

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 24-1472

---

JOSE MENDEZ,  
Appellant

v.

SUPERINTENDENT HOUTZDALE SCI;  
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA;  
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA

---

Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. No. 2:13-cv-06437)  
District Judge: Honorable Wendy Beetlestone

---

Submitted Under Third Circuit L.A.R. 34.1(a)  
March 5, 2026

---

Before: SHWARTZ, BIBAS, and PHIPPS, Circuit Judges.

(Filed: March 5, 2026)

---

OPINION\*

SHWARTZ, Circuit Judge.

---

\* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Jose Mendez appeals the District Court's order denying his habeas corpus petition. His counsel moves to withdraw under Anders v. California, 386 U.S. 738 (1967), because he believes the appeal presents no nonfrivolous issues. For the reasons below, we will grant counsel's motion and affirm the denial of the habeas petition.

## I

A jury found Mendez guilty of first-degree murder in connection with Visael Otero's death. Jean Carlos Cruz Rivera, who had pleaded guilty to third-degree murder in connection with Otero's death, testified for the prosecution. He testified that he had shared a house with Mendez and Otero at the time of the murder. One day, Mendez told him to turn up the radio, went upstairs, killed Otero, then returned downstairs holding a pistol. Immediately thereafter, Cruz Rivera and Mendez went upstairs and stole \$60,000 that was hidden in the ceiling. On cross-examination, Cruz Rivera testified that he had not spoken to Mendez about killing Otero or taking the money before Otero's death, and that he did not participate in any plan to murder Otero. Defense counsel then confronted Cruz Rivera with his statement to police that he and Mendez had planned the shooting about two hours before it happened. During closing argument, the prosecution told the jury that Cruz Rivera confessed to the murder "well before he ever had any [plea] deal." App. 158. Following the guilty verdict, Mendez was sentenced to life imprisonment.

On direct appeal, the Superior Court of Pennsylvania affirmed Mendez's conviction, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. Commonwealth v. Mendez, 889 A.2d 1214 (Pa. 2005). Mendez then sought

relief under Pennsylvania’s Post-Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-46, which was denied. See, e.g., Commonwealth v. Mendez, No. 8 EDA 2017, 2018 WL 5290715, at \*6 (Pa. Super. Ct. Oct. 25, 2018); Commonwealth v. Mendez, 215 A.3d 969 (Pa. 2019).

Mendez filed a habeas petition under 28 U.S.C. § 2254 with the assistance of counsel. The District Court referred the petition to a Magistrate Judge. Mendez v. Patrick, No. CV 13-6437, 2023 WL 12097853, at \*1 (E.D. Pa. Dec. 29, 2023), report and recommendation adopted, No. CV 13-6437, 2024 WL 5990564 (E.D. Pa. Feb. 6, 2024). The Magistrate Judge concluded that Mendez had a substantial ineffective assistance of counsel claim,<sup>1</sup> since failing to challenge Cruz Rivera’s third-degree murder plea deal as inconsistent with Cruz Rivera’s testimony (1) may have violated Mendez’s due process right to consistent prosecutorial theories or (2) was a basis for judicial estoppel.<sup>2</sup> Id. at \*9-10. The Magistrate Judge nonetheless concluded that neither the due process right to consistent prosecutorial theories nor judicial estoppel were established law at the time of trial. Id. at \*10. Therefore, because “failure to predict a change in the law is not

---

<sup>1</sup> Although Mendez had procedurally defaulted on all his claims, the Magistrate Judge excused that default on the ineffective assistance claim based on counsel’s failure to challenge Cruz Rivera’s plea under Martinez v. Ryan, which allows excusing procedural default for certain ineffective assistance claims that are substantial, or “ha[ve] some merit.” 566 U.S. 1, 14 (2012); Mendez, 2023 WL 12097853, at \*8-9.

<sup>2</sup> “[J]udicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” Fahie v. Virgin Islands, 858 F.3d 162, 170 n.14 (3d Cir. 2017) (quoting Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 221 (3d Cir. 2015)).

deficient performance,” counsel was not ineffective for failing to challenge the inconsistencies. Id. at \*11 (citing United States v. Doe, 810 F.3d 132, 154 (3d Cir. 2015)). As a result, the Magistrate Judge recommended that the District Court deny the habeas petition but issue a certificate of appealability (“COA”) because this claim “substantially show[ed] the denial of a constitutional right.” Id. at \*12. The District Court adopted the recommendation without further explanation, denying the petition and issuing a COA on Mendez’s claim that trial counsel was ineffective for failing to challenge Cruz Rivera’s plea deal. Mendez v. Patrick, No. CV 13-6437, 2024 WL 5990564 (E.D. Pa. Feb. 6, 2024).

Mendez appeals. His appointed appellate counsel moves to withdraw under Anders.

II<sup>3</sup>

A

Although counsel moved to withdraw under Anders v. California, 386 U.S. 738 (1967),<sup>4</sup> we need not rely on the Anders framework in this case to evaluate counsel’s

---

<sup>3</sup> The District Court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). Because the District Court dismissed Mendez’s habeas petition without an evidentiary hearing, we conduct a plenary review of its order. Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009).

<sup>4</sup> We note that the Anders process is grounded in Sixth Amendment concerns, see Anders, 386 U.S. at 742-45, and the Sixth Amendment does not apply to the appointment of counsel in habeas petitions, see Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987). Accordingly, we will not undertake an Anders analysis of the motion to withdraw, though applying it would not constitute prejudicial error. Cf. Simon v. Gov’t of the Virgin

motion to withdraw. The Anders briefing, however, allows us to conclude that the only issue on which a certificate of appealability was granted—the ineffectiveness of trial counsel for not challenging the prosecution’s inconsistent theories for the crime, see Mendez, 2024 WL 5990564, at \*1; Mendez, 2023 WL 12097853, at \*8-10—has no merit.<sup>5</sup> Thus, counsel’s request for withdrawal is appropriate, if for no other reason, than because it “can be accomplished without material adverse effect on the interests of the client.” Pa. R. Pro. Conduct 1.16(b)(1); see also id. 1.16(c).<sup>6</sup>

## B

Turning to the merits, we note that the Government may violate due process by relying on contradictory facts in connection with a single incident. See Smith v. Goose, 205 F.3d 1045, 1050-52 (8th Cir. 2000) (reversing denial of habeas petition when two defendants were convicted of same crime based on contradictory evidence). For

---

Islands, 679 F.3d 109, 115 (3d Cir. 2012), as amended (May 16, 2012) (declaring in the context of a challenge by a habeas petitioner to his court-appointed counsel’s request to withdraw that it was not prejudicial error to apply Anders to counsel’s withdrawal request).

<sup>5</sup> To prevail on an ineffective assistance of counsel claim, a petitioner must show that (1) “counsel’s performance was deficient,” meaning it “fail[ed] to satisfy an objective standard of reasonableness,” Taylor v. Horn, 504 F.3d 416, 430 (3d Cir. 2007), and (2) that the deficient performance prejudiced the petitioner, meaning that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” id. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

<sup>6</sup> As explained herein, because Mendez’s ineffectiveness claim lacks merit, we need not examine whether it was procedurally defaulted or, if applicable, excused under Martinez. See Bronshtein v. Horn, 404 F.3d 700, 728 (3d Cir. 2005) (holding it unnecessary to determine whether there was procedural default because “the claims in question lack merit”).

example, the government may not “offer[] contradictory theories in two separate trials to convict two individuals for the same crime.” Lambert v. Blackwell, 387 F.3d 210, 246 (3d Cir. 2004); see also Buehl v. Vaughn, 166 F.3d 163, 178 (3d Cir. 1999) (“‘[W]here a jury has convicted a defendant of two crimes and those convictions are mutually exclusive,’ . . . [the] ‘result would be patently unjust because a defendant would be convicted of two crimes, at least one of which he could not have committed.’” (quoting United States v. Gross, 961 F.2d 1097, 1107 (3d Cir. 1992), cert. denied, 506 U.S. 965)). Likewise, “judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” Fahie v. Virgin Islands, 858 F.3d 162, 170 n.14 (3d Cir. 2017) (quoting Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 221 (3d Cir. 2015)).

Counsel identifies several inconsistencies the Magistrate Judge and Mendez rely on, but none violates due process or implicates judicial estoppel, so trial counsel was not ineffective for failing to object to them.

The first inconsistency counsel identified is between Mendez’s prosecution for first-degree murder and Cruz Rivera’s plea to third-degree murder. Cruz Rivera’s plea does not rely on any facts that contradict the facts underlying Mendez’s prosecution. The record reveals that the Commonwealth relied on a single theory—that Cruz Rivera was an accomplice who remained downstairs and turned up the music to muffle the gunshots that killed Otero. Moreover, the two perpetrators’ convictions for different crimes do not demonstrate inconsistent theories. First-degree and third-degree murder share the

required elements of (1) a killing and (2) malice, but first-degree murder contains the additional element of an intent to kill. See Commonwealth v. Houser, 18 A.3d 1128, 1133 (Pa. 2011); Commonwealth v. Santos, 876 A.2d 360, 363 (Pa. 2005). Third-degree murder is therefore a lesser included offense of first-degree murder. See Commonwealth v. Young, 748 A.2d 166, 174-75 (Pa. 1999); Commonwealth v. Schaller, 426 A.2d 1090, 1092-93 (Pa. 1981). It is entirely consistent that Cruz Rivera—who turned up music at Mendez’s instruction—could have lacked the intent to kill, while Mendez—the shooter—had it.<sup>7</sup> See United States v. Moreno, 727 F.3d 255, 263 (3d Cir. 2013) (declining to apply judicial estoppel because government’s assertions were not inconsistent). Thus, counsel correctly concluded that Mendez and Cruz Rivera’s different crimes of conviction do not demonstrate inconsistent prosecution theories.

Counsel also compared Cruz Rivera’s testimony that he had no role in the murder, with both (1) the Commonwealth’s closing argument that Cruz Rivera had pled guilty to third-degree murder, and (2) Cruz Rivera’s guilty plea itself. Any inconsistency based on Cruz Rivera’s testimony on cross-examination that he had no role in the murder is immaterial because (1) defense counsel elicited that testimony, and the Commonwealth

---

<sup>7</sup> Even if there were an inconsistency, “[t]he fact that the government negotiates a plea does not mean that the government is required to treat all aspects of that plea as binding in future prosecutions.” Fahie, 858 F.3d at 170-71 (rejecting defendant’s argument that he could not have been convicted under an aiding and abetting theory after his codefendant pled guilty to being an accessory after the fact (and therefore not a participant in the murder), because given that plea, there would have been no one to aid and abet).

never relied on it, so it could not have been the basis of its theory, and (2) Cruz Rivera was immediately impeached after he testified that he had no role in the murder, the testimony was consistent with his plea and the Commonwealth's closing argument.<sup>8</sup> Thus, none of the purported inconsistencies provided a basis for a meritorious objection by trial counsel.

### III

For the foregoing reasons, counsel correctly concluded that the single issue for which the COA was granted lacks merit, and none of the issues Mendez raises falls within the issue for which the COA was granted. Therefore, because there are no nonfrivolous issues for appeal, we will grant counsel's motion to withdraw and affirm the denial of habeas relief.

---

<sup>8</sup> For the same reasons, the Commonwealth did not suborn perjurious testimony, and Mendez's trial counsel was not deficient for failing to object under Napue v. Illinois, 360 U.S. 264 (1959).