**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| **United States** | : | |
| | : | |
| **v.** | : | **No. 3:98cr109(JBA)** |
| | : | |
| **Oscar Perez Gomez** | : | |

**Ruling on Motion Under § 2255 [Doc. #165, 184, 198]**

Dr. Oscar Perez Gomez, who was convicted of one count of wire fraud for his participation in a scheme to falsely bill Medicare, moves under 28 U.S.C. § 2255 to vacate his conviction, claiming ineffective assistance of counsel. He asserts that two of his former lawyers failed to inform him of a plea offer, and that his trial counsel allowed concern for receipt of fees to take precedence over the obligation to effectively represent Perez Gomez. Following a swath of post-conviction filings by both a third retained attorney (who subsequently withdrew) and by Perez Gomez pro se, the Court appointed counsel and received supplemental briefing. As set out below, the Court concludes that the record conclusively shows that Perez Gomez is entitled to no relief.

I. Background

A. The Offense[1]

The defendant and Dr. Nilvio Aquino[2] each owned fifty percent of an enterprise that provided transtelephonic cardiac monitoring (TTM) services.[3] TTM services are clinically appropriate to identify transient, symptomatic cardiac arrhythmias only when the TTM devices are used on a symptomatic basis.[4] Perez Gomez, however, trained the technicians in his

---

[1]All citations to the Trial Transcript ("Tr.") are to the seventeen-volume set of trial transcripts [Docs. ##141-147, 149, 203-211], not to the individual transcripts of certain witnesses' testimony such as, e.g., Transcript of the Testimony of Dr. Lawrence Cohen [Doc. #129]. The only exceptions are citations to the testimony of Ismael Vanbrackle: because Trial Transcript Volume XII [Doc. #207] skips from page 1366 to page 1443 (mistakenly omitting 77 pages of cross, redirect and recross examination of Vanbrackle), all citations to Vanbrackle's testimony are to the complete two-volume Transcript of the Testimony of Ismael Vanbrackle [Docs. ##77 & 78].

[2]Aquino was convicted separately. See United States v. Aquino, 3:98cr153(JBA) (D. Conn.).

[3]See Testimony of Edward Sherota (the company's CPA), Tr. 595-598 (describing business arrangement) & Tr. 624 (the various corporations had an identical structure and relationship).

[4]Testimony of Dr. Lawrence Cohen (cardiology expert), Tr. 55. Dr. Cohen testified, in substance, as follows:

While several cardiac monitoring devices (such as an electrocardiogram [ECG] or Holter monitor) can be used to identify an arrhythmia (some alteration in the normal electrical signal that causes the heart to beat, Tr. 33), only the TTM device can provide extended monitoring (a full month). Tr. 39-41. An ECG is performed in the physician's office and only monitors the heart for several minutes, and a Holter monitor continuously records electrical impulses for only 24 hours. Tr. 36-38. A TTM device, by contrast, is worn for a full month and is capable of such extended monitoring because, unlike the ECG

employ to misuse the device in order to maximize profits: he described the device as a screening tool appropriate for healthy individuals,[5] and directed that the device be used on five scheduled, sequential days.[6] Contrary to medically acceptable use of the device, technicians performed the tests in physicians' offices five to six scheduled times per patient over the same number of days, and never allowed patients to take the device

---

and Holter monitor (which record every electrical impulse, both normal and abnormal), the TTM device is selective, recording only when the patient activates the device upon experiencing a symptom. Tr. 40-41. After the patient experiences a symptom (such as palpitations) and activates the recording feature, the patient connects the device to a telephone and the recording is sent telephonically to a physician for analysis and review. Tr. 41. Because of its extended coverage, a TTM device is medically appropriate for diagnosing a transient arrhythmia (a rhythm alteration which occurs sporadically, perhaps only four times a month) when the arrhythmia is accompanied by recognizable symptoms (as opposed to silent symptoms). Tr. 47.

A TTM device would not be clinically appropriate for scheduled use in a physician's office, because an electrocardiogram would be more appropriate. Testimony of Dr. Orley Johnson, Tr. 1057.

[5]Testimony of Juan Vazquez (TTM coordinator in Perez Gomez's employ), Tr. 922 ("Q: [I]n your orientation with [Perez Gomez], did you ever discuss with him when the device should be used? A: Yes, these devices were going to be used for patients who show symptoms or no symptoms because they were of a preventative nature."); cf. Testimony of Dr. Antonio Capella, Tr. (considered use of TTM device from defendant's company appropriate for any patient over age 65).

[6]Testimony of Betty Hernandez (office manager), Tr. 741 (describing memo written at Perez Gomez's direction which states that proper use of the TTM device is over five sequential days).

home.[7] The enterprise provided incentives for this misuse: technicians were paid on a per-transmission basis[8] and were required to complete 100 transmissions per week,[9] and doctors were compensated for each patient referred.[10] The misuse was very profitable, as reimbursement from the Pennsylvania Medicare carrier for the month of September 1992 alone was $814,275.53.[11]

Although services were provided almost exclusively to Medicare recipients in Puerto Rico,[12] the Perez Gomez/Aquino venture was carried on through a variety of corporate entities that relocated from state to state in search of higher Medicare reimbursement rates,[13] finally settling in Connecticut, where the

---

[7]Testimony of William Soler, Tr. 844, 846, 851-852; Testimony of Eric Bara, Tr. 874-875, 884; Testimony of Orlando Rodriguez, Tr. 899-900; Vazquez, Tr. 922; Testimony of Jose Rios, Tr. 932, 934; Capella, Tr. 1013-1015; Testimony of Luis Diaz Gonzalez, Tr. 1031; Testimony of Ramon Francisco Enchandia, Tr. 1043-1044; Johnson, Tr. 1055-1056. See also id. at 1058 ("Q: [W]ere you allowed to use the device in the way you felt it should be used? A: No.").

[8]Hernandez, Tr. 753, 856.

[9]Rodriguez, Tr. 897.

[10]Rios, Tr. 935.

[11]Testimony of Richard Mehan (computer programmer), Tr. 340.

[12]Testimony of Thomas Lewin (postal inspector), Tr. 1139 (over 90% of patients were from Puerto Rico).

[13]Lewin Tr. 1158 (one corporation in one state stopped billing Medicare on January 22, 1993, and the next corporation in another state began billing on January 23, 1993); Mehan, Tr. 349-350 (on the same day Mehan set up a new site in Milwaukee and TTM transmissions began to be telephoned in [to a telephone number that formerly belonged to the Pennsylvania operation], Aquino's

business operated from January 23, 1993 to at least as late as June 12, 1993.[14] On February 25, 1993, after the Connecticut Medicare carrier's fraud and abuse department began to grow suspicious of the volume, source and characteristics of TTM claims, the carrier's computer system was programed to automatically reject any claim bearing the TTM procedure code (92368) unless the claim listed one of the three following diagnostic codes: 435.9 (transient ischemic attack), 780.2 (syncope) or 427.9 (arrhythmia).[15] In apparent response, on March 15, 1993 Perez Gomez directed Office Manager Betty Hernandez to send a memorandum listing the new codes and, it

---

wife told him to close the location because Wisconsin had just reduced its reimbursement rates for the procedure).

[14]Mehan Tr. 368 (Connecticut corporation began receiving transmissions on January 23, 1993) & Tr. 392 (last Connecticut claims were transmitted on June 12, 1993).

[15]Testimony of Laurie Maniscalco (the carrier's fraud and abuse investigator), Tr. 176-180. These particular codes were selected because they identified the most common diagnosis codes that would accompany a claim for the medically-appropriate use of a TTM device; they are not exhaustive of all diagnostic codes that might accompany such a claim, however. Testimony of Dr. Arif Toor (the carrier's medical director), Tr. 202-203. Dr. Toor testified that if a claim was automatically rejected for failure to list one of these three codes, manual approval was still possible if it could be shown that the use of the TTM device was medically necessary and appropriate. Tr. 200-202.

Dr. Toor testified that each of the three codes related to the first approved use of a TTM device (use "A" in the Medicare manual), which was "to detect, characterize and document symptomatic transient arrhythmias." Tr. 197 (emphasis in original), 203. Dr. Cohen testified that "the overwhelming majority of uses for a TTM, 90 percent of the total," would be for this first approved use. Tr. 65.

could be inferred, directing that only those diagnosis codes be used[16]: the preprinted referral forms were changed to contain only those three codes,[17] and the computer billing program was edited so that it would reject any claim not accompanied by one of those three diagnosis codes.[18]

By submitting TTM claims that were accompanied by diagnostic codes indicative of transient, symptomatic arrhythmia, the Perez Gomez/Aquino enterprise was falsely representing to Medicare that the TTM devices were being given to patients to carry with them 24 hours a day for up to a month, activating the device only upon experiencing a symptom:

> Q: With respect to the symptomatic codes, under these circumstances, what do they represent to Medicare about the availability of the device and activation of the device?
>
> A: If the code is such that it is a symptomatic code, then it represents to Medicare that the patient has the device for 24 hours of each day and that the patient has been instructed to activate the device when a symptom occurs. So, Medicare has every right to expect if the code is for symptomatic arrhythmias . . . that the patient will be carrying the device for 24 hours of each day.

Cohen, Tr. 67. "Scheduled" use of a TTM device on a patient with a diagnostic code such as one of the three permitted by

---

[16]Hernandez, Tr. 669, 774-775.

[17]Rios, Tr. 960-961.

[18]Mehan, Tr. 376.

Connecticut's Medicare carrier "falls far outside of the standard of care,"[19] and knowledge of that fact is "so very basic that any nurse would know that, any physician's associate, any medical student in their third or fourth year certainly, and certainly any physician [would know]," regardless of the country in which they practiced.[20]

B. Indictment, Trial and Appeal

The indictment charging Perez Gomez with wire fraud (in violation of 18 U.S.C. § 1343) for his participation in this fraudulent billing scheme was returned by the Grand Jury on June 10, 1998, and as such the statute of limitations was five years. See 18 U.S.C. § 3282. Because the indictment alleged that the last wire transfer in furtherance of the scheme took place on June 12, 1993, the statute of limitations loomed large in the background of the evidence at trial, and was the key argument in the defendant's Fed. R. Crim. P. 29 motion, see Ruling on Motion for Judgment of Acquittal [Doc. #86], and on appeal, see United States v. Gomez, No. 99-1474, 213 F.3d 627 (Table), 2000 WL 687760 (2d Cir. May 24, 2000).

On October 9, 1998, the Assistant United States Attorney prosecuting the case sent a proposed plea agreement to Perez's

[19]Cohen, Tr. 73.

[20]Cohen, Tr. 60-61.

counsel at the time ("the pretrial attorney"). See Draft Plea Agreement [Doc. #198 Exs. A & B]. The draft agreement provided that in exchange for Perez Gomez entering a plea of guilty to one count of wire fraud, the Government would recommend a three level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, and a two level upward adjustment for his role in the offense pursuant to U.S.S.G. § 3B1.1. With these adjustments, the Government calculated the applicable guidelines range as an offense level of 20 and criminal history category of I, for a range of 33 to 41 months incarceration. Under the agreement, Perez Gomez would retain the right to argue for a downward departure but the Government would not argue for an upward departure. The draft agreement contained a waiver of the right to appeal or collaterally attack a sentence within or below the guidelines range set out in the draft. A letter accompanying the draft indicated that if the case were to proceed to trial, "the evidence as it will then exist might very well result in the Government seeking a four level adjustment for role in the offense under U.S.S.G. § 3B1.1(a)." The plea offer was never accepted.

Perez Gomez was represented by a second retained attorney ("the trial attorney") at trial. The defense argued to the jury that Perez Gomez was merely a passive investor who was being paid a return on funds he had entrusted to Aquino, and that the

charges were time-barred in any event. The jury returned a guilty verdict on the sole count (wire fraud), and the Court sentenced Perez Gomez to sixty months imprisonment.[21] On appeal, Perez Gomez was represented by yet another retained attorney ("the appellate attorney"). The statute of limitations argument was the sole contention on appeal, and it was rejected by the Second Circuit in light of the evidence presented to the jury of a June 12, 1993 wire transfer and unrelated activities subsequent to that transfer which showed that the scheme was still in business (although perhaps temporarily shut down), thus making the June 12 transfer reasonably foreseeable to Perez Gomez. See Gomez, 2000 WL 687760 at *2.

C. Motion Under § 2255

Almost one year after the Second Circuit's affirmance, Perez Gomez (through the appellate attorney) filed his original § 2255 motion [Doc. #165], claiming ineffective assistance of the trial attorney. In an affidavit attached to the motion, Perez Gomez

[21]The base offense level of six was enhanced by thirteen levels because of the amount of the loss, two levels because of planning, four levels as a result of Perez Gomez's role in the offense, and two levels for what the Court found to be false trial testimony by Perez Gomez. The resulting total offense level of 27, combined with Perez Gomez's criminal history category of I, resulted in a 70 to 87 month guidelines range. After the Court found no proper basis to depart and found no acceptance of responsibility by Perez Gomez, the statutory maximum sentence of 60 months was imposed.

made numerous claims of deficiency, most of which were centered around the trial attorney's alleged pre-occupation with fees.[22] The memorandum [Doc. #166] in support of the original motion argues that this alleged pecuniary preoccupation constituted both: (1) an actual conflict of interest entitling Perez Gomez to a "presumption of prejudice" for Strickland[23] purposes, see United States v. White, 174 F.3d 290, 294-295 (2d Cir. 1999); see also United States v. Moree, 220 F.3d 65, 69-70 (2d Cir. 2000) ("Because . . . the defendant benefits from a presumption of the prejudice that he must affirmatively prove under Strickland, courts have noted the incentive for defendants to characterize ordinary ineffective assistance of counsel claims as conflict of interest claims.") (citations omitted); and (2) ineffective assistance under the traditional Strickland standard.

The memorandum in support of the original motion lists one specific allegation of prejudice:

> Attorney Franco had evidence in his possession that the defendant's alleged criminal conduct did not continue after June 10, 1993. He failed to put this evidence,

---

[22]See, e.g., Perez Gomez 5/10/01 Aff. [Doc. #166 Ex. A] ¶ 3 ("In virtually every communication, he asked me, my friends, my family and business associates for more money. He continually threatened to stop working on my case, unless I deeded over property, signed promissory notes or immediately sent funds."); Id. ¶ 27 ("Many times, he told me he was not working hard, because he was not getting paid. I am innocent and could have proved my innocence, had I had a lawyer whose sole interest was to defend me and who was competent to handle a case like mine.").

[23]Strickland v. Washington, 466 U.S. 668 (1984).

> however, before the jury. * * * Prior to June 10, 1993, Mehan and [Aquino] were in contentious litigation. The only reference to this fact was a passing reference Franco made to this Court. It was never presented to this Court. It was never presented to the jury.

Memorandum in Support [Doc. #166] at 4-5.

While the original petition was sub judice, Perez Gomez (acting pro se) sent a series of letters, motions and memoranda [Docs. ##171, 178, 179, 184] to the Court that amplified the contentions in the motion and asserted dissatisfaction with his third retained attorney, the appellate attorney, again regarding fees. Following the withdrawal of his third retained attorney, Perez Gomez proceeded pro se and submitted a Motion for Leave to Amend [Doc. #184] in which, inter alia, he raised for the first time a claim that his first two retained attorneys were ineffective for failing to communicate the Government's pretrial plea offer. Although at the time Perez Gomez claimed to have never seen the draft plea agreement, attached as an exhibit to the motion is the cover letter to the plea agreement, with a handwritten note by the trial attorney to Perez Gomez:

> Dr. Perez, I will not send you the agreement because it is too long, I will send it by mail. In other words, he was going to plead you guilty. You can see his funny grace!

Perez Gomez 5/28/02 Aff. [attached to Doc. #184] ¶ 14 (translation by Perez Gomez). Nowhere in the motion or affidavit, however, does Perez Gomez aver that he would have accepted the plea offer; he carefully states instead only that he

"would have given serious consideration" to the offer. Id. ¶ 36.

The Court appointed counsel for Perez Gomez and directed the filing of an omnibus amended § 2255 motion containing all of his challenges to his conviction. The Amended Petition [Doc. #198] re-asserts two claims: (1) defendant's first two retained attorneys were ineffective for failing to advise him of the Government's plea offer, and (2) the trial attorney was too concerned with fees. As with Perez Gomez's original assertion of the plea agreement claim, no assertion is made that Perez Gomez would have accepted the Government's plea offer.[24] Instead, the claim of prejudice related to the alleged failure to communicate the plea offer is that defendant "was not able to make a knowing, voluntary and informed decision" about the plea offer and "was prevented from seeking the advice and assistance of competent counsel" with respect to the offer. [Doc. #198] ¶ 15. As to the alleged preoccupation with fees, the Amended Motion alleges that the trial attorney failed to "adequately cross-examine Richard Mehan" and "did not present evidence to the jury to show that, because Mr. Mehan and . . . Dr. Aquino[] were in contentious litigation, [Perez Gomez] could not have been working with Mr. Mehan as part of the alleged scheme at the time claimed by Mr.

[24]The Amended Motion notes parenthetically that "[u]ndersigned counsel . . . has not yet had a chance to show it to [Perez Gomez]," due to receipt of the actual draft plea agreement only days before the filing of the motion. [Doc. #198] ¶ 12.

Mehan." [Doc. #198 at 16]. Further, the Amended Petition asserts that "the precise scope of the ensuing prejudice" must be determined at a hearing. Id.

II. Discussion

A. Standard

A successful claim of ineffective assistance of counsel requires a showing of both "cause" (deficient representation) and "prejudice" (an effect on the outcome of the proceeding): satisfaction of the first requirement requires proof that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, while satisfaction of the second requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. United States v. Perez, 325 F.3d 115, 131 (2d Cir. 2003) (citing Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984)).[25] With respect to the prejudice inquiry, the Court must consider

[25]The assertion in the original § 2255 motion that the fee conflict claim constitutes an actual conflict of interest for which Strickland prejudice is presumed is without merit, as the Second Circuit has clarified that disputes over fees are subject to the traditional Strickland analysis of both cause and prejudice rather than the more relaxed standard for actual conflicts of interest. United States v. O'Neil, 118 F.3d 65, 72 (2d Cir. 1997) ("To the extent that the attorney shirks his ethical obligation to dutifully represent his client as a result of a fee dispute, we believe Strickland provides the appropriate analytic framework.") (citation omitted).

the totality of the circumstances when determining the effect of any deficiency on the ultimate result of the proceeding:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-696.

B. Plea Offer

Even if Perez Gomez's assertion that his attorneys failed to convey the Government's plea offer is correct and thus the first prong of the Strickland inquiry is established,[26] the claim must fail because Perez Gomez cannot establish the second prong of the Strickland inquiry. To do so, Perez Gomez must both (1) assert that he would have accepted the plea offer,[27] and (2) have some "objective evidence" other than his own assertions to support a

[26]See Pham v. United States, 317 F.3d 178, 183 (2d Cir. 2003) ("there is no dispute that failure to convey a plea offer is unreasonable performance") (citation and emphasis omitted).

[27]Aeid v. Bennett, 296 F.3d 58, 63-64 (2d Cir. 2002).

finding that he would have accepted the plea offer.[28] Neither requirement is satisfied here.

Although Perez Gomez has executed numerous affidavits in connection with these post-conviction proceedings, has made a number of pro se filings, and is now represented by appointed counsel, he has never once claimed (by affidavit or otherwise) that he would have accepted the Government's plea offer. Instead, he states only that he would have given it "serious consideration" and asserts that he was prejudiced in that he "was not able to make a knowing, voluntary and informed decision" about the offer. Even if proved at a hearing, these assertions are an insufficient showing of prejudice, as they fail to constitute a reasonable probability that the outcome of the proceeding would have been different. See Aeid, 296 F.3d at 63-64) (petitioner must "prove . . . that [he] would have accepted th[e] offer," and his failure to "assert[] that he would have accepted [the] offer" was a "critical omission") (citing Cullen v. United States, 194 F.3d 401, 403 (2d Cir. 1999); Gordon, 156 F.3d at 380-381; Purdy v. United States, 208 F.3d 41, 49 (2d Cir. 2000)).

In Mask v. McGinnis, 233 F.3d 132 (2d Cir. 2000), the defendant's affidavit stated:

---

[28]United States v. Gordon, 156 F.3d 376, 380-381 (2d Cir. 1998); Pham, 317 F.3d at 182.

> Prior to this case going to trial, I was willing to consider pleading guilty if the prosecution had offered a guilty plea with a sentence of less than 10 years to life. I rejected the ten years to life plea offer because this offer was not reasonable. A plea offer that I would have considered to be reasonable would have been 8 to 16 years.

233 F.3d at 141. The court rejected the contention that Mask "fail[ed] to evince a specific intent" to plead guilty:

> It is true that Mask's affidavit is not a direct statement that he would have accepted any plea that was more favorable than ten years to life. It is also true, however, that Mask stated in his affidavit that a plea involving a sentence of eight to sixteen years was one he considered reasonable. In the context of his affidavit, it is clear that if Mask rejected a plea because it was unreasonable, the fact that he viewed a plea of eight to sixteen years as reasonable renders it highly probable that he would have accepted it. Given the context in which this claim arises, we agree with the district court that Mask's affidavit constitutes a sufficiently affirmative statement that he would have accepted a better plea agreement had it been offered.

Id. (citation omitted). In contrast to Mask's "sufficiently affirmative statement," Perez Gomez avers only that he would have given the offer "serious consideration." His failure to allege that he would have taken the offer in some form is fatal to his claim.

Even if Perez Gomez had averred that he would have accepted the plea offer, the record does not contain the "objective evidence" required in the Second Circuit to support such an assertion. Such objective evidence may consist of "a great disparity between the actual sentence and the sentence that effective counsel would have secured for the defendant." Mask,

233 F.3d at 141 (quotation and alterations from original omitted).[29] The inquiry as to whether a defendant has presented objective evidence must take into account whether the defendant has consistently maintained his innocence, because although "it is not dispositive," a defendant's "insistence on innocence is a factor relevant to any conclusion as to whether he has shown a reasonable probability that he would have pleaded guilty." Cullen, 194 F.3d at 407.

If Perez Gomez had accepted the plea agreement, he could have reasonably expected a sentence within the range anticipated by the Government (33 to 41 months), which is 19 to 27 months shorter than his actual sentence of 60 months. While not

[29]The numbers used to determine the disparity vary with the nature of the ineffective assistance. In Gordon, the defendant rejected the Government's plea offer because his attorney erroneously advised him that his maximum exposure was 120 months, when in fact the maximum exposure was 262 to 327 months. 156 F.3d at 377-378. The disparity of over 11 years (the difference between the defendant's actual maximum exposure and his attorney's erroneous calculation of the maximum exposure) constituted sufficient objective evidence to support Gordon's claim that he would have accepted the plea offer had he known his actual exposure. Id. at 381. In Mask, the disparity was between a possible offer of 8 to 16 years (which, the court concluded, would have existed but for his attorney's misapprehension of the defendant's repeat-offender status) and Mask's actual sentence of 20 to 40 years. 233 F.3d at 136. This disparity was sufficient to constitute "objective evidence." Id. at 142. The disparity in Pham was the difference between an offer of 78 to 97 months and an actual sentence of 210 months, which the court found was sufficient to warrant remanding the matter to the district court for consideration. 317 F.3d at 183. Finally, in Cullen, the disparity was between a five year mandatary minimum sentence under a plea agreement never explained by defendant's attorney and an actual sentence of 136 months. 194 F.3d at 403.

insignificant, this disparity does not rival those in Gordon, Mask, Pham and Cullen.[30] Another factor to be considered is Perez Gomez's consistent and unwavering protestations of innocence and the absence of anything (beyond relative disparity, see supra note 30) suggesting he would have been amenable to negotiating a plea of guilty, particularly in the context of the statute of limitations issue which offered an acquittal prospect since the last wire transfer was charged to have occurred only days before the five year limitations period expired. While the jury ultimately credited Mehan's testimony that the transfer took place on June 12, 1993 and discredited Perez Gomez's evidence that the enterprise had been defunct long before that date and that Mehan's testimony was the product of bias, Perez Gomez and his attorneys would have had a fair basis for trying for an acquittal rather than pleading guilty and accepting a prison term in the three year range.[31] These factors, coupled with the fact

---

[30]When considered in relative terms, the lowest possible sentence under the agreement would have been half of Perez Gomez's actual sentence. The case law on sentence disparity does not generally distinguish between absolute and relative disparity, but even if relative disparity is a proper consideration when determining whether objective evidence exists, sentence disparity is only one factor, see Cullen, 194 F.3d at 408 ("all relevant circumstances" must be considered), and as detailed below, the totality of all relevant circumstances do not evince objective evidence.

[31]For example, in December 1998 (several months before trial and several months after the plea offer was conveyed) Perez Gomez wrote to Aquino's lawyer that the prosecution "do not have enough base but they have the worst intention for us," [Doc. #198 Ex. C;

that Perez Gomez has never yet claimed he would have accepted the plea agreement (and as oral argument made clear, still has made no proffer of any testimony to this effect), significantly outweigh the sentencing disparity and demonstrate the lack of "objective evidence" that Perez Gomez would have accepted the plea agreement.

Perez Gomez argues that because his claim is that he never knew of the plea offer, it is unfair to require him to present "objective evidence" that he would have accepted the plea offer. The claim in Mask related to a hypothetical plea offer (that is, the district court concluded that had defense counsel not been ineffective in failing to challenge an erroneous career offender designation, the prosecution would have offered a plea), and the Second Circuit still required the presentation of objective evidence that the petitioner would have accepted the hypothetical plea had it been offered. 233 F.3d at 141-142. If the petitioner in Mask was held to the Gordon "objective evidence" standard despite the fact that there never was an actual plea offer made, it is clear that the objective evidence requirement applies to Perez Gomez's claim, as well.

---

all spelling as in original], which apparently reflects his belief at the time that there was an insufficient evidentiary basis to prove his guilt. This belief persists to the present. E.g., Perez Gomez 5/10/01 Aff. [Doc. #166 Ex. A] ¶ 27 ("I am innocent and could have proved my innocence, had I had a lawyer whose sole interest was to defend me and who was competent to handle a case like mine.").

In sum, even if Perez Gomez could prove at a hearing that he had not been told of the agreement or that its terms were not adequately explained to him, his claim nonetheless fails under the Strickland prejudice prong for two independent reasons: (1) he has never claimed that he would have accepted the Government's plea offer had he known about it; and (2) any new claim that he would have accepted the plea offer would lack the "objective evidence" required in the Second Circuit.

C. Ineffective Assistance During Trial

The Amended Petition is long on allegations of deficient representation but short on allegations of actual prejudice resulting from such deficiencies. Even accepting arguendo Perez Gomez's assertion that the trial attorney was deficient because of his allegedly single-minded pursuit of fees, there is simply no basis to conclude that such deficiency would have changed the outcome of the proceeding. With the evidence of Perez Gomez's factual guilt (detailed supra) nothing short of overwhelming, his diffuse claims of deficiency because of his trial counsel's concern regarding money are unavailing absent some specific showing that the trial counsel would have done something different that would, in reasonable probability, have changed the outcome of the trial.

While Perez Gomez had a reasonable statute of limitations

defense, the record reflects that the trial attorney extensively cross-examined Mehan (a significant witness regarding the critical June 12, 1993 transmission[32]) to undermine the sufficiency of the Government's timeliness evidence. He cross-examined Mehan about his civil suit against Aquino,[33] possible bias resulting from his immunity agreement,[34] Mehan's own participation in the scheme to increase his fees,[35] his lapses in memory,[36] and whether he was "coached" by the Government.[37] As a result of the cross examination, the jury had before it evidence that Mehan had sued Aquino, had an immunity deal with the Government and had memory problems, all of which was used in

---

[32]The Government notes, however, that independent documentary evidence of the June 12, 1993 transmission was also presented to the jury.

[33]See Tr. 431-433, 470-471, 515, 526; see also Tr. 1785 (closing argument) (arguing that an April 1993 bill was Mehan's last, because "[a]fter that, Mehan went to court. He sued him. He sued Aquino and his corporations.").

[34]E.g., Tr. 425 ("Q: Would it be correct to say that you are obsessed with the concept [that Perez Gomez and Aquino were] equals since you must be sharp in your testimony, that it is good, otherwise you might lose your immunity?" A: No, sir."); Tr. 447; see also Tr. 1774 (closing argument) ("The immunity agreement has turned out to be the most important piece of evidence in this case."); Tr. 1785 ("Richard Mehan should be in jail, but he has immunity.").

[35]E.g., Tr. 447-448.

[36]E.g., Tr. 435, 444, 452. See also Tr. 1774-1776 (closing argument, with the trial attorney referring to Mehan numerous times as "Mr. Don't Recall, Can't Remember").

[37]Tr. 441.

closing argument to portray Mehan as a person whose testimony should not be credited.[38] The record thus belies any claim that the trial attorney's challenge to the timeliness of the charges was constitutionally deficient.

D. Necessity of a Hearing

Perez Gomez asserts that an evidentiary hearing is required on the motion to resolve factual disputes regarding whether he was told about the plea agreement by either attorney and the extent of the prejudice resulting from his trial attorney's allegedly deficient representation. As to the plea agreement claim, the Court concludes that an evidentiary hearing would be of no assistance because even if Perez Gomez could establish that he was never told of the agreement or that the terms were not adequately explained, there is no indication of Strickland prejudice. At oral argument, petitioner's counsel did not proffer that at any hearing Perez Gomez would testify any differently from his averment that he would have given the claim "serious consideration" or that an evidentiary hearing was necessary to establish the existence of claimed objective evidence corroborative of a claim that he would have relinquished

[38]Moreover, the jurors likely considered the issues raised concerning Mehan's immunity agreement, as they requested further clarification on who had been granted immunity in the case during their deliberations. Tr. 1869.

his claims of innocence and instead accepted a plea agreement whereby he would have had to admit his guilt to the charges.[39] As to the claim of deficient representation by trial counsel, testimony regarding the adequacy of the Mehan cross examination is unnecessary given that the trial record clearly reflects the constitutional adequacy of the defense's cross examination. Testimony about the alleged single-minded pursuit of fees would not be relevant given the Court's conclusion that the absence of any likelihood of a different result precludes relief even if deficiency could be shown. The extensive briefing by the parties gives no indication that a hearing would reveal some hitherto unidentified prejudice.

Notwithstanding Perez Gomez's extensive opportunity to present all the claims he believes entitle him to § 2255 relief, the record as it stands "conclusively show[s] that the prisoner is entitled to no relief," 28 U.S.C. § 2255, and thus no hearing is warranted. Cf. Chang v. United States, 250 F.3d 79, 86 (2d Cir. 2001) (although district court "did not have before it either the demeanor evidence or the cross-examination of counsel that would have resulted from a full testimonial hearing," the district court did not abuse its discretion in concluding that

[39]Further, if a hearing were held and Perez Gomez testified that he would have accepted the plea agreement, such testimony at this late stage would smack of contrivance and lack credibility, which is precisely the reason for the separate objective evidence requirement.

"such a hearing would not offer any reasonable chance of altering its view of the facts"); Machibroda v. United States, 368 U.S. 487, 495 (1962) ("The language of [§ 2255] does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner.").[40]

III. Conclusion

For the reasons set out above, Perez Gomez's motion [Docs. ##165, 184, 198] is DENIED. No Certificate of Appealability will issue as no "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), has been made. CJA appointed counsel is discharged with the gratitude of the Court.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

**Dated at New Haven, Connecticut, this 29th day of August, 2003.**

[40]Although the Court initially looked to an evidentiary hearing as a tool to sort out the basis of Perez Gomez's pro se claims for relief, current appointed counsel has ably articulated those claims and their basis, and thus the original clarification purpose has been met.