No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD OLIVE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
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COUNSEL FOR THE PETITIONER

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No. 19-6064

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 02, 2020
DEBORAH S. HUNT, Clerk

RICHARD OLIVE,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Before: SUHREINRICH, Circuit Judge.

Richard Olive, a federal prisoner proceeding with counsel, appeals a district court judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Olive has filed an application for a certificate of appealability.

Olive was sentenced to 372 months of imprisonment after being convicted of three counts of mail fraud, in violation of 18 U.S.C. § 1341; four counts of wire fraud, in violation of 18 U.S.C. § 1343; and two counts of money laundering, in violation of 18 U.S.C. § 1957. *United States v. Olive*, No. 3:12-cr-00048 (M.D. Tenn. Jan. 8, 2014). Olive, as the President and Executive Director of National Foundation of America ("NFOA"), falsely claimed that NFOA was a tax-exempt, non-profit organization and induced customers to transfer annuities in exchange for an investment contract by promising that customers would receive guaranteed fixed payments, despite knowing that NFOA did not have sufficient assets to guarantee the income promised in the investment contracts. Olive appealed, and this court affirmed his convictions and sentence. *United States v. Olive*, 804 F.3d 747 (6th Cir. 2015). Olive then filed a § 2255 motion, arguing that he received ineffective assistance of trial counsel when counsel failed to advise him properly regarding the government's pre-trial plea offer and failed to object to the district court's failure to provide sufficient rationale in support of its loss calculation at sentencing. The district court denied

the § 2255 motion after conducting an evidentiary hearing on the first ground for relief and declined to issue a certificate of appealability. Olive now applies for a certificate of appealability on both of his claims.

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is on the merits, "[t]he petitioner must demonstrate 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).

Reasonable jurists would not debate the district court's rejection of Olive's claim that he received ineffective assistance of counsel during plea proceedings. Olive argues that he would have accepted the government's 9-year plea offer had counsel correctly advised him that he could face up to 160 years of imprisonment, rather than 17 to 20 years. To show ineffective assistance of counsel regarding the rejection of a plea agreement, a petitioner must show that (1) counsel rendered constitutionally deficient performance, and (2) there is a reasonable probability that but for counsel's deficient performance, the petitioner would have pleaded guilty and received a less severe conviction, sentence, or both. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). Although counsel acted unreasonably in failing to inform Olive that he faced the possibility of consecutive sentences, *see Rinckey v. McQuiggan*, 510 F. App'x 458, 461 (6th Cir. 2013), Olive has failed to make a substantial showing of prejudice. The district court determined that Olive's testimony that he would have accepted any plea offer from the government had he known his actual sentence exposure lacked credibility. First, Olive rejected the 9-year plea offer despite counsel explicitly informing him that he would be convicted if he went to trial based on the government's evidence. Moreover, counsel testified that Olive never expressed a willingness to take a plea deal, and that, after the plea offer had expired, Olive refused to let him contact the government about an additional

plea agreement. Finally, during the evidentiary hearing, Olive continued to assert his innocence on the ground that he had never intended to commit fraud or create a loss. Because this court gives deference to a district court's credibility determination, reasonable jurists could not disagree with the district court's determination that Olive failed to demonstrate that, but for counsel's deficient performance, he would have pleaded guilty. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 367 (6th Cir. 2006).

Reasonable jurists would not debate the district court's rejection of Olive's claim that he received ineffective assistance of counsel during sentencing. Olive argues that counsel failed to object to the district court's failure to provide a sufficient rationale in support of its loss calculation at sentencing. To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). No reasonable jurist would conclude that Olive's attorney performed unreasonably by failing to ask for further explanation of the district court's loss calculation. By the time that the district court announced its conclusion that Olive caused a loss of between $2.5 million and $7 million, Olive's attorney had already cross examined the government's expert witness and argued adamantly that Olive caused no loss to investors. Despite those efforts, the district court indicated that it agreed with the government's expert, finding that Olive caused a "$6 million net loss." In addition, Olive suffered no prejudice because of the purported lack of an explanation because the record contained sufficient evidence to support the district court's conclusion that Olive caused a loss of between $2.5 million and $7 million. The government's expert testified that Olive's investors lost $5.9 million, which represented the difference between the amount that victims invested in Olive's company and the amount that those victims received after the company was liquidated. Finally, to the extent that Olive argues that he has newly discovered evidence showing that the district court's loss calculation was in error, that claim is not cognizable under § 2255. *See Snider v. United States*, 908 F.3d 183, 191 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1573 (2019).

Accordingly, Olive's application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Richard Olive

Petitioner,

v. Case No.: 3:17−cv−00979

United States of America

Respondant,

ENTRY OF JUDGMENT

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 7/22/2019 re [41].

Kirk L. Davies
s/ Greg Bowersock, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD OLIVE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 3:17-cv-0979**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Pending before the Court is Richard Olive's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1), and his Motion for Certificate of Appealability (Doc. No. 40). Both motions will be denied.

By Memorandum Opinion (Doc. No. 18) and Order (Doc. No. 19) filed July 6, 2018, Olive's claim that counsel was ineffective at sentencing because he failed to assert a Bostic challenge to the amount of loss calculation, and his additional claim that "new evidence" exists to reduce his sentence was denied. The Court also set his remaining claim for an evidentiary hearing, which was continued based upon separate requests from the Government and Olive's counsel.

On June 24, 2019, an evidentiary hearing was held on Olive's claim that counsel was ineffective because he failed to explain the maximum possible punishment Olive faced if convicted after trial and/or failed to inform him that any sentences could be run concurrently. At the conclusion of the hearing, the Court made detailed findings and conclusions, and denied relief on those claims.

Accordingly, for the reasons stated in the Memorandum Opinion, and the findings and

conclusions set forth at the evidentiary hearing, both of which are incorporated herein by reference, Olive's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1) is **DENIED**.

After the Court pronounced its ruling at the evidentiary hearing, Olive requested a certificate of appealability and was instructed to file a motion requesting the same. He did so on July 11, 2019, specifically as to his second claim of ineffective assistance of counsel. The primary basis for that request is an email from trial counsel that "specifically said 'the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of *17 to 20 years,*" (Doc. No. 40 at 3) (emphasis by Olive), when in fact his guideline range was determined by then-Judge Sharp to be in the neighborhood of thirty years.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a a constitutional right." 28 U.S.C. § 2253(c)(2). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). Instead, "'[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" Id. (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

Olive has not made that showing, particularly given this Court's credibility determinations. Not only did the referenced email state that the range would be 17 to 20 years "if accepted," trial counsel credibly testified that he never suggested the 17 to 20 year calculation was a guaranteed sentencing range. This is confirmed by other correspondence sent to Olive, including an email

stating the Government calculated the sentencing range to be "292 to 365 months or 24 to 30 years" (Doc. No. 13-1 at 4); a plea offer from the Government echoing that calculation (id. at 6); and a Sentencing Memorandum – commissioned by trial counsel and provided to Olive – that again indicated the Government calculated the guideline range to be 292 to 365 months before a reduction for acceptance of responsibility (id. at 14). Further, and as made abundantly clear at the evidentiary hearing, Olive's testimony that he would have accepted a 9-year deal had he known that he faced a 30-year sentence as opposed to a sentence of 17 to 20 years is simply not believable. Olive was willing to roll the dice no matter the cost and, to this day, he believes he did nothing illegal. Finally, Olive's claim is premised on Judge Sharp's acceptance a plea of 9 years, but the evidentiary record before the Court is wholly insufficient to support that conclusion. Accordingly, his Motion for Certificate of Appealability (Doc. No. 40) is **DENIED.**

The Clerk of the Court shall enter a final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD OLIVE, Register Number 21100-075, Coleman Medium FCI, Defendant.	Case No: 3:12-cr-48-1

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

1. Name and location of court which entered the judgment of conviction under attack:

   Middle District of Tennessee, Nashville Division

2. Date of judgment of conviction: January 8, 2014

3. Length of sentence: 372 months' imprisonment

4. Nature of offense involved: Counts 1-3: mail fraud pursuant to 18 U.S.C. § 1341; Counts 4-7: wire fraud pursuant to 18 U.S.C. § 1343; Counts 8-9: money laundering pursuant to 18 U.S.C. § 1957

5. What was your plea? (Check one)

   (a) Not guilty (X)
   (b) Guilty (__)
   (c) Nolo contendere (__)

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial: (Check one) Jury

7. Did you testify at the trial? Yes

8. Did you appeal from the judgment of conviction?

   Yes (X) No (__)

9. If you did appeal, answer the following:

   (a) Name of court: Sixth Circuit Court of Appeals

   (b) Result: Convictions and sentence affirmed

   (c) Date of result: September 22, 2015

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes (__) No (X)

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court: N/A

    (2) Nature of proceeding: N/A

    (3) Grounds raised: N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

    (5) Result: N/A

    (6) Date of result: N/A

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

(5) Date of result: N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion? N/A

(1) First petition, etc. N/A
(2) Second petition, etc. N/A
(3) Third petition, etc. N/A

If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully.

Summarize *briefly* the *fact*s supporting each ground.

A. Ground one: Defense counsel rendered ineffective assistance of counsel by failing to properly advise Defendant Olive regarding the Government's pre-trial plea offer.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to properly advise Defendant Olive regarding the Government's pre-trial plea offer. As a result, Defendant Olive was denied his right to effective assistance of counsel (in violation of the Sixth Amendment to the Constitution).[1] But for counsel's ineffectiveness, the result of the proceeding would have been different (i.e., Defendant Olive would have accepted the Government's pretrial plea offer).

---

[1] The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). The Supreme Court has emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair [proceeding]." *Strickland v. Washington,* 446 U.S. 668, 684 (1984) *See also Nix v. Whiteside,* 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate:

> First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair [proceeding], a [proceeding] whose result is reliable.

Id. at 687.

Prior to trial, the Government extended a plea offer of 9 years' imprisonment. After this offer was extended, defense counsel and Defendant Olive discussed the plea offer and the "pros" and "cons" of accepting the plea offer versus proceeding to trial. Defense counsel informed Defendant Olive that if he proceeded to trial, he was likely looking at a sentencing range of 17-20 years' imprisonment. Defense counsel conceded that the Government informed him that if Defendant Olive proceeded to trial and lost, his sentencing range would be 292-365 months' imprisonment. However, defense counsel told Defendant Olive that the Government's calculation was incorrect and that the actual sentencing range would be 17-20 years' imprisonment. In fact, in one email to Defendant Olive, defense counsel stated the following:

> You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of 17 to 20 years.

(Emphasis added). The email referenced above is attached to this motion. Based on defense counsel's representation that application of sentencing guidelines in this case "will result" in a sentence in the range of 17 to 20 years, Defendant Olive rejected the Government's nine-year plea offer (because, in Defendant Olive's mind – and given Defendant Olive's age – he was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer).

Contrary to defense counsel's advise, following the trial, the application of the sentencing guidelines in this case resulted in a sentencing range of *160 years' imprisonment* – the statutory maximum for each count (i.e., total offense level of 41 and a category 2

criminal history). The Court ultimately imposed a sentence of 372 months' imprisonment (31 years' imprisonment).

Had defense counsel properly advised Defendant Olive that the sentence he faced if convicted at trial was 31 years' imprisonment (or 160 years' imprisonment), Defendant Olive would have accepted the Government's 9-year plea offer. Defense counsel was ineffective for informing Defendant Olive that the sentence he faced if convicted at trial was 17-20 years' imprisonment.

In *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012), the Supreme Court stated that a defendant must establish the following to demonstrate prejudice relating to a claim that counsel rendered deficient performance by misadvising a defendant regarding a plea offer:

> In contrast to *Hill* [*v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985)], here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Defendant Olive satisfies all of the *Lafler* requirements. The written documentation in this case demonstrates that the Government's plea offer remained open until October 24, 2012. As explained above, had defense counsel properly advised Defendant Olive that the sentence he faced if convicted at trial was 31 years' imprisonment (or 160 years' imprisonment), Defendant Olive would have accepted the Government's 9-year plea offer. Defendant Olive further submits that the Court would have accepted the terms of the Government's 9-year

plea offer. Finally, the 9-year plea offer was much less severe than the 31-year sentence that was imposed by the Court at the conclusion of the trial.

Accordingly, defense counsel was ineffective for failing to properly advise Defendant Olive regarding the Government's pre-trial plea offer. Counsel's failure fell below the applicable standard of performance. *See Strickland*, 466 U.S. at 687. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different (i.e., Defendant Olive would have accepted the Government's 9-year plea offer). Defendant Olive requests the Court to grant relief on this claim, vacate his current sentence, and thereafter afford relief consistent with *Lafler* (i.e., direct the Government to re-offer the 9-year pretrial plea offer to Defendant Olive and, if Defendant Olive accepts the offer, resentence Defendant Olive after taking into account all of the circumstances in the case).

B. Ground two: Defense counsel ineffectively failed to preserve the Court's erroneous loss calculation and ruling for guidelines and restitution purposes; and "new evidence" exists in any event to further reduce the guidelines loss and restitution calculation.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to preserve the Court's erroneous loss calculation and ruling for guidelines and restitution purposes. As a result, Defendant Olive was denied his right to effective assistance of counsel (in violation of the Sixth Amendment to the Constitution). But for counsel's ineffectiveness, the result of the proceeding would have been different. Alternatively, "new evidence" exists to further reduce the guidelines loss and restitution calculation.

Defendant Olive was the CEO of a company named National Foundation of America (NFOA). The indictment generally alleged that the company was used to defraud annuity

investors of their annuities by offering a guarantee of an improbable return. The company was seized by the state of Tennessee in May of 2007 and control was never returned to Defendant Olive. At sentencing there was great dispute about the existence of loss and any calculation for assigning enhancement under the sentencing guidelines and imposing restitution. *See* August 19, 2013, Sentencing Transcript at pgs. 4-6. The Government and the defense were not only in disagreement about what may, and may not, be counted as loss attributable to the convicted offenses, but they also disagreed about the substance of the loss itself and how that calculation should be accomplished. *See id.* at pgs. 36-46. *See also* testimony of defense accounting expert Larry Pevnick/March 6, 2013, trial transcript at pgs. 1649-1668. At sentencing, the Government conceded the erroneousness of its own assessment of loss. *See* Sentencing Transcript at pgs. 37-43. The Court did not accept either party's estimation and assessed a loss in excess of $2.5 million pursuant to United States Sentencing Commission, Guidelines Manual section 2B1.1(b)(1)(J) [hereinafter USSG]. *See* Sentencing Transcript at pg. 47. In doing so, the Court neither selected a method of calculation nor articulated any basis for its assessment. While defense counsel argued the defense position concerning the calculation of loss at sentencing, he failed to object to the Court's loss finding and did not object to the Court's failure to articulate the basis of its finding sufficient to preserve the issue for review. The issue was raised on direct appeal but was not decided nor considered upon a plain error standard because it was not properly preserved. *See United States v. Olive*, 804 F.3d 747, 758 (6th Cir. 2015). Loss under the guidelines is defined as "the greater of actual loss or intended loss." USSG, §2B1.1 (Nov. 2012). A court's discretion requires only that the estimate be "reasonable," USSG, §2B1.1,

comment (n.3(C)), and restitution and loss are separate issues, and there need not be "symmetry" between the two. *United States v. Riddell*, 328 Fed. Appx. 328, 329 (6th Cir. 2009). On the other hand, the sentencing judge cannot assign a loss figure "arbitrarily" or with no findings, and the court must develop some evidence to support the loss figure. *United States v. Warshak*, 631 F.3d 266, 329-30 (6th Cir. 2010). It is not the defendant's burden to disprove loss rather it is the Government's burden to prove loss to a preponderance of the evidence. *United States v. Ravelo*, 370 F.3d 266, 272-73 (2d Cir. 2004). If the defendant rebuts the Government's loss calculation, the court is not free to ignore that evidence. *United States v. Newson*, 351 Fed. Appx. 986, 988 (6th Cir. 2009).

Defendant Olive contends that he presented evidence rebutting the loss attributable to the convicted charges and the Court made erroneous findings which were insufficient for appellate review. The Government's witnesses that testified at trial (i.e., the State receiver, Paul Eggers) *see* March 4, 2013, Trial Transcript at pg. 1155, and at the sentencing hearing (i.e., Ken Runkle), *see* Sentencing Transcript at pgs. 13-20, cited total loss values but failed to identify costs, expenses, penalties, interest, and fees, related to the administration of the state receivership. Such amounts are not properly countable according to USSG §2B1.1, Application note 3(D). Moreover these amounts were withheld in sealed records in the Tennessee court liquidation proceeding to which Defendant Olive did not have access and which were not produced by the Government. Resentencing is necessary to accurately calculate and determine the loss in accordance with the guidelines, reduce that enhancement, and accordingly reduce Defendant Olive's sentence.

Since that time, NFOA – the annuity company – has been dissolved and an additional distribution has been made to the alleged victim-donors to further reduce the loss. "Loss

shall be reduced by money and property returned, as well as the fair market value of services rendered, by the defendant (or those acting jointly with the defendant) to the victim before the offense was detected." USSG §2B1.1, comment. (n.3(E)(i)). It cannot be validly claimed that a subsequent distribution to the alleged victim-donors by the state receiver is not "new evidence" of a reduction in loss. Defendant Olive seeks a resentencing hearing in which the issue of the loss calculation is heard and findings are made in accordance with the loss properly attributable to the convicted offense.

13. If the grounds listed in 12 were not previously presented, give your reasons for not presenting them:

The proper vehicle to assert an ineffective assistance of counsel claim is by way of a 28 U.S.C. § 2255 motion in the district court, where the requisite factual record can be developed. *See, e.g., United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (citing *United States v. Khoury*, 901 F.2d 948, 969 (11th Cir. 1990)).

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes (__) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: James Nesland, 14252 East Caley Avenue, Aurora, Colorado 80016; Jeff Smith, 4450 Arapahoe Avenue, Boulder, Colorado 80303

(d) At sentencing: Mr. Nesland and Mr. Smith

(e) On appeal: Robert Dietrick, P.O. Box 682502, Franklin, Tennessee 37068; Michael Kimberly, 1999 K Street NW, Washington D.C. 20006

(f) In any post-conviction proceeding: undersigned counsel

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes (X) No (__)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (__) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) And give date and length of sentence to be served in the future: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? N/A

18. Timeliness of Motion: This motion is being filed within one year of the date that the Supreme Court denied Defendant Olive's petition for a writ of certiorari.

19. What relief do you request from this Court? Relief consistent with *Lafler* and/or a new sentencing hearing

Wherefore, Defendant Olive prays that the Court will grant him relief to which he may be entitled in this proceeding.

Respectfully submitted,

/s/ Thomas A. Kennedy
THOMAS A. KENNEDY

/s/ Michael Ufferman
MICHAEL UFFERMAN

Counsel for Defendant **OLIVE**

OATH

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on June 26, 2017:

/s/ Thomas A. Kennedy on behalf of Richard Olive[2]

[2] Pursuant to the Advisory Committee Notes to Rule 2 of the Rules Governing Section 2255 Cases (2004 Amendments), undersigned counsel is acting on behalf of Defendant Olive as a "next of friend": "[U]nder the amended rule the motion may be signed by the movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example, an attorney for the movant."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

U.S. Attorney's Office
110 Ninth Avenue South
Suite A961
Nashville, Tennessee 37203-3870

by electronic CM/ECF delivery this 26th day of June, 2017.

/s/ Thomas A. Kennedy
THOMAS A. KENNEDY
Thomas A. Kennedy, P.A.
1426 21st Street
Vero Beach, Florida 32960
(772) 299-5990
FL Bar No. 528757
Email: TomasKennedy@aol.com

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Defendant **OLIVE**

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

RICHARD OLIVE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No: 3:17-cv-00979

SUPPLEMENT TO PENDING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

The Petitioner, RICHARD OLIVE, by and through undersigned counsel, submits the attached Exhibit 1, which was inadvertently not attached to the 28 U.S.C. § 2255 motion filed on June 26, 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant United States Attorney Siji Moore
110 Ninth Avenue South
Suite A-961
Nashville, Tennessee 37203-3870

by electronic CM/ECF delivery this 19th day of October, 2017.

/s/ Thomas A. Kennedy
THOMAS A. KENNEDY
Thomas A. Kennedy, P.A.
1426 21st Street
Vero Beach, Florida 32960
(772) 299-5990
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Email: TomasKennedy@aol.com

/s/ Michael Ufferman
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FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **OLIVE**

EXHIBIT 1

From: "James Nesland" <jamesnesland@comcast.net>
Date: October 23, 2012 4:39:21 PM CDT
To: "'Richard Olive'" <richardandsusanolive@gmail.com>
Cc: "'Jeff Smith'" <jeff@smithbyerslaw.com>
Subject: Plea Bargain

Richard,

I'm writing to remind you that the deadline for accepting the Government's proposed plea bargain is tomorrow, Wednesday, October 24, 2012. I know that you informed me that you did not wish to consider and accept the plea bargain, but I must advise you that there is very substantial evidence that creates a high degree of certainty that if you go to trial you will be convicted. The strongest evidence will be David Kamer's testimony at trial that he specifically advised you on February 20, 2012 and, according to Kamer's email, at other times that "you should not be making the representation in your written material or orally that NFA is a 501(c)(3) organization." He advises you in that email that NFA is not a 501(c)(3) organization and that you should advise donors that it is not a 501(c)(3) organization and advise donors and advisors of the ramifications of an unfavorable determination. If the jury believes Kamer, and in my judgment the jury will believe him because his testimony is corroborated as true by the email, the jury will find beyond a reasonable doubt that you knew and intentionally misrepresented to advisors and donors that NFOA was a 501(c)(3) tax exempt charitable organization and contributions would be deductible. Kamer's email and testimony confirm that he advised you that your representations were not true. Because of that evidence, and the February 2006 acknowledgement letter from the IRS that states that NFOA is not tax exempt until the IRS approves the Application, it is my opinion that it will find beyond a reasonable doubt that you always knew NFOA was not a tax exempt charitable organization and knowingly and intentionally misrepresented to donors and advisors that it was tax exempt from the beginning of NFOA's operations in February 2006 through May 2007.

You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, will result in a sentence in the range of 17 to 20 years. The Government's plea bargain, if accepted by the Court, limits your sentence to 9 years. Nine years is a substantial sentence, but it is substantially less than the sentence of 17 to 20 years if you proceed to trial and are convicted (which as I advise you above has a high degree of certainty of being the result). So my advise is that you accept the plea bargain in order to assure that you will not be sentenced to a period of incarceration that is twice the period of the plea bargain.

Please understand that this advise is not easy for me to have to provide to you, but it is the best advise I can give you in light of the evidence against you and my opinion that there is a high degree of certainty that you will be convicted if you proceed to trial.

Jim

James E. Nesland

Law Office of James E. Nesland LLC

14252 E Caley Ave

Aurora, CO 80016

303-807-9449 (Office)

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD OLIVE	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 3:17-cv-0979**
	)	**Chief Judge Waverly D. Crenshaw, Jr**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

GOVERNMENT'S RESPONSE TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The United States of America, by and through undersigned counsel, hereby responds to Petitioner Richard Olive's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. As set forth below, Olive's motion should be denied.

BACKGROUND

A. Offense Conduct

The Sixth Circuit has summarized the relevant facts in this case as follows:

> Defendant founded NFOA in January 2006 and applied to the IRS for recognition of its Section 501(c)(3) status the same month. He learned the "business model" from his tenure as a development advisor and executive at National Community Foundation, which offered products similar to those later marketed by NFOA. The company purported to be a charitable organization that supported humanitarian services. As mentioned in the indictment, NFOA encouraged financial advisors to sell its products by offering a 9% commission, which exceeded the industry average.
>
> Two months after its founding, NFOA had three employees: defendant, his wife Susan, and Kenny Marks, who wrote promotional materials for the company, including video scripts. After its first year, it had five employees: Richard and

Susan Olive, David Vincent, and defendant's two stepdaughters, Breanna Galatte and Jenilee Vander Elst. Defendant's wife worked in the office and also did marketing. Vander Elst served as a receptionist. The company primarily drummed up business through mailings to financial advisors. Gallatte and Vincent fielded calls from them, explaining the ins and outs of their products. To do so, Vincent and Gallate relied upon a software program and script developed by defendant and his wife. According to Gallatte's testimony, she and Vincent were told not to deviate from the script when talking to financial advisors. Among the things included in the script was an assertion that NFOA was a tax-exempt Section 501(c)(3) organization. If a financial advisor's questions went beyond the scope of the script, he or she was referred to defendant.

As discussed earlier, NFOA's primary business was exchanging a customer's existing annuity for one of the company's installment plans, which promised higher returns. Annuities typically have an accumulated value and a surrender value. If surrendered early, the owner receives a substantially lower cash payout. Defendant typically surrendered annuities that it received from customers early. Over the course of its existence, NFOA completed contracts that exchanged client annuities worth approximately $19.3 million and surrendered them for $16.5 million.

On January 17 and March 7, 2007, the IRS contacted NFOA asking for additional information related to its application for Section 501(c)(3) status. The company retained an attorney, David Kamer, who advised defendant that NFOA should not be represented as being a 501(c)(3) enterprise when its application was still pending. Rather, he recommended that the company inform its clients of the situation and note the adverse tax consequences that would attend a denial of 501(c)(3) status. Despite this advice, defendant told others, including financial advisors, that a determination letter was not required for clients to recognize a charitable deduction.

As time passed, NFOA purchased real property with a portion of its assets. These properties included a Jiffy Lube franchise in Georgia, land in Tennessee that included a cell phone tower, an office condominium in Franklin, Tennessee, and a condominium in Las Vegas, Nevada. The last of these transactions forms the basis of a money laundering charge (Count 8). The Las Vegas condominium

> was purchased for the defendant's family vacations and to entertain financial advisors. However, it was never used for this purpose because the State of Tennessee took control of NFOA on May 24, 2007, after determining that it was undercapitalized.
>
> At trial, the district court admitted into evidence cease-and-desist orders issued against NFOA by several states, as long as they were in effect during the time period covered by the indictment. Orders were admitted from the states of Washington, Texas, Iowa, Florida, Alabama, Kansas, California, and Michigan. The orders alleged that NFOA was operating illegally because it was not licensed to sell insurance and/or was unlawfully selling securities. They also charged that NFOA incorrectly claimed that it enjoyed tax-exempt status under Section 501(c)(3). Financial advisors testified that knowledge of the orders would have affected their willingness to market NFOA products.

United States v. Olive, 804 F.3d 747, 751-51 (6th Cir. 2015) (footnote omitted).

B. Procedural History

Following a jury trial in the United States District Court for the Middle District of Tennessee, Olive was convicted of three counts of mail fraud, in violation of 18 U.S.C. § 1341; four counts of wire fraud, in violation of 18 U.S.C. § 1343; and two counts of money laundering, in violation of 18 U.S.C. § 1957. *See Olive*, 804 F.3d at 749–50. Judge Sharp then sentenced him to 372 months' imprisonment. *Id.*

On appeal, Olive challenged the sufficiency of the indictment, two evidentiary decisions made by the trial court, and three aspects of the sentencing calculation. *Id.* Specifically he challenged the sentencing by claiming that the District Court erred by failing to articulate its rationale underlying its loss calculation, by applying an organizer/leader enhancement, and by applying a vulnerable victim enhancement. *Id.* He also argued that one of the money laundering counts should have been merged with the fraud counts. *Id.* The court of appeals affirmed on

September 22, 2015. *Id.* at 759. Rehearing en banc was denied on November 17, 2015. *Id.* The Supreme Court denied Olive's petition for writ of certiorari on June 27, 2016 and denied his petition for rehearing on October 11, 2016. *Olive v. United States*, 136 S. Ct. 2511 (2016); *Olive v. United States*, 137 S. Ct. 329 (2016). On June 26, 2017 Olive filed the instant motion to vacate his sentence. (3:12-cv-00979). This response follows.

DISCUSSION

In his § 2255 motion, Olive raises three arguments as a basis for relief. First, he argues that trial counsel rendered ineffective assistance by inaccurately advising him regarding the guidelines range that would apply at sentencing if he were convicted after trial. According to Olive, had his attorney accurately advised him of the applicable range, he would have accepted the government's offer of a 9-year plea deal. Second, Olive argues that trial counsel was ineffective in failing to preserve certain objections at the sentencing hearing. Finally, he argues in the alternative that distributions made after sentencing from his dissolved fraudulent business constitute new evidence that entitles him to resentencing. All of these claims should be rejected.

A. Applicable Law

The benchmark for judging ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process ... that it cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, a petitioner must make two showings. First, he must prove that counsel made serious errors; that is, that counsel's performance was deficient. *Id.* To do so, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* Second, a petitioner must show that the deficient performance affected the outcome of his case. *Id.* Both

showings must be made to establish that there has been a breakdown in the adversarial process and the result is unreliable. *Id.* at 687.

Under the first requirement, to show that counsel's performance was deficient a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. Judicial scrutiny of counsel's performance must be highly deferential, and courts are to apply a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *see also Pough v. United States,* 442 F.3d 959, 966 (6th Cir. 2006) (cautioning that courts should not "indulge in hindsight, but must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors"). Indeed, the court must presume that the challenged action might be considered sound trial strategy. *Michel v. Louisiana,* 350 U.S. 91, 101 (1955). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. The governing performance standards depend in large part on the standards set by the legal profession. *Id.* "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

Under the second requirement, to show prejudice a petitioner must demonstrate that there exists a reasonable probability that, absent counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The focus should be whether counsel's errors have undermined the reliability of and confidence in the result, i.e.,

whether one can confidently say that the trial reached a fair and just result. *Lockhart v. Fretwell,* 506 U.S. 364 (1993).

In the specific context of a case where a petitioner claims that his attorney gave him bad advice that caused him to reject a plea offer, he bears "a heavy burden" in establishing deficient performance, *Whiting v. Burt,* 395 F.3d 602, 617 (6th Cir. 2005), and "must show that counsel did not attempt to learn the facts of the case and failed to make a good-faith estimate of a likely sentence." *Short v. United States,* 471 F.3d 686, 692 (6th Cir. 2006) (quoting *United States v. Cieslowski,* 410 F.3d 353, 358 (7th Cir. 2005)). To demonstrate prejudice, the petitioner "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper,* 566 U.S. 156 (2012); *United States v. Morris,* 470 F.3d 596, 602 (6th Cir. 2006). This showing requires a petitioner to establish "that his lawyer's deficiency was a decisive factor in his decision to plead guilty." *Short,* 471 F.3d at 692 (internal quotation marks omitted).

B. Olive's 2255 Motion Should Be Denied.

1. Petitioner has failed to demonstrate that his lawyer performed deficiently when advising him about the plea offer, or that the plea offer would have been accepted and approved but-for counsel's advice.

Olive first claims that he would have accepted a plea offer from the government but-for his attorney's purportedly bad advice regarding the application of the sentencing guidelines. This claim fails both prongs of the *Strickland* analysis.

First, Olive has failed to provide any evidence that his attorney performed below an objective standard of reasonableness. Olive concedes that his attorney advised him that, under the government's calculations, he could face a guidelines range of 292-365 months. He also concedes that his attorney provided his own estimate of the guidelines range, which, while lower than the government's estimate, still provided for an extremely lengthy sentence of 17 to 20 years. Olive makes no effort to show that his attorney's estimate was not made in good faith, or was so unreasonable as to have fallen below prevailing professional norms.

Nor does he provide any evidence to suggest that his attorney ever told him that his 17-20 year estimate was *the only* range, or the *worst possible* range, that could conceivably apply. He appears to be attempting to establish this point by relying on one sentence in one email, in which counsel told him, "You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of 17 to 20 years." (DE# 1, Motion, PageID#: 5; DE# 5, Email, PageID#: 23.) Olive chooses to add emphasis to the words "will result," but in doing so he glosses over the words that precede them: "if followed." In context, this sentence—including the "if followed" caveat—suggests that counsel was not advising Olive that he could never do worse than a 20-year sentence, but instead was emphasizing the serious consequences that Olive would likely face if he rejected the government's offer.

The facts in this case present a notable contrast with the facts in *Lafler*. There, it was undisputed that trial counsel "was deficient when he advised [the defendant] to reject the plea offer on the grounds that he could not be convicted at trial." *Lafler*, 566 U.S. at163. Here, Olive's counsel advised him to *accept* the plea offer, because there was a very high likelihood of a conviction at trial, followed by a very lengthy prison sentence. (DE# 5, Email, PageID#: 23.)

Despite this advice, Olive rejected the plea offer and proceeded to trial. Olive has provided nothing that would overcome the strong presumption that counsel performed adequately in advising him about the plea offer. *See Jones v. United States*, 178 F.3d 790, 794 (6th Cir. 1999) (finding that even though counsel could have been more explicit in the advice he gave his client regarding the plea offer, counsel's performance in advising the defendant of the risks involved with a trial as opposed to accepting the plea offer did not fall below an objective standard of reasonableness); *United States v. McConer,* 530 F.3d 484, 494 (6th Cir. 2008) (attorney's representation was deemed effective even though he did not inform his client of potential maximum exposure and instead only warned that the case would "be referred to the federal government" if the client did not plead guilty); *See Porter v. Lockhart,* 925 F.2d 1107, 1110 (8th Cir. 1991) ("Mere proof that an attorney misstated the law on one isolated occasion will not suffice to make out a claim of ineffective assistance, particularly where, as here, the defendant is represented by more than one attorney.").

Second, even if Olive could establish deficient performance, he could not establish prejudice. There is nothing in the record—such as an affidavit from Olive—suggesting that he would have accepted the offer had his attorney's estimate of the applicable guideline range been higher. In fact, the only evidence in the record demonstrates that Olive was unwilling to plead guilty, despite counsel's strong advice that he do so. His theory appears to be that, despite his attorney's advice, he was willing to reject the plea offer and proceed to trial in the hopes of acquittal when he thought that he would get "only" a 20-year sentence if convicted, but would have accepted the offer if he had realized that he could have gotten an even longer sentence that was more in line with the government's estimates. This theory is extremely implausible on its face, and is particularly hard to square with the fact that Olive seemingly still refuses to accept

responsibility for his actions, as indicated by the repeated references in his § 2255 motion to "the alleged victim-donors." Because there is nothing in the record to support his implausible assertion that he would have followed his attorney's advice and accepted the 9-year plea offer but-for his attorney's 17-20 year estimate of the applicable guideline range, his claim should be denied.

Moreover, even if Olive could show that he would have accepted the government's plea offer, it is highly unlikely that Judge Sharp would have accepted any Rule 11(c)(1)(C) agreement that called for a sentence of 9 years' imprisonment. Such a sentence would have represented nearly a 60% downward variance from the applicable guideline range of 262-327 months.[1] In other similar (but less egregious) white collar cases, Judge Sharp rejected plea agreements under Rule 11(c)(1)(C) on the grounds that they were too lenient, even when the agreed sentence was within or slightly below the applicable range. For example, in the case against George David George, Judge Sharp twice rejected plea agreements calling for sentences of 72 months and 92 months respectively. *See United States v. George*, Case No. 3:15-cr-00069, DE# 43 (rejecting 72-month plea agreement); DE# 59 (rejecting 92-month plea agreement). Likewise, in the case against John Oscar Wilson, III, Judge Sharp rejected a plea agreement requiring the Court to impose a sentence within the applicable range of 51 to 63 months. *See United States v. Wilson*, Case No. 3:16-cr-00047, DE# 43.)

Given Judge Sharp's evaluation of the severity of the offense conduct in this case—as reflected by the 31-year sentence ultimately imposed—it is very likely that Judge Sharp would

[1] Judge Sharp ultimately found a total offense level of 41 and a Criminal History Category of II, yielding an advisory range of 360-life. (Crim. DE# 127, Sentencing Tr., PageID#: 915.) Had Olive received a three-point reduction for acceptance of responsibility, as a result of pleading guilty, his offense level would have been 38, yielding an advisory range would have been 262-327.

have followed a similar course and rejected any plea agreement with a 9-year sentence, had one ever been presented to him.

2. Petitioner has failed to demonstrate prejudice as Petitioner has failed to demonstrate a reasonable probability that he would have pleaded guilty had he received proper advice

Olive next argues that his attorney was constitutionally ineffective at sentencing for "failing to preserve the Court's erroneous loss calculation and ruling for guidelines and restitution purposes." (DE# 1, 2255, PageID#: 7.) In advance of the sentencing hearing, trial counsel filed a 26-page sentencing memorandum (plus 12 additional pages of exhibits) in which he argued that the Court should impose a sentence in the range of 6 to 12 months. (Crim. DE# 95, Def. Sentencing Mem.) In that memorandum, counsel argued that "[t]here was no intended or actual loss caused by the Offense Conduct, and, thus, no legal or factual basis to interpret and apply 2B1.1(b)(1)(L) and Application Note 3(A) to increase the offense level by 22." (*Id.* at PageID#: 692-94.)

At the sentencing hearing, trial counsel cross-examined the government's witness, and reiterated the argument that "there was actually no subjectively intended loss, no objectively intended loss and no actual loss." Perhaps as a result of counsel's advocacy, Judge Sharp ultimately rejected the government's loss-amount calculations (which sought a loss amount of $10 million) and found a loss amount of between $2.5 and $7 million. When counsel's performance at the sentencing hearing is examined holistically, it is clear that his conduct was well above the constitutional minimum.

Nevertheless, Olive focuses on one specific moment at the sentencing hearing. Specifically, he asserts that his lawyer failed to preserve an objection to the Court's loss calculation, and that this purported failure resulted in the application of the more stringent plain-

error standard of review when the case was on appeal—with the implication being that the loss-calculation would have been reversed on appeal had the issue been properly preserved.

Here, Olive is conflating two separate issues: one relating to the substantive issue of the proper calculation of the loss amount, and another relating to the procedural issue of whether Judge Sharp adequately explained the methodology behind the calculation. Because counsel objected to the PSR's calculation of the loss amount, the issue was properly preserved for direct appeal. Had Olive's appellate counsel—who was different from his trial counsel—opted to pursue a substantive challenge to the calculation of the loss amount, he was free to do so, and the issue would have been properly preserved. (He presumably chose not to do so because that argument presented no likelihood of success, and Olive has not challenged appellate counsel's decisions in this § 2255.) Rather than attacking the substantive loss calculation, appellate counsel chose to challenge to the sufficiency of Judge Sharp's *explanation* of the selected loss amount. On that issue, it is true that trial counsel had not requested a more thorough explanation after the Court announced that it was applying a loss amount of between $2.5 and $7 million, and this failure resulted in the Sixth Circuit applying the plain-error standard when reviewing Olive's procedural objection. But there is no basis to conclude (1) that the failure to raise this minor procedural objection fell below prevailing professional norms; (2) that the result of the Sixth Circuit's review would have been different had the procedural objection been preserved; or (3) that, even if the Sixth Circuit had remanded for a more thorough explanation, Olive's sentence would ultimately have been any different. As such, Olive's challenge to his attorney's performance at sentencing should be rejected.

3. Olive's reliance on "new evidence" is misplaced.

Finally, Olive appears to request resentencing on the basis of additional distributions that have been made "to the alleged victim-donors" since his sentencing hearing. The basis for this requested resentencing is not entirely clear. To the extent he is simply challenging the calculation of his advisory guideline range, that challenge is not cognizable under § 2255. *See Grant v. United States,* 72 F.3d 503, 506 (6th Cir. 1996) (challenge to application of U.S.S.G. § 1B1.3 not cognizable under § 2255); *Femia v. United States,* 47 F.3d 519, 525 (2d Cir. 1995) (sentencing errors generally are not cognizable on habeas corpus); *Knight v. United States,* 37 F.3d 769, 773 (2d Cir. 1994) (holding that petitioner's claim that his guideline Criminal History Category was miscalculated was not cognizable in a § 2255 petition); *United States v. Vaughn,* 955 F.2d 367, 368 (5th Cir. 1992) (district court's application of the guidelines does not give rise to a constitutional issue); *United States v. Hewitt,* 942 F.2d 1270, 1276 (8th Cir. 1991) (prior conviction used to compute a defendant's Criminal History score under the guidelines may not be collaterally attacked); *United States v. Pregent,* 190 F.3d 279, 283-284 (4th Cir. 1999) ("Barring extraordinary circumstances . . . an error in the application of the Sentencing Guidelines cannot be raised in a § 2255 proceeding") (citing cases).

Moreover, to the extent that Olive is relying on the application notes to U.S.S.G. § 2B1.1, his argument fails even on its own terms. He cites the application note that requires loss amount to be reduced by the amount of any money or property returned to the victim "before the offense was detected." (DE# 1, 2255 Motion, PageID#: 9-10.) Needless to say, any distributions to the victim that came *after sentencing* would not fall within the category of money returned *before the offense was detected.* Olive's attempt to use this § 2255 proceeding to relitigate the

calculation of the applicable loss amount—by relying on post-sentencing distributions that are plainly inapplicable to the calculation in the first place—must be rejected.

CONCLUSION

For the reasons set forth above, the government respectfully submits that Olive's §2255 motion should be denied, and the case should be dismissed.

Respectfully submitted,

DONALD Q. COCHRAN
United States Attorney for the
Middle District of Tennessee

s/ Siji Moore
Siji Moore
Assistant United States Attorney
110 9th Avenue South, Suite A-961
Nashville, Tennessee 37203
615-736-2127

Certificate of Service

I hereby certify that on November 15, 2017, a true and exact copy of the foregoing document was delivered via the Court's electronic filing system to:

Michael Ufferman
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Fl 32308

s/ Siji Moore
Siji Moore
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD OLIVE	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 3:17-cv-0979**
	)	**Chief Judge Waverly D. Crenshaw, Jr**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

SUPPLEMENT TO GOVERNMENT'S RESPONSE TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The United States of America, by and through undersigned counsel, hereby submits the attached Exhibit 1. Exhibit 1 is composed of communications between petitioner Richard Olive and his trial counsel concerning the guidelines range that would apply at sentencing if Olive were convicted after trial. The documents evidence that Olive's trial counsel made a good faith and reasonable effort to estimate the applicable guidelines range. As noted in the Government's November 15, 2017 response, because trial counsel's performance were consistent with prevailing professional norms, Olive's 2255 motion should be denied.

Respectfully submitted,

DONALD Q. COCHRAN
United States Attorney for the
Middle District of Tennessee

s/ Siji Moore
Siji Moore
Assistant United States Attorney
110 9th Avenue South, Suite A-961
Nashville, Tennessee 37203

Certificate of Service

I hereby certify that on December 14, 2017, a true and exact copy of the foregoing document was delivered via the Court's electronic filing system to:

Michael Ufferman
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Fl 32308

s/ Siji Moore
Siji Moore
Assistant United States Attorney

Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Criminal Case No: 3:12-CR-00048

vs.

RICHARD OLIVE,
Defendant.

DECLARATION OF JAMES NESLAND

I, James Nesland, based upon my personal knowledge, make the following statements of facts:

1. I am the same James Nesland that represented Richard Olive in the criminal case entitled United States v. Richard Olive, Case No. 3:12-CR-00048 (U.S.D.C.M.D. Tenn.)
2. On October15, 2012 the Assistant U.S. Attorney in charge of the case sent a Plea Offer which proposed a 108 month sentence, or 9 years. The Plea Offer stated that the maximum sentence under the guidelines would be 292 to 365 months, or 29 to 30 years, based upon a Level 40 calculation.
3. I emailed the Plea Offer to Mr. Olive informing him of the Government's sentencing guidelines calculation of a Level 40 sentencing range of 292 to 365 months and my consultant's calculations of potential Level 37, 38 and 39 sentencing ranges of 201 to 262 months, 235 to 293 months and 262 to 327 months and we discussed it the Plea Offer several times by telephone thereafter.
4. My consultant prepared another analysis of the sentencing calculations in the Plea Offer on October 17, 2012. He analyzed the Government's calculations of a Level 40 sentencing range of 292 to 365 months and provided arguments for reducing it to sentencing ranges 188 to 235 months, 15 to 19 years or 210 to 262 months, 17 to 21 years. I provided the memorandum to Mr. Olive and we discussed it by telephone.

5. On October 22, 2012 I sent an email to Mr. Olive in which I advised that he should accept the Plea Offer because the nine year sentence was substantially less than the likely sentence of 17 to 20 years.

6. I did not advise Mr. Olive that he could receive 31 or 160 years. I also did not advise Mr. Olive that the sentences could be run consecutively. Nor did the Government's Plea Offer or my consultant make such determination

7. Mr. Olive declined to accept the Plea Offer.

I make the statements in this Declaration under penalty of perjury.

JAMES NESLAND

James Nesland

From: Jeff Smith <jeff@smithbyerslaw.com>
Sent: Monday, April 17, 2017 2:57 PM
To: 'jamesnesland@comcast.net'
Subject: FW: Olive Plea offer
Attachments: Olive Plea Offer Letter 10-15-12.pdf

From: James Nesland [mailto:jamesnesland@comcast.net]
Sent: Monday, October 15, 2012 3:55 PM
To: 'Richard Olive'
Cc: Jeff Smith
Subject: FW: Olive Plea offer

Richard,

I received this plea offer from the Government this morning. In a nutshell, the Government is stating that if you're convicted of the charges the sentencing guidelines calculations they believe will apply will provide for an Offense Level of 40 which, under the guidelines, would correspond to a sentence of 292 to 365 months or 24 to 30 years. Mike Martinez calculated an Offense Level of 37 and 39. The difference is based upon whether there is a 2 level enhancement for abuse of trust, which Mike didn't use (and I've asked him to consider now that I have Kat's letter) and a 1 level for grouping the money laundering with the fraud counts (which I've also asked Mike to consider).

However, even if its 37 (201-262 months), 38 (235-293 months) or 39 (262-327 months), the potential period of incarceration is in the range of 17 to 27 years.

The plea the Government is offering is 108 months, or 9 years (which by the way is substantially less than when Kat and I talked last week and she was proposing 12 years). It is a substantial difference. The time period for acceptance is next Wednesday, October 24, so there is no immediate need to decide. But I think it deserves serious consideration given the very substantial sentence that is possible if you proceed to trial and are found guilty.

Give me a call to discuss whenever you would like.

Jim

James E. Nesland
Law Office of James E. Nesland LLC
14252 E Caley Ave
Aurora, CO 80016
303-807-9449 (Office)
303-680-2228 (Home)
303-680-3985 (Fax)

From: Ward, Kathryn (USATNM) [mailto:Kathryn.Ward2@usdoj.gov]
Sent: Monday, October 15, 2012 1:15 PM
To: jamesnesland@comcast.net
Subject: Olive Plea offer

Jim,

Please find attached a plea offer letter to Mr. Olive. I will put the original in the mail.

Kat

Kathryn B. Ward
Assistant U.S. Attorney
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110 Ninth Avenue South, Suite A-961
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(615) 736-5151
kathryn.ward2@usdoj.gov

United States Attorney
Middle District of Tennessee

U. S. Department of Justice

9th Avenue South, Suite A-961
Nashville, Tennessee 37203

Phone (615) 736-5151
Fax (615) 736-2114

October 15, 2012

James E. Nesland
Law Office of James E. Nesland LLC
14252 E. Caley Avenue
Aurora, CO 80016
(303) 807-9449
Fax: (303) 680-3985
Email: jamesnesland@comcast.net

Re: Plea Offer in the matter of United States v. Richard Olive
Case No. 3:12-CR-00048 (U.S.D.C. M.D. Tenn.)

Dear Mr. Nesland:

Set forth below are the terms that the Government is willing to offer Richard Olive if he agrees to resolve this case with a plea of guilty:

1. The defendant would plead guilty to Counts One and Eight of the Indictment, charging violations of 18 U.S.C. § 1341 and 18 U.S.C. § 1957.

2. The base offense level for the first count of conviction is **7**, pursuant to U.S.S.G. § 2B1.1(a).

3. The Parties would agree that the loss is more than $2.5 million, but less than $7 million. The offense level should be increased by **18** levels, pursuant to U.S.S.G. § 2B1.1(b)(1), based on the loss amount.

4. The offense level should be increased by **4**, pursuant to U.S.S.G. § 2B1.1(b)(2)(B) because there were more than 50 victims.

5. The offense level should be increased by **2**, pursuant to U.S.S.G. § 2B1.1(b)(9)(A) because the offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, or religious organization.

6. The offense level should be increased by **2**, pursuant to U.S.S.G. § 2B1.1(b)(10)(C) because the offense involved sophisticated means.

7. The offense level would be increased by **2**, pursuant to U.S.S.G. § 3B1.3, because the defendant abused a position of trust.

8. The offense level should be increased by **4**, pursuant to U.S.S.G. § 3B1.1(a), because the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.

9. The offense level should be increased by **1**, pursuant to U.S.S.G. § 2S1.1(b)(2)(A) because the defendant was convicted under 18 U.S.C. § 1957.

10. The resulting offense level (prior to acceptance) would be a level **40**, which, assuming a Criminal History Category I, corresponds to a term of imprisonment of **292 to 365 months**. This offense level is merely the government's estimate at this time, and the Court-determined offense level could be higher or lower if the case were to proceed to trial and then sentencing.

11. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the government, through his allocution and subsequent conduct prior to the imposition of sentence, a **2-level reduction** will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming defendant accepts responsibility as described in the previous sentence, the United States will move for an additional **one-level reduction** pursuant to U.S.S.G § 3E1.1(b), because defendant will have given timely notice of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government to allocate their resources efficiently.

12. The United States and the Defendant would enter into a plea agreement under Federal Rule of Evidence 11(c)(1)(C), by which the parties would agree that the defendant should be sentenced to a term of **108 months** incarceration.

Please note that **these terms and conditions are subject to the approval of the United States Attorney's Office, Middle District of Tennessee. This offer will remain open until 5:00 P.M. on Wednesday, October 24, 2012**. If you have any questions, please feel free to call me at (615)736-2113 or to e-mail me at Kathryn.Ward2@usdoj.gov.

Sincerely,

JERRY E. MARTIN
United States Attorney for the
Middle District of Tennessee

By: Kathryn B. Ward
Kathryn B. Ward
Assistant United States Attorney

James Nesland

From: Jim Nesland <jamesnesland@comcast.net>
Sent: Wednesday, February 1, 2017 2:02 PM
To: 'Jim Nesland'
Subject: FW: Plea Bargain

From: Jeff Smith [mailto:jeff@smithbyerslaw.com]
Sent: Tuesday, October 23, 2012 6:04 PM
To: James Nesland <jamesnesland@comcast.net>
Subject: RE: Plea Bargain

Can't say it any better or clearer.

From: James Nesland [mailto:jamesnesland@comcast.net]
Sent: Tuesday, October 23, 2012 3:39 PM
To: 'Richard Olive'
Cc: Jeff Smith
Subject: Plea Bargain

Richard,

I'm writing to remind you that the deadline for accepting the Government's proposed plea bargain is tomorrow, Wednesday, October 24, 2012. I know that you informed me that you did not wish to consider and accept the plea bargain, but I must advise you that there is very substantial evidence that creates a high degree of certainty that if you go to trial you will be convicted. The strongest evidence will be David Kamer's testimony at trial that he specifically advised you on February 20, 2012 and, according to Kamer's email, at other times that "you should not be making the representation in your written material or orally that NFA is a 501(c)(3) organization." He advises you in that email that NFA is not a 501(c)(3) organization and that you should advise donors that it is not a 501(c)(3) organization and advise donors and advisors of the ramifications of an unfavorable determination. If the jury believes Kamer, and in my judgment the jury will believe him because his testimony is corroborated as true by the email, the jury will find beyond a reasonable doubt that you knew and intentionally misrepresented to advisors and donors that NFOA was a 501(c)(3) tax exempt charitable organization and contributions would be deductible. Kamer's email and testimony confirm that he advised you that your representations were not true. Because of that evidence, and the February 2006 acknowledgement letter from the IRS that states that NFOA is not tax exempt until the IRS approves the Application, it is my opinion that it will find beyond a reasonable doubt that you always knew NFOA was not a tax exempt charitable organization and knowingly and intentionally misrepresented to donors and advisors that it was tax exempt from the beginning of NFOA's operations in February 2006 through May 2007.

You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, will result in a sentence in the range of 17 to 20 years. The Government's plea bargain, if accepted by the Court, limits your sentence to 9 years. Nine years is a substantial sentence, but it is substantially less than the sentence of 17 to 20 years if you proceed to trial and are convicted (which as I advise you above has a high degree of certainty of being the result). So my advise is that you accept the plea bargain in order to assure that you will not be sentenced to a period of incarceration that is twice the period of the plea bargain.

Please understand that this advise is not easy for me to have to provide to you, but it is the best advise I can give you in light of the evidence against you and my opinion that there is a high degree of certainty that you will be convicted if you proceed to trial.

Jim

James E. Nesland

Law Office of James E. Nesland LLC
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303-680-3985 (Fax)

INVESTIGATIVE RESOURCES, INC.™

Confidential Memorandum
Attorney Work Product

TO: JAMES NESLAND, ESQ.
FROM: MICHAEL E. MARTINEZ, INVESTIGATIVE RESOURCES, INC.
DATE: OCTOBER 17, 2012
SUBJECT: REVIEW OF PLEA AGREEMENT

RE: RICHARD OLIVE

The following memorandum contains my analysis of the proposed plea agreement and review of the federal sentencing guidelines. The information is intended to be used as work product of the above attorney.

The guideline for a violation of 18 U.S.C. §§ 1341 and 1343 is USSG § 2B1.1. The guideline for a violation of 18 U.S.C. § 1957 is § 2S1.1.

USSG § 3D1.2 provides that all counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

USSG § 3D1.3 provides, "In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group."

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The government at paragraph 1 notes that Mr. Olive will plead guilty to Counts One and Eight of the Indictment charging a violation of 18 U.S.C. §§ 1341 and 1957. As previously noted, based on USSG § 3D1.3, the guideline for each group is calculated separately to determine the most serious of the counts. That guideline is used to calculate the sentencing guideline. In my June 23, 2012, memorandum, I outlined each guideline based on the 18 U.S.C. §§ 1341 and 1957 offense conduct. The offense with the most serious of the counts is a violation of 18 U.S.C. § 1341. Thus, USSG § 2B1.1 is the guideline to be used in calculating the offense level.

The government at paragraph 2 notes the base offense level is 7, pursuant to USSG § 2B1.1 (a). Application of this guideline is correct.

The government at paragraph 3 notes that the parties would agree that the loss is more than $2.5 million but less than $7 million. Pursuant to USSG § 2B1.1 (b)(1)(J) the offense level is increased by 18 levels. This is correctly noted by the government.

The government at paragraph 4 notes a 4 level increase applies pursuant to USSG § 2B1.1 (b)(2)(B), as the offense involved more than 50 victims. In a previous e-mail, you noted that Mr. Olive had 233 customer accounts. Unless you can show that 50 or fewer victims received complete reimbursement and suffered no loss, this application would apply.

The government at paragraph 5 notes that a 2 level increase applies pursuant to USSG § 2B1.1 (b)(9)(A) as the offense involved a misrepresentation that he was acting on behalf of a charitable, educational, or religious organization. You note that National Foundation of America (NFOA) was a charitable foundation. I am attaching a copy of *U.S. v. Frazier, 53 F.3d 1105 (10th Cir. 1995)* for your review. The Court addressed the issue of charitable - educational motives. This case involved application of USSG § 2F1.1, before the Commission consolidated the guideline with USSG § 2B1.1. The court noted,

> [T]he plain language requires that the defendant misrepresent that he was acting on behalf of a charitable, educational, religious or political organization or a government agency. Misrepresent means "to represent incorrectly, improperly, or falsely" and "[it] usually involves a deliberate intention to deceive, either for profit or advantage." Random House Unabridged Dictionary 1230 (2d ed. 1993). The phrase "on behalf of" means: (1) as a representative of; or (2) in the interest or aid of. Id. at 188. Thus, the plain language of Sec. 2F1.1(3)(A) requires that a defendant represent incorrectly, improperly or falsely that he is either acting "as a representative of" or "in the interest or aid of" a charitable, educational, religious or political organization or a government agency. Pursuant to this literal interpretation of the guideline, a defendant may be subject to enhanced punishment if he either falsely claims to be a representative of the organization, i.e., falsely claims that he has the capacity to act as an agent or employee of the organization, or if he falsely claims to act "in the interest or aid of" the organization.

You noted that the extent of Mr. Olive's alleged receipt of benefits was $153,000. The question is whether he received the money based on a misrepresentation that he was **acting on behalf** of a charitable organization when the funds were received; or did he represent that the funds would be used to cover office expenses. If the latter, I believe you have an argument against applying the enhancement.

The government at paragraph 6 notes that a 2 level increase applies pursuant to USSG § 2B1.1 (b)(10)(C) as the offense involved sophisticated means. Sophisticated means is described as:

> "Sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

There is little information within the Indictment or the proposed plea agreement to determine a rational basis to apply this adjustment. The government must prove that the offense was especially complex or especially intricate. The Indictment notes that the offense conduct occurred between January26, 2006 and May 2007, however there is further information to address the issue of sophistication. This may be an area we can explore to form an argument that the offense did not involve sophisticated means.

The government at paragraph 7 notes that a 2 level increase applies pursuant to USSG § 3B1.3, alleging Mr. Olive abused a position of trust. USSG § 3B1.3, states,

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

USSG § 3B1.3, comment. (n. 1 and 3) state,

1. Definition of "Public or Private Trust". – "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

2. This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the adjustment

> applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.

You note that Mr. Olive was not a fiduciary and customers were represented by financial advisors, of whom Mr. Olive dealt with. According to the Indictment, Mr. Olive was the President and Executive Director of NFOA. Application note 1 to USSG § 3B1.3 provides that "public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion and significantly involves less supervision than other employees. One avenue to explore is if the position Mr. Olive held significantly facilitated the commission or concealment of the offense. This can also be addressed by arguing that the offense conduct was not difficult to detect or the victims did not view Mr. Olive as maintaining a position of trust.

The government at paragraph 8 notes that a 4 level increase applies pursuant to USSG § 3B1.1 (a), alleging Mr. Olive was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. USSG § 3B1.1, comment. (n. 1) states,

> A "participant" is a **person who is criminally responsible for the commission of the offense, but need not have been convicted.** A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

The issue here is whether the family members and friend, as you noted in your e-mail, were also criminally responsible for the commission of the offense. If not, the 4 level enhancement would not apply.

The government at paragraph 9 notes that a 1 level increase applies pursuant to USSG § 2S1.1 (b)(2)(A) because the conviction is pursuant to 18 U.S.C. 1957. This adjustment would apply if USSG § 2S1.1 was used to determine the sentencing guideline range. As noted, USSG § 2B1.1 represents the most serious of the counts.

USSG §1B1.1. Application Instructions states,

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

USG §1B1.2. Applicable Guidelines states,

> (a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).

The guideline utilized to calculate the sentencing guideline is USSG § 2B1.1, not USSG §2S1.1, thus the specific offense characteristic pursuant to USSG § 2S.1.1(b)(2) (A) does not apply.

The government at paragraph 10 notes that the adjusted offense level is 40 and assuming a criminal history I, the guideline range is 292 to 365 months (prior to an adjustment for acceptance of responsibility). Applying a 3 level reduction for acceptance of responsibility results in a total offense level 37 and guideline range of 210 to 262 months.

Based on the issues noted above, the best-case scenario would be a base offense level 29. Mr. Olive would be eligible for up to a three level reduction for acceptance of responsibility pursuant to USSG § 3E1.1, resulting in a total offense level 26. A total offense level 26 and criminal history category I results in a guideline range of 63 to 78 months.

The plea agreement is represented under Federal Rule of Evidence 11(c)(1)(C) with an agreed upon term of 108 months. Accepting the agreement would bind Mr. Olive to the 108 months or 9 years, of which he would serve approximately 7.65 years. Having the ability to argue against the adjustments noted by the government represents an obviously favorable outcome for Mr. Olive.

MEM.mem
10-17-12

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

RICHARD OLIVE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No: 3:17-cv-0979

PETITIONER OLIVE'S REPLY TO THE "GOVERNMENT'S RESPONSE TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE"

The Petitioner, RICHARD OLIVE, by and through undersigned counsel, submits the following reply to the Government's response to his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. (Doc 9).

Ground one: Defense counsel rendered ineffective assistance of counsel by failing to properly advise Defendant Olive regarding the Government's pre-trial plea offer.

In its response, the Government asserts that "Olive has failed to provide any evidence that his attorney performed below an objective standard of reasonableness." (Doc 9 - Pg 7). Yet, the Government submitted a declaration from defense counsel wherein defense counsel concedes the following:

> I did not advise Mr. Olive that he could receive 31 or 160 years. I

> also did not advise Mr. Olive that the sentences could be run consecutively. Nor did the Government's Plea Offer or my consultant make such a determination.

(Doc 13-1 - Pg 3). Thus, defense counsel has candidly conceded that he failed to properly advise the Petitioner about the maximum sentence he faced in this case. Without being properly advised regarding the maximum sentence in this case, there is no way the Petitioner could make a knowing, intelligent, and voluntary decision regarding whether to accept or reject the Government's plea offer in this case.

In support of his argument, the Petitioner relies on *United States v. Gordon*, 156 F.3d 376 (2d Cir.1998). In that case, the defense attorney informed Gordon that he was facing a maximum sentence of 120 months if convicted after trial. Based on his attorney's representation, Gordon rejected an eighty-four month plea deal and was subsequently convicted after trial. *See Gordon*, 156 F.3d at 377. Under the sentencing guidelines, however, Gordon was actually facing a sentencing range of 262 to 327 months, and was sentenced to 210 months in prison. *See id.* at 377-378. After sentencing, Gordon filed a § 2255 motion arguing that his attorney was ineffective for telling him that his maximum exposure was 120 months. *See id.* at 378. The district court granted Gordon's petition, ruling that Gordon's counsel "had provided ineffective assistance in failing to properly advise Gordon of his potential sentencing exposure," and finding that Gordon would have accepted the plea but for defense counsel's "inaccurate advice." *Id.* On appeal, the Government argued that Gordon's counsel was not ineffective because he had also informed Gordon that there was a possibility of getting consecutive 120-month sentences for each count in the indictment. *See id.* at 380. The Second Circuit rejected this argument, relying

on the district court's finding that " '[a]lthough [defense counsel] does mention in his letter that there is a possibility that Gordon could be sentenced to ten years for each count under the indictment consecutively, his conclusion is clear that Gordon faced a maximum incarceration of 120 months." *Id.* (quotations omitted). In affirming the district court's finding of ineffectiveness, the Second Circuit ruled that, "[b]y grossly underestimating Gordon's sentencing exposure in a letter to his client, [counsel] breached his duty as a defense lawyer in a criminal case 'to advise his client fully on whether a particular plea to a charge appears desirable.'" *Id.* (quoting *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996).

Gordon's holding is instructive in the instant case. To the extent the attorney in *Gordon* was deemed ineffective for "grossly underestimating" Gordon's sentencing exposure by seventeen and one-quarter years (i.e., the difference between the 120-month maximum relayed by counsel and the guidelines maximum of 327 months), defense counsel's 140-year underestimation of the Petitioner's sentencing exposure (i.e., the difference between the 17-20 range relayed to the Petitioner (Doc 5 - Pg 4)[1] and the Petitioner's actual maximum

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[1] In the email contained in Document 5, defense counsel stated the following to the Petitioner:

> You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of 17 to 20 years.

(Emphasis added). The email contained in Document 5 is not the only time defense counsel told the Petitioner that his sentencing exposure following trial was 17-20 years. As explained in the "Declaration of Susan Olive" being filed as an exhibit with this reply (Exhibit A), defense counsel made this representation to the Petitioner on *several* occasions – both in writing and on the telephone. Based on defense counsel's representations, the Petitioner was led to believe that 20 years was the maximum sentence he could receive in this case if he went to trial and lost.

exposure of 160 years) was far more egregious. As explained by the Second Circuit in *Gordon*, defense counsel was ineffective for failing to provide accurate sentencing advice to the Petitioner because "[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *Gordon*, 156 F.3d at 380.

As explained in his § 2255 motion, had defense counsel properly advised the Petitioner that the sentence he faced if convicted at trial was 31 years' imprisonment (or 160 years' imprisonment), the Petitioner would have accepted the Government's 9-year plea offer.[2] Undersigned counsel are filing as an exhibit (Exhibit A) with this reply a "Declaration of Susan Olive" wherein Mrs. Olive explains that her husband would have accepted the 9-year plea offer had her husband been properly advised regarding the maximum sentence. The Petitioner is also signing a declaration to this effect, and undersigned counsel will submit the declaration to the Court as soon as they receive the declaration from the Petitioner (who is sending it through the prison mail system).

In its response, the Government *speculates* that Judge Sharp would have rejected the 9-year plea offer in this case. (Doc 9 - Pgs 9-10). Undersigned counsel note that after Judge

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[2] Based on defense counsel's representation that application of sentencing guidelines in this case "will result" in a sentence in the range of 17 to 20 years, the Petitioner rejected the Government's 9-year plea offer (because, in the Petitioner's mind – and given the Petitioner's age – he was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer). But had defense counsel properly advised the Petitioner that the sentence he faced if convicted at trial was 31 years' imprisonment (or 160 years' imprisonment), the Petitioner would have accepted the Government's 9-year plea offer.

Sharp retired, he was interviewed by Nashville Post and he gave the following answer to one of the questions posed to him:

> On making changes from within the justice system: At the district court level, it's really, really tough to do. I was on the bench for six years; I can count about five times an important case came through. The rest of the time, you're kind of cranking it out. A lot of it is theater on the criminal side. We're going to go through the motions, *you're going to plead guilty, and I'm going to sentence you and you've already worked out a deal.*

(Emphasis added). A copy of the article is being filed as an exhibit with this reply (Exhibit B). Judge Sharp's answer in the article certainly suggests that it would be rare for Judge Sharp to reject a "deal" that was "already worked out."[3]

Accordingly, for all of the reasons set forth above and contained in the § 2255 motion, defense counsel was ineffective for failing to properly advise the Petitioner regarding the Government's pre-trial plea offer. The Petitioner requests the Court to grant relief on this claim, vacate his current sentence, and thereafter afford relief consistent with *Lafler v. Cooper*, 566 U.S. 156 (2012) (i.e., direct the Government to re-offer the 9-year pretrial plea offer to the Petitioner and, if the Petitioner accepts the offer, resentence the Petitioner after taking into account all of the circumstances in the case). The Petitioner requests the Court to grant an evidentiary hearing on this claim. *See United States v. Vaughn*, 704 Fed. Appx. 207 (3d Cir. 2017) (holding that an evidentiary hearing was required to resolve whether counsel provided ineffective assistance during the plea-bargaining process by failing to

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[3] In its response, the Government cites two cases where Judge Sharp rejected plea deals. (Doc 9 - Pg 9). However, both of the cases cited by the Government involved facts that were much more egregious than the facts of the instant case.

adequately advise the defendant about the merits of 60-month plea offer that the defendant turned down).

Ground two: Defense counsel ineffectively failed to preserve the Court's erroneous loss calculation and ruling for guidelines and restitution purposes.[4]

The Petitioner contended at sentencing that he was not factually or proximately responsible for the losses assessed by the Probation Officer in the Pre-Sentence Report (PSR), (Doc 111 - Pg 777 / case no. 3:12-cr-0048). Although the court rejected all proposed loss calculations (the PSR loss assessment, the government's position (Doc 127 - Pg 904 / case no. 3:12-cr-0048), and the Petitioner's position (Doc 95 - Pgs 693-694 / case no. 3:12-cr-0048)), the court failed to identify the basis of its loss assessment and adopted a loss range that was different from the three proposed, (Doc 127 - Pgs 917-920 / case no. 3:12-cr-0048). The Petitioner continues to contend in this filing (Doc 1- Pgs 8-9) that the sentencing court is required to make factual findings and explain the basis of the loss calculation methodology. At sentencing counsel failed to preserve the court's failure to make such findings in favor of, from the Petitioner's perspective, an arbitrary assessment of guidelines loss in excess of 2.5 million resulting in a 22 level increase in the total offense level and over 5.9 million in restitution. That error procedurally precludes review of the reasonableness of the loss assessment for both the sentencing guidelines and restitution purposes. The Government makes a distinction between the District Court's failure to explain its loss calculation methodology and the "substantive challenge to the loss amount." (Doc 9 - Pg 41).

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[4] In challenging counsel's failure to preserve review of the court's determination of loss the Petitioner references new evidence of additional resources that were recently returned to donors, further refuting the government's loss assessment.

Assuming a challenge to the substantive reasonableness of a loss calculation is possible without examining the court's method of arriving at that result; logic compels the opposite conclusion in this case. First, the court did not accept either the proposed loss assessment in the PSR or that advanced by the government. (Doc 127 - Pg 910 / case no. 3:12-cr-0048). Second, contrary to the government's argument trial counsel did not preserve the Petitioner's dispute to the reasonableness of the "substantive [. . .] loss amount." (Doc 127 - Pg 919 / case no. 3:12-cr-0048). Trial counsel disputed the PSR assessment and the government's positions as well as argued the Petitioner's position. (Doc 127 - Pgs 868-873 / case no. 3:12-cr-0048). Because the court adopted neither, counsel was required to object to the court's assessment, conclusion, and its lack of explanation. Had counsel done so the appellate court may have been able to weigh in on that reasoning and avoided this issue before this court.

The Government also argues that counsel's failure to preserve this sentencing error should be viewed "holistically" apparently to find that despite his failure to preserve the core of the Petitioner's sentencing position counsel's performance was nevertheless constitutionally effective. (Doc 9 - Pg 41). The government cites no authority to suggest that counsel's laudable performance in one area may somehow cure that which is deprived by ineffective representation in another. *Strickland v. Washington* and its progeny dispute that approach. Instead the government asks for a determination that the failure to object to the court's sentence and preserve for review the central argument at sentencing, which amounts to a 30-year sentence and which is contrary to counsel's arguments during sentencing, was not professional error. Rather the absence of specific findings in the court's loss assessment prevents appellate review of the reasonableness of the loss and calculation process. From

the Petitioner's perspective, an arbitrary loss assessment cannot be corrected without a new hearing in which such findings must be made and the loss explained. The government bears the burden of showing an error was harmless by demonstrating beyond a reasonable doubt that the error did not contribute to the sentence the defendant received. *United States v. Olis*, 429 F.3d 540, 544 (5th Cir. 2005).

The appellate court held that the sentencing court committed error in failing to articulate and explain its sentence and that counsel failed to preserve that judicial error. *United States v. Olive*, (6th Cir., 2015) Here, the government merely theorizes what we cannot know from the record. Whether trial counsel's default of that issue deprived the Petitioner of review of the trial court's findings and methodology and that such review would not result in remand. The unexpressed basis for the loss assessment hidden within the sentencing judge's mind, unlike the PSR and government's positions, may well have been non-arbitrary and legally sufficient; on the other hand, it may also have been based on losses neither factually nor proximately connected to the charged offenses or otherwise unreasonable.

The context at sentencing defines the problem. The Pre-Sentence Report (PSR) cited the "intended loss" in excess of 20 million, (Doc 111 - Pg 777 / case no. 3:12-cr-0048). The Government made no claim of intended loss, (Doc 99 - Pg 730 / case no. 3:12-cr-0048) but conceded that the PSR assessment of loss was erroneous, (Doc 127 - Pgs 900-906 / case no. 3:12-cr-0048), and claimed the actual loss was 10 million, (Doc 127 - Pg 906 / case no. 3:12-cr-0048). The Petitioner refuted any claim of intended loss with reference to ample evidence at trial of his subjective and objective lack of intended loss (Doc 95 - Pgs 692-693/ case no.

3:12-cr-0048), *United States v. Rothwell*, 387 F.3d 579, 585 (6th Cir. 2004) ("An award of restitution must be based on the amount of loss actually caused by the defendant's conduct." (quoting *United States v. Liss*, 265 F.3d 1220, 1231 (11th Cir. 2001)). Moreover, the Petitioner produced evidence that NFOA was solvent upon seizure, all countable losses occurred after receivership, and unforeseeable distressed real estate market forces influenced the liquidation. (Doc 95 - Pg 694 / case no. 3:12-cr-0048) *United States v. Stein*, 846 F. 3d 1135 (11th Cir. 2017) (Court must take into account aspect of loss attributable to unforeseeable market forces.) The Government's actual loss based on a "full accumulated value," figure included 6 million in costs and losses incurred after, and as a result of liquidation plus 3 million in commissions and surrender fees incurred by NFOA were not caused by the alleged fraud rather they were integral contract costs necessary to reinvest the donations. (Doc 127 - Pg 906 / case no. 3:12-cr-0048). *U.S. v. George*, 403 F.3d 470, 474 (7th Cir. 2005) (restitution award amount remanded to ensure that only actual losses and not consequential damages were included). Ultimately the sentencing court imposed an 18 level increase finding a loss range between 2.5 and 7 million with no factual findings or explanation of methodology. *United States v. Ross*, 502 F.3d 521, 531 (6th Cir. 2007) ("[I]f the defendant raises a dispute to the presentence report, the court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." (quotations and citation omitted)).

The Government suggests (Doc 9 - Pg 41) that despite trial counsel's failure, effective review of the substantive reasonableness of the sentence could nevertheless have been accomplished on appeal without the sentencing court specifying its procedural findings and

loss calculations. The Petitioner disagrees. Both substantive reasonableness and any method of calculating the loss assessment are interdependent issues which, if objected to, must be analyzed and determined to be reasonable. *U.S. v. Rothwell*, 387 F.3d 579, 583-584 (6th Cir., 2004), *U.S. v. Whiting*, 471 F.3d 792, 801-802 (7th Cir., 2006). Any determination that the substantive assessment is presumptively reasonable as within the guidelines range, first requires a finding that the range itself is correct. The obvious rationale for requiring the court to articulate its findings and methodology is so the appellate court can fulfill its due process obligation to the appellant and ensure that through review of the sentencing court the court will apply any penalty in a non-arbitrary manner. In any event the Circuit Court may well have agreed with the Petitioner that the loss assessed included amounts not appropriately countable under the guidelines and remanded for a commensurate reduction in the loss assessment. The Petitioner seeks resentencing in which his loss assessment can be correctly calculated.

Conclusion.

The Petitioner prays the Court to grant a hearing on his § 2255 motion.

Respectfully submitted,

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Counsel for Petitioner **OLIVE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant United States Attorney Siji Moore
110 Ninth Avenue South
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Nashville, Tennessee 37203

by electronic CM/ECF delivery this 29th day of January, 2018.

/s/ Thomas A. Kennedy
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Counsel for Petitioner **OLIVE**

EXHIBIT A

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

RICHARD OLIVE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No: 3:17-cv-0979

DECLARATION OF SUSAN OLIVE

I, Susan Olive, based upon my personal knowledge, make the following statements of facts:

1. I am currently married to Richard Olive, and I was married to him in October of 2012.

2. In October of 2012, Richard informed me that his attorney (James Nesland) told him that the Government had extended a plea offer of 9 years' imprisonment. Upon Richard receiving this offer, we talked about it every day for approximately one week. Even though Mr. Nesland told Richard that the Government indicated that Richard's maximum sentence if he proceeded to trial was 30 years, Mr. Nesland told Richard that the Government's calculation was wrong and his actual maximum sentence was 17 to 20 years (and Mr. Nesland made this representation several times to Richard, both in writing and during telephone conversations). Richard and I struggled over whether he should accept the

plea offer. We both agreed that if he could receive *more* than 20 years, then he should accept the 9-year deal. But we finally came to conclusion that he should take the risk of proceeding to trial (with the hope of winning) – even if it meant getting 20 years – because, in Richard's mind – and given Richard's age – he was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer. If Richard had known that the Mr. Nesland was wrong and that his exposure was greater than 20 years (and actually *160 years*), I am certain Richard would have accepted the 9-year plea offer. Based on Richard's conversations with Mr. Nesland, Richard was led to believe that 20 years was the maximum sentence he could receive in this case if he went to trial and lost (and Mr. Nesland made it sound like 20 was the unlikely high end, and the sentence would actually be 17 or very close to it).

3. After the trial, when we received the Presentence Investigation Report with the sentencing range, Mr. Nesland told us that he was "shocked" and that the range was "worse than he ever imagined." In fact, Mr. Nesland told us that he would seek a lengthy continuance for the sentencing hearing because he was caught off-guard by the sentencing calculation.

I made the statements in this Declaration under penalty of perjury.

Susan Olive

Susan Olive

EXHIBIT B

[NASHVILLEPOST]

LEGAL

SEP 12, 2017

Kevin Sharp: Why I left the bench

Retired federal judge on his return to private practice

AUTHORS Stephen Elliott

Sanford Heisler Sharp

When Kevin Sharp, the chief judge for the U.S. District Court for the Middle District of Tennessee, announced he planned to retire shortly after Donald Trump's inauguration in January. Sharp was just six years into a lifetime appointment, and the Democrat and Obama nominee's departure would give Trump a chance to nominate judges to two of the four seats on the local district court.

Sharp (pictured) helped establish a local presence for national employment firm Sanford Heisler (now Sanford Heisler Sharp) upon his retirement, and returned to his alma mater, Vanderbilt Law School, on Monday to discuss why he'd given up his supposedly plum seat on the federal bench.

Here are are a few select thoughts Sharp offered at the event, edited for length.

On his appointment: I call myself the accidental judge. It was pure happenstance. [After a *Nashville City Paper* **article** mentioned Sharp as a possible candidate for the vacant judgeship] I started on a subtle campaign, because it's hard to do: You can't campaign but you can't not campaign. You have to have walked this thin line, and I spent the next several years trying to get this job. The White House knew who they wanted — it was not an old white guy. So I really wasn't on their radar either. [A couple of White House picks fell through and] I did not fit their demographic, but I did fit their way of thinking and I could get through the Senate.

On mandatory minimums: We weren't doing anything to help with the drug addiction, we weren't doing anything to help with the mental health issues, we weren't doing enough to educate them. Politicians don't get elected and reelected by appearing to be soft on crime, but they're not smart on crime. What politicians will tell you is we do these mandatory minimums because judges are soft on these people. You do take the discretion away from the judges but you don't end up taking away the discretion, because the discretion is back to the U.S. attorneys and the prosecutors on how they charge these crimes. It's all still about discretion. I think the discretion should be with the judges who have been hired to do this, not with the prosecutors. [In a civil case] you've got someone whose job it is to advocate for this side, and someone whose job it is to advocate for the other side, and you don't let one of those sides be the decision maker. Nobody would ever say let's let the defendant's lawyer decide what his sentence will be. People would say that's ridiculous. Well, we do it with prosecutors. I found that to be very frustrating.

On his decision to retire: While I'm struggling with all these issues [related to mandatory minimums], this guy Donald Trump gets elected president and something is happening. You can't seem to grab hold of anything and figure out even where the country is going. I don't know where it's going. But as I'm on the bench I get the sense that I don't know where we're heading, and it can go in either direction, but it's going to be important and I want to be a part of that. And I can't be a part of that if I'm sitting on the bench. I can't be a part of that if I have to sit up here. The law is the law but I can't change it from up there. And I can't be part of whatever is going on out here, and so I decided its time to go. Let somebody else do this, but I want to be a part of that. So if any of y'all have figured out what the hell is happening out there, please let me know. Until that time I'll just get out there with my baseball bats, keep swinging and see what happens.

On making changes from within the justice system: At the district court level, it's really, really tough to do. I was on the bench for six years; I can count about five times an important case came through. The rest of the time, you're kind of cranking it out. A lot of it is theater on the criminal side. We're going to go through the motions, you're going to plead guilty, and I'm going to sentence you and you've already worked out a deal. And we're just up there reading from a script. At the court of appeals level, you can make those changes, and I had been approached about whether or not I was interested in the court of appeals — now at that time everybody thought Hillary Clinton was going to win the election and so those people who were going to have the opportunity to make that decision came to me. But I sat on the court of appeals by designation; I had about 12 cases on the court of appeals and I thought, I can't do that. It became this very contentious place, people trying to make statements, or attacking the district court or attacking each other and I didn't enjoy that and couldn't see myself going into what I thought was a role that fit my personality less. I liked being a judge but I loved being a lawyer and that would even farther remove me from that.

On his return to private practice: What the law is is not that clear. It's not black and white, so the skill of the advocates makes a big difference on what the law is and how that gets played out. I get to go pick those cases. I had five cases that I thought were really important and where I had a chance to say something, less than one a year. I have to sit and wait. Now I can go and find those cases.

LEGAL KEVIN SHARP

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

RICHARD OLIVE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No: 3:17-cv-0979

PETITIONER'S NOTICE OF FILING AN AFFIDAVIT IN SUPPORT OF GROUND 1 OF HIS PENDING 28 U.S.C. § 2255 MOTION

The Petitioner, RICHARD OLIVE, by and through undersigned counsel, submits the attached affidavit in support of Ground One of his pending 28 U.S.C. § 2255 motion

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Counsel for Petitioner **OLIVE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument and the attachment have been furnished to:

Assistant United States Attorney Siji Moore
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by electronic CM/ECF delivery this 14th day of February, 2018.

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EXHIBIT 1

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

RICHARD OLIVE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No: 3:17-cv-0979

DECLARATION OF RICHARD OLIVE

I, Richard Olive, based upon my personal knowledge, make the following statements of facts:

1. I am the Petitioner in the instant 28 U.S.C. § 2255 action and I was the defendant in case number 3:12-cr-48.

2. In October of 2012, my attorney (James Nesland) told me that the Government had extended a plea offer of 9 years' imprisonment. Upon receiving this offer, my wife and I talked about it every day for approximately one week. Even though Mr. Nesland told me that the Government indicated that my maximum sentence if I proceeded to trial was 30 years, Mr. Nesland told me that the Government's calculation was wrong and that my actual maximum sentence was 17 to 20 years (and Mr. Nesland made this representation to me several times, both in writing and during telephone conversations). My wife and I struggled over whether I should accept the plea offer. We both agreed that if I

could receive *more* than 20 years, then I should accept the 9-year deal. But we finally came to conclusion that I should take the risk of proceeding to trial (with the hope of winning) – even if it meant getting 20 years – because, in my mind – and given my age – I was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer. If I had known that the Mr. Nesland was wrong and that my exposure was greater than 20 years (and actually *160 years*), I would have accepted the 9-year plea offer. Based on my conversations with Mr. Nesland, I was led to believe that 20 years was the maximum sentence I could receive in this case if I went to trial and lost (and Mr. Nesland made it sound like 20 was the unlikely high end, and the sentence would actually be 17 or very close to it).

3. After the trial, when we received the Presentence Investigation Report with the sentencing range, Mr. Nesland told me that he was "shocked" and that the range was "worse than he ever imagined." In fact, Mr. Nesland told me that he would seek a lengthy continuance for the sentencing hearing because he was caught off-guard by the sentencing calculation.

4. I did not want to go to trial, nor desire it, but under the circumstances I was presented (Mr. Nesland told me unequivocally the government was wrong in their sentencing guideline calculation, on multiple occasions) it was the risk I took. Later I found out it was not the risk involved.

5. Comparing the sentence exposure between trial and the plea offer was crucial, and weighed heavily,

to the decision whether or not to plead guilty.

I made the statements in this Declaration under penalty of perjury.

Richard Olive

Richard Olive

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD OLIVE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 3:17-cv-0979**
	)	**Chief Judge Crenshaw**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Sentenced to 31 years in prison and ordered to pay almost $6 million in restitution after a jury trial, Richard Olive has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1). He claims trial counsel was ineffective during plea negotiations and at sentencing. The former claim requires a hearing, the latter can be decided on the papers.

I. Factual Background

The facts underlying this case are set forth in the Sixth Circuit's decision affirming Olive's convictions and sentence, United States v. Olive, 804 F.3d 747, 750-52 (6th Cir. 2015), familiarity with which is assumed. As a primer to place Olive's arguments in context, the Court simply notes the following:

On March 1, 2012, a federal grand jury returned a nine-count Indictment against Olive for his role as the President and Executive Director of National Foundation of America ("NFOA"). The Indictment covered the time period from January 2006 until May 2007.

NFOA claimed to be a tax-exempt, non-profit organization, but was neither. Instead, NFOA paid brokers a 9% commission – far above the industry average – to induce customers to transfer

their annuities to NFOA in exchange for an investment contract titled "Installment Plan Agreement." Those Agreements guaranteed fixed payments, but, as Olive well-knew, NFOA had far too few assets to guarantee the income in the amounts promised. Nevertheless, he represented that customers would receive the guaranteed income, misrepresented NFOA's tax status, and continued to operate, notwithstanding that cease-and-desist letters had been issued by several states.

Once the annuities were transferred, NFOA typically surrendered them, which led to financial penalties and a reduction in value. Over the course of its existence, NFOA exchanged customers' annuities worth approximately $19.3 million and surrendered them for $16.5 million.

The funds NFOA received inured to the benefit of Olive and his family, including his wife, and two step-daughters. Not only did each of them receive a salary, Olive also used NFOA funds to purchase a condominium in Las Vegas, Nevada, land in Tennessee, a Jiffy Lube franchise in Georgia, and an office condominium in Franklin, Tennessee. Funds were also used to lease luxury vehicles for both Olive and his wife, and to pay for a family vacation to New Orleans, Louisiana via a private jet.

In May 2007, the State of Tennessee took control of NFOA because it was undercapitalized, and the Indictment followed. After a six-day trial, the jury convicted Olive on all counts: three counts of mail fraud in violation of 18 U.S.C. § 1341; four counts of wire fraud in violation of 18 U.S.C. § 1343; and two counts of money laundering in violation of 18 U.S.C. § 1957.

A Presentence Report was prepared that calculated a Total Offense Level of 45, and a Criminal History Category II. This produced a guideline range of life imprisonment, but the statutory maximum for each wire and mail fraud conviction was 240 months imprisonment, and the money laundering statutory maximum was 120 months for each count. Run consecutively, this

would have resulted in a total guideline sentence of 1,920 months (160 years), which the probation officer recommended.

On August 9, 2013, Olive was sentenced by then-Judge Kevin H. Sharp to 36 months on each wire and mail fraud conviction, and 60 months on both money laundering counts. All counts were order to run consecutively for a total sentence of 372 months. Olive was also ordered to pay $5,992,181.24 in restitution.

II. Legal Analysis

A. Standards for Ineffective Assistance of Counsel Claims

Claims of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984). "'Surmounting Strickland's high bar is never an easy task'" because "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one[.]" Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting Padilla v. Kentucky, 559 U.S. 356, 371 (2010)).

To establish an ineffectiveness of counsel claim, a defendant must first show that counsel's performance was deficient: "[a]n attorney's performance is deficient if it is objectively unreasonable under prevailing professional norms." Hodges v. Colson, 727 F.3d 517, 534 (6th Cir. 2013). In this regard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689. In fact, "[t]he Strickland Court held that petitioner must show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Sylvester v. United States, 868 F.3d 503, 510 (6th Cir. 2017)

(quoting Strickland, 466 U.S. at 687).

Under Strickland, "a defendant must [also] 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Lafler v. Cooper, 566 U.S. 156, 163 (2012) (quoting Strickland, 466 U.S. at 694)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Harrington, 562 U.S. at 105 (quoting Strickland, 466 U.S. at 694). "In making this showing, '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.'" Sylvester, 868 F.3d at 510 (quoting Strickland, 466 U.S. at 693). Rather, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Against this backdrop, the Court turns to Olive claims. First, he asserts that counsel "failed to properly advise [him] regarding the Government's pre-trial offer." (Doc. No. 1 at 4). Second, Olive claims that "[d]efense counsel ineffectively failed to preserve the Court's erroneous loss calculation" for appeal and, in any event, "'new evidence' exists in any event to further reduce the guidelines loss and restitution calculation." (Id. at 7). Olive requests an evidentiary hearing, although it is unclear whether this request is directed at one or both of these claims.

B. Evidentiary Hearing and Plea Offer Claim

The decision on whether to hold an evidentiary hearing on a Section 2255 petition is a matter of discretion. Huff v. United States, 734 F.3d 600, 607 (6th Cir. 2013). Recently, the Sixth Circuit has summarized the guidepost used for exercising that discretion:

> An evidentiary hearing "is required unless the record conclusively shows that the petitioner is entitled to no relief." Campbell v. United States, 686 F.3d 353, 357 (6th Cir. 2012) (quoting Arredondo v. United States, 178 F.3d 778, 782 (6th Cir. 1999)); see also 28 U.S.C. § 2255(b). The burden "for establishing an entitlement to an

> evidentiary hearing is relatively light," and "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." Turner v. United States, 183 F.3d 474, 477 (6th Cir. 1999). A petitioner's "mere assertion of his innocence," without more, does not entitle him to an evidentiary hearing. Valentine v. United States, 488 F.3d 325, 334 (6th Cir. 2007); see also Turner, 183 F.3d at 477. But when presented with factual allegations, "a district court may only forego a hearing where 'the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" MacLloyd v. United States, 684 Fed. Appx. 555, 559 (6th Cir. 2017) (internal quotation marks omitted) (quoting Arredondo, 178 F.3d at 782). "[W]hen a defendant presents an affidavit containing a factual narrative of the events that is neither contradicted by the record nor inherently incredible and the government offers nothing more than contrary representations to contradict it, the defendant is entitled to an evidentiary hearing." Huff, 734 F.3d at 607 (citation and internal quotation marks omitted).

Martin v. United States, 889 F.3d 827, 832 (6th Cir. 2018).

Olive's contention that counsel was ineffective during the plea negotiation process requires a hearing because the record does not establish he is not entitled to relief on this claim. What the record does show is the following:

Prior to trial, the Government offered to enter into a plea agreement, whereby Olive would plead guilty in exchange for a 9 year sentence. Olive asserts that, had he known he faced the 31 years imposed by Judge Sharp, or the potential 160 year statutory maximum, he would have accepted the plea. Instead, he relied on counsel's representation that the Guideline Range would be between 17 and 20 years imprisonment. Therefore, Olive rejected the plea offer because in his "mind – and given [his] age – he was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer." (Doc. No. 1 at 5).[1] In support of his position that he was relying on trial counsel's calculation in deciding

[1] Olive has also submitted a Declaration form his wife, Susan Olive, who similarly states that "[i]f Richard had known that the [sic] Mr. Nesland was wrong and that his exposure was greater than 20 years (and actually *160* years), I am certain Richard would have accepted the 9-year plea offer."

to reject the plea offer, Olive relies primarily upon an email in which counsel stated:

> You know from the sentencing memorandum I provided to you and our discussion that the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of 17 to 20 years.

(Id.) (emphasis by Olive). Olive emphasizes "will result" presumably to downplay the fact that it was preceded by the statement that the 17 to 20 year guideline range would apply "if followed" by the Court.

Regardless, this lone statement bust be viewed in context. Elsewhere in the record it was made clear to Olive that the Government's projection of the Guideline Range was substantially higher and would result in a sentencing range of between 292 to 365 months, or 24 to 30 years.[2] This was made known to Olive via email from his trial counsel. (Doc. No. 13-1 at 4), and by way of a Memorandum that had been prepared by Investigative Resources, Inc. at the request of trial counsel (Id. at 10-14). Further, the plea offer letter provided to Olive specifically stated that it calculated the guideline range to be between 292 to 365 months, and that "this offense level is merely the government's estimate at this time, and the Court-determined offense level could be higher or lower if the case were to proceed to trial and then sentencing." (Id. at 7).

More troubling is Olive's assertion that he was not informed about the potential maximum sentence he faced if he chose to go to trial. This assertion appears to be confirmed by trial counsel who states that he did not inform Olive "that he could receive 31 or 160 years," nor did he advise him "that the sentence could be run consecutively." (Doc. No. 13-1, Nesland Decl. ¶ 6).

(Doc. No. 16-1, Decl. ¶ 2) (emphasis in original).

[2] The difference in the parties' calculations was based upon whether a 2-level enhancement was applied for an abuse of trust, and whether 1 level would be added by grouping the money laundering and fraud counts.

"It is well settled that an attorney's failure to properly inform his client about his sentencing exposure may constitute ineffective assistance." Munson v. Rock, 507 F. App'x 53, 56 (2d Cir. 2013) (collecting cases); see also Wooten v. Raney, 112 Fed.Appx. 492, 496 (6th Cir. 2004) (noting that "in some cases the failure to inform a defendant correctly of his sentencing exposure at trial may constitute ineffective assistance of counsel"); Moss v. United States, 323 F.3d 445, 474 (6th Cir. 2003) (stating that " a failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance"). After all, "'[t]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case,'" and "it follows that '[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.'" United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998) (internal citations omitted).

A defendant's claim that he would have pled guilty but for the ineffectiveness of counsel is obviously self-serving, Turns v. United States, 248 F. App'x 708, 711 (6th Cir. 2007), and a court "must exercise caution in ordering an evidentiary hearing, since it might encourage defendants to try to manipulate the criminal justice system to obtain the advantage of a trial with its chance of acquittal as well as the advantage of a plea with its lesser sentence." Griffin v. United States, 330 F.3d 733, 739 (6th Cir. 2003). Nevertheless, "[w]hether it is reasonably probable that [a defendant's] decision to plead guilty would have been different had he been properly counseled as to his potential punishment is a question of fact." United States v. Grammas, 376 F.3d 433, 438 (5th Cir. 2004); see also, United States v. Benson, 127 F. App'x 808, 810–11 (6th Cir. 2005) (collecting cases for the proposition that the Sixth Circuit "typically refrains from addressing" claims as to whether a defendant would or would not have pled guilty but for ineffective counsel because of "the

absence of evidence" in the record, and "appellate courts are not well equipped to undertake the resolution of factual issues").

Here, the record does not resolve the issue of whether Olive, in fact, would have pled guilty had he been informed about the maximum potential exposure he faced, and the possibility that his sentence could be run consecutively. Also unanswered is the factual question of whether he has suffered prejudice in the form of a reasonable probability that the outcome would have been different had he accepted the plea.

In Lafler, the Supreme Court was presented with the issue of "how to apply Strickland's prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." 566 U.S. at 162. The Court wrote:

> Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 163-64.

Whether Judge Sharp would have accepted a plea calling for a nine-year term of imprisonment is open to question. All the Court has before it at this point is anecdotal evidence.

Olive points to a NASHVILLE POST article titled "*Kevin Sharp: Why I Left the Bench.*" There, under the heading "on making changes from within the justice system," Judge Sharp is quoted as saying:

> At the district court level, it's really, really tough to do. I was on the bench for six years; I can count about five times an important case came through. The rest of the time, you're kind of cranking it out. A lot of it is theater on the criminal side. We're

> going to go through the motions, you're going to plead guilty, and I'm going to sentence you and you've already worked out a deal.

(Doc. No. 16-2 at 4).

On the other hand, the Government argues that "it is highly unlikely that Judge Sharp would have accepted any Rule 11(c)(1)(C) agreement that called for a sentence [which] would have represented nearly a 60% downward variance from the applicable guideline range of 262-327 months." (Doc. No. 9 at 9). It points to two other white collar cases in which Judge Sharp rejected proposed plea agreements. In United States v. George, No. 3:15-cr-009, a case alleging the theft of $2.3 million from dozens of investors, Judge Sharp rejected an agreement calling for a 72 month sentence, and subsequently rejected an agreement calling for a 93-month sentence.[3] In United States v. Wilson, 3:16-cr-0047, a case involving the theft of between $750,000 and $850,000, Judge Ssharp rejected an agreement calling for the imposition of a sentence within the guideline range of 51 to 63 months.

Based on the present record, the Court is in no better position to answer the question of whether Judge Sharp would have accepted a 9-year plea deal for Olive's crimes, than it is to determine whether Olive would actually have accepted such a deal. These issues require a hearing.

C. Amount of Loss Claim

Olive's second claim -- that counsel was ineffective in failing to preserve for appeal the issue of erroneous loss calculation, and his further assertion that the amount should be reduced based upon "new evidence" – requires no hearing. By way of background to this claim, the Court notes the following:

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[3] After the second agreement was rejected, Defendant absconded and remains at large.

Notwithstanding the Presentence Report's recommendation that the base offense level be increased by 22 under U.S.S.G. § 2B1.1(b)(1)(L) because the amount of loss was allegedly somewhere between $20 million and $50 million, Judge Sharp fixed the amount of loss between $2.5 million and $7.5 million, resulting in an 18-level increase to the offense level. In fixing those parameters, he stated:

> The offense computation using 2B1.1, the base offense level is seven, convicted of -- Counts 1, 2 and 3 were the mail fraud and 4, 5, 6 and 7 were wire fraud. They have statutory maximum term of imprisonment of not more than 20 years. The base offense level is seven.
>
> The specific characteristics in 2B1.1(b) in the PSR it applied L. Based on the evidence, I think that it's J[4] that applies. It's greater than 2.5 million. I think the evidence was more than sufficient for the application of that loss amount. And so there was an 18 point enhancement.

(No. 3:12-cr-00048, Doc. No. 127, Sentencing Transcript at 47) ("Sent. Tr. at ___"). After imposing sentence, Judge Sharp, in accordance with United States v. Bostic, 371 F.3d 865, 873 (6th Cir. 2004), asked whether the parties "ha[d] any objection to the sentence as stated." (Id. at 56). Apart from asking for a recommendation that Olive be placed in the Federal Corrections Institution in Miami, Florida, counsel voiced no other objections at that time.

On appeal, Olive argued that the amount of loss calculation was improper "because the district court failed to provide [a] sufficient rationale for its decision." Olive, 804 F.3d at 758. Because no objection had been raised to Judge Sharp's statements that "J applied" and "[i]t's greater than 2.5 million," the Sixth Circuit found this claim to be subject to plain error review. In Olive's view, counsel's failure to voice an objection during the Bostic inquiry constitutes ineffective

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[4] This is a reference to subsection "J" of U.S.S.G. § 2B1.1(b) which, at the time of the offenses, provided for an 18 level increase where the amount of loss was between $2.5 and $7.5 million.

assistance of trial counsel. The Court disagrees.

As an initial matter, "the plain error and ineffective assistance of counsel standards do not necessarily generate identical outcomes with respect to the same alleged error." United States v. Carthorne, 878 F.3d 458, 466 (4th Cir. 2017). In other words, "the 'deficient performance' standard of an ineffective assistance claim will not always be satisfied by the failure to object to an obvious error," and "[c]ounsel may decide, for strategic reasons, not to object to an obvious error." Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008).

As for the Bostic inquiry, a negative answer "is immaterial to the standard of review . . . appl[ied] in evaluating [defendant's] substantive argument[s]." United States v. Simmons, 587 F.3d 348, 355 (6th Cir. 2009); see also, United States v. Vonner, 516 F.3d 382, 386 (6th Cir. 2008) (observing that, while responding "no" to a Bostic question "did not undermine [defendant's] right to appeal issues he had 'previously raised,' it did undermine his right to challenge the adequacy of the court's explanation for the sentence"). That is, "[w]here the sentencing judge complies with [Bostic], the defendant generally forfeits the right to challenge on appeal any procedural errors to which he did not object at the time of sentencing [but] is not required to object to the substantive reasonableness of his sentence to preserve that issue for appeal." United States v. Penson, 526 F.3d 331, 337 (6th Cir. 2008).

Furthermore, not only must "'[j]udicial scrutiny of counsel's performance . . . be highly deferential,'" it "should be guided by a measure of 'reasonableness under prevailing professional norms.'" Sylvester, 868 F.3d at 510 (quoting Strickland, 466 U.S. at 688–89). "Counsel need not pursue every possible claim or defense in order to avoid a finding of deficient performance." Id. citing (Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)). "'[O]nly when ignored issues are clearly

stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id. (quoting Monzo v. Edwards, 281 F.3d 568, 579 (6th Cir. 2002)).

Viewed from the perspective of reasonableness, trial counsel's failure to preserve the argument relating to the depth of Judge Sharp's findings was not deficient. Rather than focusing on that procedural argument, counsel chose to preserve the substantive issue, *i.e.*, that the loss was nowhere near that contemplated by the Government ($10 million) or the Probation Office ($20 million plus). Counsel did so by filing a 26-page sentencing memorandum (with supporting exhibits) in which he argued that the Court should impose a sentence in the range of 6 to 12 months because "[t]here was no intended or actual loss caused by the Offense Conduct, and, thus, no legal or factual basis to interpret and apply 2B1.1(b)(1)(L) and Application Note 3(A) to increase the offense level by 22." (Case No. 3:12-cr-00048, Doc. No. 95 at 11). Likewise at the sentencing hearing, counsel argued "there was actually no subjectively intended loss, no objectively intended loss and no actual loss, because the charge was that he did not have sufficient funds at NFOA to repay those installment contracts and that was never proved." (Sent. Tr. at 44). He also cross-examined the Government's witnesses in an effort to reduce the loss amount. Apparently, those arguments were not raised on appeal because, two weeks after the sentencing (and on the same day Judge Sharp clarified his earlier sentencing pronouncement), counsel was granted leave to withdraw and new counsel was thereafter appointed. "The Sixth Amendment does not require counsel for a criminal defendant to be clairvoyant." United States v. Harms, 371 F.3d 1208, 1212 (10th Cir. 2004) (collecting cases). Instead, "the constitution guarantees criminal defendants only a fair trial and a competent attorney." Murray v. Carrier, 477 U.S. 478, 486 (1986).

Regardless, and assuming counsel's performance was deficient, Olive must demonstrate

prejudice. In the context of sentencing this requires that there be "a reasonable probability that, but for counsel's errors, [his] sentence would have been different," Weinberger v. United States, 268 F.3d 346, 351 (6th Cir.2001), *i.e.*, "he would have received a lower sentence," Wilder v. United States, 2017 WL 4417859, at *1 (6th Cir. Mar. 23, 2017) (collecting cases). That showing cannot be made here.

Olive argues that, at trial, he "produced evidence that NFOA was solvent upon seizure, all countable losses occurred after receivership, and unforeseeable distressed real estate market forces influenced the liquidation." (Doc. No. 16 at 9). As a consequence, there was no intended loss. Olive also argues that "the unexpressed basis for the loss assessment [was] hidden within the sentencing judge's mind," (id. at 8), yet virtually the same argument he now makes was presented at sentencing and Judge Sharp made clear exactly how little he thought of the argument. In response to (1) trial counsel's argument that "there was actually no subjectively intended loss, no objectively intended loss," because it "was never proved"; and (2) his reliance on Olive's expert who testified about the actual present value calculation that showed Olive had sufficient assets to pay outstanding obligations, Judge Sharp stated:

> THE COURT: Well, that's not my recollection of it. My recollection of it is it was, and I'm not so sure that Mr. Olive didn't admit that, that if you froze – and I think I asked that question as well. If you – if everything freezes today and he doesn't bring in any more contracts, can he pay, I think he admitted, no, he could not. He didn't have them. And I'm certain that there was other evidence of that.
>
> * * *
>
> THE COURT: Well, my recollection is that – I do recall that your expert said that. My recollection is that based on my questions about that, that there was an admission that there was not. However, the Government's expert clearly showed that there was a deficit, that there was not enough in the installment. And, frankly, Mr. Olive's word about what anything was not very high. He was at most – not a credible witness is being kind to Mr. Olive.

(Sent. Tr. at 44-46). Ultimately, "the way [Judge Sharp] saw it," there "was not sufficient evidence to cover" the obligations due under the Promissory Notes. (Id.).

"'The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case'" because he or she "see and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Gall v. United States, 552 U.S. 38, 51 (2007) (citation omitted). Given Judge Sharp's statements during trial and at sentencing, only a small sampling of which is referenced above, it is simply unreasonable to conclude that he would have sentenced Olive to less time had he been requested by trial counsel to further explain the reasoning underlying the amount of loss calculation.

Nor, given the standard of review, is it reasonable to conclude that the outcome would have been different on appeal had the procedural issue been preserved. "Under the Guidelines, the district court is to determine the amount of loss by a preponderance of the evidence, and the district court's findings are not to be overturned unless they are clearly erroneous." United States v. Triana, 468 F.3d 308, 321 (6th Cir.2006) (citing United States v. Guthrie, 144 F.3d 1006, 1011 (6th Cir. 1998)). Utilizing this standard, the Sixth Circuit "'will uphold the district court's decision as long as it has interpreted the evidence in a manner consistent with the record." United States v. Bey, 384 F. App'x 486, 494 (6th Cir. 2010) (quoting United States v. Darwich, 337 F.3d 645, 664 (6th Cir. 2003)). "This means that, '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" Id. Further, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." Gall, 552 U.S. at 51.

In the Presentence Report, the actual loss to investors was found to be $5,929,181.24. This

figure was supported by an attached spreadsheet prepared by Paul Eggers, Jr., who served as the receiver for NFOA and liquidated its assets, and testified for the Government at trial. The figure was based on the difference between the accumulated value of the policies that NFOA exchanged (approximately $26.3 million), and the amount that the victims received from the distribution or other payments on their contracts by NFOA upon liquidation. The approximately $6 million dollar figure did not include the intended loss to the 190 victims of the scheme, that, as previously noted, would have increased the offense level by 22 levels according to the Presentence Report calculations, or by 20 levels based upon the Government's amount of loss calculation.[5]

Clearly, Judge Sharp was not persuaded by Olive's claimed lack of intent to cause losses, and he was fortunate that Judge Sharp did not find a higher loss given that, "[u]nder the Guidelines, loss is calculated as 'the greater of the actual loss or the intended loss.'" United States v. Vysniauskas, 593 F. App'x 518, 523 (6th Cir. 2015) (quoting USSG § 2B1.1 cmt. n. 3(A)). Instead, Judge Sharp fixed the loss as more than $2.5 million and less than $7.5 million, and agreed with the Presentence Report's assessment that $5,992,181.24 was the proper restitution amount. From this, as the Sixth Circuit noted on direct appeal, it can be "infer[red]" that the restitution amount was used "to determine the Guidelines' loss amount as well." Olive, 804 F.3d at 758. This is in keeping with the principle that "'[a]n award of restitution must be based on the amount of loss actually caused by the defendant's conduct.'" United States v. Rothwell, 387 F.3d 579, 585 (6th Cir. 2004); (quoting United States v. Liss, 265 F.3d 1220, 1231 (11th Cir. 2001)). Therefore, Olive cannot show that Judge Sharp clearly erred in fixing the amount of loss between $2.5 million and $7.5 million.

[5] This intended loss would have included the additional benefits Olive and his family received, such as salaries, and the commission payments Olive made to financial advisers.

Finally, Olive argues that "new evidence" exists to reduce the amount of loss calculation. In actuality, this is not an ineffective assistance of counsel claim because Olive makes no showing that trial counsel knew or should have known about those distributions prior to sentencing. Instead, Olive claims that, after NFOA was dissolved, "an additional distribution was made to the alleged victim-donor to further reduce the loss." (Doc. No. 1 at 10).

As for the merits of the claim, Olive relies on comment 3(E)(i) to U.S.S.G. § 2B1.1, but that reliance is totally misplaced. The comment states:

> (E) Credits Against Loss.--Loss shall be reduced by the following:
>
> > (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

U.S.S.G. § 2B1.1, cmt. n.3(E)(i). Olive presents nothing to suggest that "additional distributions" were made to the victims before his scheme was discovered, and this claim also fails.

IV. Conclusion

On the basis of the foregoing, the Court will hold an evidentiary hearing on Olive's claim that counsel was ineffective in failing to explain the maximum possible punishment he faced if convicted after trial and/or by failing to inform him that any sentences could be run concurrently. Olive's claim that counsel was ineffective at sentencing because he failed to assert a Bostic challenge to the amount of loss calculation, and his additional claim that "new evidence" exists to reduce his sentence will be denied.

An appropriate Order will enter.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

RICHARD OLIVE Petitioner, vs. UNITED STATES OF AMERICA Respondent.	)	Case Number 3:17-cv-00979

- -

BEFORE THE HONORABLE WAVERLY D. CRENSHAW, JR., DISTRICT JUDGE

TRANSCRIPT

OF

PROCEEDINGS

June 24, 2019

Evidentiary Hearing

- -

(APPEARANCES ON THE FOLLOWING PAGE)

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I N D E X

Monday, June 24, 2019

INDEX OF WITNESSES

INDEX OF PROCEEDINGS

EXHIBITS

PLAINTIFF'S EXHIBIT		MARKED FOR I.D.	RECEIVED IN EVD.	WITH-DRAWN
1	Collective Exhibit consisting of the following: Exhibit 1(a) - Letter from Nesland to Olive (p.1); Exhibit 1(b) - June 23, 2012 Preliminary Sentencing Guideline Analysis Confidential Memorandum (p.2-p.5); Exhibit 1(c) - October 15, 2012 letter from Kathryn Ward to James E. Nesland (p.6-p.7); Exhibit 1(d) - October 17, 2012 Review of Plea Agreement Confidential Memorandum (p.8-p.12); Exhibit 1(e) - October 23, 2012 email from James Nesland to Richard Olive (p.13); SEALED Exhibit 1(f) - Presentence Investigation Report (p.14-p.54); Exhibit 1(g) - Declaration of James Nesland (p.55-p.56)	40	40	

DEFENDANT'S EXHIBIT		MARKED FOR I.D.	RECEIVED IN EVD.	WITH-DRAWN
2	April 17, 2017 email chain, including October 2012 email	55	55	
3	Series of emails between David Kamer and Richard Oliver admitted at trial as Exhibits 37 and 42	55	55	

The above-styled cause came on to be heard on June 24, 2019 before the Honorable Waverly D. Crenshaw, Jr., District Judge, when the following proceedings were had, to-wit:

THE COURT: All right. Be seated. Good morning.

Okay. We're here for an evidentiary hearing in Olive v. United States of America.

If counsel can introduce themselves for the record.

MR. MOORE: Siji Moore on behalf of the United States.

MR. KENNEDY: Thomas Kennedy on behalf of the petitioner.

MR. UFFERMAN: Michael Ufferman on behalf of the petitioner Mr. Olive. And seated between us, Your Honor, is our client, Mr. Olive.

THE COURT: So if one of you could just give me a preview of what witnesses you're going to call for Mr. Olive.

MR. UFFERMAN: Good morning, Your Honor. May it please the Court. Again, Michael Ufferman on behalf of Mr. Olive.

As you know, we're here on Claim 1 of the 2255 motion. I think by Your Honor moving this up to 8:00, you're hoping to get this done by lunch, and it's our intent that that take place.

The defense intends to have five witnesses --

THE COURT: Whatever it takes, it takes.

MR. UFFERMAN: Well, thank you, Your Honor. We're hopeful we'll be done by lunch.

The defense intends to have five witnesses.

THE COURT: Okay.

MR. UFFERMAN: We will have our client -- and not necessarily in this order -- but we will have our client; our client's wife, Susan Olive; our client's son-in-law, Kyle Bailey.

THE COURT: I'm going to get you to go slower.

MR. UFFERMAN: I apologize.

THE COURT: Kyle Dailey?

MR. UFFERMAN: Bailey.

THE COURT: Bailey.

MR. UFFERMAN: I believe it's B-a-i-l-e-y.

THE COURT: And is that the son-in-law?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: Go ahead.

MR. UFFERMAN: Then we'll have David Komisar, who is a local attorney.

THE COURT: Okay.

MR. UFFERMAN: And then the final witness that the defense will present is Scott Key, who is an attorney who practices in criminal law both in federal and state court.

Right now he's located in Georgia. And we intend to offer him as a standard of care witness.

THE COURT: Okay.

MR. UFFERMAN: And then I know Mr. Nesland is here. And we will also -- I believe the government will be presenting him as a witness, Your Honor.

And as Your Honor knows --

THE COURT: Well, I'll let them tell me who their witnesses are.

MR. UFFERMAN: Of course. Thank you, Your Honor.

MR. MOORE: Yes, Your Honor, we plan to call Mr. Nesland, James Nesland, as a witness.

And I don't know if this is the time to address it, but I think that Kyle Bailey and Susan Olive both would only be testifying to hearsay. Which, we could address it as we go through their testimony. But at least from my understanding of what they intend to present, it would only be the defendant's statements to them at the time period, which I'm not sure there is a basis to admit that.

THE COURT: All right. Why don't we cross that bridge when we get there.

Does any party want to invoke the rule? Does the plaintiff -- does Mr. Olive want to invoke the rule?

MR. UFFERMAN: Yeah, we do prefer that.

MR. KENNEDY: Yes, Your Honor.

THE COURT: Okay. If you're going to testify in this case, I need you to step out.

MR. UFFERMAN: Your Honor, the only request we would make is because we're going to be presenting Mr. Key as an expert witness, we would ask that he be excused from the rule.

THE COURT: All right.

MR. MOORE: No objection to that, Your Honor.

THE COURT: Okay. Are you ready to call your first witness?

MR. UFFERMAN: Yes, Your Honor. We have provided Mr. Moore and we've labeled as an exhibit and provided an extra copy to the Court what the defense -- or what Mr. Olive would present today as a summary exhibit.

I don't believe the government has an objection to it. There's one email at the beginning that they had not yet seen.

And I guess, subject to -- or it's a letter.

And subject to us confirming with Mr. Nesland that that is, in fact, a letter that he sent to our client, I think that's what we intend to introduce. We can wait until Mr. Nesland recognizes that document to introduce it at that time, but those will be the only exhibits the defense intends to introduce, Your Honor -- or Mr. Olive.

MR. MOORE: I was handed this. I haven't had a

chance to show it to Mr. Nesland. So I would just ask for that opportunity before they move to admit it.

THE COURT: Is the government's exhibits also in this?

MR. MOORE: Yes -- yes, it is, Your Honor.

THE COURT: Okay.

MR. MOORE: There is one -- there is one document that was attached to the government's filing that isn't included in these exhibits. I have a copy here --

THE COURT: Okay.

MR. MOORE: -- but I wasn't planning to admit it as a separate.

And then there is one trial exhibit which was admitted at trial that we may end up moving. Sort of depends on the testimony.

THE COURT: Okay. So we're ready to get started?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: Call your first witness.

MR. UFFERMAN: Thank you, Your Honor.

Mr. Olive would call David Komisar.

COURT DEPUTY: Please raise your right hand.

DAVID KOMISAR,

called as a witness by Petitioner, was duly sworn and testified as follows:

COURT DEPUTY: Please be seated. Please state your full name and spell your last name.

THE WITNESS: David Komisar, K-o-m-i-s-a-r.

MR. UFFERMAN: May it please the Court.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. UFFERMAN:

Q. Good morning.

A. Good morning.

Q. Mr. Komisar, can you please state briefly what your occupation is?

A. I am a criminal defense attorney.

Q. Have -- when -- have you handled criminal cases in this district, specifically the Middle District of Tennessee, and in particular the Nashville Division of that district?

A. I've handled a few. I've been licensed to practice here in the Middle District since either 1988 -- I think since 1988 -- and have been a member of the CJA panel since 1993 and have been practicing fairly frequently in federal court since 1991.

Q. And of those cases, have you been involved in criminal cases in this district and in this division where the case resulted in a plea agreement?

A. Yes. Many.

Q. Have you had cases that resulted in a plea agreement where Judge Sharp was the judge presiding over the case?
A. Yes. Not -- several. As I guess you could say -- Judge Sharp, as a district judge was here for about a cup of coffee in terms of length of time of a district judge. He was the shortest tenure judge since I've been a member of the -- of this bar.
Q. And over all of the cases that you've been involved in in this district that involved pleas, is it in the tens? the twenties? the dozens?
A. Hundreds.
Q. Hundreds. Thank you.
And what's been your experience in cases in this district involving plea agreements where the government and the defense has agreed to a particular sentence that would be imposed by the judge?
THE COURT: And just so the record is clear, you're talking about C agreements.
MR. UFFERMAN: Yes, Your Honor. Thank you.
THE COURT: All right.
THE WITNESS: I probably have done close to 50 -- and that's just a rough guess -- over the years. Maybe not that many. Maybe 30. Thirty to 50. But a number of them. I -- I'm batting a thousand so far. I've never had a C plea rejected, although I have one pending in this Court, which

will be interesting, where I'll be arguing against the C plea. Which will be the first time that's ever happened.
BY MR. UFFERMAN:
Q. And previously you said that Judge Sharp was only on the district bench for a short period of time. But have some of your C plea agreements been before Judge Sharp?
A. I can specifically remember one C plea agreement in his court.
Q. And I just want to go a little further than what you said. You said you're batting a thousand. So does that mean that up until now, for all the C plea agreements that you've been involved in in this district, you've never had one rejected by a court?
A. That's correct.
Q. Can you --
A. And that's -- and that's for -- it's not necessarily because I'm that good. It's because as a general rule, a district court, historically -- and I'll explain the change that may be upon us now -- but historically a court would look at it, well, if the government and the defendant have come to this agreement, there's -- there's not a whole lot for me to -- to quibble with.
In the past, where there's a C plea agreement -- I went back on PACER and looked. And one of my C pleas that was in Judge Sharp's court, my sentencing memorandum was

literally one page long.

Recently, there is now a change. If I submit a one-page sentencing memorandum on a C plea going forward, there could be trouble with that. But back in 2012, if you had a C plea agreement, you basically in your sentencing memorandum says, "Hey, look, Judge, accept this. Both the government and the defendant agreed to it. Here it is."

Q. Did that same idea that you're talking about with the sentencing memoranda also apply to presentence investigation reports? And to be specific, would there be a difference in the type of information or the depth of the information in a presentence investigation report prepared if there's been a C plea versus one that's prepared following a trial?

A. Yes, most definitely. And again, speaking historically about the timeframe that we're talking about, in 2002, probation, when they knew that it was a C plea, it would be -- the presentence report wouldn't be quite as thorough as it would be.

And quite frankly, it would be designed to -- to correspond with that C plea agreement. Because, again, everybody's in agreement to it. Facts that would be contained in a presentence report post trial and incorporated into a presentence report will look a whole lot different than a presentence report where you're only dealing with a couple of counts of conviction pursuant to the plea. It will

be quite different.
Q. And when -- let me ask you to clarify about that.
When you say "quite different," in your experience, if it's a PSR prepared following a guilty verdict at a trial, would the difference in those facts be to your client's benefit or to your client's detriment?
A. Well, assuming the necessary of the presentence report, much to your detriment, because all kinds of facts would be before -- would be in a transcript, be before the Court, be before -- it would have been fleshed out. It would have been much more than just a summation.
Q. And you mentioned that that policy in this district -- or at least in this division -- may be changing or has recently changed.
Can you explain that?
A. Yes. The district courts, led by Chief Justice Crenshaw, has instructed all practitioners -- in fact, within the last 30 days, every criminal practitioner was in this very courtroom and was given fair warning that, look, things are going to change a little bit. We as judges want more on C pleas. We want it to be fleshed out. We don't want you just to say we've got a C plea and end your sentencing memorandum there. We want some advocacy to tell us why we want this C plea.
And that's -- that's a change that has taken

place. I can tell you that -- that presentence reports, depending upon whether you have a plea or not, change.

I have a case currently pending in this Court where there's a C plea. And the original presentence report listed the guidelines at exactly what the C plea was: 420 months.

Well, after probation got word that the C plea was -- my client wanted the plea agreement to be withdrawn, the government contacted the presentence report, and the 420, low end of the guideline range, changed from 420 to 685.

And that's an indication of what can happen where you have a C plea and everybody's on board and you have a plea that -- that kind of goes south and things change.

Q. And you said this policy -- this change in policy is recent.

That was not a policy that was in effect at the time that Judge Sharp was on the bench, was it?

A. No. Because, like I said, it -- it would be a very rare -- very rare circumstance in which a C plea would be rejected. It would almost take a manifest injustice for it to take effect.

Q. And let me -- my question wasn't very good. The timing of this recent policy that you're talking about, where judges in this district as directed by the Chief Judge want more information, that's something that's come about in the last

couple months?
A. Well, a little more than the last couple of months. It was fleshed out within the last couple of months. Henceforth, going forward, we want to see -- the Court was -- and probably fairly so -- wanted this panel to know and all practitioners to know that, going forward, you need -- if -- before we accept a C plea, we're going to have to have more than just "We got a C plea, Your Honor; take it."
Q. And that change about wanting more information occurred after Judge Sharp left the bench?
A. Clearly. Yes.

MR. UFFERMAN: Okay.

May I have one moment, Your Honor.

THE COURT: Sure.

MR. UFFERMAN: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. MOORE:
Q. How many C plea deals have you had in front of Judge Sharp?
A. I can't tell you the exact number. I -- I -- when I took on this challenge to stand in for a colleague, David Collins [sic], I did do a quick search on PACER. And I found -- I found one, Antonio Crockett, that I did a C plea with.

Q. Did you do any sort of comprehensive study on the number of C deals Judge Sharp has had --
A. Absolutely not.
Q. -- in front of him --
A. No.
Q. -- or the percentage of C deals that he then accepted?
A. No. I can just talk about my situation and the C pleas that I did have. And I did go back and look at some of the non-C pleas that I had with Judge Sharp to look at where the guidelines were and what the ultimate sentence were.

And in all occasions, the ultimate outcome were below guideline range.
Q. So your testimony today is more anecdotal; it's not based off of some sort of study?
A. Yes. Absolutely. Absolutely.
Q. But you did try to at least look up Judge Sharp's C deal history somewhat, right?
A. No. No, no, no. I did not. I just said for me. Not for specific -- I take that back.

I did try to go in and see if I could pull up all of Judge Sharp's cases, but I was inept in doing that. I could pull up all my cases, and then I went back to try to find out which ones of my cases were Judge Sharp's cases, but I did not look at all of Judge Sharp's cases.

So I cannot comment on what his percentage was or

anything else. I could just tell you that he certainly accepted my C plea that -- or mine and the government's C plea.
Q. Yeah. That one C plea?
A. Yes. That I specifically saw.
Q. Are you familiar with a case of George David George in front of Judge Sharp?
A. I am not.
Q. Are you aware of the fact that he rejected a C plea deal in that case twice?
A. I am not.
Q. Are you familiar with a case of John Oscar Wilson?
A. I am not.
Q. Are you familiar with the fact that he rejected a C plea deal in that case as well?
A. I am not.
Q. Would -- having knowing of those cases, would that have changed your testimony about it would be astronomical or that it would be some grave miscarriage of justice for a court to reject a C deal?
A. I would tell you from my history during the time that I've practiced that, absent a manifest injustice, a C plea was not rejected. I could just give you my history of it.
Q. But that's not based off of any sort of case study or a deep research of Judge Sharp's practice history?

A. No. Just based off of my practice and telling you that I've never had a C plea agreement rejected, and I've had quite a few.
Q. Is it your -- in your general experience, do judges often sentence above the government's recommendation in cases? Is that a typical practice in this district?
A. Not for me.
Q. And would it be surprising to you generally if -- if the judge came back with a sentence that was above what the government had even recommended?
A. It would -- it would be surprising to me.
Q. So, in this case, the fact that he -- the defendant here got a sentence above the government's recommendation, that would have been surprising, the same way a rejection of a C deal would have been surprising, correct?
A. Correct.
Q. And C deals are always case specific, aren't they?
A. Absolutely.
Q. And they've always been subject to the Court's approval or disapproval?
A. Correct.
Q. And it's always the defendant's ultimate decision whether to plead guilty or not, correct?
A. Correct.
MR. MOORE: One moment, please.

THE COURT: Sure.

MR. MOORE: All right. Thank you. Nothing further, Your Honor.

THE COURT: Anything on redirect?

MR. UFFERMAN: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. UFFERMAN:

Q. May it please the Court.

Mr. Moore asked you about the George David George case. If you were to learn that Mr. George was charged with fraud and in his criminal history he had previously been convicted of fraud-type offenses in both state and federal court, would you imagine that could be a reason why a judge might reject a plea offer?

A. Yes.

Q. And then finally, just to clear up in the record, you indicated you're pinch-hitting for Mr. Collins. And that hasn't been explained in the record.

Is it your understanding that Mr. Collins was supposed to be here in your place today but Mr. Collins had a medical emergency?

A. Well, if I said Collins, I meant to say Cooper.

Q. Cooper. Sorry.

A. He didn't have the medical emergency; his wife did. And

he's currently in Vancouver, Washington, at his wife's bedside in a hospital.

Q. And after he was unavailable, he assisted us in reaching out to you to give the similar type of testimony he -- you thought he was going to be giving; is that right?

A. Well, I'm not sure. David and I's styles are a little different. So we're hoping for the same results. It would not be a similar style.

MR. UFFERMAN: All right. Thank you.

No further questions, Your Honor.

THE COURT: All right. Thank you.

THE WITNESS: Thank you, Judge. May I be excused?

THE COURT: Yes.

MR. UFFERMAN: Yes, Your Honor.

(Witness excused.)

THE COURT: All right. Call your next witness.

MR. KENNEDY: The petitioner calls Kyle Bailey.

THE COURT: All right. If you'll stop there, we'll swear you in.

COURT DEPUTY: Please raise your right hand.

NATHAN KYLE BAILEY,

called as a witness by Petitioner, was duly sworn and testified as follows:

COURT DEPUTY: Please be seated. Please be sure to speak into the microphone. State your full name and spell your last name.

THE WITNESS: My name is Nathan Kyle Bailey.

And you said my date of birth as well?

COURT DEPUTY: No. Spell your last name.

THE WITNESS: Oh, spelling. Sorry. B-a-i-l-e-y.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q. Good morning, Mr. Bailey.

A. Good morning.

Q. Could you tell us your relationship, if any, to this gentleman sitting --

A. So me and Richard are related because I married his stepdaughter, Amanda.

Q. Okay. And did you know him during 2012?

A. Yes.

Q. Could you just give us a little background about yourself. What do you do?

A. So I'm an associate pastor at a church in Vero Beach, and I've been pastoring for 11 years now.

Q. And what was your education?

A. I have a doctor of ministry degree.

Q. And did you have that education back in 2012?

A. I had my bachelor's at that time.
Q. Okay. And were you aware of the charges that Richard was facing back in 2012?
A. I was very aware. He and I spent a tremendous amount of time together because Amanda is very close to her mother, and as a result, we would spend at least three days a week over at their house.

We're very close to Richard's daughter Victoria as well, and Richard and I became friends even before Amanda and I were married because he went to the same church as me when -- where I was a youth pastor at that time.
Q. Did there come a time during this process when you -- you became aware of a guilty plea offer that was made to Richard?
A. Yes.
Q. Okay. And did you -- who did you learn that through?
A. Richard.
Q. Okay. And did you have an opportunity to discuss with him during this period of time, you know, the decision that he was going through?
A. We discussed it on numerous occasions.
Q. Okay. And just to sort of identify that period of time, what was the period of time that --
A. It was -- it was October of 2012.
Q. Okay.

A. Near --
Q. And how long, if you recall, was the period of time during which he had to consider the offer?
A. I'm not -- I know that it was -- he and I spoke over the course of a week. So I think it was somewhere between a week and two weeks of time that he had. I know there was -- there was a deadline -- which is why he felt so distraught --
MR. MOORE: Objection, Your Honor. He's speculating as to the defendant's --
THE COURT: Well, let me clear it up.
You talked to him in October of 2012?
THE WITNESS: I did.
THE COURT: Not before that? Not before October? About the plea.
THE WITNESS: About this plea?
THE COURT: Yes.
THE WITNESS: As far as I can recall, it was in October, prior to the acceptance of -- of the plea.
THE COURT: All right.
THE WITNESS: Yeah.
BY MR. KENNEDY:
Q. And did you have an opportunity to observe his -- I guess demeanor or his -- whether he was anxious, under stress --
A. He was distraught. He was -- there's no other way to

put it. He was very much distraught. Even worse than that. An emotional wreck. Trying to figure out what to do.
Q. Okay.
A. Yeah. That's why we spoke so often.
Q. Just for the Court's understanding, did you become aware of what the terms of the plea offer were?
A. The way it was described to me is that he had the option to accept a nine-year plea offer or he would be able to go to trial, and the maximum that he would receive --
MR. MOORE: Objection, Your Honor. This is all hearsay. The only way for him to know is someone to have told him. He's just testifying to hearsay.
THE WITNESS: I was told by Richard.
MR. KENNEDY: Yes, Your Honor. And we agree. However, we feel that in order to understand the physical effect and the state of mind of the petitioner during this period of time, it's necessary to understand what Mr. Olive explained to Mr. Bailey as to what he was going through. And so it goes to his state of mind. It goes to his --
THE COURT: Which he's already testified. He said he was distraught and emotionally a wreck. So those are things he observed. I'm going to take that into consideration. But --
MR. KENNEDY: Okay.
THE COURT: So you can ask him during this period

in October any other questions. So I'll sustain the objection.

BY MR. KENNEDY:

Q. With regard to the decision he was making, without reference to what the terms of that decision was --

A. Uh-huh.

Q. -- could you describe -- how would you characterize his -- the process of him going through that decision?

A. I would characterize it as very unsure what to do, asking me and others --

MR. MOORE: Objection, Your Honor. This is still hearsay, the defendant's statements.

THE COURT: Yeah. I sustain.

MR. KENNEDY: Okay.

Q. In your understanding of what Mr. Olive was going through, did he express to you whether he was willing to take a plea or not?

MR. MOORE: Your Honor, the same objection. The defendant's statements to this witness is quintessential hearsay.

MR. KENNEDY: Your Honor, we expect that there may be similar statements that may be offered by the government as to that -- his willingness through Mr. Nesland. And so, in the event that this objection is sustained, we would reserve the right to recall Mr. -- Mr. Bailey to answer these

questions as well.

THE COURT: All right. Well, why don't -- I'm going to sustain it. Then, if we get there, you can call him again.

MR. KENNEDY: I don't have anything further.

THE COURT: All right. Cross.

CROSS-EXAMINATION

BY MR. MOORE:

Q. During this time in October 2012, did the defendant ever admit to you that he was guilty of these crimes?

A. That wasn't -- can you repeat that? Can you rephrase that?

Q. Okay. Let me make it clearer.

Has the defendant ever told you he's guilty of these crimes, the crimes he was charged in the indictment?

A. No.

Q. In October of 2012, during the time period that he had this plea offer, were any of your discussions ever surrounding the fact that -- that he had done something wrong, that he needed to take responsibility for that? Did he ever say anything to that effect of you?

A. I'm not sure how to answer that. I mean, to recall every sentence of the conversation, I would have to say I'm not sure.

Q. Okay.

MR. MOORE: All right. Thank you. Nothing further.

THE WITNESS: Okay.

THE COURT: Redirect?

MR. KENNEDY: No, Your Honor.

THE COURT: So did you -- in your conversation with Mr. Olive, was it as a pastor to a parishioner?

THE WITNESS: He wasn't my parishioner, no.

THE COURT: So you're testifying based on your friendship and subsequent family relationship?

THE WITNESS: Yes.

MR. KENNEDY: Nothing further.

THE COURT: All right. Thank you.

THE WITNESS: Thank you.

(Witness excused.)

MR. KENNEDY: The petitioner calls Susan Olive.

COURT DEPUTY: Please raise your right hand.

THE COURT: If you'll stop there, we'll swear you in.

SUSAN OLIVE,

called as a witness by Petitioner, was duly sworn and testified as follows:

COURT DEPUTY: Please be seated. Please be sure to speak into the microphone. State your full name and spell your last name.

THE WITNESS: Susan Olive, O-l-i-v-e.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q. Good morning, Susan. Could you tell us what your relationship is to this gentleman sitting in the middle?

A. I'm his wife.

Q. Okay. And how long have you been married?

A. Seventeen years.

Q. Okay. And so, in 2012, how long had you been married?

A. Seventeen minus -- 11 years? Is that right?

Q. Okay. And during that period of time, where were you living?

A. In Tallahassee, Florida.

Q. And did you -- there come a time when you became aware of some charges that were brought against your husband?

A. Yes.

Q. And did you participate with Richard in the hiring of a lawyer?

A. Yes.

Q. And who was that lawyer?

A. Mr. Nesland.

Q. Is that James Nesland?
A. Yes.
Q. All right. And where was he located? Where was his office?
A. It was in Boulder, Colorado. And I think he had an office also in Arizona. But mostly he met with him in Boulder, Colorado.
Q. And did you meet with Mr. Nesland yourself?
A. One -- when we first met with him, I did, the first initial meeting. But after that I did not. Just -- I just was involved in -- I overheard phone conversations, but I never met with him.
Q. Okay. And -- so when you say you overheard phone conversations, they would be phone conversations that Richard would have with Mr. Nesland?
A. Yeah. He would put him on speaker phone so I could hear also.
Q. Okay. And did there come a time when you became aware of a plea offer that your husband could accept?
A. Yes.
Q. Okay. And when was that?
A. It was around the middle of October of 2012.
Q. And how did you become aware of that plea offer?
A. I became aware of it from Richard.
Q. Okay. Was -- was there -- other than Richard discussing

it with you, was there anything else that told you what the plea offer provided for or what the terms of it were? Did you see any document?
A. Yeah, there were emails.
Q. Okay. And when you say emails, from whom?
A. There was an email from the State that -- that described what the plea offer was.
Q. Okay.
A. The government. There was an email from the government. But we mostly discussed it.
Q. Okay. All right.
And when -- did there come a time when -- during that period of time when the plea offer was available to Richard that you overheard a conversation -- telephone conversation that your husband had with Mr. Nesland?
A. Yes.
Q. Okay. And could you tell us what the advice was, if you heard what Mr. Nesland told to Richard?
A. Well, the plea offer was -- we were debating whether to take the plea offer. Like, during that time, it was a very short period. So it was about a week -- if I remember right, it was about a week long. And every day we were talking about it constantly and deciding. Because it was 17 1/2 years --
MR. MOORE: Objection, Your Honor. This is

hearsay again: Her conversations with her husband.

THE COURT: Well, I'm not sure it is her conversations with her husband.

MR. KENNEDY: Well, let's go back to the telephone conversation.

THE WITNESS: Oh, the telephone.

BY MR. KENNEDY:

Q. And did -- were the terms of the plea offer --

THE COURT: So, just to be clear here. Is this a telephone conversation --

THE WITNESS: No. This was -- the telephone -- are you talking about the telephone conversation I overheard with Richard and Nesland?

BY MR. KENNEDY:

Q. Yeah, where it was put on speaker so you could hear Mr. Nesland.

A. Yeah. I overheard them talking about the -- what the government's --

THE COURT: Well, before you tell us that, to be clear --

THE WITNESS: I was trying to explain that, what they were saying.

THE COURT: Okay. The telephone conversation you're about to talk about was the telephone on speaker phone?

THE WITNESS: Yes. He had it on speaker phone. It was his cell phone and he would put it on speaker phone so I could hear.

THE COURT: Okay.

BY MR. KENNEDY:

Q. And did you recognize who was on the other --

A. Yes. It was Mr. Nesland.

Q. And what was the purpose of the telephone call?

A. Because they offered the plea, and they said they -- we were shocked by the amount of terms that they said he could get. When we thought -- when Nesland's calculation were 17 1/2 to 20 years, they came back and said it was a different amount.

And Nesland said, "No, they're not right. It's this. But I'll have it recalculated."

That was that conversation I overheard.

Q. Okay. Now, just so the Court knows what you're talking about, did you become aware prior to this plea offer that there was a calculation done that sort of described Richard's exposure under the guidelines?

A. Yes.

Q. Okay. And so -- and -- and that was done in June of 2012, approximately?

A. Yes.

Q. And so you were aware through your discussions about

that as well?
A. Yes.
Q. So when Mr. Nesland said it would be recalculated to check the government's numbers, what was -- he was referring to this prior calculation?
A. Yes.
Q. Okay. So your understanding was -- and just so we understand when this conversation took place -- the offer had already been made and you -- and Richard was deliberating on that, correct?
A. Yes.
Q. And then there was this discussion with Mr. Nesland about -- about the plea offer, correct?
A. Yes.
Q. And then there was a -- Mr. Nesland said he would then --

MR. MOORE: Objection, Your Honor. He -- I mean, he's leading pretty egregiously. She's not even testifying. She's just saying "yes."

THE COURT: Sustained.

Why don't you ask a question.

MR. KENNEDY: All right.

Q. Just so the Court understands, when this came -- when -- this conversation came after the plea offer had already been made?

A. Yes. The plea offer was made and then those calculations came out that were higher than what Mr. Nesland already calculated. So he said he would have them -- he said, "She's wrong. We're going to have them recalculated," and he came back with his same calculations.
Q. Now, you said, "She's wrong." Do you know who --
A. Kat. He said, "Kat is wrong."
Q. And did you understand what he meant when he said "Kat"?
A. Yes. Kathryn Moore.
Q. And that was the U.S. Attorney prosecuting your husband?
A. Yes. Uh-huh.
Q. So -- so during that conversation, did Mr. Nesland state what the -- his expectation -- his previous expectation was that -- that he had been operating on during -- since June or whenever -- whenever that original calculation was done? Did he -- Mr. Nesland state that to Richard?
A. I'm not sure I understand what you're asking.
Q. Okay. So you used the term 17 1/2 to 20.
A. Yeah.
Q. Was that the calculation that Mr. Nesland had been operating on since --
A. After he recalculated it?
Q. No. Up until that point. Up until --
A. Yes. It was 17 1/2 to 20 years.
Q. All right.

A. That was the most -- I mean, it could have been less than that. That was the most he would get.
Q. And this higher number that he felt was wrong, that came -- was that within the plea offer itself? Within the plea --
A. That was what Kathryn Ward -- when she offered the plea that she said, "You should take the plea, because if you go to trial and get guilty, this is what you will get."
And he said, "Nope. She's wrong. She's doesn't know what she's talking about. This is what you would get."
So we --
Q. Okay.
A. -- we were always debating between, if you got guilty -- nine years was a lot. I mean, so. . .
Q. But did Mr. Nesland ever -- did you ever hear him during that conversation say that Richard could receive, for example, 27 years?
A. Oh, no, never ever said that.
Q. Thirty years?
A. No.
Q. 160 years?
A. No.
Q. Can you characterize your husband's demeanor or his -- the difficulty that he was having with this decision? In other words, was -- was it -- during this week where he was

deliberating and talking to you and -- was it -- was it an easy decision or was it something that he was equivocal about?

A. Yeah, it was very difficult. Mainly because I know when he puts a call on speaker phone, he wants me to be involved in it because it's so difficult, and also because we talked about it constantly.

And when he gets the call from his attorney and he puts it on speaker phone, he'll say, to the first line, he's like, "Hang on a minute. Can you repeat that again?" And then he'll put it on speaker so I can hear everything.

So he wants me involved in it so we could make that decision together. But we went -- we talked about everything.

Q. Okay.

A. It was very, very hard.

MR. KENNEDY: I have nothing further.

THE COURT: All right.

MR. UFFERMAN: Your Honor, could we have one moment?

THE COURT: Sure.

MR. UFFERMAN: I apologize, Your Honor. Nothing further.

MR. KENNEDY: Nothing further.

THE COURT: Okay. Cross-examination.

MR. MOORE: Yes, Your Honor.

Is there a copy of the plaintiff's exhibits that the witness can look at?

THE COURT: I have mine.

MR. MOORE: Is there an extra one?

THE COURT: Do you have one, Kelly?

MR. KENNEDY: We'll offer that.

THE COURT: Do you have one with the exhibit labels on it?

MR. KENNEDY: Yes.

THE COURT: Is that going to be for the court reporter -- I mean, for the deputy?

MR. KENNEDY: Yes. But we were waiting for Mr. Moore to talk to Mr. Nesland about just that one document.

MR. MOORE: I want to ask her about one that is not the document that --

MR. UFFERMAN: He can use the one that we intend to introduce. That's fine, Your Honor.

THE COURT: Yeah.

CROSS-EXAMINATION

BY MR. MOORE:

Q. So your testimony was that there was an offer from the government with a plea offer; is that correct?

A. Yes.
Q. And you saw written documentation of that plea offer?
A. Yes.
Q. And if I showed you that plea offer, would you recognize it here today?
A. Yes.
Q. All right. I'm going to direct your attention to --
THE COURT: I don't think she has a book.
MR. MOORE: I'm going to hand this one up, Your Honor.
Q. Just starting on what's been marked as Exhibit page 6 --
THE COURT: Well, I don't -- let's just make sure our record's clear here.
So you're showing her the October 15th, 2012, letter?
MR. MOORE: Yes, Your Honor.
THE COURT: Okay. Any objection?
MR. UFFERMAN: No, Your Honor.
THE COURT: So we're going to admit that?
BY MR. MOORE:
Q. Do you recognize it? And is that the plea offer from the government? Is that the letter with the offer --
A. Yes.
Q. -- the plea offer from the government?
A. Uh-huh.

MR. MOORE: Your Honor, then I would move to admit.

THE COURT: Admitted.

(Whereupon Petitioner Exhibit 1 was marked for identification and received in evidence.)

BY MR. MOORE:

Q. Can you turn to the second page of that, and can you read the paragraph starting at 10?

A. "The resulting offense level" --

THE COURT: Into the microphone.

THE WITNESS: Oh. (As read):

The resulting offense level prior to acceptance would be a Level 40, which assuming a criminal history Category I corresponds to a term of imprisonment of 292 to 365 months. This offense level is merely the government's estimate at this time and the Court-determined offense level could be higher or lower if the case were to proceed to trial and then sentencing.

BY MR. MOORE:

Q. 365 months, that's 30 years and five months, correct?

A. I don't know. Can you calculate that for me? It is -- 30 years?

Q. Yes.

A. Okay.

Q. All right. And so -- but that is more than 20 years, correct?
A. Yes.
Q. So just by plain reading of this letter, you and your husband both would have been aware that there is at least a conceivable possibility that he could be facing a sentence larger than 20 years; is that correct?
MR. KENNEDY: Objection. Calls for speculation as to what her husband --
THE COURT: Overruled.
BY MR. MOORE:
Q. Would you have been aware it's at least conceivable there could have been a sentence above 20 years?
A. That's what our attorney -- that's what our attorney -- this is what our attorney said she was wrong about.
Q. Okay. So -- but there's at least someone who's raised the possibility that --
A. That's what we --
THE COURT: Not at the same time. Let him finish --
THE WITNESS: Okay. Go ahead. I'm sorry.
THE COURT: -- the question and I'm going to give you all the time you want.
THE WITNESS: Okay.
THE COURT: So start over on your question.

BY MR. MOORE:
Q. So at this point there's at least the possibility that there is a sentence above 20 years; is that right?
A. Yes. At this point there was.
Q. And when the person who is prosecuting your case tells you there's a possibility of a sentence above 20 years, that's something to consider, isn't it?
A. Yeah. That was very scary. And then we asked the attorney -- the attorney's telling us that's not true.
Q. Okay. But you at least recognize at this point, when the person prosecuting your case tells you it's possible you're going to get 30 years, that there's at least the conceivable possibility that that will happen?
A. But it wasn't even a consideration because the attorney my husband trusted with his life is telling us that's not true and recalculating it to telling us it's only 17 1/2 years. So we didn't even consider it.
Q. So you didn't even consider this offer at all?
A. No. Because the attorney that my husband is trusting him with his life is telling him this is not true.
Q. So he was never going to accept this offer then?
A. No. No. Not the offer. You're talking about the months, not the offer.
The offer he was thinking about accepting -- you're talking about the months of how much he could -- that

he's debating the offer to.
Q. Did you understand that as part of -- with the plea agreement, he would have to do things like agree to the guideline calculation? Did you understand that?
A. We were considering nine years to 17 1/2 years if he went to trial. That was our decision, if he was going to accept nine years of imprisonment -- in our state of mind, if he was going to accept the plea, he was going to get nine years of going to prison.
Q. Did you understand that by accepting this plea, he would also be accepting that the guidelines in this case is 292 to 365 months, that that would be a part of what he was accepting?
A. What?
Q. Did you understand -- this whole document is the plea offer, and by accepting it, he would also have to accept the fact that the guideline calculation is what this prosecutor had said it is?
A. No. No.
Q. You didn't understand that?
A. No, I did not understand that at all.
Q. Were you involved in every conversation between --
A. No.
Q. -- your husband and his lawyer?
A. No.

Q. And apart from this one conversation that you overheard, is that really sort of the extent of your communications with the two of them directly?
A. No. I heard a lot of conversations.
Q. Did you ever have direct conversations with the lawyer about the plea offer or trial preparation?
A. Not -- I never had direct conversation. I just overheard the conversations.
Q. Has your husband ever admitted to you that he's guilty of these crimes that he's charged with?
A. No.
Q. Has he ever told you, "I did something wrong here and, you know, I need to accept responsibility for my wrong actions"?
A. No.
Q. Even today, has he, after trial, told you, "What I did was wrong here; I'm guilty"? Has he told you that?
A. No.
Q. Do you believe your husband's guilty?
A. He's not -- I don't believe he's guilty.
Q. So you don't believe he's guilty?
A. No. But I don't believe that's relevant to this either.
MR. MOORE: Thank you. Nothing further.
THE COURT: All right. Redirect.
MR. KENNEDY: Nothing further.

THE COURT: All right.

So, looking at the letter, in paragraph 10, do you see the second sentence?

THE WITNESS: "This offense level"?

THE COURT: Yeah. Could you read that to yourself -- or read it out loud so it's in the record.

THE WITNESS: (As read):

> This offense level is merely the government's estimate at this time, and the Court-determined offense level could be higher or lower if this case were to proceed to trial and then sentencing.

THE COURT: So what's your understanding of that sentence?

THE WITNESS: So this is -- this -- my understanding of this is this is what he could get if he went to trial.

THE COURT: That's not my question.

THE WITNESS: That it could be higher or lower.

THE COURT: Let me finish.

THE WITNESS: Oh, okay.

THE COURT: The sentence you just read, what's your understanding of what that sentence says? Could you paraphrase your understanding of that sentence.

THE WITNESS: That -- my understanding is the Court could determine if the levels are higher or lower. So

there's a range. If he gets guilty at trial. If he proceeds to go to trial and doesn't take the plea.

THE COURT: So you understood that sentence that the Court would -- if he went to trial and was found guilty --

THE WITNESS: Uh-huh.

THE COURT: -- the Court might find an offense level that is higher or lower than what's in this letter?

THE WITNESS: Right.

THE COURT: And, therefore, the range could be higher or lower?

THE WITNESS: Yeah.

THE COURT: Okay.

THE WITNESS: Am I correct?

MR. KENNEDY: Just one more question.

REDIRECT EXAMINATION

BY MR. KENNEDY:

Q. So you already described Mr. Nesland's statements to you about that calculation --

A. Yes.

Q. -- what he felt about that calculation.

A. Yes.

Q. Did you understand that -- that Mr. -- you mentioned a recalculation, correct?

A. Yes.
Q. And Mr. Nesland actually did that, right? He went back to his sentencing agent and got a recalculation, correct?
A. Yes.
Q. All right. And did that confirm what was in that plea offer, or did it confirm the memorandum that he had already produced in June?
A. It confirmed the 17 1/2 years.

MR. KENNEDY: Okay. Nothing further.

MR. MOORE: Nothing further, Your Honor.

THE COURT: So, after he confirmed the 17 1/2 years and having read the letter, what was your understanding of that second sentence?

THE WITNESS: I didn't -- we never paid attention to this anymore because he told us this was not true.

THE COURT: Not my question.

After he confirmed the 17 1/2 years, what's your understanding of that second sentence that you just read?

THE WITNESS: I don't know because I wouldn't even -- I never paid attention to it anymore. We listened to Mr. Nesland. We paid attention to him and what he told us. So I didn't --

THE COURT: But you never read the letter?

THE WITNESS: I did read this when it first came out. But then after he told us it's not -- this is not the

calculation; the government's wrong. This is what you would get if you went to trial and got guilty.

THE COURT: What was your understanding of the Court-determined offense level?

THE WITNESS: "The" -- "The Court-determined offense level could be higher or lower if the case would proceed to trial."

THE COURT: What's your understanding after Mr. Nesland told you about the 17 1/2 years the second time?

THE WITNESS: Well, I think there's a range in that too, that I thought it could be lower, but he said the max it could be was 17 to 20 years.

THE COURT: What's your understanding of the Court-determined offense level after he told you about the 17 1/2 years?

THE WITNESS: I guess I don't -- I don't -- I guess I don't have an understanding of that.

THE COURT: Okay.

THE WITNESS: I just thought that would be the max he could get if he got guilty and went to trial. That was my understanding from Mr. Nesland.

THE COURT: So you just ignored the second sentence, "The Court determination of the offense level could be higher or lower"? You just agreed with whatever -- accepted whatever Mr. Nesland said?

THE WITNESS: Yeah.
THE COURT: Okay.
BY MR. KENNEDY:
Q. Is it fair to say that you and Richard were not familiar with federal court sentencing process?
A. Yeah.
Q. Okay.
A. Yeah.
Q. And -- so, just to clarify, when Mr. Nesland said that Ms. Ward was wrong and he went back and he got a recalculation of a previous estimate, was he saying that the ultimate outcome -- and that would be -- you understood would be decided by a judge, correct? The ultimate --
THE COURT: You need to verbalize your response.
THE WITNESS: Okay.
BY MR. KENNEDY:
Q. You understood that the ultimate sentences would be imposed by a judge?
A. Yes.
Q. And that the purpose of this recalculation --
MR. MOORE: Objection, Your Honor. Leading.
THE COURT: Sustained.
BY MR. KENNEDY:
Q. What -- what was your understanding, then, of Mr. Nesland's getting the recalculation? What was the

purpose of getting the recalculation?
A. Because of this amount of sentencing. He said it was wrong. So he wanted to get it recalculated just to be sure.
Q. Okay. And -- and then, when he got that done, did you accept that as the -- what would be the most likely result from the judge?
A. Yes. That's what we used to determine whether we were going to take the plea or go forward to go to trial and take the chance and go to trial.
Q. Okay. And just to clarify an earlier statement to me, the 17 1/2 to 20 years was the calculation if you went to trial and he -- if he went to trial and lost, correct?
A. Right.
Q. So what you were looking at is what was the worst-case scenario --
A. Yes.
Q. -- correct?
A. Yes.
Q. And after that recalculation, did you ever understand it could be as high as 30 years?
A. No.
Q. 160 years?
A. No.

MR. KENNEDY: Nothing further.

MR. MOORE: Nothing further, Your Honor.

THE COURT: All right. You can step down. Thank you.

THE WITNESS: Thank you.

(Witness dismissed.)

MR. UFFERMAN: Your Honor, we're not releasing her from the rule because she possibly could be a rebuttal witness. We'll keep her under the rule at this time.

THE COURT: All right. Then she'll need to step outside.

All right. Call your next witness.

MR. KENNEDY: Your Honor, I don't know if this would be an appropriate time to do this, to have the State -- or the government speak to Mr. Nesland and -- and us possibly to speak to our client, because we attempted to get here earlier --

THE COURT: Do you want a break?

MR. KENNEDY: Yes.

THE COURT: Okay. We'll take a break.

MR. KENNEDY: All right. Thank you.

(Recess.)

THE COURT: All right. Be seated. Did you all get your exhibits straight?

MR. KENNEDY: Yes. We were going to address that now.

THE COURT: Okay.

MR. KENNEDY: The government is stipulating, as I understand it, to the collective exhibit, Petitioner 1.

MR. MOORE: I have no objections to it, Your Honor.

THE COURT: So you need to identify for the record what Exhibit 1 consists of.

MR. KENNEDY: Okay. The first -- okay. So it's identified by exhibit page number -- the first exhibit page number is -- purports to be a letter from Mr. Nesland to Mr. Olive.

THE COURT: It's an undated letter. And it's not -- it doesn't -- but you're telling me it's from Mr. Nesland? Because his name isn't on it.

MR. KENNEDY: It was undated, but it was contained within an email, but it was a --

MR. UFFERMAN: Your Honor, it's clear from looking at it that it's after the trial because it references a motion for a new trial.

MR. KENNEDY: That's correct.

THE COURT: All right. So page -- exhibit page 1 is an undated letter from Mr. Nesland.

There's no dispute about that?

MR. MOORE: No dispute about that, Your Honor.

THE COURT: All right. So that will be Exhibit 1(a).

Then Exhibit 1(b) is a confidential memorandum, attorney work product, from Mr. Nesland -- from Michael Martinez to Mr. Nesland, dated June 23, 2012.

MR. KENNEDY: That's correct. And that's the memorandum that's been discussed already.

THE COURT: And that consists of four pages? Yes.

MR. KENNEDY: Yes.

THE COURT: All right. Exhibit 1(c) is a -- is the government's October 15, 2012, letter from Kathryn Ward, consisting of two pages.

MR. KENNEDY: That's correct.

THE COURT: That's admitted.

Exhibit 1(d) is another confidential memorandum, attorney work product, dated October 17, consisting of five pages.

MR. KENNEDY: Yes.

THE COURT: And 1(e) is an email from James Nesland to Richard Olive, copying Jeff Smith, dated October 23rd, 2012. And that consists of one page.

MR. KENNEDY: One page.

THE COURT: Then Exhibit 1(f) is the presentence report --

MR. KENNEDY: That's correct.

THE COURT: -- dated October 19th, 2013.

MR. KENNEDY: Correct.

MR. MOORE: And, Your Honor, I would note that the Exhibit 1(f) should probably be placed under seal, since it is the presentence report.

MR. UFFERMAN: We don't disagree with that.

THE COURT: Agree. Thank you.

And then 1(g) is the declaration of James Nesland?

MR. KENNEDY: That's correct.

THE COURT: Consists of two pages. And it does not have a date on it.

All right. So that's what's in collective Exhibit 1.

And then does the government -- you all agree to the government's, too?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: Do you want to read those into the record?

MR. MOORE: Yes, Your Honor. Government's --

THE COURT: Let's just call it Number 2.

MR. MOORE: Yeah. Number 2 will be the October 17th, 2017, email. The top email is between Jeff Smith and Mr. Nesland, but the lower email is between Mr. Nesland and Mr. Olive.

THE COURT: Okay.

MR. MOORE: And then Government's 3 will be a series of emails that were admitted at the trial as Trial

Exhibit 37, 39 -- I'm sorry -- 37 and 42. And they're emails between Mr. Olive and -- a series of emails with Mr. Olive and also involving David Kamer, who was his tax attorney.

THE COURT: All right. So we'll just have Exhibit 1, 2, and 3 as part of the record.

MR. KENNEDY: We don't have a copy of 2.

MR. UFFERMAN: May I clarify with the government what Exhibit 2 is?

(Off-the-record discussion.)

MR. KENNEDY: No objection.

MR. UFFERMAN: No objection, Your Honor.

THE COURT: All right. So all three of those will be part of the record.

(Whereupon Defense Exhibit 2 and Defense Exhibit 3 were marked for identification and received in evidence.)

THE COURT: Are you ready to call your next witness?

MR. KENNEDY: Yes, Your Honor. The petitioner would call Richard Olive.

RICHARD OLIVE,

called as a witness by Petitioner, was duly sworn and testified as follows:

COURT DEPUTY: State your full name.

THE WITNESS: It's Richard Keith Olive. O-l-i-v-e.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q. Good morning again, Richard.

A. Good morning.

Q. So could you just tell us where you are currently residing?

A. Well, currently at Grayson County Detention Center, but I'm housed normally at Coleman, in Florida, a medium prison.

Q. Okay. All right.

So, Richard, could you describe for the Court how you came to be charged and then to hire James Nesland as your counsel.

A. Yeah. There was a gentleman out of Colorado in Denver named Jack Lutz [phonetic] that is an attorney who referred me to Mr. Nesland. And he indicated that he's one of the premier defense attorneys.

Q. Okay. Did you understand Mr. Nesland to have a good reputation in the area of this type of case?

A. Mr. Nesland had told me that he did. He had represented -- he threw out some names, and on his website that I looked up once I was in discussion with him, he had represented Neil Bush in the savings and loan crisis and on

the Jimmy Carter campaign finance committee.
Q. And so you understood him to have significant experience in this type of case?
A. Right.
Q. During your representation, did Mr. Nesland express his expectations, you know, going -- going through the investigation up -- you know, to the end, his expectation of the possible outcome of a jury trial?
A. Well, we had numerous discussions because, once I hired him, there wasn't a plea agreement until -- in October. And I hired him the first week of March. I was indicted March 1st. And so we had numerous discussions regarding trial.
Q. Okay. So, until the plea offer, your discussions were essentially trial preparation?
A. It was completely trial preparation, because there was -- the government had not discussed any plea offer or presented one. So we were preparing for trial.
Q. Okay. Did there come a time when he advised you about the possible consequences or penalty that you would suffer if you lost at trial?
A. Well, initially, when I hired him, you know, I believe he said something in reference to "These are serious charges." And when he begin discussing the amount of time that I would be looking at, that happened shortly thereafter;

I would say in March. And he had mentioned that "You're probably looking at around 11 years. You would -- you would go to a prison camp because you do not have a criminal history."

But then we just begin discussing more, and eventually it became where he was discussing 17 1/2 years would be the sentence, that if I went to trial and lost at trial -- which, again, there's no plea agreement -- that that would be the sentence that I would be looking at, is 17 1/2 years.

Q. And was that in relation to a sentencing memorandum that he may have shared with you?

A. Well, even- -- because of our discussions about the consequences of a guilty verdict at trial, he wanted to memorialize that in writing. And he wanted to issue a sentencing memorandum, and so he wanted to document that.

MR. KENNEDY: May I approach the witness, Your Honor.

THE COURT: The court officer will help you pass any documents to the witness.

BY MR. KENNEDY:

Q. And do you have Petitioner's cumulative Exhibit 1 before you?

Look on the back of the --

A. Exhibit 1, the first page, behind the cover page?

Q. No. Look at the back of the booklet.
A. Right. Plaintiff Exhibit 1.
Q. Okay. And turning to the -- I think it's (b), 1(b). Is that right? The June. . . Do you see that?
A. Yes. The June 23rd sentencing memorandum.
Q. Yes. And is that the memorandum you were just describing?
A. That's the initial one that he wanted to memorialize, that's correct.
Q. And did he share that with you?
A. Yes, he did.
Q. And when you mentioned the 17-to-20-year range or whatever, is that range listed in that document?
A. All right. So -- because we had been discussing from -- initially 11 years on up, but then that -- you know, it eventually became 17 1/2. When he -- when he did the sentencing memorandum and produced that, there were two scenarios, I believe, that he went through.

And on -- where it says in the bottom right-hand exhibit page 3, the -- there was one that represents the worst-case scenario based on the amount listed in the indictment, and we discussed that.

And then, on the next page, where it says exhibit page 4 in the bottom right-hand corner, there's one that says, "This represents the guideline based on your email,

loss of 4 million."

And that was what Jim Nesland mainly talked about, was this was his opinion. You know, he had sent an email to Mr. Martinez, obviously, because he's referring to that email. But he said, "This is the offense level based on your email."

And that -- when -- so really, I had never heard of the sentencing guidelines -- Level 37, Level 34. That means nothing to me. It's foreign to me. But Mr. Nesland would correlate that into terms of years for me. And so we would discuss that. And that came up to 151 to 188 months. And under the worst-case scenario, it was 188 months to 235 months.

So at this time Mr. Nesland now is saying, if you're found guilty at a jury trial, you're looking at anywhere from 12 1/2 to 19 1/2 years.

Q. Okay. And the page that you were just talking about is -- what page is that?

A. That's page 4.

Q. Okay. All right.

A. And it carries over to page 5. But really 3, 4, and 5 is the three that I'm referring to.

Q. So did -- was there any other calculation that Mr. Nesland made you aware of between this one that you just identified and something that occurred in October of 2012?

A. We just continued to have discussions because Mr. Nesland told me, "I'm surprised that the government hasn't made an offer to you. Because they normally do."
Q. Okay. My question is, was there any other calculation presented to you by Mr. Nesland between June and October --
A. No.
Q. -- prior to the plea offer being made?
A. No.
Q. All right. So, during that period of time, you understood you were going to trial, I guess; is that correct?
A. I had no choice.
Q. Okay. And in terms of the outcome, the June memo was all you had to go by?
A. That and our discussions. He -- he wanted to back up our discussions and let me see something, and so that's the purpose of the memorandum. So that there's something in writing that I can look at.
Q. Okay. Now, jump to October 2012. And there came a time when you were made a plea offer. Or you -- a plea offer was made to you?
A. That's correct.
Q. Okay. Describe that process.
A. Okay. So Mr. Nesland called me and said that I've received a plea offer from the government. And that it is for nine years. And he said that he wanted to update the

sentencing memorandum now that we have a plea offer because the plea offer -- the government is stating that I could face 30 years in prison. And I've never heard anything about that kind of number.

And he told me, "I believe that she's wrong, though, but let me update the sentencing memorandum so that we can look at this paragraph by paragraph."

MR. KENNEDY: Is he too close to the microphone, Your Honor?

THE COURT: No.

MR. KENNEDY: Okay. All right.

THE WITNESS: So he wanted to take the plea agreement that I now had that I received on October 15th and said that he's going to update the sentencing memorandum, with my permission, which he did. And he broke it down paragraph by paragraph for me. And each -- each one of these, I guess, they're a guideline enhancement.

BY MR. KENNEDY:

Q. Okay.

A. And he then -- so he said --

Q. Let me just go to the exhibit and ask you if the -- Mr. Nesland actually provided you a copy of the plea offer, the written plea offer ever.

A. He emailed it to me.

Q. Okay.

A. On October 15th, he called me and said, "We received a plea offer from the government." So I hadn't seen that when we spoke. I was -- I took the call, and he told me, "Hey, we have a plea offer. I emailed it to you. The government is stating that they believe your guidelines is 30 years."
Q. Okay.
A. "I don't believe that they're correct. Let me update the sentencing memorandum. We'll break it down."
He did that on October 17th, is when he got back with me. And -- and provided that via email to me.
And then we -- we went through to discuss the plea offer and the sentencing memorandum, and he told me the government was wrong. He said Kat -- Kat was wrong in her sentencing calculation. And then we went through the memorandum and he showed me why.
Q. Okay.
THE COURT: So do you want to admit Exhibit 2?
MR. KENNEDY: Yes.
THE COURT: All right. Why don't you hand that to him.
MR. KENNEDY: He has it.
THE COURT: Exhibit 2.
THE WITNESS: I have a booklet, Your Honor.
MR. KENNEDY: 1 -- Exhibit -- it's within the --
THE COURT: I thought it was --

MR. MOORE: Yeah. It's separate. The email on October 17th, 2012, that's the one that I'm admitting.

MR. KENNEDY: No. I'm talking about the plea agreement.

THE COURT: No. He received it by email -- he received it by email from Mr. Nesland on October the 15th. That's Exhibit 2.

MR. KENNEDY: Oh. And that's an attachment to that email. The plea agreement was the attachment to that.

THE COURT: Do you have another copy of Exhibit 2?

MR. MOORE: We have --

MR. KENNEDY: Yes.

MR. UFFERMAN: Yes.

THE COURT: He's already testified. This is a good time to go ahead and admit it.

MR. KENNEDY: Okay. I'll offer that Exhibit 2.

THE COURT: I think you have to give it to him. Well, it's already in by agreement.

MR. KENNEDY: Isn't that the same?

MR. MOORE: No. It's a different email. It's this one.

MR. KENNEDY: Okay. I thought this -- I thought this was already admitted.

THE COURT: It is. But I think you should show it to the witness just so I can hear him confirm this is what he

got from his lawyer.

MR. KENNEDY: Okay.

THE WITNESS: Thank you.

BY MR. KENNEDY:

Q. So the question is --

A. Yeah, this --

Q. Is this Exhibit 2 that you've been handed, is that the email that you received following the telephone conversation with Mr. Nesland?

A. This -- it doesn't say "Exhibit 2" on mine, but there is the email that was attached with the plea agreement attached to it.

THE COURT: Look on the back. Oh, it doesn't have a label on it.

MR. KENNEDY: Where is Exhibit -- do you have it?

THE WITNESS: So this is the October 15th, Your Honor, plea -- the email that I received when Mr. Nesland called me on the phone.

THE COURT: All right. Just give it to me.

Kelly, put Exhibit 2 on here.

COURT DEPUTY: He's got the originals.

THE COURT: Okay.

BY MR. KENNEDY:

Q. All right. So you reviewed that material that was attached to it, correct?

A. Not on the initial phone call, but I did -- once I got off the phone and I reviewed the email and I reviewed the plea agreement.
Q. Okay. And then what did you do?
A. Well, when Mr. Nesland told me that we received the plea agreement -- so this is prior to me viewing this email, just, you know, within a matter of minutes later, I reviewed the email. He told me he wanted to update the sentencing memorandum, which is the October 17th sentencing memorandum that he had initially done in June.
Q. Is that a separate conversation or is that --
A. No. This is the initial conversation.
Q. Okay.
A. So I'm -- I'm kind of particularizing the answer to your question.
Q. Okay. All right. Let me rephrase it.

So you had your discussion with Mr. Nesland on the phone. You received the email with the attachment, which included the plea agreement?
A. Yes, I did.
Q. You reviewed that material?
A. I did.
Q. And then what you did do after that?
A. And then I waited for Mr. Nesland to get back with me because he told me, "I believe the government is wrong." And

I waited for him to get back with me with an updated sentencing memorandum. And which he did two days later.
Q. Okay. Now, did you have a concern about the numbers that were included in the government's plea offer?
A. I did.
Q. Okay. And how did that affect your decision whether or not to take the plea?
A. Well, I declined the plea because Mr. Nesland said the government was wrong. So I did not consider that -- the 30 years was accurate.
Q. Okay. But -- but that was after you received the confirmation? Was that after you received the second memorandum from the October memorandum?
A. Yes.
Q. Okay. Well, let me ask you, before you received that -- I think that's -- I don't remember what the exhibit number is. 1(d). And it's exhibit page --
A. Are you referring to Exhibit 13?
Q. It's -- it's page -- exhibit page 8, but it's 1(d) in the cumulative exhibit. So it's page 8.
A. I have exhibit page 8, October 17th memorandum.
Q. Okay. So let's go through that.
When -- when you received that, did you have another contact with Mr. Nesland?
A. That was my next contact after I received the plea, with

Mr. Nesland.
Q. Okay. Before we talk about that, between the 17th and -- this was on the 23rd --
A. No. This was the 17th.
Q. Okay.
A. Between the 15th and the 17th.
Q. Okay. Did you talk with anybody about the plea offer?
A. I talked to Susan about the plea offer and I talked to Kyle -- Susan, my wife, and Kyle.
Q. Bailey?
A. Right.
Q. All right. So when you received the October memorandum, did you call Mr. Nesland or did he call you?
A. I don't recall that. That October 17th memorandum, I don't recall who called who.
Q. Okay. But you had a discussion about it?
A. Yes.
Q. Okay. And did it, in your view, support Mr. Nesland or support the government's estimation of the sentence?
A. Well, this is what -- when he told me that the government was wrong in their guideline calculation, then he produced this October 17th memorandum. We went through this document. And if you begin on page -- he used this to support his statement to me that the government was wrong.
So, if we go to Exhibit page 9, and at the top

left-hand corner, it says "Page 2 of 5." So he breaks down each paragraph of the plea agreement. So this is exhibit page 9 in the bottom right-hand corner.

Now, beginning in the first paragraph, he says (as read):

> The government at paragraph 1 notes that Mr. Olive will plead guilty.

And goes on. And then, if you look at the second paragraph, it says "Application" -- the last sentence (as read):

> Application of this guideline is correct.

So there's no dispute in that -- the guideline on the plea agreement under paragraph 1.

Then we go to "The government at paragraph 3" -- we're still on exhibit page 9. And the third paragraph on that page, it says (as read):

> The government at paragraph 3 notes the parties will agree to 2 1/2 to 7 million.

And it says -- the last sentence in that is (as read):

> This is correctly noted by the government.

So that enhancement Mr. Nesland is telling me would apply.

And then we go to the next paragraph. And it breaks down paragraph 4, a four-level increase pursuant to

USSG 2B1.1 It says this application would apply, the last statement in the paragraph.

And then -- so -- so there's some issues in the government's plea offer, some of those paragraphs that are not in dispute. It's "Richard, this is what -- how the federal guideline system works for sentencing, and these things apply to you."

But if you go to page 3, which is Exhibit 10, if you go to the third paragraph, the last sentence --

THE COURT: Well, let's just walk through the letter.

THE WITNESS: Okay.

THE COURT: What about the next paragraph on page 9 (as read):

> The government at paragraph 5 notes that a two-level increase applies pursuant to Section 2B1.1(D)(9)(A)?

THE WITNESS: Right. So it says -- in reference to that, the very last sentence on that page says (as read):

> If the latter, I believe you have an argument against applying this enhancement.

So Mr. Nesland is telling me this is something we can argue to try -- to -- showing me that the 30 years that the government is telling me, "Hey, you're exposed to 30 years," we can --

THE COURT: Well that's a little broad. We're just talking about paragraph 5.

What was your understanding of that last sentence?

THE WITNESS: That that is something to argue to bring it down. It doesn't mean that I -- it's not going apply to me; it could apply to me. I understood that, Your Honor.

THE COURT: Okay.

THE WITNESS: Yes, sir.

THE COURT: All right. Then go to the top of page 3. (As read):

> The government at paragraph 6 notes a two-level increase applies as the offense involved sophisticated means.

THE WITNESS: All right. And this is one where in the third paragraph, the last sentence, it says (as read):

> This may be an area we can explore to form an argument that the offense level did not involve sophisticated means.

Again, this is an argument we can make that if you go to trial, you're found guilty at sentencing, or you take the plea agreement, the government's saying these things apply, this is an argument we can make. I might lose that argument. That's how I take that to be.

THE COURT: Okay.

THE WITNESS: And then when we go -- the same thing in paragraph 7, for the abuse of trust. It says, "This can also be an" -- this is now on page 11, the second paragraph. And it's the last sentence. (As read):

This can also be addressed by arguing that the offense conduct --

So he's saying that I wasn't a fiduciary --

THE COURT: Well, actually, you need to read the sentence before that last sentence to put it in context.

THE WITNESS: (As read):

One avenue to explore is if the position Mr. Olive held significantly facilitated the commission or concealment of the offense.

THE COURT: Now read the next sentence.

THE WITNESS: Uh-huh. (As read):

This can also be addressed by arguing that the offense conduct was not difficult to detect or the victims did not view Mr. Olive as maintaining a position of trust.

THE COURT: And what was your understanding of those two sentences?

THE WITNESS: Mr. Nesland told me that's not going to apply to me.

THE COURT: But that's not what he wrote here.

THE WITNESS: Well, it's -- it's an argument to

make. And that's -- that's ultimately how I view it, that it's an argument to make.

THE COURT: But that doesn't say it's not going to apply.

THE WITNESS: No, sir, it does not.

THE COURT: All right. Thank you.

Paragraph 8. Go ahead.

THE WITNESS: Paragraph 8 -- so then, if we go two paragraphs down, there's the description of that. It says (as read):

> The issue here is whether the family members and friend, as you noted in your email, were also criminally responsible for the commission of the offense.

Which they were not. No one else was indicted. My wife wasn't indicted. This is what Mr. Nesland is telling me. It says (as read):

> If not, the four-level enhancement would not apply.

In our discussions, this four-level enhancement is not to apply, and that -- he's showing me this is one area where the government is wrong. It's not the argument. This is -- and this is the conversation in the real world that Mr. Nesland and I are having, is that she's wrong. This enhancement's not going to apply to you, and that's one

reason why she's not, is because you didn't have family members or no one else was criminally liable.

THE COURT: Did Mr. Nesland share with you what the government's proof on this point would have been?

THE WITNESS: Not at this point. He just told me --

THE COURT: Did he ever share that with you?

THE WITNESS: What their proof would have to be?

THE COURT: On this point, on whether there were family members and friends were involved? Did he ever discuss with you, "This is the government's proof on whether they could establish that"? If he didn't --

THE WITNESS: No. No. No, sir. Because he just said, "No one else has been criminally liable. You're the only one charged."

THE COURT: Sure. But that's not my question.

THE WITNESS: Okay.

THE COURT: The question is, did he ever tell you, "From our conversations with the government, I anticipate their proof on this issue would be"?

THE WITNESS: No, sir, he did not.

THE COURT: You never had that?

THE WITNESS: No, sir.

THE COURT: Do you know if he ever talked to the government about that?

THE WITNESS: Not at this point.

THE COURT: At any point?

THE WITNESS: Yes, sir. At some point I believe that there was. Now, I could be wrong. But when I was found -- after my trial, for the jury instructions -- this is after I've put on all of my -- after I've testified and the trial is over, the jury is now able to go deliberate, they have a -- a conversation, the government and my attorneys, and it's in the transcripts about aiding and abetting. Okay?

The judge at my trial in those transcripts said aiding and abetting -- the government's arguing, "We need an aiding and abetting instruction."

I assume that to be the same thing here, because who did I aid and abet? The judge said, "You're not going to get it. We're not going to have an aiding and abetting," because Mr. Nesland argued, "Who did he aid and abet? There's no one else criminally liable."

So at this point in time he didn't, but at my trial, he did.

THE COURT: Okay. Go ahead to the next paragraph.

THE WITNESS: All right. So the four-level enhancement would not apply.

And then the government at paragraph 9 notes that (as read):

> A one-level increase applies pursuant to 2S1.1

And that's summarized on exhibit page 12, the next page. And it says in the second paragraph, the last statement, that does not apply.

So that's where Mr. Nesland used this sentencing memorandum to show me, "Richard, when the plea offer states the 30 years, that this is why they're wrong in their calculation. You're not going to get 30 years."

He did say, you know, "My advice is take the plea, because nine years is less than 17 1/2 years. But those -- those guidelines don't apply to you."

And that's just the conversation that we had.

THE COURT: Okay. Go to the next one in paragraph 10.

THE WITNESS: (As read):

> That the adjusted offense level is 40. Assuming a Criminal History I, the guideline range is 292 to 365 prior to an adjustment for an acceptance of responsibility. Applying a Level 3 for reduction of acceptance of responsibility results in a total offense Level 37, a guideline range of 210 to 262 months.

THE COURT: And what did you understand that paragraph to tell you?

THE WITNESS: I understood that to be is, if the Level 40 were correct, I took the plea agreement and I get a

reduction for accepting that plea agreement, my guideline isn't the 30 years; my guideline is less than that.

THE COURT: And not only the -- not only is the Level 40 correct, but also if the Criminal History I is correct.

THE WITNESS: Right. That's correct. Yes, sir.

THE COURT: So there were two variables, at least.

THE WITNESS: Yes, there were.

All right. So when -- so I received the plea agreement. Two days later he updates it with this sentencing memorandum. We went over it line by line, item -- paragraph by paragraph, and that's where he told me -- that's what he used to show me, "Richard, what I'm telling you is correct. You're looking at 17 1/2 to 20 years. You're not going to get 20 years, in my opinion, because you don't have any experience with the federal justice system, a criminal history. You're going to get 17 1/2 years."

And this is where he used to show me that the guideline that they said was incorrect.

THE COURT: And you understood what was in the October memorandum was his opinion, explanation of his opinion?

THE WITNESS: Yes, sir. Well, and along with the conversations that we had, that this is just memorializing it in writing. But it was consistent with the opinion that he

gave me.

See, back in June, when we looked at the June memorandum, the initial one -- so from March until October -- now we're in October. But if we go back to June, we're at 12 1/2 to 19 1/2 years. Nothing's changed here. He's still telling me 17 1/2 to 20 years. That's still -- the 19 1/2, 20 years. It's still the same advice that I'm receiving from him.

So now that I have the plea and this, it's now time for me to discuss -- now that I know the consequences, I need to discuss the issues with my family about accepting or rejecting the plea.

THE COURT: Did you ever have any discussions with Mr. Nesland about your chances of being successful at trial? In other words --

THE WITNESS: Yes, sir.

THE COURT: And what was your understanding of that?

THE WITNESS: My understanding was that he felt like we had several issues that were good for going to trial.

THE COURT: What were those issues?

THE WITNESS: There were a few issues. One was the -- there was a general counsel memorandum that was introduced as evidence at trial, which states that a nonprofit does not have to have a tax determination letter to

be determined a nonprofit 501(c)(3).

There was -- I had a financial expert witness come in, a forensic analysis done of the company. And based on the indictment -- this is what Mr. Nesland is telling me -- based on the indictment, I'm indicted for not having the present value of the future income stream of the obligations of the organization to the individuals. And my financial expert said that I had enough assets.

Now, at trial, the government had one expert. It's Mr. Mark Jarquish [phonetic]. And he stated that I was $10 million short. But he stated that he did not include all of the assets. So that's how he arrived at that number.

The -- so I had the -- the general counsel memorandum; I had the present value of the -- that Mr. Nesland -- because he had -- and in fact, when this happened in October, I was meeting with Mr. Pevnik [phonetic], the financial expert.

That's when -- because my trial was originally scheduled for November the 13th. It wasn't changed until February of 2013 until November the 6th, after this had expired. So during this time I'm meeting with Mr. Pevnik.

So we have the -- the general counsel memorandum, we have Mr. Pevnik's -- then the statute, 501, 508, that regulates nonprofits, and the 508 for new organizations said that a new organization must notify the secretary that they

are operating as a nonprofit. I had done that.

He felt like that that was a point in answer to your question about are there -- did you have discussions about your chance at trial.

And then there was -- I had a tax audit for 2006 to form the corporation. My wife and I made a donation of $25,000 to National Foundation of America. We wrote that off on our income taxes as a charitable contribution.

MR. KENNEDY: Is this an area you want to continue with? Because --

THE COURT: If you don't mind.

MR. KENNEDY: Go ahead.

THE WITNESS: So we claimed that as a charitable deduction.

In 2008, we were audited by the IRS for specifically our 2006 charitable contributions. The IRS -- that was in June. In October of 2008, the IRS sent back a letter, a no change letter. They did not make any changes to our tax return, and they accepted our contribution as a deduction.

So Mr. Nesland said, "You're charged with telling the public you're a 501(c)(3), and that donors can take a deduction." And he felt like that was in our favor to go to -- if we went to trial, that that could be --

That wasn't allowed. It was hearsay, according to

the judge. So it wasn't -- but that's another point.

And then there was -- so there's the general counsel memorandum; there was the 501, 508; the present value; the tax audit; and then the cease-and-desist orders were issued from Departments of Insurance and Departments of Securities in different states. This is when I operated the organization.

So I had some more -- some states issue cease-and-desist orders. Mr. Nesland did not believe that those would be admitted in the trial. They were not excluded from trial until after this plea offer expired. Okay -- because we had filed a motion for -- to exclude them, a pretrial motion. And the judge did not rule on that until -- I think it was, like, November 1st or something.

Having said all of that, Your Honor, that does not exclude me from entering into a plea agreement. What I am doing is I'm asking Mr. Nesland, what's my consequence of going to trial? I know, if I go to trial, it's a chance. I know that.

THE COURT: And you knew that because he told you that?

THE WITNESS: I knew that because he told me that, and I knew that because I can be found guilty.

THE COURT: And he told you that in -- on page 13. Look at page 13.

THE WITNESS: Yes, sir. He sure did.
THE COURT: All right. So you knew exactly what Mr. Nesland thought your chances at trial were?
THE WITNESS: At this -- when he wrote this email, he told me, "There's a high degree of certainty if you go to trial that you're going to be found guilty because of Mr. Kamer's testimony."
THE COURT: And the date of that is October 23rd.
THE WITNESS: Yes, sir, it is.
THE COURT: And the plea offer is still available.
THE WITNESS: Yes, it is.
THE COURT: All right. Go ahead.
MR. KENNEDY: Okay. Thank you.
Q. And which brings me to that -- the issue that this email on October 23rd -- and I think it's Exhibit 13 -- page 13 -- was the last contact you had with Mr. Nesland before you had to make the decision --
A. It is.
Q. -- is that correct?
A. Yes, sir.
Q. Now, you talked about -- a lot of discussions about the likelihood of success at trial and -- and various analysis that you went through with him, correct?
A. That's correct.
Q. Having said that, I think you said you still understood

that you could be found guilty?
A. Absolutely.
Q. But up to that point, and including this last contact, your understanding of the worst-case scenario was what?
A. The worst-case scenario was 20 years. But that came with a caveat that, "Richard, that's not going to happen. 17 1/2 years is what you're looking at."

The discussions that I had with my wife talking about the decision-making process, I got from Nesland the consequences: 17 to 20 years. He's telling me right here in writing.

I understand that fully. I comprehend that, 17 to 20 years. I now discuss -- I've been discussing for a week with my wife daily, if not numerous times a day -- I mean, it was numerous times a day, wrestling with -- I mean, the dilemma that I face is -- it's extremely besetting -- the decision that I have to make, to go to trial or to accept a plea and take nine years.
Q. Okay.
A. Nine years was a long time to me. 17 1/2 years is a long time. But neither one of those is a lifetime.
Q. Did you testify -- did you -- you testified that Mr. Nesland basically, through his memorandum and your discussion with him, told you that you would not receive 30 years, right? It would -- that the maximum range -- this

maximum range --
A. Very eloquently and --
Q. Let me finish my question.
A. Okay, I'm sorry.
Q. -- that the maximum range was not what was in the plea offer --
MR. MOORE: Objection, Your Honor. This is leading.
THE COURT: Sustained. Well, he didn't finish it, but -- so it's a little unfair.
Go ahead and finish your question.
MR. KENNEDY: Well, let me ask it a different way.
THE COURT: All right.
BY MR. KENNEDY:
Q. Understanding Mr. Nesland's opinion that you've testified to about the correctness, vel non, of the State's -- the government's estimate, what did you think he meant by his October 23rd email?
A. That I will receive a sentence between 17 and 20 years if I decline the plea, go to trial, and I'm found guilty. The worst-case scenario is 20 years.
Q. And did Mr. Nesland ever tell you that any sentence had -- had to be consecutive?
A. Never mentioned that I could receive a consecutive sentence.

Q. Did he ever ask you -- or advise you that you could receive up to 160 years?
A. Not a whisper of it.
Q. And I think you've already testified to his -- his opinion about whether you could receive 30 years?
A. He told me I will not receive 30 years. That is an incorrect calculation. I'm facing 17 to 20 years. I've got that in my final email.

It's now time for me to make a decision, give him the decision that I made. My wife and I are discussing the emotional consequences, the financial consequences, the mental and the physical consequences, the possibility of a broken home for years.

And I'm discussing what do I do? Do I take the plea or do I go to trial? I -- the determinative reason that I based my decision on had to do with the most precious asset that I have, and that's time. To me, Your Honor, nine years was a long time. It was a difficult decision.

THE COURT: So after you got the October --

MR. KENNEDY: 23rd --

THE COURT: -- the second sentencing memorandum -- yeah, the October, did you think the government was not going to make an argument for more?

THE WITNESS: Never.

THE COURT: You never thought that?

THE WITNESS: No. Absolutely not. Mr. --
THE COURT: Go ahead. I didn't mean to cut you off.
THE WITNESS: Well, Mr. Nesland told me they're wrong in their guideline calculation. We didn't have a discussion, "Hey, they're going to argue for more than what they're saying here."
THE COURT: But your common sense told you that.
THE WITNESS: Well, I've never been through the experience.
THE COURT: Well, you knew what they had written in their letter.
THE WITNESS: Mr. Nesland assured --
THE COURT: Not my question.
You knew what they had written in their letter?
THE WITNESS: In the plea agreement.
THE COURT: In the plea offer.
THE WITNESS: The plea offer. Yes. I knew what they wrote.
THE COURT: And he never told you, "And the government is not going to be able to argue for more"?
THE WITNESS: He did not say what you just said.
THE COURT: Or any words to that effect?
THE WITNESS: He said that they're wrong.
THE COURT: But still not my question though.

THE WITNESS: Well, I took that to be wrong in every area of the time.

THE COURT: That's not my question.

THE WITNESS: Okay, sir.

THE COURT: Did he ever tell you that the government would not be arguing as set forth in their plea offer for 30 years or words anywhere close to that?

THE WITNESS: No. Not during the plea discussions, he did not.

THE COURT: And again, your common sense would have told you that would have been wrong? Because the government can argue whatever it likes, just like you can argue -- Mr. Nesland could argue on your behalf, right? You knew that?

THE WITNESS: That didn't cross my mind, sir. That what -- he told me very eloquently and unequivocally that they're wrong in their calculation.

I understand that's different than the point you're making. It's just the real world, the way that it happened.

THE COURT: Did you think -- did you think the Court, Judge Sharp, was bound by Mr. Nesland's calculation?

THE WITNESS: I just thought Mr. Nesland was right. He had the experience. He was my advisor. He -- I took his advice.

THE COURT: Want to answer my question, though, please? If you can. If you can't, just say you don't know.

THE WITNESS: And that is about would Judge Sharp be bound by Mr. Nesland --

THE COURT: Mr. Nesland's calculation.

THE WITNESS: I didn't think about that, would he be bound by it.

THE COURT: One way or the other?

THE WITNESS: Yeah. I didn't -- I didn't -- I took -- I didn't think of that -- that didn't enter my mind, what will the judge do, when my attorney told me, "This is what you're going to get, Richard. I've got 40 years experience doing this."

THE COURT: Why not? Why wouldn't you have thought -- the judge is the ultimate decision-maker.

THE WITNESS: Yes, sir.

THE COURT: Why wouldn't you have thought about what -- or even ask Mr. Nesland, "What do you think Judge Sharp's going to do?"

THE WITNESS: (No response.)

THE COURT: Just didn't cross your mind?

THE WITNESS: Yeah, it just didn't.

BY MR. KENNEDY:

Q. How old were you in October of 2012?

A. I was 47.

THE COURT: What's your education background?
THE WITNESS: High school. And since I've been incarcerated, I've received a diploma from a Bible college for -- an associate's degree in ministerial studies. But at the time of trial, I've graduated high school.
BY MR. KENNEDY:
Q. How old was your youngest daughter in October of 2012?
A. Ten years old. Her birthday is October 17th. She was ten.
Q. And just so -- I think you may have implied this, but just so you state it, if you had known what the judge has been asking you, that Mr. Nesland was wrong and Mr. Nesland's advice to you was not accurate, and you -- you could receive 30 years, a maximum of 160 years, and those sentences by law had to be consecutive, would you have accepted the plea of nine years?
A. Yes, I would. I never knew that there could be a consecutive sentence. There was never a discussion of 160 years. There was never a discussion of spending my life in prison. There was never a discussion of me receiving 30 years, because when the 30 years came up in the plea, Mr. Nesland told me, "Richard, she's wrong."
THE COURT: And by accepting the plea, do you understand what that means?
THE WITNESS: Well, you -- you receive the nine

years. You plead guilty to two counts. Yes.

THE COURT: Okay. Whatever counts, you would have to plead guilty.

THE WITNESS: Yeah. There were two counts. Two counts. One money laundering and one mail fraud, and you have a nine-year sentence.

THE COURT: And you know you would have taken an oath.

THE WITNESS: Yes, sir.

THE COURT: And the judge would have asked you under oath are you in fact guilty of those two counts?

THE WITNESS: Right.

THE COURT: And you would have told him yes?

THE WITNESS: I would have pled guilty to those two counts. I made business --

THE COURT: Okay. You're not answering my question.

THE WITNESS: Yes. I would have said yes.

THE COURT: And you would have said yes because that would have been the truth.

THE WITNESS: That would have been the truth. Yeah. I made business mistakes.

THE COURT: Well, what does that have to do with whether or not you're guilty or not guilty of --

THE WITNESS: Well, I never had -- maybe I'm

answering a little too quickly. I don't know. I'm not familiar with the process of accepting a plea and rejecting the plea. I never had any intent to do -- to break any law. Never, Your Honor. I didn't -- so I didn't feel like I was guilty in that regard. Of having intent to break the law.

I testified at trial over a two-day period to every allegation in the indictment. And at sentencing, the government did not feel like that I committed perjury. I told the truth. I did not receive an obstruction of justice enhancement.

And so I testified that, yes, I said I was a 501(c)(3) nonprofit organization. Your contributions are deductible. So I agreed that I did the acts that they're saying that I did. So I could have said that I was guilty of that, because that's what they're saying that I did. But. . .

THE COURT: And your guilty plea would have included an element of intent.

Would you have been able to testify under oath and agree under oath that you had the intent to engage in wire fraud and mail fraud?

And again, you can say yes, no, or you don't know.

THE WITNESS: Well, that's a difficult question because it was never presented to me by Mr. Nesland.

THE COURT: I'm presenting it to you.

THE WITNESS: No. I understand. I appreciate that. And so I'm trying -- I'm trying to think about that.

THE COURT: And you can say yes, no, or I don't know.

THE WITNESS: Well, Your Honor, I believe that I would have, because I would have accepted the responsibility of my actions and that I broke the law.

THE COURT: Okay. And you would have testified under oath, pleading guilty, that you had the intent to engage in wire fraud and mail fraud?

And I'm going to take it by your delay that you're just not sure.

THE WITNESS: I'm not sure because I think my attorney would have had to explain that to me because that was never presented to me. So yeah. I'm trying to be forthright with you, that I --

BY MR. KENNEDY:

Q. So with regard to that question and the -- and the range that you were facing, if you understood that your exposure could have been up to between 30 and 160 years, that -- would you -- would that have made you more amenable to admitting guilt?

A. Well, I can tell you that I would have accepted the plea. My breakoff was 20 years.

So I guess, Your Honor, that leads me back to your

question. I would have had to admit that I had intent to break the law because I am not going to trial -- the -- the exposure of spending my -- the rest of my life in prison, I'm not going to trial for that because that was never presented to me that that was a possibility.

The judge at my sentencing said, "I don't believe you deserve to die in prison." I never knew that was an option. I didn't know there was an option for me to pass away in prison. And so --

MR. KENNEDY: I have nothing further.

THE COURT: All right. Cross-examination.

MR. MOORE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. MOORE:

Q. As discussed, you testified at the trial, correct?

A. Excuse me?

Q. You testified at the criminal trial?

A. Yes.

Q. You raised your hand and swore to tell the truth?

A. I did.

Q. And you understood that was a solemn oath?

A. Yes, sir.

Q. And you understood there would be consequences when you raised your hand to tell the truth?

A. Yes.
Q. And when you testified at trial you said, I quote, I am not guilty, and I want you to know that I am not guilty. Was that the truth?
A. That was in the opening statement?
Q. That was your statement, right? You said these words: "I am not guilty, and I want you to know that I'm not guilty."
You said those words?
A. I did.
Q. From the jury box?
A. From the witness stand.
Q. Yeah, from the witness stand.
A. I did.
Q. Were you being truthful when you made that statement?
A. I never had any -- I thought I was. I never had any intent -- see, I was just basing it off the intent that I had to take someone's money. I never had any intent to take someone's money and not return it under the obligation of the organization.
Q. So was that a truthful statement or not truthful statement, the I am not guilty?
A. I -- I thought it was a truthful statement.
Q. Let me ask it a different way.
Are you guilty of mail fraud, wire fraud, and

money laundering?
A. I was found guilty of that after a trial. Yes, sir.
Q. And you were found guilty because you're in fact guilty of it, correct?
A. That's right. I was guilty of those charges.
Q. And when you testified "I am not guilty," that wasn't truthful, that was a lie?
MR. KENNEDY: Objection. Asked and answered.
THE COURT: Okay. Sustained. I think he's -- I think I know his position on that.
MR. MOORE: Okay.
Q. And let's -- I'm going to show you what's been premarked as -- I think we're on 3.
THE COURT: I think we've got 1, 2, but we don't have 3 in evidence.
MR. MOORE: Okay. So this will be 3.
Q. Do you recognize these documents?
A. I do.
Q. And are these documents emails between David Kamer, who was your tax attorney, and you?
A. They are.
Q. And in these documents, does David Kamer tell you to stop representing your organization as a 501(c)(3)?
A. He does.
Q. And he tells you this repeatedly; is that correct?

A. He does.

MR. MOORE: Your Honor, I would ask to admit Document 3.

THE COURT: It's in evidence. Admitted.

BY MR. MOORE:

Q. And after this, you didn't listen to his advice, did you?

A. Well, we made some changes. And --

Q. Was that a yes or no? Did you stop representing yourself as a 501(c)(3) organization after receiving these series of emails from David Kamer?

A. No. I said that I was a 501(c)(3) organization.

Q. You kept on saying it after your lawyer gave you advice to stop saying it?

A. That's correct.

Q. So you ignored your lawyer's advice here; is that correct?

A. Well, it's not that black and white. Because at trial, he even stated that this was -- he had -- takes a conservative opinion. So it's just -- him and I had talked about being a 501(c)(3). We had discussed the general counsel memorandum. He had never told me to stop offering the product that I was offering. But --

Q. So it says here -- I'm going to -- if you turn to the first, second, third, fourth -- fifth page, where it says 2

of 3. The second sentence (as read):

Namely, something to the effect that you are not a 501(c)(3) organization; status is pending.

And then if you go down to the third paragraph, it says (as read):

Second, he has issues with the representation that you have been making in your presentation materials that NFA is a 501(c)(3) organization, since it is not.

THE COURT: Slower. Just slower.

MR. MOORE: Oh, sorry.

Q. Do you see both of those sections?

A. Yes, I do.

Q. And so when he says "since it is not," what do you understand him to be saying?

A. He's telling me that the organization is not currently a 501(c)(3) organization.

Q. But you ignored his advice and continued to represent it as if it was a 501(c)(3) organization?

A. Well, we made the changes -- he's asking me to make changes in my brochures. He's asking me to make changes in my contracts. And he's asking me to make changes, like, under my signature line.

We initiated those changes. So I wasn't just disregarding his advice. It's just there were some contracts

out there that advisors had out in the field, and they sent those in, and we didn't replace them with ones that had taken off that information, but. . .
Q. So is your testimony here today that you didn't ignore his advice; that you followed his advice? Is that your testimony?
A. No. I just -- it didn't -- I tried to adhere to the advice. Now, there -- I did continue to say that I was a 501(c)(3). I never had had a problem with him speaking to an advisor and him discussing that -- his opinion, that we're waiting on a tax determination letter. I was always telling people that we did not have a tax determination letter.
And ultimately we took off that we are a 501(c)(3) out of our contract and said we're a Tennessee nonprofit.
Q. Simply put, you lied to people when you said you were a 501(c)(3); isn't that correct? You were lying?
A. Yeah, that -- it wasn't a 501(c)(3). It was determined that it wasn't a 501.
Q. And because of these lies, people gave money to your organization?
A. Well, I mean, I -- the way that I understood the tax code, that -- when I formed the organization, that you can operate as a nonprofit for 15 months and then notify the IRS that you're a 501(c)(3). So the Treasury regulations and the Internal Revenue Code state that -- and the general counsel

of the IRS says that it's the organization that is the 501, not the IRS determining that it is.

So I followed those parameters and filed the correct documents with the IRS, with the state agency.

Q. But all the time all those documents were pending, you falsely indicated you were a 501(c)(3), knowing based off Kamer's email that that was an untrue statement?

A. Well, Kamer didn't -- he wasn't -- he operated from January of '07 -- January of '06 to January of '07, and I had never -- I wasn't in discussion with Kamer. He came on board in '07 to represent me because we haven't received our tax determination letter.

So during that time, though, once he came on board, I had discussions with him. He said, "Hey, don't say this, like what you're saying here." He did say that.

Q. And after that conversation, you kept on telling the untrue statement that you're a 501(c)(3)?

A. I told people that we are a 501(c)(3) and we don't have our tax determination letter, but we are a 501(c)(3).

Q. Okay. And then you came into trial and testified that you were not guilty?

A. Again, I always thought that there had to be a -- an intent to break the law. So I am guilty of breaking the law. And when I formed the organization, I never had any intent to break the law.

Q. You're a sophisticated business person, correct?
A. Well, I don't know. I've made some mistakes. I don't know if I would go that far.
Q. You were president and executive of a company?
A. Yeah, I formed National Foundation of America.
Q. That managed millions of dollars in assets?
A. Well, we used an outside representative, but yes, sir.
Q. So you can read and write the English language?
A. Yes, sir.
Q. You can do basic addition and subtraction?
A. Yes.
Q. Is 360 months more than 20 years? Do you know that? Do you know?
A. 360 months more than 20 years?
Q. Is it more than 20 years?
A. Yes.
Q. So if you were to receive a document that you could get up to 360 months, would that have made you aware of the fact that there's a possibility you could get more than 20 years?
A. If my attorney is -- if it's a document from my attorney, then I would have taken notice of it.
Q. You ignored your Attorney Kamer's advice, why would your Attorney Nesland's advice have more weight than the tax attorney whose advice you got and ignored?
A. Because, sir, I'm facing criminal charges. And if I'm

not taking Mr. Nesland's advice and avoiding that, I'm -- when the government tells me that I am subject to 30 years in prison, and my attorney tells me flat out, unequivocally, "She's wrong; you're not facing that kind of time, but you are facing 17 to 20 years," then I'm -- I'm listening to his advice.

Q. Your attorney never told you flat out, unequivocally, that you're not facing that kind of time, did he? He never said that?

A. Yes, he did.

Q. He said, "There's no possibility" --

A. He said the government's wrong.

Q. That's not my question.

Did he flat out, unequivocally, tell you there was no possibility that you would get more than 20 years?

A. Yes. He told me you are not going to receive more than 20 years. He even told me 20 years -- you're not going to receive that. But 20 years was what I based my decision upon.

Q. Did you read the letters that your attorney sent to you, the emails and then the -- the calculations your attorney did?

A. Yes, I did.

Q. Was there equivocations in that? Did he tell you that there are multiple factors and it depends on what a judge

rules on different things?
A. Well, what email are you referring to?
Q. All right. Let's go line by line. All right. Let's start with what would be page 5. At the top line.
A. All right. And it says "Page 4 of 4" in the top left-hand corner?
Q. Yes.
A. Yes, sir.
Q. It says (as read):

> In the event Mr. Olive's criminal history career is I, the total offense level is 34; the sentencing guideline range is 151 to 188 months.

A. Right.
Q. "In the event" is not a flat-out you can't possibly get higher than this.

That means there's other factors; isn't that what that means?
A. Yeah. In the event. That would mean there's other factors.
Q. Yeah. And at this point, you know you have previous convictions, correct?
A. I have the DUIs.
Q. And you have a forgery conviction as well, don't you?
A. No. The judge excluded that because -- on my PSI that's taken off because that's not a correct charge.

Q. That wasn't my question.

I'm saying at the time you received this letter, you know you had previously been convicted of forgery?

A. I had signed my dad's name to get in his lockbox when he passed away. And so it's not what the charge is there.

Q. Were you convicted or not is my question? Yes or no?

A. I pled guilty.

Q. So that is -- so then you therefore had a conviction?

A. Well, it was expunged.

Q. Okay. So you pled guilty to forgery?

A. I did.

Q. Okay. So you were aware that you did have some criminal history? Right? You were aware at the time you got this letter?

A. No. Mr. Nesland told me that that wouldn't count.

Q. Or did he say, "In the event that your criminal history category is I," which implicates the fact that there's a possibility it may not be I?

A. Well, no. When we had our discussions, sir, what he told me is -- what was important to me is I wanted to know, Mr. Nesland, how much time am I looking at? And that's what our discussion based on.

And he told me -- I shared all the information with Mr. Nesland. And he told me the maximum amount of time that I could receive is 20 years.

THE COURT: Well, if that's true, why wouldn't you take nine?

THE WITNESS: Well --

THE COURT: Why reject nine, even if that is what Mr. Nesland told you? Twenty is still more than nine.

THE WITNESS: Well -- and my wife -- well, he told me the 20 wasn't going to happen. But I knew that 20 could happen. But my wife and I, through all the decision-making process of taking what the consequences that Mr. Nesland said that I would receive after trial, we decided that if I could receive over 20 years, that I would plead guilty.

THE COURT: You're not answering my question.

THE WITNESS: So I didn't take that -- I took a chance and went to trial.

THE COURT: Why? Given the October 23rd memo where he says you're going to be found guilty, why risk 11 years?

THE WITNESS: Because of the -- in the -- like in life, when you're going through this decision and struggling and going -- pondering it this way and that, there's just a cutoff of where you decide, look, I'm -- here's my consequences. From March until October, my attorney's telling me the same thing. His advice hasn't changed. I'm prepared -- listening to his advice. We're preparing for trial.

Then I receive -- this offer come in. To me, nine years is a long time, Your Honor.

THE COURT: But it's less than 20.

THE WITNESS: Yes, sir, it is.

THE COURT: So why turn down nine?

THE WITNESS: Well, there's a possibility --

THE COURT: Of what?

THE WITNESS: Of winning at trial.

THE COURT: After you got his email of October 23rd, you thought there was a possibility?

THE WITNESS: His conversations with me -- there were times -- where he told me the bullet points that I went through with you, about where he felt like we had a case -- a good case for trial. But that's the determinative reason.

Yes, even though seeing his email and saying there's a high degree of certainty, yes, sir.

THE COURT: Very high.

THE WITNESS: Yes, he did say that.

THE COURT: So why turn down nine?

THE WITNESS: Because I had decided that if 20 -- 17 1/2 is what I'm facing -- and he kept telling me 17 1/2, 17 1/2, 17 1/2 -- I've decided I'm going to take my chances and go to trial. I would have never done that if I --

THE COURT: I don't understand the chance you're taking. After he tells you you are going to be found guilty

beyond a reasonable doubt, what's the chance? What are you basing that chance on?

THE WITNESS: That it's based on -- on the time. That I was willing to risk the additional time.

THE COURT: Why are you willing to risk the additional time once your lawyer tells you you're going to be found guilty? What are you basing that on?

THE WITNESS: Well, my wife and I are discussing that. Nine years is a long time.

THE COURT: You're not -- do you not understand my question?

THE WITNESS: Well --

THE COURT: If you don't, just tell me.

THE WITNESS: I believe I am.

THE COURT: I'm not talking about the maximum time. I'm trying to figure out, why do you think you could go to trial and win?

THE WITNESS: My conversations -- that's not why I turned down the offer.

THE COURT: That's my question. That's my question. Why do you think you could go to trial and win? Tell me as best you can. If you can.

THE WITNESS: Well, I had conversations with Mr. Nesland where he felt like that we had a good case at trial even though there's that in writing. Yes, sir. I

understand that.

THE COURT: And that was -- the October 23rd, which I guess now is Exhibit --

MR. UFFERMAN: 1(e) Your Honor.

THE COURT: -- 1(e), that came close in time to your deadline to accept or not accept the plea.

THE WITNESS: Yeah. That's the day before.

THE COURT: That's the last word you get from your lawyer.

THE WITNESS: And it's consistent with everything he's told me up until then as far as the time goes. And that's what I'm basing --

THE COURT: Again --

THE WITNESS: I understand.

THE COURT: -- I'm not talking about time. I'm trying to find out, two days before the offer expires, why do you think you could go to trial and win?

If you don't know, just tell me you don't know.

THE WITNESS: No, I don't know that I can.

THE COURT: Let's take a break.

MR. MOORE: Yes, sir.

(Recess.)

THE COURT: All right. Be seated. Okay.

Continue with cross-examination.

BY MR. MOORE:
Q. I want to turn your attention to what's page 7. And looking at paragraph 10, do you see there where it says (as read):

> The corresponding term of imprisonment is 292 to 365 months?

A. I do.
Q. And you received this -- this exact letter, correct?
A. Yes, I did.
Q. And so you understood from receiving this letter that the United States of America thought that your guidelines range went up to over 30 years?
A. Yes, sir.
Q. Okay. Then if you could turn to page 9. And if you look at the last sentence, it says -- well, I'll read the whole paragraph for context.

It says (as read):

> You noted that the extent of Mr. Olive's alleged receipts of benefit was $153,000. The question is whether he received money based on a misrepresentation that he was acting on behalf of a charitable organization when the funds were received, or did he represent that the funds would be used to cover office expenses? If the latter, I believe you have an argument against applying

the enhancement.

That's not an unequivocal saying that the enhancement doesn't apply, is it?

A. No, it's not.

Q. So it's a possibility that this enhancement will apply?

A. That's correct.

Q. So you understood when he told you the guideline range that there was a possibility you would have a higher guideline range if some of these enhancements applied that he was going to hopefully argue against?

A. This is where he told me that this is one of the enhancements that he was not unequivocal about saying the government's wrong in their 30 years. So this is what he used. And it brought it down to 17 1/2 years. But he's saying that that one is just an argument.

Q. Okay. So you understood that you could go up higher if -- if this argument is unsuccessful?

A. No, sir. This is used to say that the 30 years is incorrect. And this document -- so this one, if it applies, it doesn't mean that I'm still subject to 30 years. He's saying this is one where there's an argument against applying this enhancement.

But the ones that we went through that Mr. Nesland said do not apply, they're the ones that brought it down. And he showed -- because the others we're assuming apply. So

we're assuming this one applies. There's just an argument that it could not apply.

Q. All right. Let's turn to page 10. And if you look at the second full paragraph. It says (as read):

> This is little information with the indictment or the proposed plea agreement to determine a rational basis to apply this adjustment. The government's prove that the offense -- the government must prove that the offense was especially complex or especially intricate. The indictment notes that the offense occurred between January 26th, 2006 and May 2007. However, there is further information to address the issue of sophistication. This may be an area we explore to form an argument that the offense did not involve sophisticated means.

A. Right.

Q. So here again, he's equivocating. He's saying that maybe it applies, maybe it doesn't?

A. This one we're assuming applies because that's not the one that he's taken off to say the government's wrong. This one applies. Possibly -- there's an argument, but when this is used for me to determine, hey, here's the plea agreement that the government says you have 30 years, Mr. Nesland is saying they're wrong in that calculation. And this one, he's

not saying, is what -- where they're wrong at. This one applies. There's just an argument to bring it down. Not to raise it up higher.

Q. Okay.

A. So if this one didn't apply, then I'm less than 17 1/2 to 20 years.

Q. But you understood that this -- all of this is estimates, right? He doesn't know what's going to apply. He didn't know what's going to apply. He's just giving you his best guess as a lawyer?

A. Well, he gave me his advice, and his advice was you will not receive the 30 years. They're wrong; it's 17 1/2. It actually goes down below 17 1/2. But it's 17 1/2 to 20 years is what he's put in writing to me. And I'm aware of that.

Q. All right. And let's turn to page 11. And the second-to-last sentence of the first paragraph. It says (as read):

> One avenue to explore is if the position Mr. Olive held significantly facilitated the commission or concealment of the offense. This can also be addressed by arguing that the offense conduct was not difficult to detect or the victims did not view Mr. Olive as maintaining a position of trust.

This is yet another equivocation, right? He's not saying, "These are the exact guidelines; I know 100 percent."

This is saying my best guess, right?
A. What he's -- what he's saying with this document is that this guideline here that you're referring to with the fiduciary and customer representation, is that this guideline -- we're not saying the government is wrong in this. This one may apply. There's an area to argue that it doesn't. That brings me down below the 17 1/2 to 20.
That doesn't -- this included does not take me past 20 years. Mr. Nesland is saying the ones that get you where the government is not correct in their 30 years, they're the ones that we went through here and discussed that this guideline does not apply. So with this guideline applying does not get me past 20 years. If it didn't apply, I would be below the 17 to 20. That's our conversation.
Q. I understand that. But I'm trying to understand if you knew at this time that he's giving you estimates and it's not ironclad? Nothing's ironclad? Did you understand that?
A. What was ironclad was that the maximum exposure that I faced, what I based my decision on, was 17 1/2 to 20. It went down to, like, 14 to 17 1/2. And then, if the guidelines weren't followed, there was never a discussion that it would be more than 20. Never, sir. It was always it would be 11, 12, 13. It was less.
Q. Okay. Turn to page 12, please.
A. I'm there.

Q. So it says in the second full paragraph (as read):

The government at paragraph 10 notes that the adjusted offense level is 40. Assuming a Criminal History I, the guideline range is 292 to 365 months prior to an adjustment for acceptance of responsibility. Applying the three-level reduction for acceptance of responsibility results in a total offense level of 37 and guideline ranging of 210 to 262 months.

Does it ever say here that that's impossible for it to happen to you? Does it say that -- does that say that anywhere in that paragraph?

A. Does it say that it's impossible?

Q. It's impossible for you to be this guideline range?

A. No. He just told me that that guideline range doesn't apply to me.

Q. And then let's read the next sentence. (As read):

Based on the issues noted above, the best-case scenario would be a base offense level of 29.

Does it tell you that you're going to an offense level of 29?

A. No.

Q. So it's just telling you the best possibility?

A. Every -- right. Every discussion we had regarding the guidelines was always 17 1/2 to 20 or less than. There was

never a conversation of more.
Q. But here it says 365 months. So you're at least aware of the theoretical possibility of 365 months?
A. That's referring to the plea agreement that Mr. -- no, I'm not -- I'm not aware that there -- sir, I'm not aware that there's a possibility for me to get 365 months because Mr. Nesland told me, "Richard, they're wrong. That's not" -- that's what he said. "Richard, Kat is wrong. That's not going to happen."

So that's what I -- when I -- I mean, this is an extremely troubling time. And that's what I took, was his advice about that. Because I'm deciding, am I going to take the plea or am I going to trial.

Q. All right. Let's turn to page 13. And the second paragraph that starts (as read):

> You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, will result in a sentence in the range of 17 to 20 years.
>
> Do you read that phrase there, "if followed"?

A. Right. I read that whole sentence. I understand that.
Q. So "if followed" means there's a possibility that the judge is not going to follow his -- his guidelines, right?
A. And every time that we discussed that, it was less than

17.
Q. That was not my question. I had a yes-or-no question.
It is, does "if followed" mean there's a possibility that the judge will not follow the guidelines that your lawyer set out?
A. There is that possibility. And it would be less. That's what Mr. Nesland told me.
Q. No, no, no. So here it doesn't say that?
A. No. That's what he told me. He didn't write that.
Q. So you're saying that all of the contemporaneous documents he sent to you were different than the oral representations he was making to you? Is that your testimony?
A. No, sir, I'm not. The sentencing memorandums from June and this sentencing memorandum in October, they both go below the 17 1/2 years. When you take off the -- the guidelines that do not apply, because there's a couple in there where this does not apply, then he never discussed that there would be more than 20 years.
So the "if followed" to me is -- and my discussions with him is, it's going to be less if it's not. But I based my decision upon the 17 to 20 years. It was a difficult decision. That's a long time.
Q. Do you understand who determines the guidelines range? Is it the judge or is it your attorney?

A. The attorney tells me the process. The judge is the one that sentences me.
Q. So -- but who is the final decider of what the applicable guidelines is, the judge or your attorney?
A. The judge is the final determination.
Q. And did -- did your lawyer ever tell you that in this case the judge isn't going to decide; I'm going to decide, and this is the only guidelines applicable to you? Did your lawyer ever tell you anything like that?
A. No. Well, what he told me -- he didn't say, "The judge is going to decide." He told me, "Here's what you're facing." So part of that, yes, "I'm telling you what you're facing."
Q. But he always told you it was up to the judge at the end of the day to decide your guidelines, correct?
A. No. He didn't caveat it with, "Of course this is the judge." It's just that the judge sentences you, and if the judge doesn't follow the guidelines, then it's less than the 17 to 20.
Q. But here, when he says "if followed," he's telling you right there that it's up for the judge whether he's going to follow this recommendation he's making or the judge can determine his own self what the guidelines is; isn't that correct?
A. It is. And the discussion was not that it would be

greater than.
Q. Did you ever respond to this October 23rd, 2012, email?
A. I replied to him via phone.
Q. Okay. But you never emailed him back?
A. No, I didn't.
Q. What did you tell your lawyer when you replied via phone?
A. I told him under the circumstances that I'm declining the plea.
Q. Did you ask for more time to consider the plea?
A. No. I had -- I had taken every day, for several different conversations every day, and discussed the plea. And the advice had never changed.
Q. Did you ever make a counteroffer to the government? Say, "Hey, I can't do nine years but maybe eight"? Did you do that?
A. No, we didn't.
Q. And at this point had you made up your mind if you were going to testify at trial?
A. I can't say that it was determined at this point in time. I was preparing for trial. And so I just don't recall if I -- you know, if that was determined that I was testifying. I think that I had always planned to testify if I went to trial. I mean, this happened three weeks before the scheduled trial date. And. . .

Q. Had you discussed these series of emails from your tax attorney, Kamer, with your lawyer, Mr. Nesland, your criminal lawyer, Mr. Nesland?
A. Had we? Yes. For -- for trial preparation, yes.
Q. And he straight out told you that these emails are bad for you, didn't he?
A. Those emails are bad for me, and that's one reason why I was so struggling with considering the plea, is because that is bad.
Q. And he told you that based off these emails, you were going to be convicted? He told you that, right?
A. Well, he said there's a high degree of certainty. And that's what made my choice very difficult.
Q. And he told you that because of these emails, the only chance you had was to testify? Isn't that correct?
A. Well, I mean, we had discussed that it's probably best that I testify. I just don't remember the timeframe of when that was. But I'm sure -- like, all along I was preparing for trial, and part of that was to testify. But -- so --
Q. So the reason you didn't accept this plea offer is because you thought you could sit up in that witness stand and explain away everything? That's why you didn't accept it, right?
A. That's not correct.
Q. You thought you were going to win, didn't you?

A. No, I didn't know if I would win or not. But there was a chance that I took, but it wasn't the chance I thought I was taking.

Q. Didn't you tell your lawyer -- and I quote -- "We will win"? Isn't that -- isn't that what you would say to your lawyer?

A. Well, I would say, "We're going to win. I'm -- I'm -- I hope I win today. We're going to win."

Q. Yeah. And you thought you were going to win based off of your testimony?

A. Well, the testimony would be part of the trial, but that's not the reason why I chose to go to trial.

Q. You thought you could explain why these emails don't say what your lawyer told you the jury would likely find them to say? You thought you could explain that, right?

A. I don't know that I necessarily do a good job today with all the nerves and emotions of explaining it today. Because it's a difficult situation.

It's -- I didn't think that I can get up there and just explain things away. It's not that ethereal of a situation. It's life. It's something I'm facing. It's -- it's a tough decision.

Q. And you didn't counter the government's offer or ask for more time because you were never going to accept any plea offer, were you?

A. That's not correct.
Q. You didn't believe you had done anything wrong?
A. I didn't have any intent to do anything wrong. But I made mistakes. I did things that I shouldn't have done.
Q. At this point, you maintained your innocence; isn't that correct?
A. Well, I admitted to what the government indicted me of doing. When I testified that I said I was a 501, I didn't say that I didn't say that misrepresentation. It's -- so --
Q. And I quote. Didn't you tell your lawyer, "I'm not -- I am not going to admit to something that I did not do."
Didn't you say that to your lawyer?
A. I may have at one point in time said that.
Q. So you were never going to accept a plea offer. You -- your testimony today is you didn't do it. There was no plea offer the government would have made that required you to stand up and say, "I'm guilty of these crimes," that you would have accepted?
A. That is incorrect. I almost accepted this plea agreement, and I based my decision on the advice regarding the exposure of my time. That's the determinative reason. It wasn't my guilt or my innocence. That's not the determining reason of why I chose to go to trial.
I chose to go to trial based on the amount of time that I could receive. And never once was there a hint that I

could die in prison. I would have accepted the plea agreement if I had known that the exposure that -- the chance that I took is not the chance that I thought I was taking.

And I understand that he tells me there's a high degree of certainty. I understand 20 years is a long time. I agree with that. Nine years is a long time. 17 1/2 years is a long time. I based my decision to go to trial on the amount of time that me and my family faced. It wasn't based on my guilt or innocence.

You -- I mean, we prepared to go to trial. We do these things. But in real life, when you're struggling about making the decision, it's a decision I have to make, and it's -- it's very hard. It's very troubling.

Q. But you do admit that you saw the government's offer which noted that the government believed that you faced up to 30 years?

A. That I saw that offer? Yes, sir, I saw that offer.

Q. And you understand that that was the position of the United States of America, that these were the applicable guidelines to you?

A. I understood that was the government's position.

Q. And then -- and you do admit that you got this previous email from Lawyer Kamer, who gave you some advice and you chose not to follow it?

Is that -- you admit that, correct?

A. Well, again, we made the changes that he was saying. They weren't made overnight.
Q. That's a yes-or-no question.
Did you follow the advice that your tax attorney gave you --
MR. KENNEDY: Objection. Asked and answered.
THE COURT: Go ahead. Overruled.
BY MR. MOORE:
Q. Did you follow the advice that your tax attorney gave you about whether to hold out your organization as a 501(c)(3)? Did you follow it or did you not follow it?
A. I said that I was a 501(c)(3) --
Q. So you did not follow it?
A. -- and if anyone wanted to speak to Mr. Kamer -- and this was at trial -- that he was free to speak to them with me or without me.
Q. So the sum of your testimony is you want the Court to believe that though you didn't follow Mr. Kamer's advice, that Mr. Nesland's advice to you on your guidelines range was the gospel and you didn't entertain the possibility that there could be other viewpoints.
Is that the sum of your testimony?
A. Sir, the testimony -- the advice from Mr. Nesland has to do with a criminal charge of me spending time in prison. And that's different than a matter of a civil issue of -- where

you're trying to compare the two -- just -- I mean, I'm the only one in this courtroom that's probably faced this situation of the criminal charge. I'm just trying to explain how it is in life. That's a difficult thing.

So with Kamer's testimony versus -- advice regarding Mr. Nesland's advice, I followed Mr. Nesland's advice as far as taking that information in to make the decision for me and my family. And that's what I based it on.

Q. And then you understood that Mr. Nesland was just giving you his best estimate as to your guidelines? You understood that, correct?

A. Mr. Nesland was unequivocal when he told me very eloquently that the government is wrong; he's right. So I did not take that, "Richard, this is the best estimate." It was, "We're breaking down this paragraph by paragraph." This is what I'm facing, because that's what he told me that I'm facing. It's what I based my decision upon.

Q. And you recognize, though, that -- there's written documentation he gave you that there are many places where there's -- he has not full clarity on which sections will apply.

You understood that, right?

A. There's -- I would dispute that. There's places where he says that this is an argument; that this guideline

applies. So we didn't consider -- I didn't consider that to be a guideline -- well, that's going to bring my guideline down; that's going to bring my time down. I considered those to be against me.

The ones where he was -- where he said this guideline does not apply, that's what he used to explain to me that this is what brings you to the -- it's actually, like, 14 to 20 years, somewhere in there is your guideline, and 17 1/2 is what the judge is going to sentence you on.

Q. In any place in any of these memos or your written documentation does he ever tell you that any single enhancement from the government with certainty will not apply? Did he ever put that in writing a single time?

A. Well, he says -- like, on page 11 of the evidence, if not -- the four-level enhancement would not apply because there's no one else that's criminally responsible. So that guideline doesn't apply.

Q. So you read that as saying unequivocally that four-level enhancement will not apply?

MR. KENNEDY: Objection. The document speaks for itself, Your Honor.

THE COURT: I agree.

MR. MOORE: Well, it's his understanding, Your Honor.

THE COURT: Go ahead. Go ahead. You can answer,

if he. . .

THE WITNESS: Well, my understanding and my conversation with my attorney -- because this is going through the plea agreement -- is that this guideline does not apply to me.

The guideline isn't what matters to me, sir. They -- I mean, I'm foreign to the guideline. It's the amount of time.

So when he goes through this and says, "This guideline doesn't apply to you," this is how I -- we get to the like 14 to 20 years. But 17 1/2 is what he told me. And I understand 17 to 20 is what's written. And I take that into consideration. 17 1/2, 17 1/2. That's what he always told me.

So the way that I -- my attorney arrived at that, is showing me: And this guideline doesn't apply.

BY MR. MOORE:

Q. But he doesn't say here unequivocally --

THE COURT: I think I can read it.

Anything further?

MR. MOORE: Thank you, Your Honor. Nothing further.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. KENNEDY:

Q. With regard to your guilt or innocence, you understand the distinction between being guilty and believing you're innocent? Do you understand the difference between --

A. Yes.

Q. -- believing you're innocent and not being innocent? Do you understand that distinction?

A. Yes.

Q. You were asked -- you mentioned your intent. And that when you began your business, you didn't have the intent that you were ultimately found to be guilty of.

Do you understand that?

A. Yes.

Q. Okay. So is it your testimony that it's your belief when you were going through this process that you -- that you were innocent?

A. It's my belief that I never intended to break the law.

Q. Okay.

A. But, having said that, sir, I can enter into a plea agreement and it say that I agree to breaking the law for mail fraud and wire fraud, because I -- I wrestled with the idea of accepting the plea agreement or going to trial. That's this whole issue of what I wrestled with.

And I understand that to enter into the plea

agreement I have to plead guilty to those charges. And I think that maybe there's some confusion because I'm not good at communicating it. But I can enter in and tell the government that I am guilty of the mail fraud and the money laundering count and plead guilty to that, even though I approached it like -- from an area that I know -- man, that wasn't my heart. Okay? It's not my heart --

Q. But you were able to --

THE COURT: Let him finish.

MR. KENNEDY: I'm sorry.

THE COURT: In your heart. Go ahead.

THE WITNESS: It wasn't my heart, my intent, to break the law. So I understand that I can break the law and admit guilty in the plea agreement even though my heart wasn't wrong. I mean, I didn't start out on this path to scheme people out of their money --

BY MR. KENNEDY:

Q. Okay.

A. -- and to break the law.

Q. But you can also understand that having the intent to do specific acts that leads to a crime, that constitutes a crime, means you had the intent to do those acts, right?

A. Right.

Q. Correct?

A. That's correct.

Q. How old were you -- you say you were 47 --
A. Forty-seven.
Q. -- in October of 2012?
If you got a -- received a nine-year sentence relative to the plea, you would have been -- what? -- 56, minus good time, when you got out?
A. Right.
Q. If you went to trial and you were found guilty and you received the 20 years that you discussed with Mr. Nesland, you would be how old?
A. Well, are you talking about with good time taken off?
Q. Yeah.
A. Hmm? I mean, because I was 47, so that's 67, but with good time I would have been 62 years old.
Q. So you -- you would have had some life left?
A. Absolutely.
Q. If you were correctly informed about your exposure and you -- that you could get a 30-year sentence, how old would you be when you were released on that sentence?
A. If I -- I'm sorry? I didn't understand your question.
Q. Well, you -- you're serving a sentence now?
A. Right.
Q. Thirty -- over 30 years, correct?
A. Thirty-one years.
Q. And you will be how old?

A. Seventy-nine.
Q. And did -- did that cal- -- if you had been informed about that calculation, you said you relied on the time.
A. I would have accepted the plea. And that goes back to where I think that I'm not good at explaining it because I just don't feel like I express it properly.

That even though I didn't feel like I had a bad heart and start out with intent to break the law, I would have admitted guilty of breaking the law and been truthful about that if I would have known that my exposure is the rest of my life in prison. I never was told the amount of time.

And I didn't feel like that -- just because I didn't have intent doesn't mean that I can't enter into a plea and say that I'm guilty of that. I -- I don't think that that hinders that.
Q. Your -- your attention was drawn to page 13 and Mr. Nesland's parenthetical comment about the high degree of certainty?
A. Yes.
Q. And the question was, did that tell you that there was no possibility of prevailing at trial?
A. No.
Q. Okay. So -- go ahead.
A. I considered that. That's one -- the -- that is, you know, just a day or so before the plea expires. And this

makes -- my wife and I had been going back and forth about the issue of accepting the plea or going to trial.

And then, when I see this about a high degree of certainty about going to trial, that makes my decision even more complicated.

Q. Up until that point, had you received that estimate of the likelihood of prevailing or losing?

A. No. Where there's a high degree of certainty?

Q. Yes.

A. No. No. I mean, he never told me there was a high degree of certainty that I'm going to be found guilty before this letter.

Q. Okay.

A. But I consider that, now that I see this in writing, I'm not just flippantly just disregarding it. I'm taking this into consideration, and it makes my decision even more difficult.

Q. Okay.

A. But, again, ultimately, the reason why -- and I don't know if it seems logical or not, but it's the logic that I had. My wife and I decided that because -- from March until October, 17 1/2 years, 17 1/2 years, 17 1/2 years. And this is just three weeks before I go to trial. So I've got seven and a half months -- even with the documentation coming from the government of 30 years, it's still, "Richard, you're

facing 17 1/2 years."

So I took a chance and went to trial. But it wasn't the chance that I thought I was taking. And I didn't find that out until I received my PSI report. And then, when that happened, Mr. Nesland was shocked by it. And he had to postpone the sentencing because he said this is worse than anyone ever imagined.

Q. Okay. Other than --

A. Had I known that, I would have entered the plea agreement. Because I'm not spending the rest of my life in prison.

Q. Other than what you considered to be the critical calculation, was there anything else that would have prevented you from taking that plea if you had known what the real calculation --

A. No, sir. There's nothing -- and that goes back to where I say that although my heart -- I didn't have the intent, I still could have entered the plea and accepted the plea agreement and accepted that guilt for breaking the law, but I was never -- never told the true consequences. And that's what I based the decision on.

MR. KENNEDY: The Court's indulgence.

THE COURT: Sure.

MR. KENNEDY: Nothing further.

THE COURT: All right. You can step down.

THE WITNESS: All right. Thank you, sir.
What do I do with this, Your Honor?
THE COURT: Leave it there.
(Witness excused.)
MR. UFFERMAN: Your Honor, the defense will call our last witness, who is Scott Key.
THE COURT: All right. If you'll stop there, we'll swear you in.
COURT DEPUTY: Please raise your right hand.

JOSEPH SCOTT KEY,
called as a witness by Petitioner, was duly sworn and testified as follows:

COURT DEPUTY: Please be seated. Please state your full name and spell your last name.
THE WITNESS: Joseph Scott Key, K-e-y.
MR. UFFERMAN: May it please the Court.
THE COURT: Sure.

DIRECT EXAMINATION
BY MR. UFFERMAN:
Q. Good morning.
A. Good morning.
Q. Could you please tell the Court what your profession is?

A. I'm a criminal defense attorney.
Q. And could you tell the Court a little bit about your background?
A. I was admitted into the practice of law, became a member of the state bar of Georgia in 2001. I did my undergraduate at Mercer University in Macon. I have a master of divinity degree from Candler school of theology at Emory, and a law degree from Georgia State University College of Law in Atlanta.

After becoming an attorney, I've practiced mainly in the area of criminal defense. In the past several years, with a focus on postconviction and direct appeals. I'm a member of the 11th Circuit Court of Appeals, the North District of Georgia, the Middle District of Georgia, and I'm on the CJA panel for both the North and Middle District.
Q. About how many cases -- and I'm not going to hold you to the exact number -- but in the neighborhood of how many cases have you handled in criminal court, both state and federal court?
A. It would be in the hundreds.
Q. And have some of those cases been in federal court?
A. Yes.
Q. Do you have any experience teaching?
A. I do.
Q. Could you tell the Court about that?

A. I'm an adjunct professor of law at Mercer University College of Law, where I've been involved in the habeas clinic there, which is a clinic for third-year law students.

In Georgia, under the Third-Year Practice Act, under the supervision of an attorney third-year law students can represent indigent clients.

We do that through -- I say that appointment; we're not technically appointed, but when pro se individuals reach -- their habeas has reached the Supreme Court of Georgia, they ask our clinic to get involved in some of those cases and we work with law students.

I also taught Georgia appellate practice and procedure with the Chief Judge at the Georgia Court of Appeals spring semester of this year.

Q. And have you had a chance to teach or speak through CLE classes to other lawyers?

A. I'm a regular CLE speaker. I'm involved in the -- well, I'm the immediate past president of the Georgia Association of Criminal Defense Lawyers, and I've been very involved in that organization. And through my involvement in that organization I receive frequent invitations to speak at CLEs.

Q. Very good. Have you represented clients in court where a plea offer has been extended by the prosecution?

A. Frequently, yes.

Q. What is the standard of care that applies when an

attorney is advising a client about a plea offer?

MR. MOORE: Objection, Your Honor. Here, they're presenting him as an expert. He hasn't been admitted as an expert. We weren't given any notice of him being called as an expert or the basis of his expert testimony.

MR. UFFERMAN: May I respond, Your Honor.

THE COURT: Please.

MR. UFFERMAN: I would offer Mr. Key in the area as an expert in the area of criminal defense and the standard of care that would apply. I don't think the parties have engaged in any type of notice regarding their witnesses. So I don't think that's been an issue up until now.

As far as whether or not in a case like this it's appropriate for an attorney to give advice regarding standard of care, I certainly have some cases to back that up.

I'm not going to ask Mr. Key whether he believes the defense attorney in this case was effective or whether prejudice has been established, but I do think it's an important issue in this case to talk about what the normal standard of care is when a defense attorney is discussing plea offers with a client and what must be discussed one way or the other.

THE COURT: Well, if you're not going to ask him about whether or not the defense attorney in this case was ineffective, what is he going to offer to me that -- or on

the prejudice, why do we need to hear him?

MR. UFFERMAN: Well Your Honor, the reason I'm not asking that is I think there's some argument in the cases -- I certainly will go there if the Court will allow me to.

THE COURT: I want to know why you're presenting him. How is he going to be helpful to the Court?

MR. UFFERMAN: He's going to discuss what an attorney should and should not do when discussing plea offers with a client.

THE COURT: So it's going to go to the level of effectiveness of Mr. Nesland.

MR. UFFERMAN: The standard of care that would apply to a criminal defense lawyer who is discussing any type of criminal plea with a client. I think that's obviously a central issue in this case.

THE COURT: Whether or not Nesland's conduct was deficient.

MR. UFFERMAN: Again, I have a case from federal court in California that would draw the line that he can't give the opinion that the specific attorney was ineffective, but he can talk about what the standard of care is for an attorney in this area.

THE COURT: In general.

MR. UFFERMAN: In general. Yes, Your Honor.

MR. MOORE: If he was a fact witness and had, as

the previous care of attorney and talked about the general practice in this district, I would have no objection.

Here's he's testifying as an expert. I mean, you can try to wrap it up as anything you want. But he's testifying about what the applicable standard of care is and what he should have done here.

THE COURT: I'm going to let him testify, because at the end of the day, I'll determine how much weight, if any, I'll give it.

But, on the other question, has he prepared a report?

MR. UFFERMAN: He has not prepared a report, Your Honor.

THE COURT: Okay. And you all didn't engage in any discovery?

MR. UFFERMAN: We did not, Your Honor.

THE COURT: I didn't -- lesson learned. I did not -- you know, typically I would have you -- have both sides disclose any experts.

MR. UFFERMAN: And I'm not aware of any order in this case nor any discussions between the parties regarding that, Your Honor.

MR. MOORE: But the Federal Rules of Evidence have very clear rules about expert disclosure. That's not a unique thing to this hearing.

MR. UFFERMAN: Your Honor, again, I would come back to what you said earlier. I would ask you allow us to proffer Mr. Key's testimony. I think it goes directly to the issue of the standard of care that would apply when discussing a plea offer with a client. The weight that you ultimately give that, you can decide after you hear the testimony.

THE COURT: All right. Well, I'm going to hear it.

How long is this going to take now?

MR. UFFERMAN: Not very long, Your Honor.

THE COURT: That doesn't tell me how long it's going to take.

MR. UFFERMAN: It's 11:30. I can't imagine I'm going past noon.

THE COURT: Okay. Go ahead.

MR. UFFERMAN: Thank you, Your Honor.

Q. So -- and I asked you, I used a term of art, "standard of care," but as a criminal defense lawyer, you or anyone in general, because you teach regarding these subjects, what must a criminal defense lawyer discuss with a client when discussing a potential plea offer from the prosecution?

A. I think the clearest thing that you have to do is -- ultimately the decision whether to enter a plea or not is the client's. There are two decisions the client makes: Are you

going to enter a plea or not? Are you going to testify at trial or are you not going to testify at trial?

But the lawyer has a responsibility to make that an informed decision. And the essential information that informs the decision of whether to accept the plea from the government or not is the maximum possible exposure versus the minimum exposure at trial and the maximum possible exposure, particularly in the federal system, where the sentencing guidelines apply even to a plea.

Q. In your experience with the clients that you've consulted with, what are some of the factors that a defendant considers when deciding whether to accept or reject a plea?

A. Very often, even if there is a -- only a miniscule chance that the client will be acquitted, clients calculate those odds and they calculate those odds on the basis of all sorts of things: Children's age, their potential age, and what type of -- or quality of life or how many years they may have when they get released.

So, very often, even in a case where there's a low possibility of an acquittal, clients will factor that among the range of possible years they would face in the event of a loss at trial.

I think clients always want to know what is the worst that could possibly happen to them and the best that could possibly happen to them, and they -- they calculate

those things in ways that I wouldn't, but it's their right to calculate those odds that way.
Q. And I know this may sound like common sense, but in your experience, does a longer potential exposure have an impact versus a lesser potential exposure as far as the client deciding to accept or reject a plea?
A. With a longer possible exposure, you -- you have clients typically that aren't -- they become less willing to take the risk of a loss at trial.
Q. And conversely more likely to take the plea?
A. Correct.
Q. And why is that?
A. Well, because if -- you have to -- you have to calculate -- or clients often calculate the impact of loss of a trial.
THE COURT: I'm wondering if I need to hear this, given I've heard it from Mr. Olive himself.
MR. UFFERMAN: I still think it goes to -- and my next question will sum this up -- I think whether what Mr. Nesland did in this case falls within the acceptable standard of care for an attorney under the Strickland standard.
THE COURT: Well, why don't you get to that question. Because he's just telling me what his clients think. I've heard from Mr. Olive, so I know what he thinks.

MR. UFFERMAN: Thank you, Your Honor. I apologize.

Q. Would it be within the acceptable standard of care for an attorney to give a maximum exposure less than the maximum exposure that applies in the case?

MR. MOORE: Objection, Your Honor. This is the exact issue he said he was not going to present and have him give an opinion to the ultimate issue, and that's where we ended up.

THE COURT: I'm going to let him testify because, at the end of the day, I'll decide how much weight to give any of this.

MR. UFFERMAN: Thank you, Your Honor.

Q. Would you like me to repeat the question?

A. Please.

Q. Would it be within the acceptable standard of care to give maximum exposure to the client that's less than the actual maximum that applies in the case?

A. No.

Q. Let me turn your attention to -- in a slightly different direction.

Is it common when clients are first charged to believe that they are innocent or to be ignorant of the fact that they may be guilty?

A. That is -- that is common.

THE COURT: Why do I need to hear this?

MR. UFFERMAN: Your Honor, I think this became an issue in light of the testimony that we've heard this morning. And if you tell me that you're aware of this, then I will stop this line of inquiry.

But I do think -- and we hear about it on TV often -- that when a client comes into a case, they somewhat believe they're bulletproof. And when there's talk about a plea discussion, unless it's explained to them, "Hey, under the actual elements that the government must prove, you could be found guilty."

And we have offered pleas -- we have many jurisdictions that allow clients to enter pleas in their best interest, but in federal court that's normally not the case.

And I think some of the discussions that go on behind the scenes between criminal defense lawyers and clients are relevant --

THE COURT: I don't think I need -- I'm going to hear Mr. Nesland in a few minutes and you can certainly ask him those questions.

MR. UFFERMAN: I would like to proffer that at some point, if I can submit a written proffer.

THE COURT: Yeah, you can.

MR. UFFERMAN: Thank you, Your Honor. Then I won't waste the Court's time.

THE COURT: It's not a waste. We just don't need to get into that for this purpose.

MR. UFFERMAN: Thank you, Your Honor.

No more questions.

CROSS-EXAMINATION

BY MR. MOORE:

Q. Are you licensed to practice law in the Middle District of Tennessee?

A. I am not.

Q. Have you ever practiced in this district before?

A. I have not.

Q. And are you familiar with initial appearances in the Middle District of Tennessee? Are you familiar with how they happen here?

A. Not really, no.

Q. Are you aware of the fact that the judge at the initial appearance tells the defendant what the maximum is for each count that they're facing?

A. I'm not aware of how initial appearances work in the Middle District of Tennessee.

Q. Do they do something similar in Georgia?

A. It -- it depends on which district you're in. But that would not be unusual to see.

Q. So if the judge -- the initial appearance tells you the

maximum sentence that you're facing for each count, would you view that as -- as not an effective advisement by the Court?
A. I wouldn't to the extent that someone months down the road is considering how the sentencing guidelines will be calculated. I've appeared in many first appearance hearings and I've never seen -- I've never seen in-depth discussion between the magistrate and a defendant about the sentencing guidelines and how those might be calculated. No.
Q. But at least the defendant is therefore aware of the maximum for each count, correct, after the initial?
A. They would -- it would not be unusual for a defendant to be advised of the potential maximum sentence they would receive for what they're charged with at the time of the first appearance hearing.
Q. Have you spoken with the defendant in this case?
A. No, I haven't.
Q. So you don't know if his lawyer ever advised him what the -- the maximum sentence he would face is? You don't know, right?
A. I've seen -- I've seen some of the -- I've seen the exhibits that have been discussed, and I can speak to those. But I do not know beyond the exhibits that are before the Court what might have been discussed.
Q. Are you familiar with 924(c), carrying a firearm in furtherance of a drug trafficking crime?

A. Yes.
Q. What's the maximum sentence for that?
A. 924?
Q. Yeah. 924(c).
A. This is a person that's on, like, for a drug trafficking offense?
Q. Carrying a firearm in furtherance of --
A. If there's a 924 notice, then there's a potential life sentence.
Q. Yeah. So is it your viewpoint that everyone who is facing a 924(c) would therefore plea because the exposure is so high?
A. In fact, I went to trial with someone who had a 924 notice about a year ago.
MR. MOORE: One moment, Your Honor.
Q. Did you ever speak with Mr. Nesland, the -- his criminal trial lawyer?
A. I have not.
Q. So your testimony about the standard of care, that's not specific to this case because you have no idea whether he upheld the standard of care, correct?
A. I don't know -- I don't know what happened. I don't know what their discussions were, no.
MR. MOORE: Thank you. Nothing further.
THE COURT: Any redirect?

MR. UFFERMAN: Briefly, Your Honor.

Your Honor, I would like to show the witness a document. It's a transcript from this case that the government's provided to Mr. Olive. It's a transcript of the March 9th, 2012 -- what appears to be the first appearance hearing in this case.

Can I provide that to the witness?

THE COURT: Do you have a question to go with it?

MR. UFFERMAN: I do. Yes, Your Honor. I do. Yes.

THE COURT: What's the question? How is that relevant? I'm trying to understand.

MR. UFFERMAN: Mr. Key was asked by the government whether or not he's familiar with whether magistrate judges in first appearance hearings go over maximum sentences, and I was going to ask Mr. Key to review the actual first appearance proceeding in this case, which -- to see if it says anywhere in there that Mr. Olive could be given consecutive sentences as a result of the charges in this case.

MR. MOORE: If he was there, he could testify to it. But him just reviewing a transcript of a hearing that he's not familiar with and didn't attend, I don't think he can testify.

THE COURT: I guess I can read it myself.

MR. UFFERMAN: I will make that argument during my closing argument, Your Honor.

THE COURT: You can step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: I think you're free to leave or stay.

(Witness excused.)

THE COURT: Any other witnesses?

MR. UFFERMAN: Your Honor, at this point -- I guess if we could have a moment to consult.

THE COURT: Sure.

MR. UFFERMAN: Your Honor, at this point, Mr. Olive rests.

THE COURT: All right.

The government have witnesses?

MR. MOORE: We have one witness, Your Honor.

THE COURT: Go ahead and call him.

MR. MOORE: James Nesland.

And, Your Honor, one thing that I would like to note for the record and just get your guidance on how you want me to proceed is -- there are going to be references to the docket entry, and I was going to ask the Court to take judicial notice of that.

I was going to show it to him because the timeline is based off of that. I didn't know if you want me to formally move the docket entry into evidence. I don't think

that's necessary. But I was going to show it to the witness.

THE COURT: Does the -- does Mr. Olive's attorney know what docket entries you're going to refer to?

MR. MOORE: It's actually just the ECF docket, not actually any of the underlying documents.

THE COURT: Okay. Yeah.

MR. UFFERMAN: Just the docket entries?

THE COURT: I think we need to be clear what's in the record here and what's not.

MR. MOORE: Yeah. I'm not planning to admit it. But I was going to show it to the witness.

THE COURT: Come on forward, Mr. Nesland. All right. If you'll stop there, we'll swear you in.

JAMES EDWARD NESLAND,

called as a witness by Respondent, was duly sworn and testified as follows:

COURT DEPUTY: Please be seated. Please state your full name and spell your last name.

THE WITNESS: James Edward Nesland, N-e-s-l-a-n-d.

DIRECT EXAMINATION

BY MR. MOORE:

Q. And what is your occupation, Mr. Nesland?

A. I'm a lawyer.
Q. And how long have you practiced law?
A. Forty-nine years.
Q. And just briefly, can you give the Court a short summary of where you've practiced law and what type of law you practice?
A. Well, I started in New York. And then I was in private practice there for three years. Then went to the U.S. Attorney's office for the Southern District of New York and was in the criminal division there for five years. And then I went to the U.S. Attorney's office in the District of Colorado and I was there for almost two years.

And then I went back into private practice and have been doing criminal and civil defense work since then.
Q. And did you represent the defendant at his criminal trial?
A. Yes, I did.
Q. And there's a binder up there in front of you.
A. There's a binder up here?
Q. Or I'm sorry. It's being passed to you now.
A. Thank you.
Q. I'll turn your attention to page 2.

And what is that?
A. It's a -- looks to be like a letter that I sent to Richard.

Q. Sorry. Look at the -- I know it's physically the second page. But it says "Exhibit P2" at the bottom?
A. Oh, 2.
Q. Yeah.
A. Oh, I'm sorry.
That's the June 23rd, 2012, memorandum that I had prepared by Michael Martinez, who was a retired probation officer then acting as a sentencing consultant.
Q. And why did you have this prepared?
A. If I recall, I had motions to dismiss the indictment, and those were denied. That one was denied.
And then I had motions to preclude evidence involving cease-and-desist orders that had been issued against NFOA. And my recollection is those had been denied.
And so I wanted to find out from Michael, who I worked with many times before, what the sentencing perspective was on this particular indictment. That's all we had at that point in time, was the indictment. And I had him prepare that.
Q. Did you share this with the defendant?
A. I shared it with him on October 4th of 2012.
Q. And so you discussed with him these guidelines calculations, correct?
A. Yes.
Q. Did you ever tell him that these were -- that these

guidelines calculations were exactly what he would get and that it could not be different than this?
A. No. No.
Q. Is there any --
A. That was -- that was always an estimate. It was the best guess estimate that Michael could make.
Q. And did you make it clear to the defendant that this was just a best guess estimate?
A. Made it clear to him that the Court wasn't bound by these, wasn't bound by the guidelines. And that the Court could impose any sentence that it found fit; that the Court could do an upward departure or a downward departure. But that it was more often the case that the Court stayed within the sentencing guidelines.
Q. And then I'll turn your attention to the page that -- at the bottom that says P4.
A. P4?
Q. Yes. And there's a paragraph that says (as read):

> In the event Mr. Olive's criminal history category is I, the sentencing guideline range based on Total Offense Level 36 is 188 to 235 months?

A. That was if he pled guilty without a plea bargain.
Q. Did -- go ahead. Sorry.
A. His sentence -- his sentencing level was 39, which was

much higher.
Q. Right. So, if he went to trial, it would be higher than this guideline range?
A. Right. I talked to him about what a 39 was. I went through this explanation of how this all works with these factors. Just tried to explain it to him and then told him that what they do is they do these calculations and they make an adjusted offense level. In this case it would be most likely 39; that's what Michael analyzed it to be. And that if he -- and if I remember right, that was 27 to 29 years, 26 to 29, maybe 24 to 27. Somewhere in there. It was below 30. I remember that.
Q. So did you ever imply to him that this 235 months referenced here is the absolute max that he could possibly get?
A. No. I said he could have an upward departure.
Q. And at this point --
A. And that was at this time.
Q. At this point.
A. Because I didn't have any competing calculations.
Q. And at this point, would you characterize the sentence he faced with acceptance or without acceptance as still significant?
A. It reduced it below 20, if I remember right. If he -- if he pled guilty.

Q. If he pled guilty.
A. And my point was that that would be a substantial difference. And I said, "Maybe we should try to do a plea bargain." I said, you know, "We haven't discussed it with Kathryn Ward yet, but she might be open to it to avoid trial."
Q. And what did the defendant say when you raised that suggestion?
A. He didn't want to do a plea.
Q. Did he give you any indication why he didn't want to do a plea?
A. Didn't do anything wrong. Hadn't done anything.
Q. All right. Did you talk to the defendant about emails that he had received from his tax lawyer?
A. Oh. This meeting -- so we get it in context, on October 4th -- the trial was I think then scheduled for November sometime.

So Richard came up to Boulder, Colorado, and we met in Boulder at my associate's office, because that's where all our documents were, all the government's documents that had been given to us and then the documents that we had gotten from NFOA.

And we reviewed an awful lot of that evidence. We reviewed the cease-and-desist orders. We reviewed other evidence. We reviewed the acknowledgment that he had

received that he was not an NF- -- that NFOA was not a charitable organization until it was approved.

And then we got to Kamer's -- Mr. Kamer's emails. And Mr. Kamer had been hired by Mr. Olive as counsel to NFOA, and to give him tax advice and to deal with the IRS on this charitable process, charitable organization process.

And Mr. Kamer sent him a chain of emails, but one particular email -- and I don't have it here -- but basically he said that you are not a charitable organization; you shouldn't be representing yourself as a charitable organization. You should tell all of your customers, clients, that you are not approved; that unless you're approved, they would not get their charitable deduction.

I think that's essentially what he said. Something akin to that. Basically told him you can't be saying what you're saying. Because it's not true.

And I told him that I had talked with Mr. Kamer's lawyer, who was a lawyer in Mr. Kamer's office. Mr. Kamer resisted speaking to me. But I talked to his lawyer. And he said that he would confirm that; he would testify; and that he would testify that he had those discussions on more than one occasion with Mr. Olive and that he understood that Mr. Olive had agreed that he would remove that designation from his paperwork and that he would stop making those representations. And that was what I got from him.

So I explained all that to Richard. And I said, "That's just overwhelming evidence. I mean, I'm not going to be able to get the jury to acquit you when you've got that kind of testimony from the lawyer you hire to give you the advice about what you ought to be saying. It's not going to happen."

Q. So, after this meeting in Boulder, did you have plea discussions with the Assistant United States Attorney assigned to the case?

A. Right. I called Kathryn Ward probably within a day or two of that, and said to her if she would have any interest in negotiating a plea, to avoid the trial, and put this thing to bed.

And she said, "Well, I'll have to determine what I think the guidelines would be and what my agents say, and I'll get back to you." So she did eventually. Within probably two or three days. And she was talking about basically 30 years. And she said I think the guidelines would put him somewhere in the range of 30 years.

I said, "Well, what -- what -- you know, what will you offer?"

And she said, "I think we're willing to consider 12 years if he were willing to plead to that."

And I said, "I don't -- I don't think that will work. I don't -- I don't think that will work."

And then we started discussing where she was -- where she had gotten to this. And her point was that there was a high likelihood of conviction, and that the loss was 4- to $5 million, which was a substantial 20 levels or thereabout, and some of the factors that go into it.

And I couldn't -- I couldn't credibly take the position that he would win on the merits, he wouldn't get convicted, because it wouldn't have been credible.

So I started with her on several factors, one of which was primarily the loss. And I said to her, I said, "You've got a loss of 4- or $5 million. That's what you're saying. But that's based on the receiver." And I said, "The receiver did not take into consideration the four properties that NFOA held and a number of the annuities that it had held." And I said, "If you value all of those, he had more than enough to pay all of the annuitants, his clients, his customers."

And she said, "Well, that's not the receiver's testimony or" --

And I said, "That's -- that's the evidence. And if you look at the receiver's testimony -- or you look at the receiver's evidence, he didn't consider any of those. And I've got an expert that will consider all of those, and that's what he says." And so I said, that "Takes out not only actual loss -- because there is no actual loss; nobody

had lost any money -- it takes out the intended loss."

And then I said, "The low -- I think he's got a strong likelihood of getting convicted. There's a substantial issue with respect to motive. And motive will go to the sentence. You know that." I said, "It's not required for the crime, but it's required -- judges always look at motive. What's his motive?" And I said, "He really had no criminal motive." I said, "He preserved the assets. Put them in the bank. This isn't a Ponzi scheme where he was taking the money and using it for his own benefit. But he was putting it away. He was investing it."

And he only benefited to the tune, I think -- I had the calculation -- 150-, $170,000, somewhere in there. That's the only benefit he had received in this. They had foregone the wages, salary, for a substantial period.

And so that's what I really tried to impress upon her. And I said, "So that -- you know, that's where your -- that's where the issue is. It's really not so much in the trial; it's really in the sentencing." And I said, "We've got strong arguments with respect to sentencing."

And she listened. Argued back and forth, but -- then said she would think about it. And then she came back with nine years.

And I tried five again, but she said, "No, I'm not going to go to five." She said, "Look, nine is seven and a

half. That's about as close as you're going to get to five from me."

I said, "All right. Put it down and put all the factors in there and give me the plea offer."

And that's what she did on October 15th.

Q. And then did you provide this to the defendant?

A. I forwarded the email to him. I got it in the morning. I called Mike Martinez, sent it to him, talked to him a little bit about it. Got his perspective on the factors. And then I drafted an email and forwarded the plea bargain with the email.

Q. And then there should be Exhibit 2. It will be a loose sheet.

A. I'm sorry.

Q. They're handing it to you now.

A. Oh. All right.

Q. If you look at the email dated October 15th, 2012, it's a forward of the October --

A. I saw the -- where Jeff forwarded it. Right. This is the one I forwarded to Richard, cc'd to my associate.

Q. And then you -- and in that forward also included the original plea offer made by the government, correct?

A. Well, she put the original in the mail. This would have been a copy. I would have scanned -- it would have pushed through. And she -- she mailed me the original.

Q. Okay. And then, if you look at that second paragraph, can you read the paragraph that starts "However"?
A. Of my email or --
Q. Of your email.
A. (As read):

> However, even if it is 37, 201 to 262 months; 38, 253 to 293 months; or 39, 262 to 327 months, the potential period of incarceration is in the range of 17 to 27 years.

Q. Had you ever told the defendant that it was impossible for him to get a sentence that went up as high as 27 years?
A. No.
Q. And in this --
A. I told him he could get higher than that.
Q. And in this email, aren't you here advising him that his possible sentence is certainly above 20 years?
A. Oh, yeah, I'm telling him that the potential range -- and I'm putting it in potential -- period of incarceration is in the range -- that's the sentencing range. Seventeen would have been the bottom of the lower calculation, I think, 37, and 27 was the top calculation of 39, if I remember right.
Q. Did you have a conversation with the defendant shortly around the -- the -- around the time of this email about this plea offer?
A. Well, I would have followed up probably either that --

later that day or in the morning to make sure he got it. And told him that, you know, you need to review this and we need to discuss it. And then we had discussions about it following that.

Q. All right. And during your discussions with him about this plea offer, what was the nature of that discussion?

A. First I said -- I went through --

MR. KENNEDY: Objection Your Honor, to the extent it asks for potential hearsay.

THE WITNESS: Pardon?

THE COURT: Why don't you repeat your question.

BY MR. MOORE:

Q. All right. What was the discussion between you and the defendant about this plea offer?

MR. KENNEDY: My objection is that discussion -- that question includes potential hearsay.

THE COURT: All right. Well, let's -- you can reraise your -- I don't see it right now.

So go ahead and answer.

If you see some, you can object.

THE WITNESS: Well, I -- my first -- he had it with him.

BY MR. MOORE:

Q. The offer from the government?

A. I went through it.

Q. Okay.
A. I assume he had it with him. Because I was talking through it, and he wasn't saying, "Well, I don't know what you're talking about." So. . .
Q. Okay.
A. And I said -- I went through the factors that they were using. And I said -- similar to what we had done previously.
And I said, "They've calculated through these factors that -- a Level 40." And I said, "If -- their range is 292 to 365 months, which is like" -- I can't do the calculation, but it's somewhere around 27 to 30 or 31 years. And I said, "That's what the government says your sentence will be. That's what they're going to argue. And the judge may or may not accept that." I said, "He doesn't have to. Many judges do align with the government." But I said, "That's not necessarily so." And I said, "I don't think that that will be the case." I said, "Because I think, based on what Mike has done, that the best maximum will be 39, because they were using a -- a -- it's in here -- but they were using a -- I'll find it.
Q. You thought one of the enhancements wouldn't apply? Is that --
A. Yeah. I thought one of the enhancements certainly wouldn't apply. Mike was convinced of that. And that was where they were factoring in that he would get a -- one level

because he also had money laundering counts.

And Mike was saying, "No, it's either/or. Whichever is the highest. You don't give anything for the lower one."

So. . . And then he was talking about abuse of trust, because I had talked with Michael about abuse of trust. And he explained to me what abuse of trust was. That's getting somebody, elderly people, or whatever, getting them to trust you and then taking their money.

And I said, "He didn't do any of that, because all of his work was with advisors to customers. He met with the advisors in retreats. He met with the advisors at his office. He telephoned the advisors. And these were all financial advisors. And they're the ones upon whom the clients trusted in giving the recommendation to do these annuities." So I said, "The likelihood is that that's not going to be proven."

Q. Did you ever tell him that it's impossible that the judge would find that those enhancements applied?

A. I always told him that the judge could do whatever the judge wanted to do. And that was the reason why I was pushing the plea bargain. Because, if he got a plea bargain, it was fixed. If the judge accepted it, it was fixed.

And at this point in time, we had already discussed that Jeff, my associate, had done whatever research

he could do to find out a couple of things. One of which is, what was Judge Sharp's sentencing habits? If we could find anything like that. Does he sentence within the guidelines? Does he do departures? Does he side with the government? Is he open to argument? Things like that.

And we couldn't find anything. So I said, "I don't know what he'll do." And then we had done research -- or Jeff had done research on whether or not he accepted plea bargains. Some judges are loath to accept plea bargains. And we couldn't find anything on that. So. . . That had been discussed. That had been discussed back in October.

And then I told him that that's the beauty of a plea bargain; it's a fixed sentence.

Q. A C plea bargain?

A. You can do nine years. That's what you'll do. You know you'll do that. I tried to emphasize that to him.

Q. Did you reiterate to him at this point what you thought his likelihood of success at trial was?

A. I'm sorry?

Q. At this point, when you're discussing the plea offer, did you reiterate to him what you thought his likelihood of success at trial was?

A. Oh, yeah. I mean, I always did. I think it's in an email. If it wasn't in this email, it was in the next one. But I always told him from October forth -- forward, every

time we met, that he basically stood to be convicted. There wasn't -- I mean, I tried to phrase it in ways that made it a little more palatable. But I would say, you know, "a high degree of certainty," "pretty likely," "I don't think you'll get away with it." "I don't think you'll get acquitted." You know, that kind of stuff.

But I always emphasized that the likelihood of conviction was really, really high. That. . .

Q. And when you would tell the defendant this, what would he tell you about your chances of winning?

A. I think we --

MR. KENNEDY: Objection. Hearsay.

MR. MOORE: The -- the defendant's statements are not hearsay when used by the government because he's a party opponent.

THE COURT: Yeah. I don't -- where is the hearsay?

MR. KENNEDY: Well, he's asking -- he's asking for Mr. Olive's statements to him about those responses.

THE COURT: Okay. Overruled.

BY MR. MOORE:

Q. So what would the -- what would the defendant say after you told him you didn't think that there was a likelihood of success at trial?

A. "I think we can win."

And I would say, "Richard, I don't think we can win."

And he would say, "Well, I think we can. And I'm not going to plead to something I didn't do."

Q. Did he ever express --

A. He was always firm on he didn't do it. And I -- I believe he believed that.

Q. Did he ever express a willingness to take a plea?

A. No.

THE COURT: I didn't hear you.

THE WITNESS: No.

BY MR. MOORE:

Q. And then, in front of you, you should have the October 23rd, 2012, email.

Do you see that? It's a separate document.

A. I -- if it's up here, I don't see it.

Q. The very top email says February 1st, 2017 [verbatim]. But we're focusing on further down.

A. I've got the October 15th.

Are we back into this book?

Q. No. I think it should be a separate stack of documents. Sorry. You're -- let me correct. It is in this book. Let me find it for you. Sorry.

If you'll turn to exhibit page 13. Sorry about that.

A. Exhibit 8?
Q. It's Exhibit P13, is what it says at the bottom.
A. Oh, yeah.
Q. And then, in the second paragraph, you write that (as read):

> You know from the sentencing memorandum I provided to you in our discussions that the applicable sentencing guidelines, if followed, will result in a sentence in the range of 17 to 20 years?

A. Right.
Q. When you said, if followed, what did you mean by that?
A. Well, we had been discussing the ranges that Michael had, the government had. Michael had the 37, the 30- -- and I'm -- put 38 in there. And then 39. And the government had 40.

And I kept telling him, when we were talking about it on the 4th and then we had discussions about it, that 27 -- that the 37 is the best you're ever going to get. Not going to get any lower than that, I don't think.

THE COURT: As an offense level?
THE WITNESS: Pardon?
THE COURT: As an offense level?
THE WITNESS: As an offense level. So you're going to do -- what? -- 17 to 21 years, I think it is, for

that one.

And I said, "That's the best you can do. I mean, I'm going to argue for a lot better sentence," and I did. But I said, "That's the most likely sentence you're going to get, at best." And I said, "You can get the 38 or the 39 or the 40. You can get all of those. You can get whatever the judge gives you, but you are going to get that."

And that was what I was emphasizing here. You will get that. You're not going to do any better than that. You can do worse, but you're not going to do any better. That was the point of that. It was just reemphasizing what we had talked about.

BY MR. MOORE:

Q. Did the defendant ever respond to this email?

A. I don't think he did.

Q. And do you remember if you had a conversation with him after this email but before the plea deal would have expired?

A. No. I -- I may have -- I couldn't honestly say I did or didn't. It would be my practice to follow up after an email, but I don't have a specific recollection of talking to him again about any of this until we had a conference in January after the November trial was moved to February. And then we met again in January. But by then it had expired. But I was going to try to resurrect it.

Q. And then -- so this trial -- was it actually tried in

February of 2013?
A. (Witness moves head up and down.)
Q. And is it your testimony that at some point before that you met with the defendant --
THE COURT: You need to verbalize --
THE WITNESS: Yes. I'm sorry. I'm sorry, Judge. I know better.
BY MR. MOORE:
Q. And so at some point before this February 2013 trial, did you again meet with the defendant in preparation for the trial?
A. My associate has it diaried at January 18th, so I accept that's probably when it was that he and I met with Richard. And it was really a trial prep again, like we had had in October. But here we had been more focused on he was going to testify. We wanted to start seeing how he would do with his testimony.
And in that context, I raised all of this again. I said, "It's not too late to try to go back to Kathryn and see if we can't get that plea bargain." I said, "You know, the evidence hasn't changed. We don't have a very good chance of ever winning this case. She still may be willing to do the nine years."
And he said, "Nah, I don't want to do that."
And then I had Jeff try to talk to him. Because

Jeff has a different demeanor than I do. And Jeff talked to him, and he said, "No, I'm not going to plead." That was the end of that.

Q. So even after the plea offer expired, you were still trying to talk to him about the possibility of seeing if you could reach some sort of agreement to settle this?

A. Right. Because it was still -- I don't know -- close to 30 days or more to the trial. And I don't think she had started preparing. Probably hadn't.

And so that's usually the -- that's usually the determinant when you get a plea bargain, is whether they've already prepared for trial. And even then you can get it.

Q. Did you talk to the defendant about if he was going to testify at the trial?

A. Oh, yeah.

Q. And what was that discussion?

A. Well, there was a lot of discussion about that, but -- his -- his -- he would look at me and he would say, "Jim, my life -- this is my life. And I'm -- I want -- I want to -- I want them to know what -- that I didn't do anything wrong."

And we talked about the risks. We talked about the fact that the risk of conviction, if he testified, wasn't really much worse if they didn't like his testimony than it was anyway.

But that if he testified -- and Richard can be

very convincing. And I -- he believed that he wasn't doing anything wrong. He had his reasons why. And I believed that if he could make that convincing story to the jury, he could probably convince them that he actually believed it and was acting in good faith, even if they found that he should have done something different.

And so I thought that was his only real chance. And he thought it was his only real chance.

Q. And so had he ever expressed reservations about testifying? Did he ever tell you that he didn't want to testify?

A. Oh, no. His life depended on it. And he was pretty confident. I mean, he's a confident man.

MR. MOORE: Thank you, Your Honor --

THE COURT: All right. Cross.

MR. MOORE: -- nothing further.

MR. UFFERMAN: May we have a moment, Your Honor?

THE COURT: Sure.

MR. UFFERMAN: May it please the Court.

CROSS-EXAMINATION

BY MR. UFFERMAN:

Q. Good afternoon, Mr. Nesland.

A. It's afternoon. Yes. Thank you.

Q. You have the packet in front of you. I believe it's

Exhibit 1?
A. This one?
Q. And we've been referring to those as subletters within. But to make it easy, I think on page 1 is a letter that you sent that we've been referring to as Exhibit 1(a), that we believe is a posttrial letter because it refers to you filing potentially a motion for new trial?
A. I saw there wasn't a date on that. That tells you who wrote it.
Q. Well, I guess let's clarify.
Do you recognize that?
A. Yes.
Q. Okay. And that is something that you sent?
A. Right.
Q. And that is something that you sent after the trial, if it's consistent with the language within --
A. Oh, yeah. He was in the -- he was in the jail by then.
Q. Very good.
A. Got remanded. So he was in jail by then.
Q. Okay. And have you had a chance to look through that letter? And if not, could you look through it.
A. (Reviews document.) Okay. Yeah.
Q. For the record, we paused while you had a chance to read that letter.
Have you now had a chance to read the letter?

A. Yes, I have.
Q. And does it refresh your memory as to some of the things you were discussing with Mr. Olive after the trial?
A. Some of them.
Q. And based on what you just read through, isn't it true that in that letter, even at that point in time, you continued to believe that you had strong arguments to make the guideline range lower and that you had strong arguments that the government's assertions that the guideline range should be higher were incorrect or that you would have the better of the arguments?
A. Yeah, I did.
Q. And that's -- that's consistent with --
A. I can tell you which ones they were, too. But I think I put them in a sentencing memorandum that was about 20 pages long, if I remember, but. . .
Q. And that's what you were discussing with Mr. Olive during or prior to the time that he had to accept the plea or --
A. No.
Q. -- during those discussions?
A. No, no.
Q. Well, let me --
A. We didn't discuss -- these -- these arose primarily from the trial.

For example, the judge had found and refused to give an aiding and abetting instruction at the government's request because he said, "Who did he aid and abet? He was the solo on this. There was nobody else involved."

And Kathryn tried to argue that his daughters that worked there; Susan, his wife; and some other friend. And he said, "I didn't see any evidence of their culpability."

So that's four levels. Take that out of the equation, you drop it quite a bit.

Q. But also, based on the June 2012 and the October 2012 memos, at that time you also believed that you had good arguments in response to the government trying to say the offense level should be higher? Based on what your consultant had put together?

A. No. My consultant believed that we had the better argument on the three levels.

Q. Thank you.

A. That it would -- instead of 39 -- or instead of 40, it would be 37 or 39. We had the better -- much better argument on the 39, but on the abuse of trust, we had a very good argument. We thought we had the better of it.

Q. And then I want to refer you to a declaration that I also don't believe is dated.

But are you familiar with the declaration that you've prepared in this case?

A. Well, I edited it.
Q. So are you familiar with the declaration that you signed in this case?
A. Yeah. I think you or Tom prepared it.
Q. That's not what I've asked. So please listen to my question.
Are you familiar with the declaration that you ultimately signed in this case?
A. Yes. But I don't see it here.
Q. Let me figure out where that is in the documents we prepared to you.
THE COURT: Look on page 55.
THE WITNESS: Okay. Sure.
BY MR. UFFERMAN:
Q. Can you please review that and verify that's your signature on the second page?
A. Most certainly is.
Q. And Number 6, paragraph 6, it is true, as you said in this declaration, that you did not advise Mr. Olive that he could receive 31 or 160 years?
A. I certainly did not.
Q. And it's also true that you did not advise Mr. Olive that the sentences could be run consecutively?
A. No, I did not.
Q. And it's also true that the government's plea offer or

your consultant did not make such a determination?
A. Nobody made that determination. I think maybe the probation office did later. But nobody did --
Q. So, therefore --
A. The government was at 40.
Q. So isn't it also true, then, that you don't know what Mr. Olive's decision about a plea offer would have been if you had told him that you're looking at a nine-year offer versus a 160-year exposure? Is that fair to say?
A. Absolutely not. I don't know what he would have thought.

MR. UFFERMAN: May I have a moment, Your Honor?
THE COURT: Yes.
MR. UFFERMAN: Nothing further, Your Honor.
THE COURT: Redirect.
MR. MOORE: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. MOORE:
Q. If you could turn to page 7 in that binder in front of you.
A. All right.
Q. And then if you look at Number --
A. Just so I'm right, the second page of her plea bargain?
Q. Yes. And then do you see Number 10 there? Where it

says "a term of imprisonment of 292 to 365 months"?
A. Right.
Q. This document was provided to the defendant, correct?
A. Yes.
Q. And did you ever tell him that it was impossible for him to get that 365 months that the government was suggesting here?
A. No.
MR. MOORE: Thank you, Your Honor. Nothing further.
THE COURT: All right. You can step down.
THE WITNESS: Pardon?
THE COURT: You can leave.
THE WITNESS: Okay. Thank you, Judge.
THE COURT: You can do whatever you like.
(Witness excused.)
THE COURT: Okay. Any other witnesses?
MR. MOORE: No other proof from the government, Your Honor.
THE COURT: So I would suggest we take a break, and then I assume that counsel would like to make argument?
MR. UFFERMAN: Yes, Your Honor.
THE COURT: And the government?
MR. MOORE: Yes, Your Honor.
THE COURT: And I don't know where I read this --

and maybe I imagined it, so correct me -- you all did not want to file any post hearing briefs?

MR. UFFERMAN: I don't think we've discussed it one way or another, Your Honor. I will do whatever you would ask us to do.

THE COURT: Well, I'm --

MR. MOORE: I do not believe it's necessary, Your Honor.

THE COURT: All right. So what do you want?

MR. UFFERMAN: Your Honor, I'll defer to the Court. I'm prepared to make an oral argument. I'm prepared to make a written argument.

THE COURT: You need to tell me. I'm ready to hear your oral argument. And I think I understand the issues here. But I don't want to deny you the opportunity to file something in writing if you want.

MR. UFFERMAN: Your Honor, may I have a moment?

THE COURT: Sure.

MR. UFFERMAN: I've learned the hard way. I will turn my mic off as well.

Your Honor, we're prepared to move forward with oral argument today.

THE COURT: So do you all want to take a quick recess and then we come back in -- what? -- 15 minutes?

MR. UFFERMAN: Yes, Your Honor. That would be

perfect.

THE COURT: Do you want more time?

MR. UFFERMAN: No, Your Honor. I'm ready to go.

THE COURT: Is that enough time?

MR. MOORE: Yes, Your Honor.

(Recess.)

THE COURT: All right. Be seated.

All right. Before I hear your arguments, did you have any rebuttal proof? I did not ask you that.

MR. UFFERMAN: No, Your Honor, we do not have any rebuttal.

THE COURT: Do you want to share with me your proffer?

MR. UFFERMAN: Yes, Your Honor. Thank you. Let me approach the podium.

And before I do, Your Honor, because we've rested, we've advised my client's wife, Susan Olive, even though she was under the rule, it's okay for her to be in the courtroom.

THE COURT: All right.

MR. UFFERMAN: The proffer is along these lines, Your Honor: That when a defendant is being advised about a plea offer, a defendant many times when meeting with counsel -- and a lot of this is not seen in open court -- will come in with the idea that I'm not guilty, and I'm innocent, or the government's not going to be able to prove

this case. That's the defendant's understanding of the case without understanding how the process works in this courtroom.

And then a plea offer can arise. And the plea offer can come in probably many different forms, but I'll summarize it by saying it can come in the form of a plea offer that's too good to turn down, or it can come in the form of a plea offer that the risk is too great to not accept.

And if the defendant for either of those reasons -- or perhaps another reason -- decides then that I better accept the plea offer, then there may have to be a follow-up discussion. In many jurisdictions in this country, it's okay for a defendant to enter an offered plea or a best interest plea where the defendant is not required to admit guilt. But in federal court that's usually not the case.

So then, after the defendant has gotten to the point of, okay, I'm now entering the plea and the defense attorney begins to explain to the defendant that you are going to have to stand up in front of the district court judge and admit guilt, the defendant may in that conversation have a revelation that, even though I came into this thinking I'm not guilty, when you explain it to me this way and how the government is going to present their case and how it's going to look to a jury and these are the elements that must

be established in this case, and this proof really matches up with those elements, many defendants are able to come to the conversion that they can stand up in district court and admit guilt, even though they may have at the start of the process really thought that they were innocent.

And I submit that because my client never accepted a plea, he never got to that point because they never had that discussion; he rejected the plea offer. But had that plea been accepted, they would have gone through that process. And started -- some of that process, you've already started to go through it today.

THE COURT: Okay. Well, I guess here -- obviously, we're on his 2255. Here, you know, he's been in custody and had your good advice and guidance. So he knows what is necessary in order for his 2255 to be successful.

MR. UFFERMAN: I think he knows from the standpoint that he would, yes, I would have accepted the plea. Going one step further, that means that I would have to stand up in court and accept guilt for the two counts that I would have had to admit guilt to.

I don't know if we've had that thorough of a discussion. But again, I think you started to have it today, and I think my client was candid when he said under these circumstances, I would have admitted guilt because -- because, A, I realize I made mistakes, and despite me having

this concern that I didn't have this intent, I can see how the government could prove that I did have the intent.

THE COURT: All right. All right. That's -- that's good to hear. All right.

So do you want to -- why don't you start your argument, then I'll let the government respond. And then you'll get the last word.

MR. UFFERMAN: That was going to be my next question, Your Honor. You've already answered it.

PETITIONER'S CLOSING STATEMENT

MR. UFFERMAN: So, with that, may it please the Court -- I've already told the court reporter -- I've already apologized up front for how fast I talk. And I have notes to try to make me go slower. So I'll do my best.

Your Honor, the standard that applies in this type of case is pretty straightforward. It's different than a normal Strickland case. We know that the U.S. Supreme Court set out the standard in Lafler -- and maybe a couple of these elements will be in dispute. I think one of them is probably the biggest, but let me go through what I believe the elements under Lafler are for my client to be successful for his 2255. And I get this from the U.S. Supreme Court itself.

One is that there was a plea offer that was extended by the government and that would not have been

withdrawn by the government within the relevant timeframe.

I don't think there's any dispute in this case that there was a plea offer that was in effect from October 15th, 2012, to October 24th, 2012.

Let me skip to the last element, which is, had the defendant accepted the plea, that plea -- the sentence as a result of that plea would have been less than the sentence he's currently serving.

That's clear in the record as well. He's currently serving a 31-year sentence and the plea offer was for nine years.

So the other two elements may or may not be in dispute, one certainly more so than the other. I'll begin with what I think is the easier of the two.

There's been some reference by the government in its response about whether or not Judge Sharp would have accepted the plea offer in this case. We presented Mr. Komisar today as a witness and the government hasn't put on any evidence to rebut that, that, at least in Mr. Komisar's experience, and I think he's an attorney that practices frequently in front of the Court and in this jurisdiction, that he's -- he thinks it would be rare for a judge to reject a plea deal. He, himself, has not had any plea deals rejected.

THE COURT: He's only had one though.

MR. UFFERMAN: Well, he's only had one in front of Judge Sharp, correct.

THE COURT: All right.

MR. UFFERMAN: And he gave some reasons for that. One reason was that in a situation like this, the judge generally is going to know less about the case pursuant to a C plea than the judge would know at the back end. And therefore, when you're presenting a C plea, the facts are not going to potentially be that bad, and therefore there would be less of a reason for the judge to reject the plea.

He also explained --

THE COURT: Of course, here Judge Sharp had the advantage of having sat through the trial. So he knew quite a bit.

MR. UFFERMAN: Yes. By the time that he ultimately imposed the sentence. Which, again, I think would have been very different -- had the plea been entered in this case, he wouldn't have been exposed to many of the negative facts that came out through the PSR. So I think that's a factor that's in our favor.

I think another factor that's in our favor, frankly, is that the government did extend the plea offer in this case. And generally the government doesn't extend plea offers in bad faith or plea offers that they think the judge is going to reject. I understand that's not the be-all,

end-all for this claim. Obviously, it's a separate claim that the Supreme Court said we have to establish.

But again, the government -- I don't think the government can argue that they didn't believe that Judge Sharp in good faith would have accepted the plea; otherwise, that would mean the government would have to be accepting that they submitted a plea offer that they really didn't think the judge would accept, and I don't think the government in this district would ever do that.

I also want to respond to -- so, again, the government hasn't put on any evidence to refute what Mr. Komisar said or to otherwise show that Judge Sharp wouldn't have accepted the plea in this case.

We did submit an article with the submissions that we provided with the pleadings that Judge Sharp acknowledged, I think when he left the bench, that a big part of this process of being a federal judge is accepting plea offers and judges don't have a lot of say-so. I think that would go somewhat to Judge Sharp's intent.

But then I want to respond to the two cases that the government cited in its response. And I think one in particular is very, very different from the facts of this case, and that's the George David George case. And the Court obviously can look at the docket or take judicial notice of the docket. The George David George case was also a fraud

case. And it is true that Judge Sharp rejected, not once, but twice, different plea offers that were submitted by the government.

But in the George David George case, Mr. George had been convicted in state and federal court prior to the charges that resulted in his ultimate sentence in the case that the government is citing to of fraud offenses. So he was -- and I believe I read in the sentencing memo a thrice-sentenced fraud defendant by the time he ever showed up in court for that particular case. I submit that's someone who is in a very different position than most people, and certainly different than the position than my client was in front of -- was when he was in front of Judge Sharp.

There was this talk about one of these issues about some forgery. And in -- I think the record reflects that at sentencing, Judge Sharp struck that from the PSR. So my client does have a criminal history category of II, and I believe those are for two DUI offenses that my client had in state court, in no way related to the fraud offenses for which he was convicted of in this case.

That's, again, very different from Mr. George, who was convicted of fraud offenses involving victims prior to ever coming into the case and ultimately was convicted and was given a pretty significant -- I believe he got 240 months, more than the six-year offer and the

seven-and-a-half-year offer.

The other case they cited to is the John Oscar Wilson case. And from my review of the record, although Judge Sharp initially rejected a plea agreement that would have a sentence within a range of 51 to 63 months -- and there's no transcript that I could see from the case -- later on a different judge accepted a plea deal, and Mr. Wilson was actually sentenced to 52 months, something that -- within the low range of the range that was initially offered to Judge Sharp.

I don't know what happened during the initial sentencing hearing -- or plea hearing that -- where Judge Sharp rejected the plea. He may have, you know, said there's outstanding information that we need to get some answers to, and maybe that's ultimately what happened and those things were answered and that's why the subsequent judge ultimately imposed a sentence of 52 months. So, again, I think that case is very different based on what I'm seeing from the document.

Now, I'll concede I'm reading it from the docket. If I'm missing something that the government certainly would potentially have more knowledge about the case than I do, then I'm not trying to misrepresent something; I'm simply referring to the case based on what I can read from the docket.

So I do think the two cases that have been cited by the government in its response are very different from my client's situation, and therefore, I submit that we've met our burden of showing that it's likely that had this nine-year plea offer been presented to Judge Sharp, he would have accepted it in this case.

I do note that the two cases -- I don't know how this -- what relevance this has, but I'll throw it out there regardless -- that the plea offer in this case was in October of 2012. I believe Judge Sharp was on the bench, if I remember right, from 2011 to 2017? Yes. 2011 to 2017. So this was relatively shortly after he came on the bench, and the George case, I believe, was 2014 -- no, I'm sorry -- 2015 -- no. That -- the George case was 2015 and the Wilson case was 2016.

Again, I don't know how that cuts, but I point it out to the extent it might be relevant.

THE COURT: But at the end of the day, on the prejudice element of his claim, I need to make a finding based on a preponderance of the evidence.

MR. UFFERMAN: Yes, and I submit based on Mr. Komisar's testimony based on the fact that the government extended this plea offer, the fact that they put on nothing in response to the testimony that we presented, the fact that Mr. Nesland himself said he looked into it and couldn't find

something that would indicate that Judge Sharp had a history of rejecting these plea offers, all of that weighs in favor of us satisfying our burden by a preponderance of the evidence.

I was successful on a 2254 case in the 11th Circuit, a case called Sullivan. I can read the cite into the record. 837 F.3d 1195. That's the 11th Circuit from 2016. It was a Lafler case. And in that case, the evidence at the evidentiary hearing also involved other attorneys saying what their general understanding of the particular judge's practice was.

I will note in thinking about this and having a couple of Lafler cases, it's not an easy standard that the Supreme Court gave us. I don't think anyone thinks it's appropriate to call the judge back and ask, "What would you have done?"

THE COURT: Well, Judge Sharp's available.

MR. UFFERMAN: I think that's an after-the-fact conclusion that -- that would not be something that any judge, including the U.S. Supreme Court justices that drafted Lafler, would think would be appropriate.

So I don't know of any way other than putting someone on like Mr. Komisar and, again, Mr. Nesland in his candor to the Court saying that he couldn't find anything one way or the other. I think that's the best evidence that can

be presented by the parties. And I think that makes it difficult to -- and the other analogy I would make in that regard is certainly, in a normal Strickland prejudice case, I'm not permitted to reach out to the 12 jurors and say, "What would you have done had you heard this evidence?" And I think calling back the judge is basically the same type of thing that I think most judges would think potentially is not the appropriate way to handle that particular element or factor of the Lafler test.

So, unless the Court has any other questions about that factor, I'm hoping to leave that and to really focus what I think is the most important aspect of the Lafler test, as it applies to this case. And that is whether or not my client would have accepted the plea offer had he been properly advised. And part of that then comes into was he properly advised. So let me start with that.

THE COURT: Advised on the plea offer?

MR. UFFERMAN: Correct.

THE COURT: All right.

MR. UFFERMAN: And I submit that the most important document in this case is Exhibit 1(e), which is the page 13 of the submission, and that is the October 23rd, 2012, email. And I'm going to go through that.

Before I go to that, I did -- I referenced this earlier, and I'm sure the Court is aware of this, but there

was -- we do have a transcript. The government prepared it, I believe, or it may have been prepared as part of the appellate proceedings, but we do have a transcript of the March 9th, 2012, first appearance proceeding before Magistrate Judge Bryant.

And certainly, when you review that, Your Honor, you'll see that Judge Bryant appropriately went through all of the counts and said what the maximum sentence is for those counts, but at no point did he say, "and the maximum sentence could be each of those counts consecutively." No, he didn't say "concurrently" either. He didn't make any mention of it.

But I submit a reasonable person when hearing that is not going to automatically assume that it's possible that they could be consecutive, and that is something that normally would have to be spelled out to any criminal defendant.

THE COURT: So you don't dispute that at his detention hearing he was told the maximum?

MR. UFFERMAN: For each count.

THE COURT: For each count.

MR. UFFERMAN: But in no way was it said in here, unless I'm missing something, that it said, "So the ultimate maximum exposure you have is 160 years." That was not said.

And I think Mr. Nesland both today and in his declaration said that he never told my client that. There's

not a single written document that's been submitted by either party, even the government's calculations at the time that my client was considering the plea, that in any way said that my client could get 160 years.

But we now know from the sentencing hearing, as decided by Judge Sharp, that the total offense level in this case was 41; it's a Category II criminal history case; and that results in 360 months to life. But because life exceeds the statutory maximum for the counts, the statutory maximum became -- or the guideline maximum became the maximum for each of the counts, consecutive. And that's from guideline 5G1.2(d) [verbatim] if I remember off the top of my head, which says, in this context, every one of the counts must be sentenced consecutively.

And that -- again, I appreciate Mr. Nesland's candor -- is not something that he even contemplated with my client, that if he went to trial and lost he was looking at 160 years, which, for all intents and purposes, certainly would have been the rest of his life.

So I think when you look at the sentencing memos, in both sentencing memos, the June 2012 and the October 2012, the government's done a very good job today of pointing out specific things that were said in those memos. And then yes, there's not the language that says it would be impossible for the judge to give this range or that range. We concede,

that's not in there.

Nevertheless, the tenor from both of those memos is that your attorney, Mr. Nesland, "I believe the government's wrong, and I've had a consultant who's helped me prepare this, and we believe we have good arguments for most of these enhancements." And for some, as my client acknowledged as he was going through it, he understood that actually we maybe don't have a good argument for this one; we'll make the argument, but that could go against it. But for several we do have good arguments and we believe the government's wrong.

Now, again, he didn't say that in no uncertain terms in the initial memos. It was the consultant, I believe, that drafted it, so he didn't use that terminology, but at least what's being presented to my client in these memos -- not just once, but twice -- is that the range that the government is coming up with in this case is not correct and we think we have good arguments to respond to that.

But then you get to the October 23rd email. And -- and I think this is true. My client said this in his testimony today. I think it's true of anyone in federal court. We talk about base offense levels and total offense levels and Category II, and we even talk about months. Mr. Nesland was a good example of this. You know, I -- I got very bad grades in math throughout my high school, which is

why I went to law school. It's not easy unless you're doing this day to day. Probation offers can probably convert months to years like that. I still have trouble doing it. It's certainly for someone -- despite how knowledgeable my client may have become in the business world, he had a high school degree. And again, he's just not used to seeing these terms.

So even when you hear month ranges, that's not easy to figure out, what does that mean? The average person when thinking about this, they're going to want to know what's my bottom line, and I want to know my bottom line in years. And this exhibit gets right to it.

And of course I'm going to go to the second paragraph. (As read):

> You know from the sentencing memorandum I provided to you in our discussions that the applicable sentencing guidelines, if followed, will result in a sentence in the range of 17 to 20 years.

Now, I'm going to address the various words in this. I'm going to start with "will result."

THE COURT: You don't want to start with "if followed"?

MR. UFFERMAN: I will start with "if followed."

THE COURT: It comes before "will result."

MR. UFFERMAN: Then I will do that, Your Honor. And I think I have great arguments for both. And I think -- I'm hopeful that we will carry the day when we explain this. So let's start with the "if followed."

I think the government today -- because they specifically asked that question to Mr. Nesland -- they were hoping that he was going to come back and that he would respond, "Oh, when I said 'if followed,' of course I was talking about the possibility of an upward departure."

That is not the answer that he gave when asked to give some explanation as to what he meant when he put the two words "if followed" in that email. He previously had said that, "Yes, I told my client that guideline ranges were not binding," or something to that effect, and that a judge could go above or could go below, but that he added that "most likely or more often than not, judges go with the guideline range." I think that's what he testified to today.

The other thing I will note is that there are several -- there are written communications in this case, for better or for worse, as I'm sure Mr. Nesland thinks, and I'm thankful that there are. Because in too many times, as you know, Your Honor, in these cases it's the defense word against the defense attorney's word, and I'm not going to win that battle if it's my client's word against the attorney's word.

So in this case we know exactly what Mr. Nesland was saying to my client because he put it in writing. Nowhere else in writing that I'm aware of -- and if I missed it, I apologize -- but I have not seen anywhere in writing where Mr. Nesland said to my client, "Again, as I told you earlier, be aware the judge could give you an upward departure. Again, I'm concerned, this is the type of case where the judge would give you an upward departure."

In fact, if you look at the tenor of all these documents, he's arguing that, you know, you're a pretty good candidate for mitigation. And we can argue against a lot of these things. We can put together a good sentencing memorandum.

So I don't think, I submit, it's fair to look at this evidence and see that upward departure was not his concern and was not something that he was concerned about with this "if followed" language.

And of course, what's most important is what's going on in my client's mind. What is he thinking? So if he's not been warned -- and Mr. Nesland in no way said that he was warning him -- that the real issue is you've got to worry about an upward departure and an upward variance -- if that's not something that's being told to him, then I submit that "if followed" doesn't mean much of anything to my client.

Then it really comes around to "will result in a sentence in the range of 17 to 20 years." And I note that in this same email, when talking about whether or not my client would be convicted, he actually -- he qualified his opinion with "a high degree of certainty." Which is a pretty -- pretty -- that's a qualification, but that's as close to the high end of a qualification as you can have. I think it's a high degree of certainty you're going to be convicted.

THE COURT: Yeah. He's talking about his conviction.

MR. UFFERMAN: But in this sentence, he doesn't qualify it at all. Doesn't say "high degree of certainty it will be 17 to 20." He says "will be 17 to 20." If you go to trial and lose, it will be 17 to 20.

And I submit that with all -- everything that's been going on up until that point, this is the most important communication in the case. This is the day before he's got to decide, am I taking nine years and saying goodbye to my wife and my ten-year-old daughter to go away for nine, thinking I'll do seven and a half --

THE COURT: So what's your -- what's your argument on -- on Mr. -- on your client's -- Mr. Olive's testimony that 20 is this magical -- 20 years is this magical number?

MR. UFFERMAN: Your Honor, I can --

THE COURT: You heard me question him.

MR. UFFERMAN: Oh, sure. Sure.

THE COURT: Nine is still less than 20.

MR. UFFERMAN: Yep. And I think -- I tried to bring this out through Mr. Key, and I think it also really is just common sense, and it really matters when you think about this: He was 47 years old. If he -- and I'll go through the numbers again. If he took nine, he was going to be 56 with no good time. If he took -- if it was 17, he's 64. If it's 20, it's 67. With good time on either of those, he's basically in his early sixties.

Mr. Kennedy said it was okay for me to say this; so I will. He's 61 today as he sits in court. Mr. Kennedy thinks he has a pretty good life ahead of him at the age of 61.

So my client's thinking, worst case, I'll -- I'll roll the dice. Because if I lose under my attorney's worst-case advice, "will result," I'm still going to be out in my early sixties and I can still have a full life. I can still see my daughter graduate high school, my ten-year-old daughter -- well, that's with the nine years. I'll see her graduate high school. I can still see my daughter have grandkids and be a part of their life, hopefully for ten, 15 years after that.

THE COURT: But if he takes the nine, he's actually going to get out, as Mr. Nesland said, probably

seven and a half for good time. So he would be in his early fifties.

MR. UFFERMAN: So he's willing to take the risk that, even if I lose, I still have life outside of prison. But if you tell me it's actually 30, I'm getting out when I'm 77. And we now, as the Court is well aware, we're at life expectancy numbers. May not even make it out of prison on a 30-year sentence.

THE COURT: And --

MR. UFFERMAN: And even if he does, how much time is he going to have?

THE COURT: I understand your argument. Just tell me why that makes good sense.

MR. UFFERMAN: I'm sorry. I didn't hear the last part.

THE COURT: I understand your argument. Why is that logical? Why does that make good sense?

MR. UFFERMAN: Your Honor, I think -- I think that's -- that's what criminal defendants go through in their mind. If you're -- and Mr. Key said this. The greater the exposure, the more likely you are to accept the plea.

So if he was saying the range was 17 to 30 and he failed to tell him that it actually could be life, the argument I'm making to you right now wouldn't make much sense, because even under the 17 to 30, you would be saying,

"Mr. Ufferman, look, so he was told it can be 30; he could get out when he's 77." And you say, "That's not much different; he's not going to have much life, if any, after that, so why does that matter?"

We know that the Supreme Court in *Graham* and *Miller* spent a lot of time talking about life expectancy tables, and these are decisions any defendant -- in particular in those cases, juvenile defendants -- have to go into -- goes into the calculation as to how they're going to proceed.

So I submit really the most important factor that any defendant is going to be going through is what -- what's the benefit versus the risk? And if the risk isn't so high that it costs me everything, I'm willing to roll the dice. But if the risk is so high that it will cost me everything, I can't roll the dice.

And I submit we are right at the line where that exactly applies in this case. The risk of getting out in your early sixties, although very high, is not costing you everything because, as Your Honor, knows, there is life after 61. There is hopefully a lot of life. There is not life after 77.

THE COURT: But there's even more life at 53.

MR. UFFERMAN: But so maybe I'm willing to take the chance that I get all of my life. I don't have to do any

time if this jury believes that I didn't commit a crime. And the risk is, so if they don't believe me, the worst I'm going to get is I'm still out in my early sixties; I can enjoy my grandkids; I can enjoy my wife.

But if you tell me they don't believe me, and my attorney's saying there's a great certainty they're not going to believe you, and if I lose, I'm going to spend the rest of my life in prison and never see my grandkids? Never see my wife? That's a risk I cannot take. And I submit we're right in those numbers in this case.

So let me -- I am getting ready to sum up. Because I -- I've talked about how this exhibit, Exhibit 1(e) is the most important exhibit in this case, and then I want to come back to the *Gordon* case that I cited in my reply. And this is the Second Circuit. This is on page -- let me give the cite, Your Honor. I apologize. This is 156 F.3d 376. It's The United States v. Gordon, the Second Circuit, in 1998. I cited to it in my 2255 reply. Excuse me.

On page 380 the Second Circuit says (as read):

> As we have previously noted, the decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case, and counsel may and must give the client the benefit of counsel's professional advice on this crucial decision.

Finally, it follows that 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.

On the next page they go over to say --

THE COURT: So just stop there. Standing trial or the decision to accept a plea offer.

So your lawyer's told you --

MR. UFFERMAN: High degree of certainty.

THE COURT: Even higher than high degree.

MR. UFFERMAN: Yep.

THE COURT: And -- and enough information to make an intelligent decision on the plea offer.

MR. UFFERMAN: Yes.

THE COURT: So --

MR. UFFERMAN: Well, other than he didn't tell him the correct maximum.

THE COURT: Right. But in terms of the plea offer, what did Mr. Nesland not do?

MR. UFFERMAN: The only other thing I would point out in that regard -- and he testified to this -- is that one of the reasons that my client was still saying at the end of the day that -- why he thought he can win this case is because when he got up on that stand, he thought he could explain to this jury why he didn't have that intent.

But then the next thing that he acknowledged today is that discussion, that preparation about what his testimony would be didn't happen -- and you'll correct me if I'm wrong -- but my memory of his testimony was -- January -- this came out through the government's examination of him. They went over his testimony in January of 2013. This plea offer expired in October of 2012.

So if the key thing that the defense is going to be presenting, in my client's mind as Mr. Nesland knew it, was your testimony is going to be able to convince that jury -- and that's what he's thinking -- then I would think, wait a minute, client, let's do our prep testimony now, and see how strong you really are going to be. Because maybe you'll see if we do your prep testimony now that you're not as strong as you think you are. And maybe you think you are with me giving you softball questions, but let's talk about what a seasoned prosecutor is going to do to you on cross-examination and see how strong your testimony is going to hold up.

THE COURT: And apparently they did that. And apparently Mr. Nesland was so concerned after they did all that, he offered up, "Maybe I better call the government back and see if that plea offer is still on the table."

MR. UFFERMAN: But there was still no plea offer at that time.

THE COURT: But he didn't get a chance to find out because your client never allowed him to do so. We don't know if the government's offer would have been --

MR. UFFERMAN: We don't know. But we also know that the letter that was provided to my client said this plea offer expires October 25th, if I remember the exact date. And I think my client at that point was going down the road of, okay, we put that behind us --

THE COURT: We all know the government may make an offer for all various kinds of reasons and you never know until you ask.

MR. UFFERMAN: But the critical time would have been before it expired the first time.

THE COURT: Sure.

MR. UFFERMAN: Because I think once -- because the other thing -- and you juggle this as a criminal defense lawyer -- on the one hand you want to get your client to accept what would appear to be a good plea -- and I'll acknowledge Mr. Nesland, other than failing to give him the -- if he really wanted to make sure -- to get the best chance of my client saying yes to the plea offer, he should have done a little more research of the guidelines so he could say, "You're looking at 160 years." I submit that would have put my client over the edge. He didn't.

But then the other -- the things you weigh when

you're trying to go down this road is, on the one hand, I want him to accept the plea deal, but once he's made that decision that he's not, then I want him to be confident in his defense, because this is what we've got to present and we've all got to be on the same page and be positive about it.

And I think the time to have discussions was in October of 2012. And if the key decision or you know that the key reason that your client thinks he can win this case is because of his testimony, at that point you better be having that prep session and be going over what the government's going to ask in cross so you can see that your testimony may not be as strong as you think it is.

THE COURT: All right.

MR. UFFERMAN: So let me go over -- and I'll conclude with this -- this is Headnote 5 of the *Gordon* case (as read):

> The district court found that although Dedes does mention in his letter that there is a possibility that Gordon could be sentenced to ten years for each count under the indictment consecutively, his conclusion is clear that Gordon faced a maximum incarceration of 120 months.

In our case there's not even a mention of the possibility of consecutive sentences. And I submit that any

reasonable defendant -- any reasonable defendant looking at Exhibit 1(e) and reading that "will result in a sentence in the range of 17 to 20 years," he thought that I can take this risk, and if I lose, I'm not getting more than 20.

And that wasn't -- just like it was clear in *Gordon*, I think it's even more clear in this case. Any reasonable defendant upon reading this would have that conclusion, that I'm not getting more than 20. And boy, was he shocked when he saw, A, he did get 31; and he actually could have gotten 160, and that would have been a lawful sentence under the guidelines.

So then ultimately in *Gordon* the Second Circuit concluded by saying (as read):

> By grossly underestimating Gordon's sentencing exposure in a letter to his client, Dedes breached his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable.

I submit that Mr. Nesland, although good intentioned, had the same breach in this case: He didn't advise my client properly. He didn't tell him the maximum.

As Mr. Key said, as the Second Circuit said, as every circuit really said, that in order for a defendant to make a knowing, intelligent, and voluntary decision about a plea, they need to know the exposure. My client wasn't

properly advised. I think there is ineffectiveness. And I submit that, as my client indicated today, had he known that the risk in this case -- he said, you know -- I forget the exact words he used, but "It wasn't the gamble that I thought I was taking." And if he had known the actual gamble, which is not that I could get out in my early sixties, but it's actually gambling my life, literally, he would not have taken that gamble and he would have taken the nine years.

Thank you, Your Honor.

THE COURT: All right.

RESPONDENT'S CLOSING STATEMENT

MR. MOORE: Your Honor, I think here you asked the most pertinent question: Why, when he had been offered nine years, even if he thought 20 years was what he was going to get, would he not have accepted that offer when his lawyer told him that he -- there is a high degree of certainty he would be convicted?

And the reason, as they've just conceded, is he thought he could beat it. He thought if he got up there and spun his tales about why all of this was okay, that he would walk out of the back of the courtroom.

And that decision -- because -- and that decision is why he didn't accept it. There was no offer that he would accept when he thought he was going to beat it. Even today,

when Your Honor asked him quite pointedly whether -- there's a mental state required to plead guilty, and that mental state requires that you had criminal intent.

He waffled -- this is after nine years in jail considering this, after being prepared by his two lawyers and knowing that he has to say yes to that question to have any -- any chance of this -- of winning on this, he still can't bring himself today to admit that -- that he intentionally committed fraud.

And so, therefore, we believe that he hasn't established that he would have accepted the plea offer.

Additionally, you should credit the testimony of his lawyer, Mr. Nesland, who is a respected member of the bar, who has practiced for many years.

When he told him that -- "I told him many times that the judge can vary up; he can vary down; this is my best estimate. I'm not telling you this is certainly what you're going to get."

Here, the only testimony presented on the other side was the defendant -- who now, this is his second conviction for fraud, and he testified at trial and the jury rejected his testimony. So his -- the credibility of him coming here today and saying that "My lawyer told me I'm not getting more than 20," even when it contradicts the -- the documents that were sent at the same time, I think that's

highly incredible and the Court shouldn't rely on that.

I disagree that the October 23rd is the most important document. I think the October 15th email in which the plea agreement was forwarded to the defendant is the most important document in all of this.

In the second paragraph, Mr. Nesland says (as read):

> However, even if it's 37, 201 to 262 months; 38, 235 to 293 months; or 39, 262 to 327 months, the potential period of incarceration is in this -- the range of 17 to 27 years.

Here he's telling him as clear as you possibly can be that the sentence range can certainly go above 20. And he's telling him that -- that he needs to accept this plea offer.

So here he tells him the range under any of these different scenarios. Here, it goes up to 27. He ended up getting 31. This is not a case in which there was some vast discrepancy, where the lawyer as in some of the cases didn't make any effort to find out the facts of the case and just gave him a plea estimate that had no basis.

Here Mr. Nesland, you know, did a very exhaustive review. He created two separate memos in which he estimated the guidelines. He hired a former probation officer to review those and estimate the guidelines.

And most importantly, he provided to his client the United States's estimate of the guidelines. And the United States estimated that the guidelines went up to 362 months. He ended up getting 367. There's nowhere in any of these documents where he says that -- you know, that it's impossible that the United States's guidelines will be the final court-determined guidelines.

Here, he was certainly aware that the United States believed it went up to 362. And the only thing that his lawyer told him is "We have arguments here that -- this is their guidelines; I think we're going to come in lower; I'm giving you my best estimate."

And that's exactly what a lawyer should do. The standard is not that you have to estimate the guidelines perfectly in every single case. Oftentimes when defendants are pleading guilty, neither party knows what the guidelines in that case would be. And a lot of times that will factor based off of the defendant's criminal history, which is sometimes not to be determined, or judgment decisions by the Court about which enhancements to apply.

And just because your lawyer tells you there are arguments to be made on this enhancement, one direction or the other, that doesn't mean that it certainly cannot apply at all.

Here, as plaintiffs, they have a very high burden

here. They have to show that here the -- counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied on as having a just result.

And it's not just serious errors. It has to be errors so serious that counsel was not functioning as the counsel guaranteed by the -- guaranteed the defendant by the Sixth Amendment.

That's an extremely high burden. It's not that the lawyer didn't -- the lawyer was perfect or didn't make any mistakes. It has to be that this conduct was so below what the standard of practice is that it affected the outcome, and it was pretty much as if the guy had no lawyer at all. That's what the standard is.

Here, there's also (as read):

> A strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

And that's from Pugh [phonetic] v. The United States. And there the Court cautions that we shouldn't indulge in hindsight. Of course, every time someone is convicted in trial, in hindsight, it would th have been better to take the plea offer.

But that's not what this Court is here to do. Here, it's whether the defendant or the defendant's lawyer

exercised reasonableness in his approach to the case and gave him -- and exercised under the professional norms.

In addition, here there was, as is standard practice in this district, an initial appearance. And at the initial appearance he was advised of the maximum sentence of each count.

It cannot be that the standard for advising your client about what they're facing is higher than the standard practice in this district in which we do in every initial appearance.

Pretty much what -- what they're arguing here is that, you know, all initial appearances in the Middle District of Tennessee are -- you know, absolutely inappropriate if they don't go down the list and add up each one instead of correctly advising them of the maximum for each charge that they're facing. And that's what -- there's no question here that he was properly advised of the maximum exposure for each count that he faced.

And here he made a good-faith estimate, and that's all that's required of him. And I think that the Court should credit that.

Just to respond to a couple of the things. You know, Komisar testified here today. I think the Court should not give great weight to that. He admitted he did no research. He had had one C plea deal in -- in front of Judge

Sharp. And he wasn't even aware of the two C deals Judge Sharp had rejected after -- after this case. And I just don't think that his testimony was very helpful.

If there was some lawyer who had testified, you know, that they had had some extensive experience in front of Judge Sharp and had deals similar to this, that may have been helpful to the Court, but I think that Komisar's testimony here was not very helpful.

Here, I think that the -- and -- and I think the George David George case is very helpful here. Here we have, similar to that case, a defendant who had committed fraud multiple times, and there Judge Sharp clearly indicated that he was concerned that the sentence wasn't reflective of the conduct. And that's why he twice rejected a C deal.

And, you know, even though the United States extended a plea offer, that's so -- that is not binding on the Court. When we extend a plea offer, that is our evaluation of the case, and the Court exercises its own independent judgment of what an appropriate resolution is. And so us extending a plea offer is -- in no way, you know, guarantees that the Court will end up then accepting it.

And here we think that if you look at what Judge Sharp did since then, it shows that he was unlikely to accept a plea deal like that.

Additionally, what Judge Sharp did at sentencing I

think is something the Court could take into effect. This is a case that had extensive pretrial litigation. You know, the Court is certainly free to look at the docket entry. This is not a case in which, you know, it went on the first setting and the judge had no idea what the facts of the case were. They extensively litigated the fact that he received cease-and-desist orders. They extensively litigated the allegations in the speaking indictment.

And so Judge Sharp had heard all of that before this case went to trial, and he'd heard all that before this plea offer was made. So I think the Court should reject the argument that if -- you know, if Judge Sharp hadn't sat through trial that he wouldn't have sentenced him in the way he did. Judge Sharp had a significant amount of information about this case and would have been able to rely on that information in deciding how he should -- he wanted to sentence the defendant.

Here, the lawyer, I mean, stated as strongly as a lawyer will in writing that he should accept this plea offer. He told him that from the very beginning he met him. He told him it's a high level probability. Even on the eve of trial, he's like, "You should accept this plea offer. I will go back, begging to the government to reextend it."

And the defendant never gave any indication in any of these times that he was willing or interested in accepting

a plea offer. And he told him that he wasn't. And, quote, I'm not going to plead guilty to something I didn't do.

Nothing about that sounds like someone who would have accepted a plea offer if he had realized that the maximum sentence was slightly longer than -- than he would have anticipated.

So here I think the evidence has shown that they don't meet either of the elements. First, I think that the representation here by his lawyer is consistent with the practice in the Middle District of Tennessee. He properly advised him. There's no indication anywhere at any point that he told him his statutory max was lower than what it ended up being.

Here, they're conflating what -- the guidelines estimate with the statutory max. There is nothing in here that shows that he had inappropriately advised him on the law on what he was facing for each count. He properly advised him on the law, and he did a guidelines estimate, which turned out slightly below what the final guidelines level was, but he had been informed by the United States our view on the guideline.

And then, additionally, there's no indication that he would have accepted this plea offer or that the result would have been any different. We heard his testimony today in which he's still equivocating. His lawyer said that he

said that he was never going to accept a plea offer and that he didn't do it.

So I think it fails under both of those standards. And because of that, I ask that the Court reject the 2255.

THE COURT: All right. Thank you.

Mr. Ufferman, you get the last word here.

PETITIONER'S REBUTTAL CLOSING STATEMENT

MR. UFFERMAN: Thank you, Your Honor.

May it please the Court. I'll try to be brief. I respectfully -- well, regarding what the magistrate judge said in the initial appearance, it's not any judge's duty to correctly advise a client when considering a plea offer what the maximum exposure is other than the defense attorney himself.

So I'm not saying that the magistrate judge should have said those should be imposed consecutively or not. The magistrate wouldn't be in a position at that point to know whether they could be imposed consecutively or not. The defense attorney has a duty to know, and the fact that it wasn't said is the reason I was making that point. Had it been said, it would be different, but it wasn't said.

And I think, again, Mr. Nesland acknowledged there's not anything in this case that would have ever told my client prior to the plea cutoff date that he was looking

at something in the neighborhood of 160 years. I don't -- there's no dispute in this record that he was never informed that by anyone.

I respectfully think it's disingenuous for the government to say that they really believe that Judge Sharp would not have accepted the plea. So now we have them offering a plea offer that they think, looking back now, the judge wouldn't have even accepted it. Again, I don't think the government is in the habit of offering plea offers that they believe would be in bad faith because the government wouldn't even accept -- because the judge wouldn't accept such a plea offer.

I submit that that's them addressing this after the fact. It's easy for them to make that argument; that's clearly not what they thought at the time. And again, other than the two cases they've cited -- I've explained both -- the general -- the only other evidence before the Court today is that the general practice in this district, and in particular at least Judge Sharp, to Mr. Komisar's knowledge, was that C pleas are not being routinely rejected by judges.

I also respectfully disagree with Mr. Moore that the October 15th email was the most important document in this case. For obvious reasons, the October 23rd, the last document that he saw right before making his decision, I submit, would be the most important document.

I submit that the October memo negates that previous plea offer from the government and the letter -- or the email that was submitted with it. Because the October memo goes through and again reiterates the defense's and Mr. Nesland's belief that they could have good arguments in response to a lot of the government's assertions regarding whether the enhancements would apply.

But then let me point the Court to Exhibit 1(a). We haven't talked much about it. But it's the very first document in the packet. And in that you'll see in there that Mr. Nesland says (as read):

> After trial, as you may recall, she -- being the Assistant United States attorney -- claimed it -- "it" being the plea offer -- was better than the 20-year sentence under the guidelines.

He reiterates even after the trial that what the range was that my client was looking at was the 20-year sentence under the guidelines. It further shows that that's exactly what Mr. Nesland was also thinking throughout this case and certainly at the time that the plea offer was being discussed.

So then the last three points I want to make -- let me grab a piece of paper, Your Honor. I apologize.

Number one, I asked Mr. Nesland, I thought was a critical question. And he could have -- I wasn't positive

what the answer would be. I said, "You don't know what Mr. Olive would have done if you had actually told him that the sentence -- the exposure was 160 years?"

He could have said, "Yeah, I do. It's my belief it wouldn't have mattered what the range was; he was never going to enter a plea."

And to his credit and he was -- he was truthful and honest with the Court, and he agreed, "Yes, I don't know." And I submit that if he really believes that no matter what was being said, he was going to reject the plea deal, that is what his answer would have been. But instead he said, "Yeah, I don't know. Because we didn't have that discussion."

Number two -- and this is kind of the unique aspect of *Lafler* that I disagree with, but I'm not a member of the US Supreme Court -- if you grant relief, my client's not guaranteed the nine-year deal. That's not how this works. If you grant relief, the government is required to reoffer the nine-year plea offer. My client then has the opportunity to accept that. If that happens, then he appears back in front of you. And the U.S. Supreme Court said that you then get to decide, based on all the circumstances of this case, what a fair sentence should be.

Now, of course I'm probably going to argue at that time that the fair sentence should be nine years. But

there's no guarantee that he gets that. The U.S. Supreme Court could have said that, but they didn't. So he's not even guaranteed to get the nine years if you grant this 2255.

And then, finally, I go back to what the Second Circuit said in *Gordon*. Their words (as read):

> By grossly underestimating Gordon's sentencing exposure in a letter to his client, he breached his duty as a defense lawyer.
>
> The gross underestimation in *Gordon* pales in comparison to saying, "You're looking at 20 years," and in actuality it's 160. He could not make a knowing, intelligent, and voluntary decision about whether to accept that plea without knowing his actual exposure. And if he thought it was 20 and that gave him life after prison, that's one thing. But to think that it literally would be life -- because once -- I'm not aware of any person in recent times that has lived to be 160 plus 47. He was looking at life. And that's the only advice that could be given to him for him to properly make that decision.
>
> And as I've explained, you can see why that would change his decision from no to the nine-year offer to yes. And I'd ask you to give him that opportunity to now accept that, knowing the actual exposure, so you can impose what would be a fair sentence in this case.
>
> Thank you, Your Honor.

THE COURT: All right. Well, thank you.

Mr. Olive, I considered and have read all the briefing prior to today. And I convened this evidentiary hearing on your claim -- on the limited claim that your counsel was ineffective for failing to explain the maximum possible punishment you faced if you were convicted after trial and/or failed to inform you that the sentence would run consecutively.

And I'm adopting and incorporating Docket Entry 18, which is the memorandum and opinion that I issued back on June 6th, 2018. And in summary there, I said (as read):

> To succeed on your 2255 claim, you have to establish two elements by preponderance of the evidence:
>
> One, that your counsel's performance was deficit; that his performance was objectively unreasonable under prevailing professional norms.
>
> And, two, prejudice: Specifically, that there's a reasonable possibility or probability that, but for your counsel's errors, your sentence would have been different. Specifically, it would have been lower.

And here I'm going to start on the second element because that's really determinative here for me as the trier of fact.

Mr. Komisar testified on your behalf. Mr. Komisar is a respected member of the criminal practice bar here. The Court's familiar with him. Here, though, his testimony and the weight I can give his testimony is really pretty limited because he had only presented one C agreement to Judge Sharp that was accepted by Judge Sharp. So it is too far a stretch for me to conclude that that means that Judge Sharp would have accepted your plea agreement had it come to him.

But specifically, I do know that under prevailing Sixth Circuit authority you -- any judge who considers a C agreement has responsibility to look at that agreement under all the sentencing factors under 3553(a). And I have no reason to believe that Judge Sharp would not have done that. In fact, I've gone back and looked, and Sixth Circuit authority that a district judge look at C agreements under 3553(a) existed at least back to 1990. So way before this. I have every reason to believe Judge Sharp would have engaged in that analysis when he looked at this -- this particular C agreement had it been presented to him.

So your petition is really disposed of, because I think you fail to establish by preponderance of the evidence that there is a reasonable probability that your sentence would have been different and in fact lower. I think Judge Sharp would have applied the 3553(a) factors as he was required to do. And there is simply insufficient evidence

here for me to conclude that he would have imposed a custody sentence of nine years even if your plea agreement had been presented to him.

With that, I will note that your attorney testified -- and I think he was truthful in all of his testimony, and impressive -- and I'll get back to him later -- that he had done research on Judge Sharp's preferences, and particularly his history of accepting or not accepting C agreements. And he could find nothing that gave him any guidance.

So I -- on that first element, I just don't think it's likely -- or you've not proven to me here today that he would have accepted the plea agreement. And that's dispositive.

However, when I look at all of the evidence presented, I believe that it is more likely than not that you would not have accepted a plea, really under any circumstances. First of all, I credit the testimony of your wife, Susan Olive, and your son-in-law, Nathan Kyle Bailey, both of which testified consistently that you never admitted to them your guilt to the charges that went to trial and that we're discussing here today.

Next, I notice that you don't believe that you had the intent to engage in the mail or wire fraud. And that intent is an essential element of the crimes. Had you come

before the Court and offered your plea, you would have had to admit that you had the intent to engage in that conduct.

I find here today that it is not likely that you would have admitted to the required intent for the Court to have even accepted the C agreement had it been presented.

At today's hearing, I further find that your demeanor did not reflect truthful testimony. Specifically, you were evasive. Your answers were self-serving. You were prideful. And you were very skilled at avoiding answers to the questions.

Repeatedly throughout the hearing this morning, this afternoon, the Court had to remind you, "That's not the question I'm asking." Even on examination of your attorney, on direct examination, you had a tendency to say what you wanted to be said here today and not answer the questions. And the same was true on the government's cross-examination.

And then, finally, quite frankly, the Court does not follow or appreciate your testimony that what was in your heart is somehow different from your intent to testify on the elements of the charges in the indictment. I think quite the contrary. In your heart of hearts, as your wife and son-in-law and you testified, you simply had not accepted and have not accepted that you are guilty of any of the charges in the indictment and on which the jury's found you guilty.

Third, I believe that your intent in going to

trial was because you thought you could convince -- to use Mr. Nesland words -- I would use the word you thought you could persuade the jury to believe that you were not guilty. Again, the Court finds you very skillful, very artful in the choice of words and the ability to use words to your own advantage.

I think it's clear from the evidence presented here that because your lawyer told you two days before the plea offer expired that you were going to be found guilty at trial -- and this is where -- I told you during your testimony and I'll say it again in my findings -- I find it illogical that you would have turned down a nine-year sentence -- custody sentence and rolled the dice or taken the risk, or however you want to put it, and go to trial when your lawyer is telling you and did tell you in the October 23rd email that a jury was going to find you guilty beyond a reasonable doubt.

So I don't follow, I don't accept, I find it not credible that you turned down that offer because you thought there was some chance, some possibility that you could win at trial. Indeed, when I questioned you on that issue, at the end of the day, you said you did not know why you had that -- that belief that something would happen at trial.

Your testimony on that issue, I also credit that I think it's more likely than not that you did tell your

lawyer, quote, I think we can win. I think it's more likely than not that you said, I'm not going to plea to something that I didn't do, end quote. And quite frankly, there were no circumstances in which you would have taken a plea of any -- of any type.

After the plea offer expired, you refused to let your lawyer go back to the government. His testimony, which the Court finds convincing, was, it's not too late. We're still pretrial. The government -- the government might still offer the nine -- nine years. And you would not give him authority to do so.

All of that taken together just confirms in the Court's mind that there were no circumstances in which you would have taken a plea, and that goes to the element of prejudice.

So, in summary, I find by preponderance of the evidence that you failed to establish the prejudice element of your 2255 claim. I further find that I think Judge -- it is unlikely Judge Sharp would have accepted the plea. And I find that, in fact, it is unlikely that you would have -- you would have offered to plead to the essential elements of the counts in the indictment.

But as I set forth in the memorandum, there's two elements to the claim. I think -- I think the prejudice element is dispositive. But for purposes of the record, I'll

turn to the first element, and that's your lawyer's deficit performance.

I'll incorporate what was said in my memorandum. Quote (as read):

> It's well settled that an attorney's failure to properly inform his client about his sentencing exposure may constitute ineffective assistance. There are cases that the failure to inform a defendant correctly of his sentencing exposure at trial may constitute ineffective assistance of counsel.

And I've cited a number of Sixth Circuit cases to that effect. But here's the key for the Court (as read):

> After all, the decision on whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case. And it follows that knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision on whether to plead guilty.

Here, I do find that Mr. Nesland was -- did not live up to and did not perform the acceptable standards in informing you of the maximum statutory sentence, as well as the fact that they would run consecutive. But that finding

is in contrast to my finding that I do think he performed adequately and did, quite frankly, a very nice job of advising you of the plea and the possible sentences that could come from that plea agreement and your nonacceptance of the plea agreement.

Mr. Nesland is impressive, lawyer of 49 years, practicing civil with an emphasis on criminal law. The Court's impressed that he was with the U.S. Attorney's office with the Southern District of New York. And I find credible his testimony that he prepared the two sentencing memorandums, June the 12th and October the -- October the 20 -- October the 15th -- October the 17th, in order to give you his, quote, best guess estimate, end quote, about what the sentencing guidelines were.

I believe that a lawyer of that experience and years would have told you, and he did tell you, that the Court was not bound by the guideline range; the Court could vary upward or downward. And he never guaranteed a top sentence from which the Court would not be able to go further.

Your testimony, quite frankly, Mr. Olive, shows to the Court that Mr. Nesland testified truthfully. In your own testimony, you said, "I believe" -- you quote Mr. Nesland in saying, quote, He said I believe that she is wrong, referring to the U.S. Attorney.

And then again you said Mr. Nesland said, "I don't believe that her sentencing calculations are right."

I think he probably did say that. And in doing so, he expressed to you nothing more than what his professional judgment was about what the potential sentencing guidelines could have been. That was his belief. He backed up that belief by giving you two very comprehensive sentencing memorandums in which he went item by item to each and every one of the sentencing factors and possible enhancements with his -- with his professional evaluation of the likelihood that each one of those sentencing enhancements would have been -- could be applied and the arguments against.

As we went through it on my questioning to you, you noted on some of those, he conceded the government was correct. On others he merely noted you -- Mr. Nesland on your behalf -- had an argument that that particular sentencing enhancement might not apply. But there's nothing in either sentencing memorandum that said that he guaranteed you that the sentencing range would be no more than 17 1/2 years.

Now, on the issue of advising you on the plea offer from the government, the Court further finds that he provided it to you in a very timely manner. He followed up with you in terms of explaining to you each of the elements

in the government's letter and what each one of those elements did. He used his sentencing memorandums to compare what the government was going to argue for sentencing with his analysis of the sentencing.

And he gave you -- I find truthful his testimony that he gave you his best outcome for you, his best -- the lowest possible sentencing guideline range that may be applicable to you. And I find his testimony here today to be consistent with that.

The sentencing advice he gave you was consistent with the sentencing guidelines. I think he did a good job explaining you had some possibility of certain enhancements not applying, but he at no time made any guarantee.

In sum, the Court finds that Mr. Nesland gave you a good-faith, reasonable analysis of the potential guideline sentencing range. And from there, you had enough information, had you truly been interested in taking a plea, to make a decision on the -- on the plea offer from the government.

So, while Mr. Nesland may have been deficit in giving you the statutory maximums, he was not deficit in advising you of the terms of the plea offer. And in that regard, I think this case is different from the Second Circuit case. Mr. Olive had good advice and guidance in terms of the exposure under the plea offer. And I think he

had sufficient information to weigh the benefits of that plea offer against what -- his potential sentencing exposure.

Quite frankly, the Court finds it highly unlikely that an attorney of Mr. Nesland's experience and years at the bar would have guaranteed any particular sentence to their client.

Finally, the Court notes that Exhibit 2 was provided to Mr. Olive, and certainly there Mr. Nesland advised you that the possible sentencing range could be more than 17 years.

So, for all the reasons I've expressed, as well as those that are in the Court's prior memorandum opinion, on this claim of your 2255, the Court finds that no relief is appropriate.

I've already disposed of your prior claim.

So for -- for this particular 2255, the Court will enter a judgment now on both arguments presented by Mr. Olive.

Anything else from the -- from the plaintiff?

MR. UFFERMAN: Your Honor, I can do this in writing, but obviously Mr. Olive would ask for a certificate of appealability. We think based on what we've presented and your findings today that at least a reasonable jurist could see this differently, and we ask you give us the opportunity to further pursue this.

THE COURT: I'm going to have you file a motion on that so the record's clear.

Anything from the government?

MR. MOORE: Nothing from the government, Your Honor.

THE COURT: All right. Thank you.

MR. UFFERMAN: Your Honor, I do have one other request. I apologize.

Is there anything I need to do to have my client sent back to Coleman in Florida?

MR. MOORE: I believe he's here on a writ. But I -- I can file the writ to have him returned, Your Honor.

THE COURT: All right.

MR. UFFERMAN: Thank you, Your Honor.

(Court adjourned.)

REPORTER'S CERTIFICATE

I, Lise S. Matthews, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on June 24, 2019, in the matter of RICHARD OLIVE v. UNITED STATES OF AMERICA, Case No. 3:17-cv-00979; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (pages 1 through 231) is a true and accurate record of said proceedings.

This the 12th day of November, 2019.

/s/ Lise S. Matthews
LISE S. MATTHEWS, RMR, CRR, CRC
Official Court Reporter