App. No. ________

In The

Supreme Court of the United States

Fabio Ochoa,

Petitioner,

v.

United States of America,

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

1. Petitioner Fabio Ochoa respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for thirty days to February 15, 2023. The court of appeals issued its opinion on August 18, 2022. App. A, *infra*. Petitioner timely filed petition for rehearing on September 8, 2022. App. B, *infra*. The court of appeals denied Petitioner's motion for rehearing on October 18, 2022. App. C, *infra*. Absent an extension of time, the petition would be due on January 16, 2023. Petitioner is filing this Application at least ten days before the due date. *See* S.Ct. R. 13-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

2. Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit based on substantial questions relating to that court's resolution of conflicts of interest in counsel's plea-stage representation of petitioner. The Eleventh Circuit affirmed denial of a 28 U.S.C. § 2255 evidentiary hearing, despite evidence that counsel intentionally failed to pursue a favorable plea agreement and caused a crucial lapse in petitioner's ability to resolve the case by plea, where counsel, in collusion with another of counsel's clients, sought to convince petitioner to pay enormous sums of money ($30,000,000) to join co-defendants in what proved to be a fraudulent pay-to-plead scheme and failed to address other plea alternatives with petitioner. The Eleventh Circuit's categorical ruling that because petitioner had retained additional counsel to address specific litigation matters in the criminal case (i.e., counsel who did not participate in plea discussions or plea representation with petitioner until much later in the case), petitioner could not show that conflict of interest affected the totality of the relevant representation and thus petitioner could not maintain a claim as to his plea counsel's conflicts of interest.

3. The Eleventh Circuit's decision is in conflict with the decisions of other Circuits which apply an individualized appraisal of the impact of each of multiple counsel in a case. Unlike the Eleventh Circuit, other courts recognize that where counsel play different roles, conflicted counsel's ineffectiveness is not automatically cured by the existence of other counsel. These issues may warrant granting a writ of certiorari and will require substantial legal research and review by the undersigned, including as to extent of circuit conflicts. Due to case-related and other reasons, additional time is necessary and warranted for counsel to research the decisional conflicts, and prepare a clear, concise, and

comprehensive petition for certiorari for the Court's review..

4. The press of other matters makes the submission of the petition difficult absent an extension. Counsel has been required to devote considerable time over the past several weeks to preparation for the January 17, 2023 specially-set trial in *United States v. Alexander*, S.D. Fla. No. 21-cr-60253-KMM, a multi-defendant health care fraud conspiracy prosecution involving still ongoing discovery and motion practice issues. Counsel is also required to file appellate briefs in multiple criminal appeals in the January 5–26, 2023 period (Eleventh Circuit Nos. 19-13238, 21-13832, 21-14133, 21-14301, 22-11995, 22-12225, and 22-12315).

5. The forthcoming petition is likely to be granted in light of, among other things, the need to clarify the right to conflict-free plea counsel in the context of representation by multiple counsel.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended thirty days to and including February 15, 2023.

Respectfully submitted,

/s/ Richard C. Klugh

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January 2023

[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

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

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.

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

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,

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[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."

Ochoa was represented through trial by yet more lawyers, who are also not alleged to have been conflicted.

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**.

No. 18-10755-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FABIO OCHOA-VASQUEZ,

Movant/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.

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

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PETITION FOR REHEARING BY APPELLANT FABIO OCHOA-VASQUEZ

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Fabio Ochoa-Vasquez v. United States
Case No. 18-10755-C

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Aldazabal, Mauricio

Alexander, Glenn

American Civil Liberties Union of Florida, Inc.

Bergendahl, John

Bergonzoli, Nicholas

Black, Roy

Blue, John

Bowen, Dawn

Cardena, Carlos

Castiblanco, Jaime

Docobo, Richard

Dominguez, Humberto

Ferrer, Wifredo A.

Fabio Ochoa v. United States, Case No. 18-10755-C
Certificate of Interested Persons (Continued)

Forman, Daniel

Gonzalez, Manuel

Gregorie, Richard

Jimenez, Marcos Daniel

Keefer, William A.

Klugh, Richard C.

Lewis, Guy A.

Lewis, Neal R.

Londoño, Hector Mario

Marshall, Randall C.

Matters, Michael

McLaughlin, James A.

Mendez, Armando

Ochoa, Freddy Ivan

Perdomo, Sergio

Perez, Joaquin

Perczek, Jackie

Ramsey, Rachael

PETITION FOR REHEARING

REHEARING IS WARRANTED BECAUSE THE CONFLICT OF INTEREST SUFFERED BY COUNSEL HANDLING PLEA NEGOTIATIONS FROM LATE 1999 THROUGH FEBRUARY 2000 WAS NOT ABATED BY LATER EFFORTS OF ADDITIONAL COUNSEL THAT WERE DIRECTED TO SHOWING GOVERNMENT MISCONDUCT, RATHER THAN NEGOTIATING A PLEA.

Appellant respectfully seeks rehearing of this Court's decision, *see* Opinion attached as Appendix A, affirming the district court's denial of appellant's requests for discovery and an evidentiary hearing in support of his 28 U.S.C. § 2255 motion alleging the conflict of interest of plea negotiation counsel, Joaquin Perez. This Court concluded that the conflict of interest of only one of multiple defense attorneys in a case is insufficient in this context and stated:

> 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.

Opinion at 9.

Two principal reasons support rehearing. First, the record does not conclusively show simultaneity of multiple counsels' representation of appellant in the critical early stage of appellant's case (late 1999 and early 2000) when a favorable

plea agreement was available, and the Court should therefore reconsider any reliance on a former prosecutor's conclusory affidavit asserting that attorney Jose Quinon was hired and first appeared as counsel for appellant *as soon as charges were filed* against appellant. *See* Opinion at 11 n.1. Second, the Court should reconsider its reliance on case law regarding the curing of single-attorney-conflict prejudice by multiple-counsel representation, where such cases deal with counsel who have taken on the formal and significant role of counsel of record who assume responsibility for the defendant's representation in a criminal case. *See* Opinion at 9–11 (citing *United States v. Novaton*, 271 F.3d 968, 1011 (11th Cir. 2001); *United States v. Logan*, 910 F.3d 864, 870 (6th Cir. 2018); *United States v. Stoia*, 109 F.3d 392, 398 (7th Cir. 1997)). Appellant submits that the cited decisions, which deal with attorneys who actually take on the responsibility of being counsel of record in a criminal case, with all the associated obligations involved—including the obligation to advise a defendant regarding plea options, *see Logan*, 910 F.3d at 869—are not applicable in this case of pre-extradition representation where the defendant is not yet before the criminal-case court and counsel have not agreed to undertake the role of counsel in the criminal case.

In appellant's case, because he was litigating in two countries, with his primary Colombian counsel addressing the extradition, and with attorney Quinon helping *that* effort by working to show prosecutors the fundamental errors in their extradition

application as well as related government misconduct, it simply is not the case that there was a shared responsibility of counsel in the criminal case going beyond the limited matters for which each attorney was hired. Unlike attorneys appearing as counsel in a criminal case, as in *Novaton*, *Stoia*, and *Logan*, an attorney (such as Quinon) hired to fight an extradition has no obligation to advise a defendant regarding a plea, investigate plea options, consult with other counsel looking into plea options, or to take on *any* other representational responsibility. The fact that attorney Quinon did not take on any plea negotiation role until *long after* Perez had finished his conflicted work as an attorney retained to pursue a plea is not merely permissible, but fully understandable in the context of a pre-extradition case where neither Quinon nor Perez was even licensed to practice law in the extraditing country. The task-based hiring of those two attorneys prior to commencement of the criminal case in the United States was valid and the attorney's limited, different roles fell well outside the ordinary-criminal-case representation context of *Novaton*, *Stoia*, and *Logan*. This key differentiation of professional roles for attorneys hired for limited purposes before the criminal case even began makes appellant's case marks appellant's case as one that requires an evaluation of the actual adverse effects of each attorney as to that attorney's individual and distinct role in the case.

Novaton, *Stoia*, and *Logan* involve counsel of record in a criminal case in which a defendant and counsel have appeared and are litigating *the criminal case*. In that

context, each attorney who appears can be attributed responsibilities that go beyond narrow assignments. But this is not so in the pre-extradition phase, because the defendant need not even hire temporary counsel of record in the criminal case until after extradition. And in this case, *no attorney filed an appearance as counsel in the criminal case until late 2001*, after appellant's extradition and long after favorable plea negotiation was no longer possible.

In the time period relevant to this case, the appellant had not yet been brought within the jurisdiction of the district court and thus was not called upon to hire (nor could he ask a federal court to appoint under 18 U.S.C. § 3006A) *any* attorney as his counsel in the criminal case—nor could appellant even afford to do so in 1999, as is confirmed by the fact that the government's case against appellant was premised on the theory that he was short of liquid assets, *see* Gov't Br. 16 (conceding Ochoa was "cash poor"), and also by the extreme efforts by the government to criminalize the hiring of counsel for appellant in the criminal case. *See United States v. Velez*, 586 F.3d 875, 876 (11th Cir. 2009) (addressing prosecution of one defendant, "a Miami attorney, [who] was hired by the Miami-based criminal defense team of Fabio Ochoa, an accused Colombian drug leader, to review the source of funds to be used to pay Ochoa's legal defense fees in the United States").

Appellant's case presents fact-bound questions that make the district court's summary resolution of the case precipitous. In a key passage of this Court's opinion,

the Court concludes that there was evidence admitted at a hearing to the effect that "Quinon represented Ochoa '[f]rom the time [he] was charged through the time of his extradition.'" *See* Opinion at 11, n. 1. However, the internally quoted reference appears only in an affidavit filed by one of the attorneys for the government in opposition to the § 2255 motion, and the contents of the affidavit were never tested or given precise context in any hearing, evidentiary or otherwise. *See* DE:169-2 at 2 (affidavit of former AUSA Ed Ryan). There were several problems with the Ryan affidavit, including that his name is not mentioned in relation to appellant's case until Ryan's March 2000 meeting with *Perez* and Van Vliet (*see* Gov't Br. 11), making his recollection that he joined the prosecution team "around the year 1999" an unreliable premise for any opinion about the early stages of appellant's representation by Quinon. In any event, prosecutor Ryan's conclusory affidavit is certainly not enough to conclusively refute the allegations of the § 2255 motion so as to warrant summary disposition. An evidentiary hearing is required unless the record "conclusively" refutes the claim. 28 U.S.C. § 2255(b)).

Apart from AUSA Ryan's unreliable opinion about the start date of Quinon's non-plea-related work, the facts about what Quinon did and when he did it remain subject to determination and evaluation at an evidentiary hearing. And particularly in this case, the absence of clarity as to what it means to seek legal help in the extradition phase and what (and when) the attorneys hired in sequence to perform

specific pre-extradition tasks did or did not take on as their responsibility plainly calls for an evidentiary hearing.

The timeline of events as to representation and conflict show that the finding of the absence of adverse effect is premature because despite the government's arguments to the contrary, there was not much overlap between the periods of representation by attorneys Perez and Quinon, and there was no overlap in the plea-related representation by Perez and the later plea representation by Quinon. The first U.S. criminal defense attorney who appears anywhere in the picture for appellant in the pre-extradition phase of the case was attorney Perez, and he was conflicted from the start of his representation in late 1999. The first record indication of involvement of attorney Quinon in appellant's case is in mid-February 2000, at least two months after Perez was noted as working on settlement of the case. But from February 2000 to October 2000, there is no indication that Quinon was hired to or took on the job of plea negotiation. Instead, his hiring was to work on showing defects or misconduct in the government's handling of appellant's case; there is no evidence that he was hired to work on plea negotiations or even that appellant could afford to hire him for both purposes at that time. The first record indication of attorney Jose Quinon's involvement in plea negotiations is in late 2000, *after* Perez was no longer working on the case.

Further evincing that Quinon was out of the plea loop is that by December 1999, AUSA Van Vliet had learned that the Vega pay-to-plead plan was a scam and had passed the word around to all agents in the case. *See* CRDE:1141:21-22. When Quinon brought the matter to the attention of Van Vliet in mid-February 2000, he was two months late and the government was already on the road to solving the problem a different way by indicting Vega and an associate.

Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985), remains the most closely analogous decision in this Circuit on the question of adverse effect in plea negotiations. In *Ruffin*, the conflicted attorney approached the government regarding a plea bargain for one co-defendant which involved testimony against the other co-defendant he represented. *Id*. at 749–50. This plea bargain never came to fruition. Nonetheless, the Court found the attorney's behavior constituted an actual conflict of interest that adversely impacted the attorney's performance and reversed the conviction. *Id*. at 752. The Court rejected any need for the defendant to show that the prosecutor would have been agreeable to a plea bargain on his behalf had his attorney negotiated for it, recognizing that this would amount to a requirement that actual prejudice be shown, which is not required. *Id*.; *accord Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981) ("Had he not been facing a conflict of interest, Smith might have been able to negotiate a plea agreement on Baty's behalf in return for becoming

a prosecution witness against Miller. The conflict of interest before trial alone would be sufficient to grant Baty's habeas petition.").

Novaton, *Logan*, and *Stoia* do not call for a different decision here. In *Stoia*, the § 2255 court, *after* conducting an evidentiary hearing, found the actions of a *fourth* trial lawyer added to a trial counsel team late in the case did not cause *any lapse* in trial representation. *Stoia v. United States*, 109 F.3d 392, 397 (7th Cir. 1997) ("An 'adverse effect' occurs when a lawyer's actual conflict of interest causes a 'lapse in representation contrary to the defendant's interests.'") (quoting *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994); *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985)). Importantly, where conflicted counsel in *Stoia* had failed to perform the tasks he agreed to work on, his failure was *not* the result of the conflict—unlike Perez. *See id*. at 397 (counsel's "failure to prepare his ... motions could not have resulted from his" conflict of interest). And in *Stoia*, lead counsel testified at the evidentiary hearing that conflicted counsel's actions had no effect on the case, showing that an evidentiary hearing can ultimately benefit the government while revealing the truth.

In *Novaton*, this Court assumed for the purposes of decision that a conflict of interest existed, but found no evidence that the representation was "adversely affected by the possible conflict of interest" because nothing fell through the cracks in the representation at trial which was vigorous and effective. 271 F.3d at 1012. In appellant's case, unlike *Novaton*, the conflict of interest is obvious and odious; it

stinks to high heaven. And there can be no finding, absent an evidentiary hearing, that the conflict did not adversely affect appellant in the period when a favorable plea offer was a viable possibility, when Quinon did not even discuss a plea with the prosecutors until late 2000, after all plea negotiation leverage was gone. As to that the-defense-ship-has-sailed plea offer, the government's gloss on AUSA Ryan's affidavit cannot diminish the adverse effect of Perez's actions. *See* Gov't Br. 49 ("AUSA Ryan's affidavit details the pre-extradition plea *offer* that the government extended to Quinon ... (DE:169-2).") (emphasis added). The "offer" to Quinon (in October 2000) was not an offer at all, much less the offer that would have been available in early 2000 when Perez was interposing the Vega Program as the hurdle. The Quinon "offer" was merely a demand that appellant surrender without any government-offered benefit in return: the government asked appellant "to cooperate with the United States Government, waive the formal extradition process and come to the United States and enter a guilty plea. Ultimately, Defendant Ochoa rejected that *offer* [sic]." DE:169-2:2–3 (emphasis added).

And in *Logan*, where the conflict of interest was alleged to have adversely affected one of the defendant's attorneys in the plea negotiation stage, the court found that "[c]ollectively ... petitioner received both competent and deficient advice on whether to accept the February 19 plea offer with a ten-year sentencing cap," and "petitioner's counsel of record at the time" gave him competent advice about the offer.

910 F.3d 864, 869–70, 871. *Logan* shows that the mere existence of lawyers on a team is not what matters in plea effectiveness; instead, what matters is whether the only advice the defendant is receiving about a plea is bad advice as the adverse result of a conflict of interest. In appellant Ochoa's case, the record shows he never even met Quinon until 2001. The only advice he received about a plea was the conflicted (indeed extremely conflicted) plea advice given by Perez. The logic of *Logan* compels, at a minimum, the granting of an evidentiary hearing in this case.

> That distinguishes [appellant]'s situation from the out-of-circuit cases the government cites in which multiple attorneys gave conflicting advice at the same time about the same plea offer. *See*, *e.g.*, *Clark v. Chappell*, 936 F.3d 944, 969 (9th Cir. 2019) (concluding that the petitioner was not prejudiced by one attorney's advice to reject a plea deal because another of his attorneys advised him to accept it); *Logan v. United States*, 910 F.3d 864, 869–70 (6th Cir. 2018) (ruling that the petitioner who received "both competent and deficient advice on whether to accept the February 19 plea offer" received effective assistance).

Day v. United States, 962 F.3d 987, 994 (7th Cir. 2020).

Quinon's role in 2000 was as a trial lawyer making arguments to the government about improprieties in relation to the extradition. The fact that he never even visited appellant, much less consulted with or advised appellant about a plea negotiations, in the two-year pre-extradition period is of critical importance. There is no showing in the record that appellant even knew Quinon had approached the prosecutor, AUSA Van Vliet. Confirming the absence of any representation or consultation by Quinon regarding a plea, the government did not produce the letter to

Quinon from Van Vliet discussing obliquely a plea issue until 2014—fourteen years after the letter was apparently sent. *See* DE:169-2. Perez had already minimized the possibilities of an acceptable plea by delay while trying to sell appellant the Program. The reality of months of ruined negotiation time because of Perez's pushing of the Program, instead of pursuing a legitimate plea bargain, cannot be dispelled absent an evidentiary hearing.

Quinon's representation timeline shows in February 2000, Quinon met with Van Vliet to discuss government involvement (misconduct) in relation to the Vega Program. In May 2000, he wrote to Van Vliet regarding misrepresentations in the extradition affidavit. In April or early May 2000, he met with Van Vliet and again addressed lies in the extradition affidavit. In the same period, Van Vliet wrote to Quinon rejecting that interpretation of the affidavit. In September or October 2000, Quinon again met with Van Vliet and, this time, Ryan. But in a December 7, 2000 letter from Quinon to Ryan, again he raised the lies in the extradition affidavit. In February 22, 2001, Ryan wrote to Quinon saying the government has more evidence now. And in August 2001, appellant was extradited.

The timing of Perez's conflicted representation was critical. Whether viewed as retaliatory or merely inevitable, given Perez's ongoing role as house counsel for the Program, those who did not get on board in some fashion were inevitably going to be left behind and find themselves facing newly-converted witnesses against them,

spoiling future negotiations. In these circumstances, an evidentiary hearing should be granted.

While it may turn out that appellant cannot prove adverse effect at an evidentiary hearing, it may also turn out, as appellant alleges, that Perez, the only attorney retained for plea negotiation, made a favorable plea deal impossible through his active conflict of interest that led others to pay for a plea bargain and left appellant with no chair to sit on when the music stopped on the pay-to-plead scheme in March 2000 with the indictment of Baruch Vega.

To summarize, because the Court reached conclusions on factual questions that are still in dispute regarding the timing of representation and roles served by the two Miami lawyers who performed work for appellant when the government was seeking his extradition from Colombia to face a federal indictment in Miami, reconsideration of the decision is warranted. Even if in *the ordinary case* of representation of a defendant (unlike petitioner Ochoa) by attorneys who appear in a criminal case as counsel of record, the defendant cannot claim adverse effect from the conflict of interest of one of the attorneys, the factual disputes in the instant case regarding overlapping counsel issues should be resolved at an evidentiary hearing.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should grant rehearing and remand the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 3,058 words.

s/ Richard C. Klugh
Richard C. Klugh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed on this 8th day of September, 2022, and served on that date by U.S. Mail upon Assistant U.S. Attorney Armando Mendez, 99 N.E. 4th Street, Miami, Florida 33132.

s/ Richard C. Klugh
Richard C. Klugh

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

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.