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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANCISCO GERMAN ALVAREZ, Defendant-Appellant.	No. 21-55826 D.C. No. 3:18-cr-01653-GPC-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Submitted April 8, 2024**
Pasadena, California

Before: BERZON and MENDOZA, Circuit Judges, and BOLTON,*** District Judge.

Francisco Alvarez ("Alvarez") appeals from the district court's denial of his 28 U.S.C. § 2255 motion, challenging his conviction following a guilty plea. We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

review de novo the district court's denial of a § 2255 motion. *United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. Alvarez argues that the district court clearly erred in finding that he knowingly and voluntarily pleaded guilty. We review the voluntariness of Alvarez's guilty plea de novo and the district court's underlying factual findings regarding the voluntariness of the plea for clear error. *United States v. Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001). "A plea is voluntary if it 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Id.* (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

Alvarez claims that his plea was unknowing and involuntary because he was paranoid that prison staff were conspiring to cause him "mental anguish" and because other inmates treated him poorly due to his germaphobia obsessive compulsive disorder ("OCD"). While Alvarez may have believed that he lacked the criminal intent to commit the crime with which he was charged, he chose to plead guilty because he was eager to be released from custody. Despite his claimed paranoia and germaphobia OCD, Alvarez clearly understood the consequences of his available options—either proceed to trial and remain in custody or plead guilty and be sentenced to time served. "[B]eing forced to choose between [these] unpleasant alternatives is not unconstitutional." *Id.* at 1115–16.

The district court also conducted a thorough change of plea hearing, during which Alvarez affirmed that: (1) he was not under the influence of medication, alcohol, or drugs, or under substantial stress; (2) nobody had threatened, coerced, unduly pressured him, or promised him anything to plead guilty; (3) he fully understood the plea agreement and proceedings; and (4) he was knowingly and voluntarily pleading guilty. Alvarez's sworn statements during his plea colloquy "carry a strong presumption of verity" and "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Alvarez's contrary allegations in support of his § 2255 motion fail to overcome this barrier. There is no basis in the record to conclude that his guilty plea was unknowing or involuntary.

2. Alvarez also suggests that the district court erred by denying his § 2255 motion without holding an evidentiary hearing on Alvarez's competency. "[A] competency determination is necessary only when a court has reason to doubt the defendant's competence." *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993); *see* 18 U.S.C. § 4241(a). The competency standard for a defendant to plead guilty is the same as the competency standard to stand trial. *Moran*, 509 U.S. at 398–99. Alvarez concedes that he was competent to stand trial, and points to no evidence in the record that he lacked the "ability to understand the proceedings [or] to assist counsel in preparing a defense" when he pleaded guilty. *Miles v. Stainer*, 108 F.3d

1109, 1112 (9th Cir. 1997) (citations omitted). No evidentiary hearing was therefore required.

3. Alvarez argues that he was denied effective assistance of counsel because his attorney failed to investigate Alvarez's competency, consult a psychiatric professional, or consider a *mens rea* defense. To show ineffective assistance of counsel, Alvarez must demonstrate that (1) trial "counsel's representation fell below an objective standard of reasonableness" and (2) counsel's deficient representation was prejudicial, that is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). We review de novo the legal question of whether a defendant received ineffective assistance of counsel and review the district court's underlying factual findings for clear error. *Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010) (citation omitted).

"Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). Alvarez's ineffective assistance claim regarding his trial counsel's failure to investigate Alvarez's competency before his guilty plea fails because, as Alvarez recognizes, he was competent to stand trial; he was therefore competent to plead guilty. *See Moran*, 509 U.S. at 398–99; *Stanley v.*

Cullen, 633 F.3d 852, 862 (9th Cir. 2011) (ruling an attorney's failure to move for a competency hearing constitutes ineffective assistance when an "objectively reasonable" attorney would have reason to doubt the defendant's competency and "there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered") (internal quotation marks and citation omitted).

As for trial counsel's failure to investigate *mens rea* defenses, we need not determine whether this constituted deficient performance, because any such professional error was not prejudicial. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). To show "prejudice" in a guilty-plea case, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Doe v. Woodford*, 508 F.3d 563, 568 (9th Cir. 2007) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Alvarez was unequivocal that while he believed he lacked the requisite intent for the crime with which he was charged, he chose to plead guilty in exchange for the government's recommendation of time served. Alvarez fails to show a reasonable probability that he would have forgone this opportunity and "insisted on going to trial" had his attorney investigated a *mens rea* defense. *Id.*

AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANCISCO GERMAN ALVAREZ, Defendant-Appellant.	No. 21-55826 D.C. No. 3:18-cr-01653-GPC-1 Southern District of California, San Diego ORDER

Before: CANBY and BERZON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is granted with respect to the following issues: (1) whether appellant's plea was knowing and voluntary, and (2) whether counsel was ineffective for failing to adequately investigate appellant's mental state prior to entry of the plea. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Appellant's completed CJA Form 23 (Docket Entry No. 4) is construed as a request for leave to proceed in forma pauperis and is granted.

The opening brief is due March 29, 2023; the answering brief is due April 28, 2023; the optional reply brief is due within 21 days after service of the answering brief.

This order authorizes production of transcripts at government expense. *See* 28 U.S.C. § 753(f). Appellant must provide a copy of this order to the reporter(s) along with the designation.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

CA No. 21-55826
DC No. 18cr1489-GPC

In the United States Court of Appeals for the Ninth Circuit

FRANCISCO ALVAREZ,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court Southern District of California
The Honorable Gonzalo P. Curiel

APPELLANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY

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TABLE OF AUTHORITIES

Pursuant to Rule 22(b)(2), Federal Rules of Appellate Procedure, and the Rules of *Habeas Corpus* and Section 2255 Proceedings, Petitioner-Appellant Francisco Alvarez respectfully asks this Court to issue a certificate of appealability (COA).

Introduction

The facts provided to the district court by Petitioner Alvarez, unsuspectingly corroborated by the Government, in this ineffective assistance of counsel (IAC) *habeas,* indisputably show that defense counsel for Alvarez was on notice that his client's mental condition *during September 9, 2017 - the time of one of the offense - and during the waiver of trial and guilty plea*, were in question. And because of that notice, defense counsel had at the very least, a duty to identify and investigate a possible lack of *mens rea*, and to consult with a psychiatric professional. Defense counsel failed. Yet, the court denied the *habeas* without a hearing.

In denying without a hearing Alvarez's robust *habeas,* the district court violated this Court's precedent in *Weeden v. Johnson,* 854 F.3d 1063, 1069 (9th Cir 2017), where this Court noted:

> The Supreme Court has ***repeatedly*** made plain that counsel has the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Strickland v. Washington*, 466 U.S. 668 (1984)] at 691; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Hinton v. Alabama*, 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014).

Emphasis added.

The Government itself, in its Response and Opposition to the *habeas* Petition,

provided evidence to the district court, by way of multiple exhibits/attachments of Instagram and other social media activity, documenting *bizarre behavior* by Petitioner Alvarez going back to at least ***June 29, 2017***. These attachments accompanied ATF Reports documenting the bizarre activity. Docket 57.

Yet, in its Order Denying Alvarez's *habeas* Petition, at pages 21-22, the district court initially stated:

> ...Petitioner suggests that [an incident] shows that he also could not form specific intent with respect to ***Count 3***, which occurred almost ***an entire year prior on September 9, 2017***. As such, a psychological exam at the time of his arrest and shortly thereafter ***would not have demonstrated his mental state back on September 9, 2017***. Therefore, Petitioner's counsel was not deficient in not seeking a psychological evaluation.

Order Denying Petitioner's Motion to Vacate (Order), docket 67, pages 21-22. Emphasis added.

Then, the district court oddly explicitly added:

> Next, Petitioner argues his defense counsel had a duty to investigate his mental health for purposes of his defense ***during April and May of 2018***. However, even if Petitioner's counsel had a duty to investigate Petitioner's mental health prior to the plea deal, Petitioner has not shown any prejudice ***because by May 16, 2018, Petitioner was mentally stable, and not taking any medication and engaged in treatment***. Therefore, by the time of the plea discussions in June/July 2018 he was competent to make a reasoned decision among the choices available to him.

Order Denying Alvarez's *habeas* Petition, page 22, emphasis added.

First, Alvarez placed in controversy the argumentative conclusion that "he was competent to make a reasoned decision among the choices available to him." But also, the district court had contradictory facts before it that fully showed that it had only been *less than one month* before, "during April and May of 2018" as the district court noted, when Alvarez was so psychologically troubled that he had stripped himself naked and had refused to emerge from the Marshals tank for the aborted detention hearing before Magistrate Schopler on April 20, 2018.

Therefore, contrary to the district court's interpretation, Alvarez's defense counsel indeed had ample notice that his client's mental state was at issue the entire time. This notice undeniably gave rise to a duty to investigate and secure a mental examination of Alvarez before anyone rushed to secure his "waiver" and guilty plea, extracted with the promise of a time-served sentence, and waiver of a Presentence Report (PSR). With no PSR, the elaborate facts regarding Alvarez's compromised mental state would emerge.

The following is an insightful and revealing quotation from page 8 of the Government's untimely Opposition to Alvarez's *Habeas*:

> Petitioner showed ***signs of deteriorating mental health*** during the hours' long standoff with SDSD [San Diego Sheriff's Department] during their attempts to get him to exit [his] residence. [ ] After the violent and stressful, but necessary measures taken by SDSD to extricate him from the residence, ***Petitioner's metal health suffered as reflected in his medical treatment and assessments immediately after his arrest***. See 18CR01653-GPC, Dkt. 53, Exh. A-6 (sealed) at 100-106. ***This included his refusal to appear for court where he undressed in his holding cell, delaying his detention hearing***. Id., ***Dkt. 11***. [Hearing on ***April 20, 2018***, before Magistrate Judge Schopler.]

> Petitioner's mental health was discussed at his continued detention hearing by both counsel and the Magistrate and the Magistrate ultimately decided to detain Petitioner based, in part, ***on his deteriorated mental health***. See Id., Dkt. 12, 14, Order of Detention (noting "Unstable Mental Health" and prior failure to appear "***due to getting naked and refusing to come to court***").

Government's Response and Opposition, 2/24/2020, Docket 57, emphasis added. The aborted detention hearing attempted on ***April 20, 2018*** was before a different Magistrate from the one who later took Alvarez's waiver and Guilty plea. The Magistrate who accepted the change of plea and waivers was visiting Magistrate Averitte and no one discussed Alvarez's mental health "at his continued detention hearing".

The complete record before the district court contained material facts that established that for a considerable period before he was arrested, Alvarez had exhibited behavior indicative of serious psychological issues such as delusion and that he had been abusing medication and drugs. In a 2255 setting, the district court was mandated to accept the specific allegations as true and then to shift the burden to the Government. *See*, 28 U.S.C. Section 2253(b), discussed below at Section III.

Even the Government provided the district court exhibits at ECF Docket No. 57, noted by the district court's order at page 2, footnote 1, which militated in Alvarez's favor. These exhibits were incendiary in nature because they graphically showed behavior by Alvarez that demonstrated psychological unbalance and a possible mental condition as early as ***June 2017***. September 2017 was the very date selected by the district court as somehow too far back to indicate any *mens rea* relevance to IAC and to the time of Alvarez's change of plea.

I.
PROCEDURAL FACTS

On August 8, 2019, Alvarez filed in the district court his Preventive Petition and Motion to Vacate, Set Aside or Correct his conviction and sentence pursuant to 28 USC § 2255. [Docket 39] His *Motion* was supported by 38 pages of exhibits, which included medical records and a detailed, non-conclusory 5-page sworn declaration from Petitioner. The *habeas* Petition was assigned civil case 19-cv-01489-GPC. [Docket 40]

After various revised briefing schedules, the district court ordered Petitioner to file his Complete Amended Petition no later than January 24, 2020. Respondent was ordered to file its Response and Opposition "no later than February 21, 2020." [Docket 52]

On January 24, 2020, as ordered by the court, Petitioner Alvarez filed his Amended Petition and Points & Authorities supported by 97 *additional* pages of Exhibits. [Docket 53]

But then, the Government failed to abide by the briefing schedule and did not file its Response as ordered - "no later than February 21, 2020". Instead, the Government took an additional three days to file its untimely Response and Opposition on February 24, 2020. [Docket 57]. Noticeably, the Government's Response lacked any sworn declaration and provided only 4 exhibits consisting of ATF Reports of Investigation from the underlying criminal case which rehashed the case but failed to directly address any of the specific allegations in the *habeas*.

Then, on March 13, 2020, Petitioner Alvarez file his *Motion to Strike Government's Untimely Response and Opposition* together with his *Reply to Government's Response and Opposition*. [Docket 58] It would not be until September 18, 2020, when the district court ordered the Government to respond to

Alvarez's March 13, 2020 Motion to Strike. [Docket 60] On September 25, 2020, the Government filed its Response to Alvarez's Motion to Strike. [Docket 61]

Then, on September 29, 2020, Petitioner Alvarez filed his Corrected Reply to the Government's response to his Motion to Strike. [Docket 63] At this point, the *habeas* was submitted for the court's consideration. While Alvarez's Petition had supporting exhibits of medical records and his detailed, non-conclusory sworn declaration, the Government had only the four reports of investigation exhibits from the underlying case and *no declaration* countering Alvarez's factual allegations. Then, months passed by.

On June 4, 2021, the district court issued its Order Denying Alvarez's *habeas* and denying a certificate of appealability. *See*, Exhibit A. [Docket 67].

In the district court's Order denying a Certificate of Appealability at pages 22-23, in the face of contradictory evidence, the court concluded:

> In this case, Petitioner has failed to provide sufficient facts to demonstrate that Petitioner did not knowingly and voluntarily enter the plea agreement and understand its effect, that the indictment was secured by material misrepresentations ***and that defense counsel was ineffective***. Therefore, the Court finds that reasonable jurists would not find this Court's dismissal Petitioner's claims debatable and the Court declines to grant Petitioner a certificate of appealability.

Id. emphasis added. Alvarez filed his Notice of Appeal on July 31, 2021. [Docket 69]

Petitioner-Appellant Alvarez respectfully asks this Court to issue a COA so that he can develop the actual meritorious multiple issues in his 2255 motion, demonstrating how he was subjected to a "denial of [his] constitutional right(s)" to

the effective assistance of counsel and due process and how the district court's internally contradictory Order never substantively addressed several of the disputed facts.

II.
THE UNIQUE FACTS OF THIS CASE SUPPORT ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Title 28 U.S.C. Section 2253(c)(2) provides that a certificate of appealability may issue when "(1) the applicant has made a substantial showing of the denial of a constitutional right." Appellant Francisco Alvarez submits that the evidence as a whole in his *habeas* Petition, he demonstrated that he has amply met the standard for issuance of a COA as interpreted in *Buck v. Davis,* 137 S.Ct. 759, 773 (2017).

In *Buck,* the Court reaffirmed the *relatively low standard* required for issuance of a COA – "the ***only*** question is whether the applicant has shown that 'jurists of reason ***could disagree*** with the district court's resolution of his constitutional claims ***or*** that jurists could conclude ***the issues presented*** are ***adequate*** to deserve encouragement to proceed further." Quoting *Miller-El* v. *Cockrell*, 537 U. S. 322, 336 (2003) (state case involving a *Batson* issue under a stricter 2254 AEDPA standard, but finding that a COA was nevertheless required), emphasis added.

Here, palpably, the district court's order denying Alvarez's *habeas* contains internally contradictory facts/reasoning with which a "jurist of reason could disagree". *Miller-El* v. *Cockrell* at 336. It is also evident that the district court either ignored key facts showing that Alvarez's mental condition was indeed impaired; or, the court simply failed to *properly* consider them, contrary its passing mention of the central directive in *Weeden.*

//

III.
THE IAC ISSUE ACTUALLY RAISED BY ALVAREZ AND LEFT UNADDRESSED BY THE DISTRICT COURT

In his *habeas*, Mr. Alvarez very specifically challenged the *voluntariness* of his guilty plea and the appellate and collateral attack waivers, but as each related to the IAC of his counsel for failure to investigate, at all, the mental condition/psychological conditions suffered by Petitioner. *See,* Introduction above.

Mr. Alvarez submits that his *Petition* was pursued in good faith, with detailed, non-conclusory allegations and evidence, that the district court should have accepted as true, but did not. *The Rules Governing 2255 Proceedings*, specifically 28 U.S.C. Section 2253(b), provides:

> Unless the motion and the files and records of the case ***conclusively show that the prisoner is entitled to no relief***, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. ...

(Emphasis added.)

A. The Reasons Why Mr. Alvarez Involuntarily Waived Trial and Instead Pleaded Guilty

Mr. Alvarez provided the district court evidence, medical records, and his sworn declaration that enlightened the reasons why he waived jury trial and his rights to collaterally attack his conviction and sentence. [Docket 39-1]

The evidence he provided, much of it undisputed, established that Alvarez made these decisions at a time when he was on and off heavy medication, that he was still suffering from psychological delusions, constant subjectively valid perceived threats to his safety, constant humiliations from inmates, and *extreme* phobias that

made him irrational. Alvarez's psychological problems undeniably went far beyond those examples in the carefully selected and dissimilar cases in the district court's Order at pages 8-9, cited by the court to show examples where IAC was denied.

In the district courts' selected cases, there were allegations by petitioners arguing lack of voluntariness because of "depression" only - *Tanner v. McDaniel;* "stress and defendant's difficulty being separated from his family during pretrial detention" – *United States v. Yell;* "petitioner suffered from depression and lived with 'a death wish'" – *United States v. Hibler*. Notably, the district court carefully avoided meaningful discussion at pages 8-9 of *Weeden v. Johnson,* 854 F.3d 1063 (9th Cir. 2017). Contrary to those easily distinguishable cases, the evidence here established that Alvarez was fully diagnosed with a host of serious psychological issues, was heavily medicated and segregated, was said to have perpetrated assaults on BOP guards at the Metropolitan Correctional Center, and even displayed bizarre behavior such as stripping himself naked in the Marshall tank adjacent to Magistrate Schopler's courtroom. All those in addition to the bizarre behavior documented from as far back as June 2017 in the Exhibits provided *by the Government.* [Docket 57]

In post-conviction proceedings, where Petitioners challenge the voluntariness of a waiver of trial and of a guilty plea, it is routine to cite to the colloquy given at the time of the waiver and entry of the guilty plea; this to note the "admissions" of facts and acknowledgment of knowledge and the voluntary waivers and guilty plea. Although it is also widely reported in the literature and case law that, like false confessions, increasingly, defendants plead guilty out of necessity even when they are not guilty and where they have meritorious defenses – as in this case. When they do so, they invariably make admissions that are simply not true nor voluntary, as here with Alvarez. *See, Anatomy of a Plea*, by Andrew St. Laurent, The Champion, June 19, 2019, pages 42-47, National Association of Criminal Defense Lawyers.

It is simply undeniable here that, *except for the court*, the parties in this case had full knowledge that Alvarez had been suffering from longstanding and serious psychological issues and delusions as far back as June 2017. Of that, there was no doubt. There should also be no doubt even today as well, that any competent defense counsel had an absolute duty to investigate the bizarre behavior, drug and medication abuse, and delusions manifested by his client before and after the arrest. Yet, defense counsel failed at this obvious obligation and, instead, opted for a fast plea and sentence, *without a PSR*.

The record of Alvarez's medical exhibits is clear that his psychological and OCD conditions continued almost unabated. As an example, records note that on May 1, 2018, Alvarez was released from the hospital and given various medications which were prescribed to help stabilize him. But even a report dated May 16, 2018 (BATES 000094-000095), noted that Alvarez "continued to demonstrate" symptoms. The same report also noted that, when Alvarez was released in the Metropolitan Correctional Center (MCC) general population on May 9, 2018, only eight days after his release from the hospital, "he discontinued" a critical medication prescribed to him. Alvarez also provided additional reports under seal for May 22, 2018, and June 18, 2018, BATES 000012-0000015 and 000078.

The under seal May 16, 2018 report is entitled "Reason for Referral and Identifying Information" and notes that Alvarez had created a disruption on April 19, 2018 at the MCC and had committed an "assault" on an officer and that Alvarez was "combative". Yet, by May 9, 2018, he had been released to the general population unmonitored, under medication that he was supposed to take on his own. This is the medication that the record before the district court documented that Alvarez on his own had "discontinued".

Alvarez's declaration indisputably established what was going through his

mind when the plea agreement was presented to him on July 14, 2018. He specifically noted the variety of phobias, his fear of the conditions at the MCC, and the reasons why he signed the plea agreement. In contrast, the Government did not present any *contradictory sworn declaration*. Alvarez's declaration, thus, remained uncontradicted.

IV.
MR. ALVAREZ'S WAIVER OF TRIAL AND GUILTY PLEA WERE INVOLUNTARY

It is axiomatic that a waiver of trial and guilty plea must be voluntary, unaffected by medication or serious delusion and other mental issues. *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993); *Brady v. United States,* 397 U.S. 742, 747-48 (1970). Here, Alvarez provided the district court with a robust factual basis in his Declaration and medical evidence that cast serious doubt about his psychological and physical conditions at the time of his decision to accept the Government's offer and at his guilty plea.

Expressly, Alvarez's decisions were motivated principally by his aggravated and irrational fear, his untreated unbalanced psychological state, and his debilitating delusions connected to his pathological OCD. All of this while he was on and off heavy medication, as noted in his declaration. Significantly, the medical records given to the district court disclosed by MCC/BOP and Alvarado Hospital and Medical Center corroborated Alvarez's sworn declaration.

Mr. Alvarez's waivers of trial, collateral attack, and guilty plea were involuntary and made at a time when he was suffering serious and *continuous* delusions and obsessive disorders, making him extremely paranoid and terrified. His decision to plead guilty and say whatever he had to say were compelled by fears and delusions and under heavy mediation. Both parties knew these facts.

The Government knew that Alvarez had continually suffered from psychological delusions and that he was under medication. Yet, the Government did not reveal any of these serious issues to Magistrate Judge Averitte at the time of the guilty plea, despite the Judge's questions, *of the lawyers also*, asking specifically about anything in Alvarez's background or state of mind that could have affected his decision to plead guilty. *See,* Petitioner's Exhibit ISO *habeas* petition A-17, 4:16-7:25. [Docket 53-1]

V.
THE MEDICAL AND MCC DISCIPLINARY RECORDS ESTABLISHED THAT ALVAREZ WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The MCC/BOP medical and disciplinary records produced *by the MCC Lawyer,* made it self-evident that Alvarez's psychological state during his initial custody was chaotic and riddled with psychotic delusions, among other challenges, and that he remained under observation for the rest of his stay at the MCC.

Also, as Alvarez's Declaration noted, even when he was transferred to the general population at the MCC, he was unmonitored and remained unbalanced, irrationally thinking that the inmates were going to harm him and that the guards did not care. He was mocked as the "weirdo" on his floor and was kicked out of several cells because the inmates did not want to "bunk" with him. *So, he learned to hide his psychological pathology from everyone as best he could.*

Within the first month, approximately, of when Alvarez was detained, there is ample evidence from the disclosed medical records that he was severely disturbed. He was suffering from psychotic delusions, serious OCD, and extreme paranoia. This reality necessarily compels the rational inference that he was even worse during the time of the alleged offenses because of his abuse of drugs and medication and steroids;

not the opposite as the district court concluded. Yet, his lawyer at the time failed to look into these serious issues.

One of the medical records dated May 16, 2018, provided to the district court under seal, noted that "it has become apparent his symptoms were due to [medication] delirium given their course of duration." The same report narrates, it bears repeating, an "incident" in which at the MCC, Alvarez allegedly caused a disturbance and assaulted an officer on April 19, 2018. The same report notes "Given all the available information, it appears [Alvarez] ***was unable to appreciate the wrongfulness of his behavior at the time he engaged in*** [the incident] ***and he should not be considered responsible for his actions.***" *Habeas* Exhibit A-6, BATES 000095, under seal, emphasis added. If nothing else in the case thus far, this should have alerted all to Alvarez's competency; most of all his defense attorney whose duty it was to determine his own client's mental condition.

Despite this documented psychological history, Alvarez's then-counsel did not take the time to obtain an *ex parte* psychological evaluation to determine whether Alvarez could have even been capable of forming the necessary specific intent/*mens rea* for the charged offenses. Nor did counsel determine whether Alvarez was even sufficiently rational and free from pathological paranoia and delusions to have been capable of effectively and meaningfully assist in his defense.

In his Declaration, Alvarez specifically notes that he lied when he pleaded guilty and waived trial and collateral review because he had been under extreme paranoia and delusions. He specifically noted that he would have said anything during the guilty plea colloquy, just to get out of what he saw as a nightmare at the MCC that was destined to result *in his death at the hands of inmates*. Surprisingly, and it bears repeating, that neither the Government nor Alvarez's then-counsel disclosed to

Magistrate Averitte on July 26, 2018, the long psychological history nor the heavy medication being then administered to Alvarez.

For these reasons, Alvarez submits that he was also denied his right to the effective assistance of counsel. In *Weeden v. Johnson*, 854 F.3d 1063 (9th Cir. 2017), this Court noted the established precedent relative to the absolute duty of a lawyer to conduct adequate pretrial investigation, to then determine strategy effectively (to either plead guilty or proceed to trial).

In *Weeden*, defense counsel failed to make *any* investigation into his 14-year-old client's psychological state of mind at the time of the offense. Counsel made the "tactical" decision not to consult with a psychologist, fearing that such tactic could backfire and not support his approach to the case. Of this, this Court aptly noted:

> The correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, ***but whether Weeden's counsel had a duty to investigate such evidence in order to form a trial strategy, considering "all the circumstances."*** [quoting *Strickland v. Washington*], *466 U.S. 668, at 691* (1984). The answer is yes. The prosecution's felony murder theory required proof that Weeden had "specific intent to commit the underlying felony," *People v. Jones,* 82 Cal. App. 4th 663, 98 Cal. Rptr 2d. 724, 727 (Ct. App. 2000), so Weeden's "mental condition" was an essential factor in deciding whether she "actually had the required mental states for the crime," *People v. Steele,* 27 Cal. 4th 1230, 120 Cal. Rptr. 2d 432, 47 P.3d 225, 240 (Cal. 2002). The Supreme Court has repeatedly noted that the mind of a fourteen-year-old is markedly less developed than that of an adult, [citations omitted], and trial counsel described Weeden as "unusually immature." Given the exculpatory potential of psychological evidence, counsel's failure to investigate "ignored pertinent

> avenues for investigation of which he should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009).

Emphasis added.

This Court then made this ruling, which is directly applicable to Alvarez:

> Counsel's performance was deficient because he failed to investigate, a failure highlighted by his later unreasonable justification for it. We do not suggest that counsel must investigate psychological evidence in every case, or even the ordinary case. ***But the Supreme Court has made clear that some "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts."***[citation omitted]. For the reasons noted above, this was such a case. The Court of Appeal's finding that counsel rendered adequate performance because he made a tactical decision not to investigate was therefore "contrary to, or involved an unreasonable application of," clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

Weeden at 1471, emphasis added. Here, the medical and disciplinary records form MCC/BOP contain the psychological/medical opinion of a doctor and others that Alvarez's mental state, ***even weeks after his arrest***, was ***still*** such that he was "unable to appreciate the wrongfulness of his behavior at the time he engaged in [the assault at the MCC] and he should not be considered responsible for his actions." For defense counsel to not have obtained these critical medical records before advising Alvarez to quickly accept the time-served felony plea agreement, was a direct denial of effective assistance indistinguishable from that in *Weeden*.

//

CONCLUSION

The standard for issuing a Certificate of Appealability is a very low one. *Miller-El, v. Cockrell*, 537 U.S. 322, 338 (2003). In this motion, Petitioner Alvarez submits that he has made a substantial showing that the IAC issues he raised in his 2255 are definitely debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle, 453* U.S. 880, 893 fn. 4 (1983). For these reasons, Alvarez respectfully requests this Court to issue a Certificate of Appealability.

Dated: August 20, 2021

Respectfully submitted,
/s/ Ezekiel E. Cortez
EZEKIEL E. CORTEZ
Pro Bono Attorney for
Petitioner-Appellant,
Francisco Alvarez

No. 21-55826
DC No. 18cr1489-GPC

In the United States Court of Appeals for the Ninth Circuit

FRANCISCO ALVAREZ,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

CERTIFICATE OF SERVICE

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the county of San Diego, California, not a party to this action, and that my business address is 550 West C Street, Suite 620, San Diego, California 92101;

2. That I electronically filed *Appellant's Request for Certificate of Appealability* with the U.S. Court Appeals for the Ninth Circuit in San Francisco, California, which automatically serves counsel for Appellee by electronic service; and

3. That I provided an additional copy to Petitioner-Appellant Francisco Alvarez via electronic service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 20 August 2021, at San Diego, California.

s/ Ezekiel E. Cortez
EZEKIEL E. CORTEZ

C.A. No. 21-55826
18CR01653-GPC; 19CV01489-GPC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCISCO GERMAN ALVAREZ,
Defendant-Appellant.

Appeal from the United States District Court Southern District of California
The Honorable Gonzalo P. Curiel

ALVAREZ'S REPLY BRIEF

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And this is where this Court's guidance in *Chavez* becomes central. Guidance that, Alvarez submits, was ignore below; and by the Government now before this Court.

II.
By illogically conflating competence with involuntariness, the Government and the court failed to appreciate that Alvarez's evidence established that his guilty plea was involuntary and that he was denied effective assistance.

The Government and district court failed to meaningfully address this Court's guidance in *Chavez*, on the proper procedure mandated for the determination of the voluntariness of a guilty plea. In his *habeas*[3], Alvarez noted for the district court and Government that in *Chavez,* this Court specifically held of voluntariness issues: "...if the psychiatric and judicial inquiries are too narrow when the question is competence to stand trial, ***they may be of no value when the defendant expresses a desire to waive a constitutional right.***" Id., at 519, emphasis added. This Court added "a defendant who is competent to stand trial ***is not necessarily competent to plead guilty.***" *Chavez* at 519, footnote 3, emphasis added.

In the district court's Order denying Alvarez's *habeas,* the court expressly noted:

> Petitioner has not shown any prejudice [from IAC] because by May 16, 2018, Petitioner ***was mentally stable***, and not taking any medication and engaged in treatment. ***Therefore, by the time of the plea***

[3] At page 25.

> ***discussions in June/July 2018 he was competent to make a reasoned decision among the choices available to him.***

ER-169, emphasis added. "Mentally stable", the court concluded, without elucidating what that meant in the context of *Chavez.*

The problem with this "finding" by the court, as it openly adopted the Government's *unsupported* argument, was that Alvarez was placing at issue the *voluntariness* of his guilty plea. Not whether "he was competent" or "mentally stable" when he pleaded guilty. Alvarez did not place in issue the stability of his psychological state, as the district court irrelevantly concluded:

> At the time of his plea agreement and plea hearing in July 2018, the medical records clearly show that Petitioner had been successfully treated physically and mentally and he was no longer under the influence of any medication and consequently, his mental health was ***stable***. See *Chavez*, 656 F.2d at 518 ("evidence of possible present ***incompetence***, such as a history of psychiatric problems in the ***remote past***, may be so overshadowed by other evidence of present ***competence*** that it does not demand further investigation at an evidentiary hearing").

District court's order denying 2255, pages 10-11, District court Docket 67, emphasis added. Alvarez's was not questioning whether he was "competent" or "mentally stable" when he pleaded guilty. When the court ignored his explicit declaration, the court failed to properly heed this Court's guidance in *Chavez* - "a defendant who is competent to stand trial ***is not necessarily competent to plead guilty***." *Chavez* at

519, footnote 3, emphasis added. And so, it was with Alvarez – he was indeed competent but was also riddled with delusional paranoia and extreme obsessions and all he wanted to do was to get out of jail. Alvarez noted in his declaration that he believed that he was going to die at the MCC at the hands of the inmates there. This set of factors rendered his guilty plea involuntary.

In this critical error, the court and the Government ignored the very specific Guidance from this Court in *Chavez* noted by Alvarez at pages 19-20 of his *habeas*.

It bears repeating here again that in his *habeas,* Alvarez specifically noted:

> In Chavez, ... at footnote 3, this Court explained "***a defendant who is competent to stand trial is not necessarily competent to plead guilty.***"

Id., emphasis added. Alvarez's was pleading guilty under extreme duress and paranoid delusions that did not simply evaporate once he because "stable" under the care of the MCC medical staff. He simply learned to hide them, as he did from the magistrate who took his guilty plea.

Long ago in *Boykin v. Alabama,* 395 U.S. 238, 243 (1969), the U.S. Supreme Court reaffirmed the seriousness and gravity of a guilty plea when a defendant waives his Fifth Amendment right to the privilege against self-incrimination and the Sixth Amendment rights to confront witnesses and to trial by jury. And in *United States v. Ruiz,* 536 U.S. 622, 629 (2002), the Court noted:

> Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences."

And in *Missouri v. Frye*, 566 U.S. 134 (2012), the Court noted of the plea bargaining stage of criminal cases:

> The reality is that plea bargains have become ***so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process***, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.... In today's criminal justice system, therefore, ***the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.***

Id., at 143, (emphasis added).

Here, for Alvarez, former defense counsel had a duty to explore the openly displayed psychological issues with which Alvarez had been struggling. Before rushing to plead guilty, defense counsel should have performed at least minimal investigation into his client's history of serious delusions and bizarre behavior and should have consulted a professional. He failed to do either. In these failures, he violated Alvarez's right to the effective assistance of counsel.

By having denied Alvarez's *habeas* on the pleadings alone, the lower court deprived him of the presumption that his declaration and allegations were true.

CONCLUSION

For all the reasons discussed above, this Court must vacate Mr. Alvarez's conviction, vacate his sentence, and remand this case for proceedings consistent with this ruling.

Date: November 15, 2023.

Respectfully submitted,

s/ *Ezekiel E. Cortez*
EZEKIEL E. CORTEZ
Attorney for Appellant,
Francisco Alvarez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANCISCO ALVAREZ

Defendant.

Case No.: 19cv1489-GPC
18cr1653-GPC

ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND DENYING MOTION TO STRIKE GOVERNMENT'S RESPONSE AND EXHIBITS AND DENYING MOTION FOR ORDER TO DISCLOSE GRAND JURY TRANSCRIPTS

[REDACTED -ORIGINAL FILED UNDER SEAL]

Petitioner Francisco Alvarez ("Petitioner"), proceeding with counsel, filed an amended petition for writ of habeas corpus pursuant to 28 § U.S.C. § 2255. (ECF No. 53.) The United States of America ("Government") filed a response. (ECF No. 57.) When the Government filed its response late, Petitioner filed a motion to strike the

Government's untimely response and grant the petition and also a motion to strike irrelevant exhibits and a motion for order to disclose grand jury transcripts. (ECF. No. 58.) In response to the Court's order, the Government filed a response. (ECF No. 61.) Petitioner filed a reply to the Government's response. (ECF No. 63.)

For the reasons set forth below, the Court DENIES the petition for writ of habeas corpus and DENIES Petitioner's motion to strike the Government's response and irrelevant exhibits[1] and motion for order to disclose grand jury transcripts.

PROCEDURAL BACKGROUND

On March 28, 2018, a federal grand jury indicted Petitioner on three counts for 1) possession of a firearm by a prohibited person in violation of 18 U.S.C. § 922(g)(1); 2) possession of a firearm by an unlawful drug user in violation of 18 U.S.C. § 922(g)(3); and 3) knowingly making a false written statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6). (ECF No. 1, Indictment.)

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[1] Petitioner moves to strike the Government's response as untimely as it was filed three days late, on a Monday instead of a Friday. (ECF No. 58 at 2-3.) Respondent argues that Petitioner has not shown prejudice due to the filing of the untimely opposition one business day late. Respondent explains that the delay was due to reviewing the voluminous medical records attached to Petitioner's amended petition. (ECF No. 61 at 3 n.2.) The Court has discretion and the inherent power to strike a filing and in the interest of considering the petition on the merits, the Court DENIES Petitioner's motion to strike the Government's untimely opposition. *See Ready Transp., Inc. v. AAR Mfg., Inc.,* 627 F.3d 402, 404 (9th Cir. 2010) (district court has inherent power to control its docket, including power to strike items from the docket); *Goodes v. Pacific Gas & Elec. Co*., No. C 12–01667 SI, 2012 WL 2838832, at *1 n.3 (N.D. Cal. July 10, 2012) (court considered the plaintiffs' late opposition in the interest of deciding defendant's motion on its merits). In addition, Petitioner moves to strike the Government's exhibits attached to its opposition as prejudicial and not relevant to the issues in this petition. (ECF No. 58 at 5.) The Government disagrees. (ECF No. 61 at 4-7.) While the Court disagrees with Petitioner and concludes that the documents are relevant as they relate to the underlying criminal case he is challenging, the Court did not rely on the contents of these exhibits to rule on the petition. Instead, a couple of the documents were used for purposes of describing the procedural background. Accordingly, the Court DENIES Petitioner's motion to strike the Government's exhibits.

On July 26, 2018, Petitioner, with the advice of counsel, plead guilty to Count 3 of the Indictment for knowingly making a false written statement in the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6) pursuant to a plea agreement. (ECF No. 24 ("Plea Agreement").) Petitioner signed the plea agreement and attested that he discussed the facts of the case with his counsel and understood the charges and consequences of pleading guilty. (*Id.*) During the guilty plea hearing before the Magistrate Judge, Petitioner represented that the plea was knowing and voluntary and that he fully understood the terms of the agreement. (ECF No. 44 at 15–16.[2]) Specifically, the presiding Magistrate Judge inquired into the Petitioner's state of mind during the plea colloquy:

> COURT: I understand you are all in custody, but I am going to ask you and I need you to tell me if you had any alcohol or drugs currently, if you are under the influence of any alcohol, drugs or medicine, or if you have taken any medicine, alcohol, or drugs within the last 24 hours. Mr. Alvarez?
>
> ALVAREZ: No, Your Honor.
>
> COURT: Is there anything going on in your situation, your personal life, that has got you – placed so much stress upon you that you are not able to think clearly, that you are not able to understand the proceedings, that you are not able to communicate or understand what is going on? Anything that prevents you from fully understanding what we are doing today? Mr. Alvarez?
>
> ALVAREZ: No.

(*Id.* at 4-5.)

The Magistrate Judge again confirmed whether Petitioner understood what was happening and whether he had reasons that he did not feel like he was competent to

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[2] Page numbers are based on the CM/ECF pagination.

proceed with the plea. (*Id.* at 6-7.) When the Magistrate Judge asked Petitioner's counsel whether he had any reasons to believe his client was not fully competent, counsel responded in the negative. (*Id.* at 7:23-25.) The Magistrate Judge further asked whether Petitioner was entering the plea agreement freely and voluntarily and whether anyone had threatened him or coerced him into pleading guilty, and he responded in the negative. (*Id.* at 8:1-14.) In conclusion, the Magistrate Judge found that the guilty plea was made knowingly and voluntarily and with a full understanding of the nature of the charges, the constitutional rights and all consequences of the plea. (*Id.* at 27:6-13.) Subsequently, the Magistrate Judge issued Findings and Recommendations that Petitioner's guilty plea was made "knowingly, intelligently, and voluntarily, and did not result from force, threats, or promises (other than those made in a plea agreement)" and he was competent to enter a plea. (ECF No. 25 at 2-3.)

On July 27, 2018, the undersigned adopted the Findings and Recommendation of the Magistrate Judge and accepted the guilty plea. (ECF No. 27.) On August 9, 2018, Petitioner was sentenced to a time-served sentence on Count 3, the remaining counts were dismissed and Petitioner was subject to supervised release for three years. (ECF No. 32.) On April 2, 2021, the Court granted Petitioner's motion for early termination of supervised release. (ECF No. 66.)

On August 8, 2019, Petitioner timely filed a preventative petition for writ of habeas corpus under 28 U.S.C. § 2255 seeking to vacate his guilty plea as being involuntary and seeking to dismiss the indictment in violation of his Fifth Amendment due process rights. (ECF No. 39.) He claims that at the time he plead guilty, he was not competent because "he was under medication, suffering from serious psychological delusions, real constant threats to his safety, constant humiliations from inmates, and extreme phobias." (*Id*. at 4.) He also claims the indictment was secured by misleading statements made to the

grand jury. (*Id.* at 13-14.) On January 24, 2020, Petitioner filed an amended petition and added a claim for ineffective assistance of counsel for defense counsel's failure to adequately assess whether Petitioner could have formed the required mens rea for the alleges crimes and whether he could effectively and meaningfully assist in his own defense and failed to adequately investigate Petitioner's long history of psychological problems. (ECF No. 53 at 3-4.) On February 24, 2020, the Government filed an opposition. (ECF No. 57.) In response to the Government's late filing, Petitioner filed a motion to strike the Government's untimely response and to strike irrelevant exhibits as well as a motion for an order to disclose grant jury transcripts. (ECF No. 58.) The Government filed a response. (ECF No. 61.) On September 29, 2020, Petitioner filed a reply. (ECF No. 63.)

FACTUAL BACKGROUND

On August 13, 2017, the San Diego County Sheriff's Department ("SDSD") responded to a domestic disturbance after Petitioner's mother called to report that her son refused to turn down loud music. (ECF No. 53-1, Ex. A-9.) When two SDSD Deputies arrived, they announced their presence and asked Petitioner to open his bedroom door. (*Id.*) Petitioner refused, told the officers to leave, and after the Deputy asked Petitioner to open the door again, he stated "how about I have guns in here." (*Id.)* Subsequently, the Deputies heard a shotgun rack from inside Petitioner's bedroom. (*Id.*) Multiple deputies then responded to assist. (*Id.*) After making telephone contact and his refusal to exit the home, SDSD left the scene once Petitioner stated he was not going to hurt anyone. (*Id.*)

On September 9, 2017, Petitioner purchased a DSA rifle, which is an AR-15 assault-style firearm. (ECF No. 53-1, Ex. A-15.) In order to purchase the firearm, Alverez was required to fill out a Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Form 4473. (*Id.*) Question 11(e) of the form asks whether the applicant is an

"unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug or any other controlled substance?" (*Id.*) Question 11(e) also states in bold letters, **"Warning: The use or possession of marijuana remains unlawful under Federal Law regardless of whether it has been legalized or decriminalized for medicinal or reactional purposes in the state where you reside."** (*Id.*) On September 29, 2017, when he picked up the firearm, Petitioner was required to recertify that all his answers on the form were true. (*Id.*)

On October 1, 2017, two days after he picked up the DSA rifle, SDSD received a call from a concerned citizen about Petitioner's social media posts containing numerous pictures, posts, and comments depicting marijuana and firearms. (ECF No. 57-1, ROI 1 at 2-3.) In response, ATF began to surveil Petitioner's home. (*Id.*)

On October 3, 2017, SDPD deputies received a 911 call from Petitioner's brother stating Petitioner was attempting to break down his door and was possibly in possession of a firearm. (ECF No. 53-1, Ex. A-10.) When SDPD Deputies asked Petitioner to come out of the house, he complied and briefly exited the home. (*Id.*) Deputies eventually left the scene once it was determined no crime had been committed. (*Id.*)

On October 4, 2017, ATF agents obtained and executed a search warrant of Petitioner's home. (ECF No. 57-3, ROI 2 at 4.) ATF agents seized seven firearms, over 8,000 rounds of assorted ammunition, 22 grams of marijuana, marijuana paraphernalia, and several cellphones. (*Id.* at 3-5.) A search warrant of Alverez's phone also revealed his Instagram account, which depicted photos of him in possession of firearms and marijuana. (ECF No. 57-2, ROI 3 at 9-10.) On April 11, 2018, after a long standoff with SDSD in its effort to extricate him from his residence, Petitioner was arrested and taken into custody. (ECF No. 53-1, Ex. A-8.)

/ / /

DISCUSSION

A. Standard of Review on 28 U.S.C. § 2255

Section 2255 authorizes this Court to "vacate, set aside, or correct the sentence" of a federal prisoner on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a). To warrant relief under section 2255, a prisoner must allege a constitutional or jurisdictional error, or a "fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill v. United States*, 368 U.S. 424 (1962)).

B. Waiver of Trial and Voluntariness of Guilty Plea/Waiver of Right to Appeal and Collaterally Attack Sentence

Petitioner argues that his Fifth Amendment right was violated by the involuntary nature of his waiver of jury trial and guilty plea. In response, Respondent maintains that Petitioner waived his right to appeal or collaterally attack his conviction and that the record demonstrates that his guilty plea was voluntarily and knowingly made.

Due process requires that a guilty plea be both knowing and voluntary. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Bousley v. United States*, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'") (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). "To determine the voluntariness of the plea, we look to the totality of the circumstances, examining both the defendant's subjective state of mind and the constitutional acceptability of the external forces inducing the guilty plea." *Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007) (internal quotation marks omitted). A habeas petitioner bears

the burden of establishing that his guilty plea was not voluntary and knowing. *Little v. Crawford*, 449 F.3d 1075, 1080 (9th Cir. 2006) (citing *Parke v. Raley,* 506 U.S. 20, 31-34 (1992)).

A valid waiver of a constitutional right demands that a defendant "must have that degree of competence required to make decisions of very serious import." *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981). A court must look at whether a "mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver." *Id.*

In *Chavez*, the court found that the evidence that was before the court when it accepted the guilty plea created doubt sufficient to warrant an evidentiary hearing as to the defendant's ability to make a reasoned choice. *Id.* at 519. The defendant had a "history of antisocial behavior and treatment for mental illness", "an emotional outburst in open court, resulting in [the defendant's] forcible removal from the courtroom," "previous psychiatric finding of insanity based upon psychoneurosis and the use of drugs", "two psychiatric reports, neither addressing the issue of competence to plead guilty, one indicating 'adequate judgment,' the other indicating poor insight and judgment", "emotional outbursts and Chavez's firing of his attorneys in connection with the guilty plea issue" and "an inference that Chavez had not even attempted to plea bargain." *Id.*

Yet, the fact that a criminal defendant suffers from depression, stress or anxiety will not render him incapable of knowingly and voluntarily pleading guilty. *Tanner v. McDaniel*, 493 F.3d 1135, 1145-46 (9th Cir. 2007) (rejecting claim that petitioner's depression rendered his guilty plea involuntary where plea hearing record indicated that petitioner "lucidly and voluntarily decided to plead guilty"); *United States v. Yell*, 18 F.3d 581, 582-83 (8th Cir. 1994) (defendant's guilty plea was not involuntary despite claims

plea was induced by stress and defendant's difficulty being separated from his family during pretrial detention); *Locklear v. Berghuis*, No. 1:09–cv–924, 2013 WL 706055, at *8 (W.D. Mich. Jan. 31, 2013) (holding that petitioner's plea was voluntary despite evidence that petitioner suffered from depression and lived with "a death wish"); *United States v. Hibler*, No. 10–10137–EFM, 2012 WL 2120001, at *5 (D. Kan. June 11, 2012) ("Although Hibler makes a credible argument that he was experiencing stress at the time he pleaded guilty, he has not alleged the existence of any evidence showing that he did not plead guilty of his own free will."). The Tenth Circuit has recognized, "deadlines, mental anguish, depression, and stress are inevitable hallmarks of pretrial plea discussions," but "such factors considered individually or in aggregate do not establish that [a criminal defendant's] plea [is] involuntary." *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995), *cert. denied* 516 U.S. 1062 (1996). Rather, as the Ninth Circuit has explained, a defendant's mental anguish will render his plea involuntary only if it caused him to be "unable to make the decision to plead guilty freely and intelligently." *Tanner*, 493 F.3d at 1145-46; s*ee Ybarra v. United States*, 461 F.2d 1195, 1199 (9th Cir. 1972) (guilty plea was voluntary even though petitioner alleged his mind was hazy and he was suffering from drug addiction withdrawal symptoms because he did not claim he did not understand the nature of the proceedings at the time of the plea or did not understand what he was doing when he pleaded guilty).

In *Hibler,* the defendant argued he was coerced to plead guilty to protect his son from further abuse and from pressure from his attorney. The court concluded that the defendant's decision to "plead guilty in hopes of expediting his son's placement with relatives was a voluntary choice between the alternatives available to him and that every criminal defendant deciding whether to enter a guilty plea is undoubtedly influenced by factors extraneous to the individual's guilt or innocence, such as offers of leniency, the

weight of the evidence, and the advice and wishes of counsel, family, and friends. So long as these influences do not overbear the defendant's free will and compel him to plead guilty, the decision to plead guilty is uncoerced." *Hibler,* 2012 WL 2120001, at *5.

In this case, Petitioner argues that his guilty plea was not knowing and involuntary because he "was under medication suffering from psychological delusions, real constant threats to his safety, constant humiliations from inmates, and extreme phobias." (ECF No. 53 at 9.) Specifically, Petitioner claims that he was heavily medicated by the medical staff at the MCC "before and right after he 'accepted' the Government's dictated terms for his plea agreement." (ECF No. 63 at 3.) He also maintains he agreed to plead guilty to time served because he wanted to be released from custody due to the "oppressive and unusually punitive conditions" at the MCC. (ECF No. 53 at 10-11.) The Government argues Petitioner's mental health issues were fully disclosed as a matter of record. (ECF No. 57 at 10.) The Government further contends that Petitioner's behavior at the change of plea hearing appeared intelligent and voluntary to the Magistrate Judge. (*Id.* at 11.)

After a careful review of the record before the Court, the totality of circumstances demonstrates that Petitioner's anxiety and obsessive-compulsive disorder ("OCD") and opioid addiction did not substantially impair his ability to make reasoned choices when Petitioner entered into a plea agreement on July 26, 2018. While Petitioner may not have been competent to plead guilty at the time of his arrest on April 12, 2018, and shortly thereafter, he was treated at [redacted]. (ECF. No. 56, Ex. A-6, MCC/BOP Medical Records (UNDER SEAL).) At the time of his plea agreement and plea hearing in July 2018, the medical records clearly show that Petitioner had been successfully treated physically and mentally and he was no longer under the

influence of any medication and consequently, his mental health was stable. *See Chavez,* 656 F.2d at 518 ("evidence of possible present incompetence, such as a history of psychiatric problems in the remote past, may be so overshadowed by other evidence of present competence that it does not demand further investigation at an evidentiary hearing").

When Petitioner was arrested on April 11, 2018, [redacted]. (ECF No. 50, Alvarado Medical Records at 20[3] (UNDER SEAL); ECF No. 56, Ex. A-6, MCC/BOP Medical Records, BATES 222-224 (UNDER SEAL).) [redacted]. (ECF No. 56, MCC/BOP Medical Records, BATES 92, 93, 240, 248 (UNDER SEAL); ECF No. 50, Alvarado Medical Records at 23, 27-30, 40 (UNDER SEAL).) [redacted]. (ECF No. 56, MCC/BOP Medical Records, BATES 92, 93 (UNDER SEAL); ECF No. 50, Alvarado Medical Records at 23, 27-30, 40 (UNDER SEAL).) [redacted] (ECF No. 56, MCC/BOP Medical Records, BATES 93, 95 (UNDER SEAL).) [redacted]. (*Id*. at BATES 243 (UNDER SEAL).)

[3] Page numbers for the Alvarado Hospital Medical Records are based on the facsimile page numbers.

[redacted]. (*Id.* at BATES 94 (UNDER SEAL).) [redacted]. (*Id.* (UNDER SEAL).) [redacted] (*Id.* (UNDER SEAL).) [redacted]. (*Id*. at BATES 95 (UNDER SEAL).) [redacted] (*Id.* at BATES 104 (UNDER SEAL).) [redacted]. (ECF No. 50, Alvarado Medical Records at 27 (UNDER SEAL).) [redacted] *(Id.* at 40-51 (UNDER SEAL).) [redacted]. (ECF No. 56, MCC/BOP Medical Records, BATES 194-205, 210 (UNDER SEAL).) [redacted] (*Id.* at BATES 194, 200 (UNDER SEAL).) [redacted] (*Id.* at BATES 196 (UNDER SEAL).) [redacted] (*Id.* at BATES 94 (UNDER SEAL).)

[redacted]. (*Id.* at BATES 97-100 (UNDER SEAL).) [redacted]. (*Id.* at BATES 96 (UNDER SEAL).) [redacted]. (*Id.* at BATES 95.)

[redacted] (*Id.* at BATES 93 (UNDER SEAL).) [redacted] (*Id.*, BATES 92 (UNDER SEAL).) [redacted]. (*Id.* (UNDER SEAL).) [redacted] (*Id.* (UNDER SEAL).) [redacted] (*Id.* at BATES 91 (UNDER SEAL).) [redacted] (*Id.* (UNDER SEAL).)

[redacted].[4] (*Id.* at BATES 90 (UNDER SEAL).) [redacted]

[4] [redacted]

[redacted]. (*Id.* (UNDER SEAL).) [redacted] (*Id.* (UNDER SEAL).) [redacted] (*Id.* (UNDER SEAL).) [redacted] (*Id.* at BATES 90 (UNDER SEAL).) [redacted]. (ECF No. 24.)

Petitioner's first claim that he had been "under medication and suffering from a variety of OCD paranoia and hallucinations" during the waiver and change of plea hearing on July 26, 2018 is belied by the record. (ECF No. 63 at 6.) [redacted]. (ECF No. 56, MCC/BOP Medical Records, BATES 93, 95 (UNDER SEAL).) Despite his prior mental incompetence when he was arrested, by the time of his plea hearing in July 2018, [redacted] The evidence presented does not raise reasonable doubt about Petitioner's competence to plead guilty. *See Chavez,* 656 F.2d at 518.

Next, in a declaration, Petitioner states that he plead guilty because he wanted to get out of the MCC due to the humiliation he suffered by the other inmates. (ECF No. 53-1, Ex. A-16, Alvarez Decl. at 61-65.) He explains that because his withdrawal symptoms caused him diarrhea and paranoid delusions, the other inmates openly mocked

him and complained about his behavior. (*Id.* at 61, 63.) In addition, he was kicked out of about eight different cells due to his OCD. (*Id.* at 63.) Therefore, when he was offered the plea agreement for time served, despite that fact that he believed he was not guilty on Count 3, he wanted to escape the torture and threats at the MCC. (*Id.*) Moreover, his attorney encouraged him to plead guilty to one count stating it was best for him. (*Id.* at 63-64.) He plead guilty so he could be released from the MCC and he did not mention his psychological and physical trauma that was still affecting him during the plea hearing. (*Id.* at 64.) He questions why nobody else told the judge about his psychological condition, the medications he was given by the MCC and hospital staff, and the psychological stressors affecting him. (*Id.*)

Petitioner's declaration is not supportive because he presents general statements of stress due to being mocked by other inmates which is not sufficient to demonstrate his plea was involuntary. *See Tanner*, 493 F.3d at 1145-46; *Miles*, 61 F.3d at 1470. Moreover, he provides no specific facts concerning the threats and torture he suffered at the MCC. Furthermore, he does not address his stable mental condition after he became medication and opioid free. Instead, the medical records show that he voluntarily made a reasoned decision to plead guilty rather than go to trial in order to be released from custody based on a time served sentence.

Moreover, Petitioner's exchange in court with the Magistrate Judge during the change of plea hearing also points to a knowing and voluntary waiver. A defendant's "statements at the plea colloquy carry a strong presumption of truth." *Muth v. Fondren*, 676 F.3d 815, 821 (9th Cir. 2012) (citing *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) ("[T]he representations of the defendant [at a plea hearing] . . . constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."); *United States v. Ross*, 511 F.3d 1233, 1236

(9th Cir. 2008) ("Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea.") (citations omitted)). Petitioner entered into a written plea agreement with advice of counsel, indicated that his plea was knowing and voluntary, and that he fully understood the agreement. (ECF No. 44 at 4–5.) The Magistrate Judge questioned Petitioner and further confirmed Petitioner's understanding of the plea agreement. (*Id.*) Responding to the Magistrate Judge's inquiry, Petitioner confirmed that he was not under the influence of medication, and that there was nothing going on in his situation that placed him under so much stress such that he was not able to think clearly or understand the proceedings. (*Id.*) These statements by Petitioner have a "strong presumption of veracity in subsequent proceedings attacking the plea." *See Ross*, 511 F.3d at 1236. The totality of circumstances from Petitioner's medical records, Petitioner's statements during the colloquy, and the Magistrate Judge's independent findings support a conclusion that Petitioner knowingly and voluntarily waived his right to trial in entering into a plea agreement. Because Petitioner knowingly and voluntarily waived his right to trial and pleaded guilty, the Court considers whether he waived his right to collaterally attack his sentence under the plea agreement.

"Plea agreements are contractual in nature and are measured by contract law standards." *United States v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990) (internal quotation marks omitted) (quoting *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985)). "A defendant's waiver of his appellate rights is enforceable if the language of the waiver encompasses his right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made." *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004); *see also United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that a defendant may waive the right to collateral review). The court "looks to the

circumstances surrounding the signing and entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily." *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996). The court "must also focus [sic] upon the language of the waiver to determine its scope." *Id.* "[W]hether the district court informed the defendant of [his] appellate rights and verified [his] intent to forfeit them" is also relevant. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000**).**

Here, Petitioner entered into a plea agreement with the Government. (ECF No. 24.) According to the terms of the plea agreement, Petitioner waived his rights to appeal and collateral attack except for a claim for ineffective assistance of counsel. (*Id*. at ¶ XI.) Furthermore, Petitioner represented that the plea agreement was knowing and voluntary, that he had "discussed the terms of this agreement with defense counsel and fully underst[ood] its meaning and effect," and that he "consulted with counsel and [was] satisfied with counsel's representation." (*Id.* at ¶¶ VI, XIV, XV.) Petitioner initialed each page of the Plea Agreement and signed the final page under penalty of perjury. (*Id.*) Furthermore, Petitioner was addressed in open court, pursuant to Federal Rule of Criminal Procedure 11. Finally, the Magistrate Judge confirmed that Petitioner specifically waived his right to appeal with the guilty plea. (ECF No. 47 at 17-18.)

Petitioner's plea agreement is enforceable because the surrounding circumstances indicate the plea agreement was made knowingly and voluntarily, and he waived his right to collaterally challenge his conviction except for an IAC claim. Therefore, the Court DENIES the claim challenging the indictment. Nonetheless, even if Petitioner did not waive his right to collaterally challenge his conviction, his claim still fails.

C. Challenge to the Indictment

Petitioner claims that the Government secured the indictment against Petitioner using "misleading statements." (ECF No. 53 at 21.) He claims that as to Count 1, he was

not a prohibited person in possession of a firearm because his prior conviction in state court had been set aside, and dismissed in a state court order on April 20, 2005 and modified on December 13, 2007. (*Id.* at 17-18.) As to Counts 2 and 3, Petitioner claims he did not have the "mens rea" to commit the crime because he did not know he was an "unlawful" user of marijuana and other medically prescribed drugs because in a reasonable person's mind, a medical marijuana card prescription for medicine makes a person a "lawful" user. (*Id*. at 19.) Respondent responds that the issues as to Count 1 and 2 are moot because they were dismissed by this Court. As to Count 3, the indictment and plea agreement make clear that he made a material misrepresentation that he was not using marijuana when he purchased the firearm and in fact the question on the ATF form states in bold letters, **"Warning: The use or possession of marijuana remains unlawful under Federal Law regardless of whether it has been legalized or decriminalized for medicinal or reactional purposes in the state where you reside."** (ECF No. 53, Ex. A-15.)

As to Petitioner's challenge to Counts 1 and 2 of the indictment, they are moot because they were dismissed as part of the plea agreement, (ECF No. 32). *See United States v. Boeckman*, 993 F.2d 884, 1993 WL 147314 at *1 (9th Cir. 1993) (§ 2255 challenge to the sufficiency of the evidence on counts in indictment that were dismissed under a plea agreement were moot); *see e.g., United States v. Miller*, 387 F. Supp. 1097, 1100 (D. Conn. 1975) (challenge to counts in the indictment moot based on agreement with the government dismissing them). As to the challenge to Count 3, Petitioner claims that he did not know he was an "unlawful" user of marijuana as there is "constitutional vagueness" on the ATF Form 4473 because by asking whether one is an "unlawful" user, there must be instances of "lawful" use. However, in this case, because Petitioner plead guilty, he admitted all factual allegations contained in the indictment. *See United States*

v. Mathews, 833 F.2d 161, 164 (9th Cir. 1987) ("a guilty plea conclusively proves the factual allegations contained in the indictment"). Under the plea agreement, Petitioner plead guilty to Count 3 and the government agreed to dismiss Counts 1 and 2. Therefore, his claim of insufficiency of the evidence to support the indictment under Count 3 is barred. *See Boeckman*, 1993 WL 147314 at *1.

Furthermore, Petitioner's argument that he believed he was a lawful user of marijuana is not supported by the record. As the Government points out, the ATF Form 4473 specifically highlights that use of marijuana is unlawful under Federal law even though it may be legal in California. (ECF No. 53-1, Ex. A-15 at 55.) There is no vagueness in the question asked.

In his motion to strike, Petitioner summarily argues, without legal authority, that based on the arguments and facts presented in the Government's opposition, it has triggered the request for the production of grand jury transcripts concerning Petitioner's mental condition as well as whether he was a prohibited felon incapable of buying a firearm. (ECF No. 58 at 19.) The Government responds that Petitioner's motion is moot because Counts 1 and 2 were dismissed, and the request for grand jury transcript is speculative. (ECF No. 61 at 10.)

Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule") governs secrecy in Grand Jury proceedings and provides a limited list of exceptions for disclosure. Fed. R. Crim. P. 6(e). A defendant seeking a request to produce grand jury transcripts bears a burden of overturning a presumption of secrecy. *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("[W]e start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.")). Rule 6(e)(3)(E)(ii) provides that "[t]he court may authorize disclosure—at a time, in a manner, and subject to any other

conditions that it directs—of a grand jury . . . at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before a grand jury[.]" Fed. R. Crim. P. 6(e)(3)(E)(ii). Disclosure of grand jury proceedings is available only by court order, and a defendant bears the burden of establishing a "particularized need" or "compelling necessity" for disclosure which outweighs the policy of grand jury secrecy. Fed. R. Crim. P. 6(e); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

Here, except for speculation, Petitioner provides no compelling reason or particularized need for the grand jury transcript. Accordingly, the Court DENIES Petitioner's request for grand jury transcripts.

D. Ineffective Assistance of Counsel

Petitioner argues that he was denied his right to effective assistance of counsel because Petitioner's defense counsel "did not obtain an *ex parte* psychological evaluation" to determine whether Petitioner could have formed the requisite intent for the charges against Petitioner and whether Petitioner "could effectively and meaningfully assist in his own defense." (ECF No. 53 at 23.) Respondent argues that defense counsel was aware of Petitioner's mental state based on visits with Petitioner and discovery that was produced in the case and defense counsel was not ineffective and the claims are speculative. (ECF No. 57 at 18-19.)

A defendant claiming ineffective assistance of counsel ("IAC") must show both (1) deficient performance under an objective standard of reasonableness and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, "[t]he challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter,* 131 S. Ct. 770, 787 (2011) (quoting *Strickland*,

466 U.S. at 687). Defendant must overcome a strong presumption that counsel "rendered adequate assistance . . . in the exercise of reasonable professional judgement," in the form of a reasonable trial strategy. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995). To demonstrate prejudice, the petitioner must show that "but for counsel's unprofessional errors," there is a reasonable probability "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"); *see Richter,* 131 S. Ct. at 792 ("The likelihood of a different result must be substantial, not just conceivable").

Petitioner contends that he was denied effective assistance of counsel by his failure to investigate Petitioner's psychological state. (ECF No. 53 at 22-25.) Relying on *Weeden v. Johnson,* 854 F.3d 1063 (9th Cir. 2017), Petitioner asserts that when the only plausible defense turns on whether the client had the requisite mens rea to be found guilty of the crime, counsel has a duty to investigate the client's mental state. (ECF No. 53 at 23-24.) More specifically, Petitioner urges that counsel cannot claim it was a tactical reason not to investigate because Count 3 turns on whether Petitioner knowingly made a false statement and it was unlikely that Petitioner could form the specific intent to make a false statement on a firearm application because the prolonged use of prescribed medication may have caused a psychological imbalance. (*Id.*)

However, Petitioner's argument improperly relies on the incident [redacted]. (ECF. No. 56, Ex. A-6, MCC/BOP Medical Records, Bates 94 (UNDER SEAL).) Even though the medical records explicitly attribute Petitioner's inability to appreciate the wrongfulness of his actions to the [redacted], Petitioner suggests that this incident shows that he also could not form specific intent with respect

to Count 3, which occurred almost an entire year prior on September 9, 2017. As such, a psychological exam at the time of his arrest and shortly thereafter would not have demonstrated his mental state back on September 9, 2017. Therefore, Petitioner's counsel was not deficient in not seeking a psychological evaluation.

Next, Petitioner argues his defense counsel had a duty to investigate his mental health for purposes of his defense during April and May of 2018. However, even if Petitioner's counsel had a duty to investigate Petitioner's mental health prior to the plea deal, Petitioner has not shown any prejudice because by May 16, 2018, Petitioner was mentally stable, and not taking any medication and engaged in treatment. Therefore, by the time of the plea discussions in June/July 2018 he was competent to make a reasoned decision among the choices available to him.

Therefore, because Petitioner has not shown the requisite deficiency in defense counsel's performance and that there was prejudice, the Court DENIES Petitioner's claim for ineffective assistance of counsel.

D. Certificate of Appealability

To appeal a district court's denial of a § 2255 petition, a petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A district court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). To satisfy this standard, the petitioner must show 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).

In this case, Petitioner has failed to provide sufficient facts to demonstrate that Petitioner did not knowingly and voluntarily enter the plea agreement and understand its effect, that the indictment was secured by material misrepresentations and that defense counsel was ineffective. Therefore, the Court finds that reasonable jurists would not find

this Court's dismissal Petitioner's claims debatable and the Court declines to grant Petitioner a certificate of appealability.

CONCLUSION

For the reasons set forth above, the Court **DENIES** the petition for writ of habeas corpus under 28 U.S.C. § 2255 and **DENIES** a certificate of appealability. The Court also DENIES Petitioner's motion to strike the Government's response and exhibits and motion to order grand jury transcripts, (ECF No. 58). The Clerk of Court shall enter judgment accordingly.

IT IS SO ORDERED.

Dated: June 4, 2021

Hon. Gonzalo P. Curiel
United States District Judge