at the time of Perez' representation, Joaquin Quiñon, tried and failed to negotiate a plea bargain that Ochoa would accept, [DE 169-2, p. 2], and Ochoa does not suggest Quiñon was somehow compromised in this regard. And later, Ochoa's trial counsel attempted to secure a plea bargain which Ochoa again rejected. [*Id.* at p. 3]. Throughout this time Ochoa steadfastly maintained his innocence, and the Court is left to speculate as to the terms of an agreement the government would have offered that Ochoa would have accepted. As for the last element, as already explained, Ochoa offers no

evidence that Perez did not pursue a reasonable alternative plea bargaining strategy because of his loyalty to Bergonzoli.

On this record, it is clear that Ochoa has not established that Perez' representation of Bergonzoli in Colombia created a conflict of interest that adversely affected his performance as Ochoa's lawyer.

IV. Second claim: Perez' representation of Hector Londoño in Colombia created a conflict of interest

Ochoa next contends that at the same time he represented Ochoa in Colombia Perez also represented Hector Londoño, which created a conflict of interest for Perez. [DE 10, p. 121]. There are a number of reasons why Ochoa has failed to show that Perez was ineffective as his counsel due to this alleged conflict of interest.

First, and most fundamentally, Ochoa has not presented evidence that Perez in fact represented Londoño. At most we have the declaration of Gomez Ramirez, Londoño's Colombian attorney, that Bergonzoli told him that he had hired, or would hire, Perez to represent Ochoa in the United States. [DE 174-1, p. 1, ¶3; pp. 2-3, ¶ 5]. Neither Londoño nor Perez confirms that Perez was ever retained, and it was Glen Kritzer who appeared as Londoño's counsel when he arrived in the United States. Evidence of the February 25, 2000, meeting between Londoño and Perez at the Colombian prison, and the fact that at that time Londoño gave

Perez some unidentified documents for an unspecified purpose, does not establish this Perez was his attorney then.

Assuming, for the purpose of this analysis, that Perez was Londoño's lawyer in February, 2000, Ochoa has not shown that this caused Perez to have inconsistent interests; the first element of proof that Perez had an actual conflict of interest. Notably, Ochoa's argument regarding Londoño is quite brief. [*See* DE 10, pp. 121-22 (*Amended Motion*); DE 173, p. 3-5 (*Reply*)]. In it Ochoa never identifies Perez' inconsistent interests; he simply concludes that his and Londoño's interests were "directly and materially adverse." [DE 10 at p. 121]. This conclusory statement, untethered to evidence, proves nothing.

If we move forward, however, and once again assume that Ochoa and Londoño had inconsistent interests in February, 2000, we confront the next element Ochoa must show: that this had an adverse effect upon Perez' representation of Ochoa. Ochoa's complaint appears to be that Perez advised Londoño that it would be in his interest to try to work out a plea agreement with the government that included his cooperation and that Londoño did so, after arriving in this country and while represented by a different attorney (Glen Kritzer). [DE 10, p. 126]. Unfortunately for Ochoa, Londoño's cooperation included his testifying for the government at Ochoa's trial.

Ochoa's argument misses the mark because he focuses on what Perez did (or should not have done) for

Londoño. The proper focus, in evaluating whether a conflict of interest had an adverse effect, is on what the petitioner's lawyer did or refrained from doing *on the petitioner 's behalf* because of the alleged conflict.

Ochoa has not identified what Perez should have done for Ochoa that he did not do, because of his supposed representation of Londoño. To the extent that Ochoa complains that Perez did not do all he could to get Ochoa an acceptable plea agreement, there is no evidence that Perez' representation of Londoño (if there was one) adversely effected his representation of Ochoa. The record shows the contrary: that Perez continued his efforts to secure a plea bargain for Ochoa even after his February, 2000 meeting with Londoño.[17] As for the efficacy of those discussions, Ochoa does not suggest, much less provide evidence, that Perez' advice to Londoño in any way hampered the negotiations between the government and Perez regarding a plea agreement for Ochoa. There simply is no evidence that Perez' advice to Londoño limited Perez' ability to engage in effective plea bargaining for Ochoa.

In sum, Ochoa has not pointed to a single instance where Perez could have pursued a reasonable alternative strategy for Ochoa but did not because of his representation of Londoño. Having failed to do this, Ochoa has not shown that Perez' representation of Ochoa was adversely effected by his concurrent representation of

---

[17] *See* [CR DE 1141, pp. 28-31] (AUSA Van Vliet testified that she and Perez discussed a global plea agreement for Ochoa in March 2000).

Londoño. Ochoa's claim that Perez had an actual conflict of interest that arose from his alleged representation of Londoño is without merit.

V. The third claim: Perez' Representation of Bergonzoli During Ochoa's Criminal Trial deprived Ochoa of the effective assistance of counsel

Ochoa next claims that actions Perez took as Bergonzoli's lawyer, in two instances long *after* Perez represented Ochoa, deprived Ochoa of his Sixth Amendment right to the effective assistance of counsel.

As already noted, Perez represented Bergonzoli for a period of years in the criminal prosecution of Bergonzoli in this District. *United States v. Bergonzoli*, 99-CR-00196-SEITZ. After Bergonzoli had been sentenced, and at a point when Ochoa was preparing for his own trial, Ochoa's trial counsel filed a Petition for Writ of Habeas Corpus Ad Testificandum that asked the Court to order the Marshals Service to transport a number of individuals who were in Bureau of Prisons custody, including Bergonzoli, to this District so that they could testify as witnesses at both the hearing on Ochoa's Motion to Dismiss the Indictment, and later at Ochoa's trial. [CR DE 1048]. The Court issued the writ and Bergonzoli was brought to the Federal Detention Center (FDC) in Miami. [CR DE 1054]. In May of 2003, several months later, and shortly before Ochoa's trial began, Perez filed a motion on behalf of Bergonzoli, asking that Bergonzoli be released from the writ and allowed

to return to his designated prison. [CR DE 1341]. Perez wrote that Bergonzoli had not been called as a witness at the hearing on the Motion to Dismiss as Ochoa had represented he would be, and that it appeared that neither party would call Bergonzoli as a witness at Ochoa's trial, and that, for security reasons, Bergonzoli had been periodically housed in the Special Housing Unit (SHU) at the FDC Miami, a condition presumably not imposed at his designated prison. Ochoa never filed an opposition to Perez' motion, nor did the Court enter an order granting or denying that motion.

The second act by Perez that forms the basis of this claim also took place in 2003. While Ochoa's trial was underway, his trial counsel filed a motion in Bergonzoli's case, asking the court to unseal that file so that Ochoa's counsel could review it as part of its assessment whether to call Bergonzoli as a trial witness. [Bergonzoli CR DE 50]. Perez filed a response on behalf of Bergonzoli, opposing the motion and arguing that the file should remain under seal for the safety of Bergonzoli, his family and others. [Bergonzoli CR DE 53, p. 2]. The Court granted Ochoa's motion in part and ordered that the file be unsealed, with the exception of certain documents. [Bergonzoli CR DE 54]. After Ochoa's trial concluded, the Court unsealed most of the remaining documents. [Bergonzoli CR DE 86].

In the Amended Motion now before this Court, Ochoa contends that these actions by Perez in 2003 deprived Ochoa of his Sixth Amendment right to the effective assistance of counsel, because Perez was representing Bergonzoli's interests in a manner that

conflicted with Ochoa's interests. The fundamental flaw in this claim is that Perez was not Ochoa's lawyer at the time of this alleged conflict of interest. The Sixth Amendment guarantees that while an attorney represents a criminal defendant he or she must provide effective representation of that client. It does not extend to the behavior of that lawyer after his or her representation has concluded. Ochoa certainly has not cited any authority that suggests otherwise, and this Court knows of none.[18]

As the Supreme Court noted in *Strickland*, when a court decides whether a defendant's lawyer was constitutionally ineffective, it must judge "the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" 466 U.S. 668, 690 (emphasis supplied). At the time of Perez' 2003 conduct, he was not Ochoa's

---

[18] In contrast to Ochoa's claim, courts have recognized Sixth Amendment claims that arise from a conflict of interest caused by successive representation. *See Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir. 1999); *see also Mickens v. Taylor*, 535 U.S. 162, 176 (2001) (leaving open the question whether successive representation cases are decided under the *Strickland* or the *Sullivan* standard). Those circumstances, however, are entirely different than what Ochoa complains of here. There, the criminal defendant (turned habeas petitioner) complains that his attorney – *while acting as his lawyer* – was severely compromised in that representation because of the lawyer's loyalty to a *former* client. In contrast, Ochoa complains that someone who was *no longer his lawyer* was acting in a way contrary to Ochoa's interests. This may have been an ethics violation by Perez, but it cannot be the basis of a Sixth Amendment claim because Perez was not Ochoa's lawyer at the time.

counsel, nor had he been for years. This claim must be denied.

VI. Ochoa Has Not Established Ineffective Assistance of Counsel Under *Strickland v. Washington*

Although Ochoa has not established that Perez had an actual conflict of interest, he could prevail if he could show that Perez' conduct amounted to the ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*. As noted earlier, *Strickland* requires that Ochoa show that: (1) Perez' performance was deficient because it "fell below an objective standard of reasonableness" and (2) Ochoa suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. 668, 687-88 (1984). To establish prejudice within the meaning of *Strickland*, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A habeas petitioner claiming ineffective assistance of counsel must carry his burden on both *Strickland* prongs, and a court need not address both prongs if the defendant has made an insufficient showing on one." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). It is very clear that Ochoa cannot satisfy the prejudice prong of *Strickland*, as I explain below. It thus is unnecessary to evaluate whether Perez' performance was deficient.

a. Perez' concurrent representation of Bergonzoli and Ochoa

As noted earlier, Ochoa claims that while in Colombia Perez sought to help Bergonzoli convince Ochoa to join the Program, which "ruined [Ochoa's] real opportunities for legitimate plea bargaining" and "result[ed] in a lost opportunity to negotiate a plea." [DE 173, p. 6]. To establish prejudice caused by the ineffective assistance of counsel in the plea process, the defendant must show a reasonable probability that but for counsel's ineffectiveness: (1) "the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "the court would have accepted its terms" and (3) "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 123 S. Ct. 1376, 1385 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1403 (2012). Ochoa does not offer evidence that might prove any of these elements.

Ochoa does not identify the terms of the plea agreement he claims the prosecution would have offered him had Perez not been conflicted by his representation of Bergonzoli, nor has he given the Court any reason to believe he would have accepted this unknown agreement. Ochoa offers only the broad assertion that the government would have entered into the same plea agreements it offered his co-defendants. Ochoa had some forty co-defendants, and he leaves the

Court to guess which of those plea agreements he thinks Perez could have persuaded the government to extend to him. Ochoa also gives the Court no reason to believe that he would have accepted such a plea deal, a proposition that stands in contrast to Ochoa's pretrial insistence of his innocence,[19] and Ochoa's rejection of all plea offers made to his conflict-free counsel.[20]

In sum, the Court has no evidence that Ochoa was prejudiced by Perez' joint representation of Bergonzoli and Ochoa and that claim fails under a *Strickland* analysis.

b. Perez' concurrent representation of Londoño and Ochoa

Ochoa complains that Perez' advice to Londoño, to try to work out a plea agreement that involved his cooperation, "negatively impact[ed]" Ochoa because "Londoño testified at trial against [Ochoa] as an instrumental government witness." [DE 10, p. 126-27]. Ochoa has not shown that the result of his trial would have been different but for Perez' conduct and therefore he has not established the prejudice element of *Strickland.* Londoño testified that by the time he met with Perez, he was already trying to negotiate a plea deal and cooperate with the government. [CR DE 1578, pp. 25, 30]. There simply is no evidence that Perez'

---

[19] *See e.g.* [CR DE 987, *Motion to Dismiss Indictment*, at pp. 62-63].

[20] [DE 169-2].

conversation with Londoño caused him to cooperate against Ochoa.

Ochoa also ignores the fact that the prosecution relied on much more than Londoño's testimony to establish Ochoa's guilt, to include wiretap recordings, other cooperating witnesses and documentary evidence. [DE 169, p. 15, n. 7]; *see also Ochoa I*, 428 F.2d at 1022. He assumes that the jury's verdict rested on Londoño's testimony but offers no evidence that this is true.

On this record Ochoa has not shown that he was prejudiced as a result of Perez' advice to Londoño.

c. Perez' representation of Bergonzoli after Perez ceased representing Ochoa

Lastly, Ochoa complains that he suffered prejudice as a result of Perez' representation of Bergonzoli in seeking to quash the Writ of Habeas Corpus Ad Testificandum and opposing Ochoa's motion to unseal documents in Bergonzoli's separate criminal case. [DE 10, p. 116-18]. For the reasons explained above, Perez' conduct when he was not Ochoa's counsel cannot be the basis of a Sixth Amendment claim.

VII. Discovery is Not Warranted

Ochoa has requested permission to conduct discovery in an effort to support his claims. [DE 173, pp. 4-5, 16]. A habeas petitioner "is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*,

520 U.S. 899, 904 (1997). Rather, he must establish good cause, which exists "where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Vanholten v. United States*, No. 3:15-cv-79-Orl-37MCR, 2016 WL 1170981, *5 (M.D. Fla. March 25, 2016) (quoting *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006)). "[A] habeas case is not a vehicle for a so-called fishing expedition via discovery, in an effort to find evidence to support a claim." *Borden*, 646 F.3d at 810, n. 31.

The Amended Motion lacks specific allegations, relying instead on assumptions and conjecture. Ochoa has not identified the discovery he reasonably believes would lead to evidence that supports his claim. And, as noted, Ochoa's claim that Perez operated under a conflict of interest is not new; it is an issue that he repeatedly raised at the trial level. This far down the road there is no justification for Ochoa's failure to support his request for discovery with specifics. The Eleventh Circuit is clear that "good cause for discovery cannot arise from mere speculation." *Arthur*, 459 F.3d at 1311. Ochoa has not demonstrated good cause for conducting discovery on Claim VI of the Amended Motion.

VIII. An Evidentiary Hearing is Not Warranted

Ochoa has asked the Court to hold an evidentiary hearing. This is not warranted because the record conclusively shows that Ochoa is not entitled to relief. *See* 28 U.S.C. §2255(b); *see also See Smith v. Singletary*, 170

F.3d 1051, 1054 (11th Cir.1999) (citation omitted) ("A district court, however, need not hold an evidentiary hearing [on an ineffective assistance of counsel claim] if it can be conclusively determined from the record that petitioner was not denied effective assistance of counsel.").

IX. Certificate of Appealability

Title 28 U.S.C. section 2253 provides that a certificate of appealability must issue before an appeal may be taken of the denial of a section 2255 petition. 28 U.S.C. § 2253(c)(1)(B). Either the District Court, or the Court of Appeals, may issue such a certificate, but only if the petitioner has "made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). Where a habeas petition is denied on the merits, this standard requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based on this record, Ochoa cannot make this substantial showing of the denial of a constitutional right.

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Ochoa should make any argument he may wish to make regarding the issuance of a certificate of appealability during the objection period for this Report and Recommendation.

X. Recommendation

For the forgoing reasons, I RECOMMEND that Claim VI of Ochoa's Amended Motion to Vacate, Set Aside, or Correct his Judgment and Sentence, filed pursuant to 28 U.S.C. § 2255 [DE 10], be **DENIED** and that a certificate of appealability be **DENIED** upon entry of the Court's final order.

XI. Objections

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable K. Michael Moore, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in chambers at Miami, Florida, this 9th day of December, 2016.

/s/ Chris McAliley
CHRIS McALILEY
UNITED STATES
MAGISTRATE JUDGE

Copies to:
The Honorable K. Michael Moore
All counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-15620
Non-Argument Calendar

D.C. Docket Nos. 1:07-cv-22659-KMM,
0:99-cr-06153-KMM-7

FABIO OCHOA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(June 24, 2014)

Before PRYOR, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

Fabio Ochoa appeals the district court's denial of his 28 U.S.C. §2255 motion to vacate, set aside, or correct his judgment and his 365-month total sentence following jury convictions for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1) and 846, and conspiracy to import 5 kilograms or more of cocaine into the United States, in violation of 21 U.S.C. §§952 and 963. On appeal, Ochoa contends that the district court erred when it did not reach the merits of Ochoa's ineffective assistance of counsel/conflict of interest §2255 claim because the merits resolution of a related issue, which was decided on direct appeal, did not resolve the "totality" of Ochoa's §2255 claim.

"In a Section 2255 proceeding, we review legal issues de novo and factual findings under a clear error standard." Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (quotation omitted). "We review de novo the district court's application of the law of the case doctrine." Alphamed, Inc. v. B. Braun Med., Inc., 367 F.3d 1280, 1285 (11th Cir. 2004). An appellant granted a certificate of appealability ("COA") on one issue cannot simply brief other issues as he desires in an attempt to force both us and his opponent to address them. Hodges v. Att'y Gen. State of Fla., 506 F.3d 1337, 1340-42 (11th Cir. 2007). COA orders specifying the issues that will be considered at the merits stage of an appeal are generally treated as controlling absent rare circumstances, such as where it is unclear which issues will be addressed on the merits or the parties have

briefed the issue at our direction. See Hodges, 506 F.3d at 1340-41 (refusing to apply 11th Cir. R. 27-1(g) to COA order because it would effectively repeal 28 U.S.C. §2253(c)(3)'s requirement that a COA specify the issues that will be considered at the merits stage of the appeal). We have explained, "It is one thing for an appellate court in an unusual case to be persuaded during its consideration of the merits of a granted issue to expand the COA to include a related issue and to request supplemental briefing on that previously excluded issue. It is another thing for an appellant to simply ignore the COA order and brief any issue he pleases. We recognize the former practice and condemn the latter." Hodges, 506 F.3d at 134142.

As a preliminary matter, since both a single judge and a two-member panel from our Court rejected a COA on the issues on which Ochoa requests, again on appeal, an expansion of his granted COA, we strike all of Ochoa's arguments not covered under the COA. See Hodges, 506 F.3d at 1340-42. Thus, the only issue in this appeal is set forth in the COA issued by this Court on October 18, 2012, to-wit:

> Whether the district court erred by failing to reach the merits of Ochoa's claim in his 28 U.S.C. §2255 motion to vacate, that his initially retained counsel, Joaquin Perez, was constitutionally ineffective due to a conflict of interest, based on its finding that the claim was barred from review by this Court's decision on direct appeal.

We will not generally consider claims of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim or develop a factual record. United States v. Patterson, 595 F.3d 1324, 1328 (11th Cir. 2010). The preferred means for deciding a claim of ineffective assistance of counsel is through a 28 U.S.C. §2255 motion even if the record contains some indication of deficiencies in counsel's performance. Id. at 1328-29 (citing Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 1694 (2003)). We will, however, consider those claims on direct appeal if the record is sufficiently developed. Id. at 1328.

The Supreme Court has established that a previous federal determination of a claim on collateral review is controlling in a subsequent round of review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Sanders v. United States, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077 (1963). Sound judicial practice provides that a court generally adheres to a decision in a prior appeal in the case unless one of three "exceptional circumstances" exists: the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. Outside the Box Innovations, LLC v. Travel Caddy, Inc., 695 F.3d 1285, 1301-02 (11th Cir. 2012).

The Supreme Court has recognized that the Sanders bar to relitigation on collateral review extends to claims that were determined on direct review. See Davis v. United States, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303 (1974). We have similarly held that, at least where there has been no intervening change in controlling law, a claim or issue that was decided against a defendant on direct appeal may not be the basis for relief in a §2255 proceeding. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012), cert. denied, 133 S.Ct. 1740 (2013). "While law of the case preclusion is limited to those issues previously decided, the doctrine does operate to encompass issues decided by necessary implication as well as those decided explicitly." Luckey v. Miller, 929 F.2d 618, 621 (11th Cir. 1991).

"A rejected claim does not merit rehearing on a different, but previously available, legal theory." United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). The Supreme Court has explained that a "ground" for collateral relief is "a sufficient legal basis for granting the relief," and identical grounds may often be proved by different factual allegations. Sanders, 373 U.S. at 16, 83 S.Ct. at 1077. The Supreme Court cautioned, "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." Id.

We conclude that the district court erred in holding that Ochoa's ineffective assistance of counsel claim based upon Perez' alleged conflict of interest was previously denied on the merits in United States v. Ochoa-Vasquez, 428 F.3d 1015 (11th Cir. 2005) (Ochoa I). In

United States v. Ochoa-Vasquez, 179 Fed.Appx. 572, 2006 WL 68792 (11th Cir. 2006) (Ochoa II), in considering Ochoa's motion for new trial based on newly discovered evidence, we construed his claim that his former counsel violated his Sixth Amendment rights by operating under conflict of interest as essentially setting forth an ineffective assistance of counsel claim. We held: "We conclude the record below is not sufficiently developed to evaluate Ochoa's ineffective assistance of counsel claim at this time. Thus, the claim would be more appropriately addressed in a §2255 motion." We agree. At most, Ochoa I denied only that part of Ochoa's ineffective assistance of counsel claim that involved Perez' representation of Bergonzoli with respect to a specific matter (i.e., Perez' opposition to Ochoa's attempt to unseal documents in Bergonzoli's case). Ochoa I denied that claim only on the basis of the record then before it.

We conclude that a more thorough and refined analysis of Ochoa's more comprehensive ineffective assistance of counsel claim in this §2255 proceeding is necessary, and that the district court is best situated to conduct that analysis in the first instance. Accordingly, the judgment of the district court is

VACATED AND REMANDED.

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

Case No. 07-22659-MOORE/GARBER

FABIO OCHOA,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent. /

ORDER DENYING MOVANT'S MOTION TO ALTER JUDGMENT PURSUANT TO RULE 59(e)

(Filed Sep. 28, 2011)

THIS CAUSE came before the Court upon Movant's Motion to Alter Judgment Pursuant to Rule 59(e) (ECF No. 146). The Untied States filed a Response (ECF No. 147). Movant filed a Reply (ECF No. 148).

UPON CONSIDERATION of the Motion, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

After three years of litigation and dozens of pleadings, Fabio Ochoa ("Ochoa") requests that the Court amend several orders issued in the course of this habeas proceeding. "The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest

errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (citations omitted).

Ochoa first moves the Court to alter the judgment with respect to various discovery orders issued by Magistrate Judge Garber throughout this litigation. Specifically, he objects to the February 23, 2009, Order Denying Motion for Leave to Conduct Discovery (ECF No. 64); the November 6, 2009, Order Denying Motions to Preserve Testimony (ECF No. 114); and the October 2, 2009, Order Striking Supplement Filed by Fabio Ochoa (ECF No. 102); and the November 6, 2009, Order Denying Ochoa's Motion for Reconsideration on Order Striking Supplement (ECF No. 113). Additionally, he is challenging this Court's April 9, 2009 Order Denying Appeal of Magistrate Judge Order Denying Motion for Reconsideration of Order Denying Movant's Motion to Supplement (ECF No. 133). With respect to these motions, the present motion is untimely. See Fed. R. Civ. P. 59(e). Ochoa should have moved to alter or amend these judgments within twenty-eight days after they were entered.

Ochoa also moves to alter or amend this Court's Order Denying Movant's Motion to Vacate (ECF No. 145). Ochoa then regurgitates all of his previously litigated arguments. He has presented no new evidence nor has he revealed any manifest errors of law or fact – he merely disagrees with this Court's conclusions. To the extent he raises any new arguments, he may not

do so in a Rule 59(e) motion. Stone v. Wall, 135 F.3d 1438, 1442 (11th Cir. 1998) ("The purpose of a Rule 59(e) motion is not to raise an argument that was previously available, but not pressed.").

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Movant's Motion to Alter Judgment Pursuant to Rule 59(e) (ECF No. 146) is DENIED. This case shall remain CLOSED. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of September, 2011.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Counsel of record

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

Case No. 07-22659-MOORE/GARBER

FABIO OCHOA,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent. /

ORDER DENYING
MOVANT'S MOTION TO VACATE

(Filed Mar. 24, 2011)

THIS CAUSE came before the Court upon Movant's Amended Motion to Vacate, Set Aside and/or Correct Judgment and Sentence (ECF No. 10). This Motion is now fully briefed.

UPON CONSIDERATION of the Motion, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND[1]

On August 26, 1999, Movant Fabio Ochoa ("Ochoa") was named in a superceding indictment. See Superceding Indictment (CR ECF No. 10).[2] After Ochoa was extradited from Colombia, a jury found him guilty of two counts of this indictment: conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and conspiracy to import five kilograms or more of cocaine into the U.S., in violation of 21 U.S.C. §§ 952 and 963.

On August 26, 2003, the Court sentenced Ochoa to 365 months in prison and five years of supervised release. (CR ECF Nos. 1562, 1581). Ochoa appealed. The Eleventh Circuit upheld the conviction and sentence but reversed with respect to several rulings relating to access to sealed documents. Ochoa then moved the district court for a new trial based on new evidence. The motion was denied, and this denial was also appealed. The Eleventh Circuit affirmed the trial court's decision.

Ochoa now files his Amended Motion pursuant to 28 U.S.C. § 2255, alleging seven claims for relief: (1) he is entitled to a new trial because of the Government's knowing use of false testimony and withholding of material evidence (Claim I); (2) his appellate counsel was

---

[1] The facts surrounding this case have already been discussed at length elsewhere, see United States v. Ochoa-Vasquez, 428 F.3d 1015 (11th Cir. 2005), and will not be repeated here except to the degree relevant to specific claims.

[2] CR-ECF numbers refer to Case No. 99-06153-CR-KMM.

ineffective for failing to argue that the Government had no jurisdiction over Ochoa (Claim II); (3) his trial counsel was ineffective for failing to argue that the Government had not shown an essential element of the charged crimes (Count III); (4) his appellate counsel was ineffective for failing to raise a Federal Rules of Evidence 404(B)/403 claim (Claim IV); (5) the Government lied while presenting grand jury testimony (Claim V); (6) his trial counsel suffered from conflicts of interest (Claim VI); and (7) he is entitled to resentencing (Claim VII). Each of these claims will be addressed in turn.

II. **RECANTED TESTIMONY** (Claim I)

Ochoa's first claim relates to the recantation of co-conspirator Alejandro Bernal ("Bernal"), who testified against Ochoa at trial.

A. Background

Bernal was one of four co-conspirators who testified as to Ochoa's involvement in a conspiracy to import and sell cocaine. He testified pursuant to a plea agreement, in which the Government stated it would make a motion on Bernal's behalf recommending that his sentence be reduced and that Bernal be granted certain immigration benefits.

Several years after Ochoa's conviction and sentence, Bernal partially recanted his trial testimony in a letter dated May 28, 2007 to an assistant U.S.

attorney. He stated that, in exchange for testifying, the Government had made several promises beyond those contained in his plea agreement. These promises included definite sentencing reductions, immigration benefits for his family, and protection for property of his in Columbia. On September 20, 2007, Bernal appeared to admit the contents of the first letter were fabricated, stating "I have acted erroneously, under much pressure, financial and family problems and with Olivia." On December 9, 2007, Bernal renewed his recantation and stated several other promises that were made to him, including an "earnest" offer by a member of the Government that Bernal come live with his family after the trial. He also stated that Government prosecutors pressured Bernal to falsely state that he saw the wiretaps that were used to record Ochoa and other conspiracy members.[3]

B. Law Governing Recantations

"[R]ecantation evidence should be 'looked upon with the utmost suspicion." Castillo v. Ercole, 2009 WL 1492182, at *6 (S.D.N.Y. May 27, 2009) (quoting Ortega v. Duncan, 333 F.3d 102, 107 (2d Cir. 2003)). This is especially so where the recantation stands "alone, uncorroborated, and unsupported." Summers v. Dretke, 431 F.3d 861, 872 (5th Cir. 2005). As the Eighth Circuit has explained:

---

[3] Ochoa does not make clear what significance attaches to whether Bernal saw the recorded wiretaps other than to suggest that Bernal's statement to that effect was false.

> It is easy to understand why this should be so. The trial is the main event in the criminal process. The witnesses are there, they are sworn, they are subject to cross-examination, and the jury determines whether to believe them. The stability and finality of verdicts would be greatly disturbed if courts were too ready to entertain testimony from witnesses who have changed their minds, or who claim to have lied at the trial.

United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997). "The majority of . . . circuits which have addressed this question . . . have found that it is within the district court's discretion to decide new trial motions based on recanted testimony without a hearing." United States v. Provost, 969 F.2d 617, 620 (8th Cir. 1992) (collecting cases from First, Second and Fifth Circuits); United States v. Pearson, 203 F.3d 1243, 1274-75 (10th Cir. 2000) (same). "In making the preliminary credibility determination, the question is not whether the district judge believes the recantation, but how likely the district judge thinks that a jury at a second trial would be to believe it." United States v. Papajohn, 212 F.3d 1112, 1117-18 (8th Cir. 2000) (abrogated on other grounds by Crawford v. Washington, 541 U.S. 36 (2004)); Grey Bear, 116 F.3d at 350 (same).

Typically, "[f] or newly discovered evidence to justify a new trial, the evidence must be material and not merely cumulative or impeaching, and must be such that it will probably produce an acquittal." United States v. Diaz, 190 F.3d 1247, 1255 (11th Cir. 1999). However, where potentially credible allegations exist

suggesting that the Government knowingly used false testimony, a defendant's burden is lightened and the standard is "whether it is reasonably likely that the truth would have produced a different verdict." United States v. Anton, 603 F.2d 566, 570 (5th Cir. 1979) (citing Giglio v. United States, 405 U.S. 150 (1972)). Where this false testimony involves withheld impeachment evidence "[t]he focus of inquiry is whether disclosure of this information would undermine his credibility so as to introduce an element of reasonable doubt." Id.

C. Analysis

Even assuming that Giglio's standard applies to Bernal's recantation, no hearing or new trial is necessary for two independent reasons. First, no reasonable juror would credit the recantation as true. Few kinds of new evidence are less trustworthy than a recanted recantation. See Maize v. Wainwright, 421 F.2d 151, 152 (5th Cir. 1969) ("[W]hen a witness recants the recantation and then recants the re-recantation, a Trial Judge neither needs nor must credit him. The District Judge was clearly correct in denying the petition without a hearing."). This is especially so where, as here, the self-stated purpose of the "recanting" letters was to obtain benefits allegedly owed to Bernal by the Government. Thus, Bernal has significant incentives to fabricate the contents of the recantations. Indeed, he brought a meritless pro se claim to compel the Government to fulfill

the alleged promises.[4] Further, the recantation itself is incredible. See United States v. Leibowitz, 919 F.2d 482, 483 (7th Cir. 1990) (recantation affidavits are not worthy of belief where they contain fantastic assertions). For example, Bernal's recantation contains allegations that a prosecutor earnestly invited Bernal to live with him after the trial was over. Similarly, the suggestion that the Government would undergo an intense lobbying effort to knowingly make Bernal perjure himself by stating he saw the hidden wiretaps is nonsensical. The veracity of the wiretaps were not challenged by Ochoa's defense and the genuineness of Ochoa's voice on the wiretaps was confirmed by several sources. Tactically, the Government encouraging perjury to add cumulative evidence to support an uncontested point is absurd. Simply stated, the recantation letters are worthless as new evidence.[5]

Second, even assuming Bernal's letters were credible, Bernal's claim still would fail. As in Antone, the jury here was already apprised that Bernal had significant self-interest in testifying against Ochoa. Most

---

[4] The Eleventh Circuit denied this claim. United States v. Bernal-Madrigal, 346 F. App'x 397 (11th Cir. 2009).

[5] Ochoa points to several correspondences from the Government suggesting that they were assisting Bernal and his family in ways that went beyond the language of the plea agreement. This hardly corroborates the recantation when considering that Bernal testified in a high profile criminal trial involving a drug cartel known for violence. Thus, the Government had legitimate reasons to protect the safety and well-being of Bernal and his family, including fulfilling nonlegal ethical duties and encouraging future potential cooperators to come forward.

significantly, the jury was aware that the Government had promised Bernal that it would request Bernal's time in prison be reduced. This promise already created such great self-interest to testify that any additional self-interest in protecting property or obtaining immigration benefits for his family would be cumulative. Similarly, in light of overwhelming uncontested evidence that the wiretap recordings were authentic, even if Bernal lied while testifying about seeing the wiretaps, no juror could reasonably find based on this evidence that Ochoa was innocent. Cumulatively, the recantation evidence was not reasonably likely to sway a juror in Ochoa's favor, given the overwhelming amount of separate evidence of guilt, including testimony from three other co-conspirators, documentary evidence, and audio and videotape recordings. In fact, Bernal himself still maintains that Ochoa was guilty of narcotics trafficking.

In sum, Ochoa's first claim lacks merit and must be dismissed.

III. INEFFECTIVE ASSISTANCE OF COUNSEL (Claims II, III, IV and VII)

Ochoa's second and third claims allege that his appellate counsel was ineffective in failing to raise on direct appeal issues related to Ochoa's lack of intent to import drugs into the United States. Ochoa argues that the Government did not prove Ochoa's intent. Thus, the Government failed to show jurisdiction (Claim II) and failed to prove an essential element of

its charged offenses (Claim III).[6] Additionally, he claims that his appellate counsel should have raised the issue of the admittance into evidence of information regarding Ochoa's criminal background (Claim IV) and should have raised claims of Booker violations (Claim VII).

Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under Strickland. Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009). Defendants usually must bear the danger of their attorneys committing mistakes. "Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." Murray v. Carrier, 477 U.S. 478, 492 (1986).

Under the Supreme Court's Strickland decision, ineffective assistance of counsel is only established if the defendant can prove:

> two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

[6] Ochoa's third claim is framed as ineffective assistance of trial counsel. Because we find this claim was adequately preserved by trial counsel's Rule 29 argument related to jurisdiction, we address this as an alleged failure of appellate counsel. In a footnote, Ochoa argues that his trial counsel was also ineffective for failing to develop the record further with respect to these claims. This claim is without merit as Ochoa has made no showing that the outcome would have been different had the record been developed further.

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. . . .
>
> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland v. Washington, 466 U.S. 668, 687-88 (1984); see also Shere v. Secretary, Fla. Dep't of Corr., 537 F.3d 1304, 1310 (11th Cir. 2008) ("Defendant may establish ineffective assistance of appellate counsel by showing: (1) appellate counsel's performance was deficient, and

(2) but for counsel's deficient performance defendant would have prevailed on appeal.").

"[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288 (2000). It is "possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. Id. at 288; see Heath v. Jones, 941 F.2d 1126, 1130-31 (11th Cir. 1991) ("[E]ffective advocates 'winnow out' weaker arguments even though the weaker arguments may be meritorious.") (citing Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Counsel need not "cloud what she deemed to be more persuasive arguments." Eagle v. Linahan, 279 F.3d 926, 937 (11th Cir. 2001). This is so because:

> Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Barnes, 463 U.S. at 752 (quoting Justice Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951)).

In the present action, Ochoa has failed to show that his appellate counsel's performance fell below an objective standard of reasonableness. Counsel filed a 63 page initial brief containing seven different claims, including a First Amendment claim relating to access to sealed records, a claim regarding the use of an anonymous jury and a Batson challenge. Appellate counsel also intervened in an appeal in a related case, received an amicus brief by the ACLU of Florida in the primary appeal, and later brought a second appeal based on newly discovered evidence. Thus, Ochoa must show that his prior counsel was constitutionally ineffective by the failure to bring a particular claim that was "clearly" more meritorious than the claims brought. No such showing has been made. On appeal, his counsel successfully won his First Amendment claim to unseal documents, and the anonymous jury and Batson challenges were considered meritorious by a dissenting judge. This strongly suggests that Ochoa's counsel did a highly competent job of selecting potentially meritorious issues and in litigating those issues. See Dunkins v. Thigpen, 854 F.2d 394, 400 (11th Cir. 1988) (finding no ineffective assistance where counsel "performed admirably in formulating and pursuing petitioner's defense strategy at trial and on appeal"); Philmore, 575 F.3d at 1265 ("Appellate counsel's failure to challenge [a] decision under a different legal theory cannot be considered deficient performance, especially given that

counsel raised eleven other enumerations of error in a one-hundred page brief."). Further, counsel could reasonably decide not to include claims based on Ochoa's intent given evidence Ochoa did intend to import cocaine into the United States. Bernal[7] testified that a co-conspirator, Armando Valencia, transported a 8,671 kilo load of cocaine to the United States. (CR-ECF No. 1573, at 80-81, 83). He testified further that Ochoa had invested in this load. Id. Another co-conspirator testified that Ochoa was paid $150,000 in U.S. currency for his share in this load. (CR-ECF No. 1415 at 30-33). Ochoa's suggestion that he was unaware that the drugs he owned would be sent by a co-conspirator to the United States would have to overcome evidence showing that he was an experienced high-level drug dealer with a significant investment in this shipment. Thus, even assuming Ochoa's counsel erroneously failed to raise appeals based on Ochoa's lack of intent, counsel's decision to focus on other claims did not make his representation constitutionally infirm. Murray v. Carrier, 477 U.S. 478, 486-87 (1986) ("the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it," does not show ineffective assistance); White v. State of Fla., Dept. of Corr., 939 F.2d 912, 914 (11th Cir. 1991) (error not obvious where it was "undiscovered by several attorneys and judges for approximately five years").

---

[7] To the extent Ochoa's arguments are based on Bernal's recantation of this testimony, his claim is denied for the credibility reasons stated in Section II.

Ochoa's remaining ineffective assistance claims are even weaker. With respect to the admission of Ochoa's past criminal record, the trial court's decision would have been reviewed for abuse of discretion, and reversal under this standard was unlikely given that the evidence was only admitted to show intent or because the evidence was inextricably intertwined with the charged offenses. Further, the jury was provided with a limiting instruction to only use this evidence appropriately. Thus, it is highly doubtful that the Eleventh Circuit would have reversed on these grounds.

Similarly, an appeal based on Booker v. United States, 543 U.S. 220 (2005), would have virtually no chance of success. This claim would have been reviewed for plain error, which requires a defendant to show an "(1) error, (2) that is plain, and (3) that affects substantial rights," and that "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005) (citation omitted). Under the third prong, the defendant must show that the error has "affected substantial rights, which almost always requires that the error must have affected the outcome of the district court proceedings." Id. (citation and punctuation omitted). Here, Ochoa points to no evidence suggesting that his sentence would have been lower under an advisory, as opposed to mandatory, sentencing regime. Thus, it would have been exceedingly difficult for his appellate counsel to show the third prong was met. Therefore, Ochoa cannot show his

appellate counsel was ineffective for failing to raise this claim.[8]

In sum, Ochoa has failed to show that his appellate counsel performed deficiently, and therefore the first Strickland prong is not met. Where no ineffective assistance is shown, this Court may not review the actual merits of the claims appellate counsel failed to bring. Philmore, 575 F.3d at 1265. Thus, claims two, three, four and seven must be dismissed.

IV. GRAND JURY TESTIMONY

Ochoa claims that the Government improperly lied during grand jury proceedings. Where the Government makes factual errors before a grand jury, but a petit jury later finds the accused guilty beyond a reasonable doubt, the grand jury errors are deemed harmless. See United States v. Mechanik, 475 U.S. 66, 71 (1986). The exception to this rule is where a prosecutor knowingly presents false evidence to a grand jury. Id. at 70. Here, at most, Ochoa has pointed to factual inaccuracies and has not presented any evidence suggesting that the Government knew that it was presenting false testimony. Thus, claim five must be dismissed.

---

[8] To the extent that Ochoa's sentencing argument is based on the rule of specialty, it is barred from collateral review. See Burke v. United States, 152 F.3d 1329 (11th Cir. 1998).

V. CONFLICT OF INTEREST

Ochoa claims that one of his attorneys provided ineffective assistance of counsel because he labored under a conflict of interest. This claim was previously denied on direct appeal. Ochoa-Vasquez, 428 F.3d 1015. Ochoa has made no showing of newly discovered evidence that would change the outcome of the Eleventh Circuit's prior decision. Thus, claim six must be dismissed.

VI. CONCLUSION

For the foregoing reasons, it is ORDERED AND ADJUDGED that Ochoa's Amended Motion to Vacate (ECF No. 10) is DENIED. The Clerk of the Court is instructed to CLOSE this case. All pending motions not otherwise rule upon are denied as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of March, 2011.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10755-CC

FABIO OCHOA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(Filed Oct. 18, 2022)

BEFORE: WILLIAM PRYOR, Chief Judge, BRASHER, Circuit Judge, and ALTMAN,* District Judge.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Fabio Ochoa-Vasquez is DENIED.

---

* Honorable Roy K. Altman, United States District Judge for the Southern District of Florida, sitting by designation.