UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO._____

(Criminal Case No. 10-20527-Cr-LENARD)

RENE DE LOS RIOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28, U.S.C., §2255

Statement Regarding Prior Proceedings

1. The judgment of conviction from which Petitioner, De Los Rios, seeks relief was entered on the docket by the United States District Court for the Southern District of Florida, Miami Division, on January 2, 2008. The judgment of conviction was appealed to the Eleventh Circuit Court of Appeals. De Los Rios' conviction was affirmed and he filed a motion for rehearing that was denied on October 19, 2012. The conviction became final on January 17, 2013 and, accordingly, this Petition is timely.[1]

2. De Los Rios was charged in a five-count Indictment with one count of

[1]Title 28, U.S.C., § 2255 requires a petition be filed within one year of the judgment becoming final. A judgment which has been appealed unsuccessfully becomes final when the time for filing a petition for certiorari expires. *Clay v. United States*, 537 U.S. 522, 525 (2003). When a motion for rehearing is filed in the Circuit court, a petition must be filed within 90 days of the denial of that motion. *See* Sup.Ct. R. 13(3). In this case, that deadline was January 17, 2013. Because De Los Rios did not file a petition, the statute of limitations began to run on January 18, 2013. *Washington v. United States,* 243 F.3d 1299, 1301 (11th Cir.2001). As such, De Los Rios has until January 17, 2014 to file a § 2255 motion.

conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 (Count I) and four counts of submitting false claims in violation of 18 U.S.C. § 287 (Counts II-V). DE #3. He entered a plea of not guilty and proceeded to a jury trial on February 15, 2011. This trial resulted in a hung jury. Trial began again on March 31, 2011. De Los Rios testified at both proceedings. The second trial ended in his conviction on all counts of the Indictment. De Los Rios was sentenced to a total of 235 months in prison.

3. De Los Rios timely instituted an appeal of this conviction and sentence. He was represented on appeal by undersigned attorney Lisa Colón, Esq., 80 S.W. 8th Street, Suite 2803, Miami, Florida 33130. That appeal, docketed as Case No. 11-13134, raised the following issues:

ISSUE I

THE DISTRICT COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE GOVERNMENT TO INTRODUCE TESTIMONY REGARDING THE SCHEME TO DEFRAUD MEDICARE AT J&F COMMUNITY MEDICAL CENTER

ISSUE II

DE LOS RIOS WAS DENIED A FAIR TRIAL BY THE DISTRICT COURT'S WRONGFUL EXCLUSION OF EVIDENCE THAT WAS CRUCIAL TO HIS DEFENSE

ISSUE III

THE DISTRICT COURT ERRED WHEN IT INSTRUCTED THE JURY THAT IT COULD FIND DE LOS RIOS HAD KNOWLEDGE AND WAS THEREFORE GUILTY OF THE CRIMES CHARGED IN THE INDICTMENT IF IT FOUND DE LOS RIOS WAS DELIBERATELY IGNORANT OF THE FACTS OF THE OFFENSE

ISSUE IV

THE SENTENCE THE DISTRICT COURT IMPOSED MUST BE VACATED BECAUSE IT WAS SUBSTANTIVELY UNREASONABLE

The Eleventh Circuit affirmed this conviction in an unpublished opinion entered on September 4, 2012. The opinion's citation is 489 Fed. Appx. 320 (11th Cir. 2012).

4. De Los Rios has not filed any other petitions, applications or motions with respect to the above-referenced judgment against him in any federal court. There are no petitions or appeals now pending in any court as to the judgment under attack herein. He does not have a future sentence to serve after he completes serving the sentence under attack herein.

5. Attorney, Jose Quinon, represented Petitioner at all pre-trial stages and at both trials. Pursuant to Title 28, U.S.C. §2255, De Los Rios' conviction and sentence should be vacated because his trial attorney provided ineffective assistance of counsel. Counsel failed to properly advise regarding the severe sentence De Los Rios faced if convicted after trial and/or to convey a plea offered by the government. Trial counsel's (lack of) advice to De Los Rios led to the imposition of a sentence that was at least three times greater than it would have been had he pleaded guilty.

STATEMENT OF THE FACTS AND THE CASE

A five-count Indictment charged De Los Rios with one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 (Count I) and four counts of submitting false claims in violation of 18 U.S.C. § 287 (Counts II-V). The offenses occurred "from in or around April 2003 through in or around September 2005" at a Hialeah medical clinic named Metro Med. DE3. The Indictment also charged four other defendants with the same offenses. These defendants pleaded guilty.

De Los Rios' trial was scheduled to begin on February 15, 2011. By that time, several significant events had occurred. First, it was clear that Lissette Borges and co-

defendant Damaris Oliva were cooperating with the government. They were in line to provide testimony regarding the Medicare fraud scheme at Metro Med and the role De Los Rios played in that scheme. Second, counsel was unsuccessful in his attempt to exclude Rule 404(b) evidence which put De Los Rios in the center of a second Medicare fraud scheme involving the treatment of HIV patients. Finally, counsel was also unsuccessful in his attempt to exclude expert testimony from Dr. Wohlfeiler who was prepared to (and ultimately did) testify that the medications prescribed to the HIV patients at Metro Med were unnecessary. Thus, prior to trial, counsel was aware of the daunting task in front of him.

Yet, trial counsel did not discuss with De Los Rios the option of pleading guilty to the Indictment. He did not advise that pleading guilty would benefit him because he would receive a three level reduction for acceptance of responsibility. He did not advise that entering into negotiations with the government would minimize his exposure under the guidelines. In fact, prior to trial counsel never discussed with De Los Rios the Sentencing Guidelines or how they apply to the case.

After the first trial, the government contacted counsel to make an offer. The details of that offer are not addressed because De Los Rios never learned them from counsel. Instead, counsel called De Los Rios and his family into his office to discuss his fee for the second trial. In terms of what he told De Los Rios, it was only that his case could be beat and, therefore, he should not consider pleading guilty. De Los Rios only learned after his conviction that he was facing point adjustments for sentencing factors that could have been negotiated and/or avoided. Had De Los Rios been told at any point that his sentence would be exponentially greater after a trial, that the guidelines and/or charges were subject to negotiations, or that an offer from the government was on the table, he would have

entered a plea of guilty.

MEMORANDUM OF LAW

The Sixth Amendment to the United States Constitution guarantees to the criminally accused the "right to have the assistance of counsel for his defense." Enjoyment of the right to assistance of counsel would be meaningless if the assistance counsel provides is ineffective. *McMann v. Richardson*, 397 U.S. 759 (1970); *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Therefore, where counsel's assistance falls below an objective standard of reasonableness and prejudices the defense, counsel is ineffective and the defendant is entitled to relief from the prejudice. *Strickland v. Washington*, 466 U.S. 688 (1984).

Strickland established a two-prong analysis for determining whether a defendant's Sixth Amendment right to assistance of counsel has been violated by his counsel's ineffectiveness. The first prong requires the defendant to show that the representation his counsel rendered was deficient, in that the errors counsel made were so serious he was "not functioning as the 'counsel' guaranteed by the Sixth Amendment" so that the representation he provided fell below an objective standard of reasonableness. 466 U.S. at 687-688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). Acts and omissions that fall "outside the wide range of professionally competent assistance" satisfy this first prong of *Strickland*.

The second prong requires that the defendant show his counsel's ineffective representation caused him prejudice and, accordingly, rendered the outcome of the proceeding in which counsel was ineffective unreliable.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

> been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. In this regard, the possibility of an increased prison sentence flowing from counsel's error constitutes the prejudice that satisfies *Strickland*'s second prong. *Glover v. United States*, 531 U.S. 198 (2001)(Counsel's failure to raise a grouping argument, which exposed the defendant to an additional 6 to 21 months in jail, constituted prejudice triggering relief under *Strickland*.).

The constitutional guarantee of effective assistance of counsel extends to plea negotiations. *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The importance of counsel's role at this stage cannot be understated because, as the Supreme Court has noted, the plea bargaining process is a critical stage of the criminal process.

> Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006–Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc 06st.pdf; *Padilla, supra,* at ——, 130 S.Ct., at 1485–1486 (recognizing pleas account for nearly 95% of all criminal convictions). 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. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler, post,* at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, Plea

> Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L.Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). 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.
>
> To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " *Massiah,* 377 U.S., at 204, 84 S.Ct. 1199 (quoting *Spano v. New York,* 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

Thus, a determination of counsel's effective assistance at the pretrial stage does not focus solely on trial preparation. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012)("The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.").

When the requirements of the Sixth Amendment are superimposed on the workings of the criminal justice system, two principles are clear. First, counsel must know the guidelines' structure and content and how his client would fare if convicted at trial. *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)("Because the Sentencing Guidelines have become a critical, and in many cases, dominant facet of federal criminal proceedings, we can say, however, that familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity

for counsel who seek to give effective representation."). Second, counsel must accurately relay this information to his client so that he understands what he faces if the conviction comes as a result of a plea versus a jury verdict and can make an informed decision how to proceed. *United States v. Day*, 969 F.2d at 43 ("Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty."). When counsel does not he has acted ineffectively. *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004)("When the defendant lacks a full understanding of the risks of going to trial," counsel's performance falls below an objectively reasonable standard.).

The case law not only provides guidelines for analyzing De Los Rios' claims of ineffective assistance of counsel for his failure to explain to De Los Rios that his sentence would be less severe if he pleaded, but a clear directive of what must be done as a result of his failure to convey the government's offer prior to the second trial. *Lafler v. Cooper*, 132 S. Ct. at 1387 ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."). The fact De Los Rios maintained his innocence at trial (and on appeal) is of no moment. The law is clear. A defendant can still demonstrate prejudice for counsel's failings in the plea bargaining process after he has received a fair trial. *Lafler v. Cooper*, 132 S. Ct. at 1386 ("Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."); *Lalani v. United States*, 315 Fed. Appx.

858, 861 (11th Cir. 2009). It is the fact counsel did not convey an offer that matters, not that the defendant professed his innocence. *Griffin v. United States*, 330 F.3d 733, 738-39 (6th Cir. 2003)("If Griffin's attorney told him of the plea offer and explained the plea process to him, we cannot say, given the disparity in sentences and the evidence arrayed against him, that he would not have changed his mind and accepted the plea.").

In this case, counsel (who was paid separate pre-trial and trial fees) did not discuss the Sentencing Guidelines with De Los Rios at all prior to De Los Rios receiving a copy of his Presentence Investigation Report. De Los Rios, who had no experience with the criminal justice system, had no idea prior to his conviction that his sentence would be based on a guideline calculation, that the offense level could be reduced by accepting responsibility (or was otherwise subject to negotiation) or that a negotiated plea would limit his sentence exposure through dismissal of some of the counts (as it did with all four of his co-defendants). To De Los Rios' knowledge, counsel did not enter into negotiations with the government when he knew or should have known, under the facts of this case (cooperating co-defendants and a client who is 72 years old), that it was beneficial to do so. And, when the government made its offer, counsel did not explain it. Instead, he called a meeting to discuss his fee for the second trial. This was ineffective.

In terms of the prejudice that resulted, De Los Rios received a much more severe sentence than he would have received had he entered a plea. Proof of this is apparent from a review of his co-defendants' sentences. Damaris Oliva, the mastermind of the conspiracy pleaded guilty to Count 1, negotiated an agreed guideline range of 97-121 months and received an 82 month sentence (based on cooperation and prior to the Rule 35 reduction). Two other co-defendants, Lisandra Aguilera and Estrella Rodriguez

received 70 and 57 month sentences respectively for their conspiracy convictions charged in Count 1. They were responsible for altering blood results and patient records. None of these defendants received a two-level increase for conscious or reckless risk of serious bodily injury under § 2B1.1(b)(13(A). Aguilera and Rodriguez still received a full three level reduction for acceptance of responsibility despite having pleaded guilty only days before their scheduled trial.

Likewise, Jose Diaz, who actively prepared to defend against the Indictment until six days before trial was scheduled to begin, received a full three-level reduction for acceptance. He, like De Los Rios, was a physician at MetroMed. His Plea Agreement, DE #175, provided for an offense level between 26 and 29, leaving open the option to litigate, at sentencing, the sophisticated means and leadership enhancements. Diaz was *not* subjected to a two-level abuse of trust enhancement or a two-level enhancement for conscious or reckless disregard for serious bodily injury (like De Los Rios received). Diaz ultimately received 54 months for the health care fraud conspiracy charged in Count 1.

De Los Rios, on the other hand, received the maximum statutory penalty of 10 years for Count 1. That was 38 more months on Count 1 than the organizer of the scheme received. It was 66 months more than the other doctor received. What is more, this Court stacked a 60 month sentence for Count 2 and 55 month sentence for Count 3 on top of the 120 months to run consecutively.[2] As a result of going to trial, De Los Rios is serving a ***235*** month sentence - at least 3 times more time than the defendants charged with the very

[2]Even a plea straight to the Indictment would have yielded less time than De Los Rios received as it is unlikely the Court would have given him *consecutive* sentences on Counts 2 and 3 after a plea.

same offense. Had counsel explained the structure of the Sentencing Guidelines and the results that come before and after trial, De Los Rios would have been in a position to make an informed decision about going to trial. Furthermore, had De Los Rios understood the disparity between a post-plea sentence and a post-trial sentence, he would not have gone to trial and, instead, would have entered a plea of guilty.[3] Accordingly, but for counsel's ineffective assistance, the result of this case would have been very different.

WHEREFORE, De Los Rios respectfully requests this Court grant his motion or, at a minimum, set this matter for an evidentiary hearing. *Aron v. United States*, 291 F.3d 708, 714 (11th Cir. 2002)(Noting § 2255 requires a hearing unless the files and records "conclusively" show that a petitioner is not entitled to relief).

[3]Given De Los Rios' age, the disparity is the difference between leaving a cell before the end of his life and more than likely dying in prison.

OATH

I declare under penalty of perjury that the factual allegations contained in this Motion are true and correct.

RENE DE LOS RIOS

Respectfully submitted,

LISA HANLEY COLÓN , ESQ.
Law Office of Lisa H. Colón, P.A.
80 S.W. 8th Street
Suite 2803
Miami, Florida 33130
Telephone: (305) 514-9275
E-mail: lisahcolonpa@gmail.com
Florida Bar No. 125946

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, 2013, a copy of the foregoing was provided to the United States Attorney's Office via CM/ECF.

LISA HANLEY COLÓN, ESQ.