

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11975-J

MICHAEL METAYER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Michael Metayer's counseled motion for a certificate of appealability, to appeal the denial of his 28 U.S.C. § 2255 motion to vacate his sentence, is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL METAYER,

Petitioner,

v.

CASE NO. 6:14-cv-746-Orl-37DCI
(6:11-cr-347-Orl-37DAB)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case involves an amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 8) filed by Michael Metayer ("Petitioner"). Petitioner asserted twenty-three grounds for relief. The Court previously denied grounds one through fifteen and seventeen through twenty-three and scheduled an evidentiary hearing on ground sixteen regarding whether counsel rendered ineffective assistance by failing to convey a two-year plea offer and by advising him to proceed to trial. (Doc. 23 at 11-16). On October 19, 2016, the Court conducted an evidentiary hearing. *See* Doc. 67. Subsequent to the hearing, Petitioner filed a Supplemental Memorandum (Doc. 68) and Respondent filed a Response to the Supplemental Memorandum (Doc. 69). As discussed hereinafter, ground sixteen is denied.¹

I. LEGAL STANDARD

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was

¹ The procedural history can be found in the December 3, 2015 Order. (Doc. 23).

deficient and “fell below an objective standard of reasonableness”; and (2) whether the deficient performance prejudiced the defense.² *Id.* at 687-88. A court must adhere to a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. “Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

The Sixth Amendment right to effective assistance of counsel extends to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). The two-part test enunciated in *Strickland* applies to claims that counsel was ineffective during plea negotiations. *Lafler*, 132 S. Ct. at 1384 (applying *Strickland*’s two-part test to federal habeas petitioner’s claim that counsel was ineffective for advising him to reject a plea offer); *Hill v. Lockhart*, 474 U.S. 52, 48 (1985) (applying *Strickland*’s two-part test to defendant’s challenge to his guilty plea based on ineffective assistance of counsel).

“As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”

Missouri v. Frye, 566 U.S. 133, 145 (2012). As explained by the Eleventh Circuit,

counsel has an obligation to consult with [his] client on important decisions and to keep him informed of significant developments in the course of his prosecution. *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). Negotiating a plea agreement stands as a “critical point for a defendant” in the development of his case. *Frye*, 566 U.S. at —, 132 S. Ct. at 1407.

Carmichael v. United States, 659 F. App’x 1013, 1021 (11th Cir. 2016). Consequently, even when plea offers are informal, “counsel [has] a continuing obligation to consult with [his client]

² In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court of the United States clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel’s deficient representation rendered the result of the trial fundamentally unfair or unreliable.

regarding important developments, including plea negotiations, in his case.” *Id.* at 1022.

“Otherwise, such informal plea negotiations would be unlikely to turn into formal plea offers.” *Id.*

With respect to the prejudice inquiry in such cases, the defendant must demonstrate:

a reasonable probability existed that (1) the plea offer would have been presented to the court (*i.e.* the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that were, in fact, imposed.

Id. at 1022 (citing *Lafler*, 566 U.S. at 164).

II. EVIDENCE PRESENTED AT EVIDENTIARY HEARING

A. Petitioner’s Testimony

Petitioner testified that prior to being charged in this case, he had never been arrested or had any experience with criminal matters. After his arrest, Petitioner retained Akhtar Hussain (“Hussain”), an attorney who had represented his family in immigration matters, to represent him.

At the first meeting after his arraignment, Hussain told Petitioner that he did not believe the Government had any evidence against him although Hussain had not received any discovery at that time. Petitioner claimed Hussain never discussed his sentencing exposure under the guidelines or the benefits of entering a plea or proceeding to trial. Petitioner testified Hussain told him that taking a plea was not advisable because it would affect his immigration status.

According to Petitioner, Hussain had to withdraw from his case in March 2012, and the Court gave him a week to find an attorney before counsel would be appointed. Petitioner hired Attorney Alexander Michaels to represent him. Michaels entered a notice of appearance on April 4, 2012. (Criminal Case No. 6:11-cr-347-Orl-37DAB, Doc. 86).³

³Criminal Case No. 6:11-cr-347-Orl-37DAB will be referred to as “Criminal Case.”

Petitioner testified that Michaels called him in approximately mid-May to tell him that Assistant United States Attorney Robert Bodnar ("AUSA Bodnar") wished to speak with him. According to Petitioner, Michaels said he rejected AUSA Bodnar's request. Petitioner maintained Michaels asked him if he was a "snitch" and willing to cooperate to which Petitioner responded negatively. Petitioner said Michaels told him that the Government would not do anything for him if he cooperated, and Petitioner believed cooperation required him to become an informant but denied understanding what cooperation meant. Petitioner had spoken with DEA agents prior to being charged but claimed Hussain did not explain the purpose of the meeting.

Petitioner testified he next talked to Michaels a couple of days before the trial, which started on July 24, 2012. Petitioner said that except for this meeting, he did not communicate with Michaels in the thirty days before trial and Michaels did not tell him of any communications with the Government.

Petitioner testified that Michaels never discussed with him prior to trial (1) the elements of the offense the Government had to prove, (2) the minimum or maximum penalty for the offense, (3) the benefits of entering a plea, including the potential for acceptance of responsibility and application of the safety valve, (4) the pros and cons of going to trial versus entering a plea, (5) the sentencing guidelines, (6) what would happen if he lost at trial, or (7) any plea offers from the Government. Petitioner further testified that Michaels did not contact him while he was in jail before his sentencing hearing and claimed he did not learn his sentencing range until the hearing. Petitioner did receive a copy of his PSR in November before the sentencing on December 17, 2012.

After Petitioner was sentenced, his relationship with Michaels soured. He sent letters to the Florida Bar related to Michaels' failure to provide him with legal documents. In response,

Michaels sent the Florida Bar a letter in which he stated:

Additionally, it is important to note that I advised Mr. Metayer not to go to trial and that the best course of action was to take a plea because he had a difficult case to win. I had worked out a deal with the prosecutor where he would have received approximately 2 years in prison. However, he chose to go to trial, which is his right.

(Doc. 20-8 at 2; Pet. Ex. 21).

According to Petitioner, he was surprised when he received Michaels' letter to the Florida Bar because contrary to Michaels' representations in the letter, Michaels did not advise him not to proceed to trial and never told him he should take a plea. Additionally, Petitioner maintained Michaels never advised him that there was a deal worked out whereby Petitioner would serve approximately two years in prison. Petitioner also testified Michaels never discussed the possibility of him receiving a sentence of two years under the guidelines.

Petitioner said after he filed his § 2255 motion, he received the Government's response to his motion, which contained an email he had never seen before dated July 9, 2012, from AUSA Bodnar to Michaels. In the email, AUSA Bodnar asked Michaels if Petitioner was certain he wanted to proceed to trial and detailed the potential benefits of entering a plea with or without an agreement. (Doc. 17-3 at 1-2, Pet. Ex. 17). Among the benefits outlined by AUSA Bodnar was the potential for Petitioner to receive application of the safety valve and less than the minimum mandatory sentence of five years. (*Id.*). Petitioner testified Michaels never conveyed the information in the email to him nor did Michaels ever tell Petitioner he had plea communications with AUSA Bodnar. Petitioner also said Michaels never told him that his potential guideline range was 151 to 188 months if he proceeded to trial.

According to Petitioner, if he had known (1) he was facing 151 to 188 months if convicted at trial, (2) he could enter a plea and tell his role in the conspiracy, and (3) he would get less than the five-year minimum mandatory sentence, he would have entered a plea. Petitioner further

maintained that had Michaels told him of the strength of the Government's case against him, he would not have proceeded to trial. However, Petitioner admitted he maintained his innocence through sentencing and did not accept responsibility, although he said he would have done so had Michaels given him the option. Petitioner denied telling Michaels he wanted to go to trial and said he went to trial because he did not know he had another option and did not know how the system worked. Petitioner, however, also said he thought he either had to "plea guilty or . . . go to court and let the judge make the decision"

B. Michaels' Testimony

Michaels testified he has been practicing criminal law in the United States since 1984. His criminal defense practice is comprised of approximately 75% state and 25% federal cases with cases in the Northern, Middle, and Southern Districts of the United States District Courts of Florida. Michaels maintained he is familiar with how plea offers work in the federal system and that they are always conveyed in writing. Michaels said he is familiar with the federal sentencing guidelines, including the acceptance of responsibility and safety valve provisions.

Michaels stated he has had clients who have cooperated with the Government and that in his experience defendants can receive huge benefits if they cooperate. Michaels explained that examples of benefits defendants may receive for cooperation include reductions regarding their role or the loss amount and 5K or Rule 35 reductions.

According to Michaels, his custom is to initially meet with his clients, discuss the facts of the case with them, explain that they are the boss, and tell them that at some point in time they must decide if they want to go to trial or enter into plea negotiations or enter a plea. Michaels said he advises his clients that he will give them his recommendation of how they should proceed in light of the evidence, but the final decision on how to proceed is theirs.

Michaels testified that prior to trial, he had several meetings in his office with Petitioner and at least one family member. Michaels said he reviewed the discovery materials at length with Petitioner, evaluated Petitioner's case, and had several conversations about his opinion of the case. Michaels acknowledged that when he began representing Petitioner, he was representing another client on trial for murder in Miami.

Michaels said he told Petitioner multiple times that he could be convicted of the conspiracy charge even if he never touched the cocaine. According to Michaels, he told Petitioner five or six times that he would benefit from entering a plea with or without cooperation and he strongly recommended to Petitioner not to proceed to trial. Michaels said that although he frequently tries cases, he begged Petitioner not to go to trial and to allow him to work out a deal. Michaels testified that his recommendation to Petitioner was premised on his assessment of the evidence, Petitioner's ability to testify, the potential to receive acceptance of responsibility and safety valve, and his conversations with AUSA Bodnar. Michaels said he advised Petitioner if he lost at trial, he could receive up to twenty years in prison.

Michaels asserted he told Petitioner he could take a plea and either cooperate or not cooperate but if he chose to cooperate, he must tell the truth. Michaels stated he told Petitioner that the Government wanted to talk to him and explained the benefits of cooperating with the Government. Michaels testified Petitioner maintained his innocence throughout the proceedings but entertained the idea of entering a plea without cooperation. According to Michaels, the reason Petitioner refused to consider a plea requiring cooperation was because Petitioner maintained he did nothing wrong and could not cooperate because he had no information to provide. Michaels said AUSA Bodnar was open to the possibility of Petitioner entering a plea without cooperation. Michaels testified he tried to convince Petitioner to allow him to try to negotiate a plea without

cooperation, but Petitioner rejected the proposal and said he wanted to go to trial.

Michaels said he explained the guidelines to Petitioner on several occasions, told Petitioner he could not tell him for certain what his sentence would be, and advised Petitioner that a PSR would be completed which the Court would use in determining Petitioner's sentence. Michaels testified he told Petitioner based on his conversations with AUSA Bodnar that he believed he would qualify for the safety valve and that he thought his sentence would be less than five years. Michaels said he explained to Petitioner in order to qualify for the safety valve, Petitioner had to tell the truth about his participation in the offense. Michaels testified he advised Petitioner it would be worth compromising and admitting guilt despite his insistence he was innocent because he could receive a sentence of approximately two years.

A voicemail message from Michaels to AUSA Bodnar on June 5, 2012, establishes Michaels told AUSA Bodnar,

I spoke to my client, Mr. Metayer, he's not interested in anything. So it looks like we are going to trial. . . . [H]e . . . rejected any type of cooperation or plea so we need to rock n roll I guess. Thank you again for uh working with me on this. . . .

(Gov. Ex. 1). Michaels testified he left the voicemail for AUSA Bodnar because they had a conversation about the benefits of Petitioner entering a plea, but after talking to Petitioner, he would not consider a plea. Michaels said the Government never formally made a plea offer because Michaels had conveyed to the Government that Petitioner was not interested in entering a plea. Michaels also said AUSA Bodnar never indicated Petitioner would receive a two-year sentence.

Regarding the statements made in the letter to the Florida Bar, Michaels explained that the evidence he considered damaging to Petitioner's case was the testimony of a "snitch," tapes of conversations, and other circumstantial evidence. Michaels said his reference to a two-year deal was his estimate of what he thought Petitioner would have received had he entered a plea based

on his communications with AUSA Bodnar and the sentences other co-defendants received. Michaels stated his estimate included credit for acceptance of responsibility and safety valve. Michaels testified he conveyed this information to Petitioner several times, and Petitioner's response was to maintain he was not guilty and wanted to proceed to trial.

With respect to the potential sentence mentioned by AUSA Bodnar in the July 9, 2012 email, which was premised on Petitioner entering a plea, Michaels testified he had told Petitioner this information even before he received the email. Michaels affirmed he told the Court at sentencing that Petitioner continued to maintain his innocence. *See Criminal Case, Doc. 165 at 20; Gov't Ex. 4 at 20.*

Michaels admitted he has been reprimanded several times by the Florida Bar because he behaved too aggressively on behalf of his clients. Michaels said he could not recall if he met with Petitioner or reviewed the PSR with him prior to the sentencing hearing.

C. AUSA Bodnar's Testimony

Bodnar testified that he was involved in the investigation of the case against Petitioner and one of Petitioner's co-defendants, Noel, who testified against Petitioner at trial. According to Bodnar, the DEA wanted Petitioner's cooperation to identify other individuals involved in the conspiracy, including information regarding Petitioner's cocaine suppliers. Bodnar testified he believed the DEA attempted to secure Petitioner's cooperation on the day Noel was arrested. Bodnar stated he spoke to Hussain twice about the possibility of Petitioner cooperating, and Hussain said he would convey the Government's interest in cooperation to Petitioner. Bodnar testified that the third time he approached Hussain to express an interest in Petitioner's cooperation, Hussain told him that Petitioner was leaning towards going to trial.

Bodnar stated he also spoke to Michaels regarding Petitioner's cooperation multiple times

and that each time he spoke to Michaels about Petitioner cooperating, Michaels responded that he would talk to Petitioner about it but Petitioner appeared to want a trial. According to Bodnar, before the status conference on June 20, 2012, he again spoke to Michaels about Petitioner cooperating and his sentence exposure. Michaels told him that Petitioner had no interest in a plea and was adamant he wanted a trial. Bodnar testified that Michaels sounded exasperated when he spoke to him. Bodnar further described Petitioner's demeanor at his arraignment and at the hearing on Hussain's motion to withdraw as defiant, meaning Petitioner appeared to deny any involvement in the offense.

Bodnar testified he never made a plea offer to Petitioner and that his July 9, 2012 email to Michaels was only intended to lay out Petitioner's potential sentence exposure if he proceeded to trial. The email included his assessment that Petitioner could qualify for safety valve if he met the requirements, which included providing a truthful statement regarding his involvement in the offense and a determination he was not a leader in the offense. Bodnar said if Petitioner had qualified for safety valve, his sentence could have been less than the five-year minimum mandatory. Bodnar noted that the Government would never have offered Petitioner a two-year plea deal because others less culpable than Petitioner received greater sentences. Bodnar agreed he made overtures to engage Petitioner in plea negotiations and that the Government would have made a plea offer if Petitioner had accepted those overtures. Bodnar testified that both Hussain and Michaels made it abundantly clear to him that Petitioner did not want to cooperate and wanted a trial.

III. FINDINGS OF FACT

Assessing the credibility of witnesses is reserved for the Court. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1988) ("Assessing the weight of evidence and

credibility of witnesses is reserved for the trier of fact.”). “[T]o adequately determine the credibility of a witness . . . the fact finder must observe the witness.” *United States v. Powell*, 628 F.3d 1254, 1257 (11th Cir. 2010) (quoting *Louis v. Blackburn*, 630 F.2d 1105, 1110 (5th Cir. 1980)). “A proper credibility determination. . . includes [consideration of] ‘the internal consistency of the [witness’s] testimony, or his candor or demeanor on the stand.’” *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (quoting *Gallego v. United States*, 174 F.3d 1196, 1198 (11th Cir. 1999)).

After carefully considering the evidence and viewing the witnesses and their demeanor while testifying, the Court finds the testimony of Michaels and AUSA Bodnar to be more credible than the testimony of Petitioner. In making this determination, the Court notes Petitioner maintained he was unaware he had any option available to him other than proceeding to trial and did not know how the system worked. Nevertheless, Petitioner admitted that Hussain mentioned the possibility of a plea. In addition, Petitioner was always accompanied by his brother or other family members when he met with Michaels. Petitioner’s brother had experience in the criminal justice system and had been represented by Michaels.

Petitioner was represented by two experienced criminal attorneys. While it is possible one of them failed to explain to Petitioner his option to enter a plea with or without cooperation, what cooperation entailed, the possible sentence he faced if he proceeded to trial or entered a plea, and what the Government had to prove to convict him, that neither of them would have done so is difficult to credit. Petitioner’s credibility is further called into doubt by his testimony that Hussain failed to explain why he was meeting with the DEA prior to charges being filed against Petitioner. It is nonsensical to believe that Hussain would not have explained to Petitioner the purpose of the meeting, and if not, that Petitioner would have failed to question Hussain about the purpose of the

meeting.

Most importantly, Michaels's testimony that he begged Petitioner not to proceed to trial and to allow him to work out a deal is corroborated by Michaels's voicemail message to AUSA Bodnar and his letter to the Florida Bar. Michaels sounded deflated in the June 5, 2012 voicemail message, which is consistent with AUSA Bodnar's testimony that Michaels appeared exasperated in conversations he had with him regarding Petitioner's insistence on his innocence and the decision to proceed to trial. That it was Petitioner's decision to proceed to trial is further corroborated by Michaels' statement at sentencing that Petitioner maintained his innocence.

Attorney Michaels' expressed dislike of "snitches," the federal government, and his contentious behavior at the hearing are troubling and do not reflect well on the bar. Nonetheless, the Court finds his testimony concerning the advice he gave Petitioner to be credible. Michaels had represented clients in the past who had cooperated with the Government and entered pleas and therefore knew the benefits that could be received from cooperation. There is no discernable reason why Michaels would have failed to advise Petitioner about AUSA Bodnar's attempts to engage in plea negotiations or why he would have outright rejected those attempts without consulting Petitioner, particularly given that Petitioner could have entered a plea without cooperation. In addition, the undersigned presided over both the trial and sentencing and observed Attorney Michaels to be a zealous advocate (sometimes overly so) unlikely to withhold material information about a possible plea that would take a sixty-month mandatory minimum sentence off the table in order to travel from Miami to Orlando for a three day trial absent the client's insistence.

Based on the evidence presented, the Court concludes the following: (1) the Government never made a formal plea offer, (2) Michaels advised Petitioner about the strength of the Government's case, the potential sentence he faced if convicted at trial, and the possible sentence

he could receive if he entered a plea, (3) Michaels consulted with Petitioner regarding the Government's plea discussions and recommended Petitioner enter a plea, and (4) Petitioner did not wish to cooperate, maintained his innocence, and refused to enter a plea. Furthermore, it is highly questionable that Petitioner would have qualified for application of the safety valve given his unwillingness to admit his involvement in the offense, and thus, it is unlikely he *would* have received less than the mandatory minimum sentence of five years had he entered a plea. In sum, Petitioner has not established counsel failed to consult with him about the Government's plea discussions or his ability to enter a plea or that a reasonable probability exists that he would have entered a plea but for counsel's purported failure to do so. Therefore, ground sixteen is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Petitioner's amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 8) is **DENIED**.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is directed to file a copy of this Order and the December 3, 2015 Order (Doc. 23) in criminal case number 6:11-cr-347-Orl-37DAB.
4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional

right.⁴ Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE AND ORDERED in Orlando, Florida, this 28th day of February, 2017.




ROY B. DALTON JR.
United States District Judge

Copies to:
Michael Metayer
Counsel of Record

² Pursuant to the *Rules Governing Section 2255 Proceedings for the United States District Court*, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

APPENDIX C

(*Id.* at 12).

At trial, Officer Smith, Noel, and numerous officers testified in accordance with Officer Smith's affidavit. Noel admitted that he did not tell officers in the first interview after his arrest that Petitioner had provided the cocaine to him. (Criminal Case Doc. 163 at 185). Petitioner seemingly premises his allegations of fraud on Noel's inconsistent statements to police. This, however, does not establish that Officer Smith's affidavit contained any false statements. Officer Smith attested that Noel implicated Petitioner in a series of post-arrest statements. Consequently, Petitioner has not established that counsel had any basis to challenge the criminal complaint affidavit or that a reasonable probability exists that such a challenge would have been successful. Accordingly, ground nine is denied.

F. Ground Sixteen

Petitioner asserts counsel rendered ineffective assistance by failing to convey a two year plea offer to him and by advising him to proceed to trial in light of the offer. (Doc. 8 at 33). According to Petitioner, the Government made a two-year plea offer and counsel never consulted with him about the offer. (*Id.*). Further, in his Amended Reply, Petitioner contends that counsel never discussed any plea with him. (Doc. 20 at 7). Petitioner maintains he would have accepted the two-year plea offer had he been advised of it. (Doc. 8 at 33).

The Sixth Amendment right to effective assistance of counsel extends to plea negotiations. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). "[D]efense counsel has the duty

to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). The two-part test enunciated in *Strickland* applies to claims that counsel was ineffective during plea negotiations. *Lafler*, 132 S. Ct. at 1384 (applying *Strickland*’s two-part test to federal habeas petitioner’s claim that counsel was ineffective for advising him to reject a plea offer); *Hill v. Lockhart*, 474 U.S. 52, 48 (1985) (applying *Strickland*’s two-part test to defendant’s challenge to his guilty plea based on ineffective assistance of counsel).

With respect to the prejudice inquiry in the context of a foregone guilty plea, defendants must demonstrate:

a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 132 S. Ct. at 1409.

In the instant case, the Government asserts that it never made a two-year plea offer to Petitioner’s attorney and Petitioner continued to maintain his innocence even after trial. (Doc. 17 at 12). The Government notes it engaged in plea discussions with defense attorney Alexander Michaels, wherein the Government only told Michaels that Petitioner would be in a better position if he pled guilty, with or without a plea agreement, because he could receive a sentence less than the five-year minimum mandatory. (*Id.*). To support its argument, the

Government relies on an email from Assistant United States Attorney Robert Bodnar, Jr. ("AUSA Bodnar"), to Michaels asking if Petitioner was certain he wanted to proceed to trial and detailing the potential benefits of entering a plea with or without an agreement. (Doc. 17-3 at 1-2). The Government, however, seemingly concedes that it did make a plea offer. See Doc. 17 at 13 (the Government stating, "Importantly, Metayer does not claim that counsel *did not convey the plea offer the United States actually made*. Specifically, Metayer does not allege that counsel failed to advise him that his sentence would be lower if he were sentenced based on a guilty plea and an acceptance of responsibility rather than a jury finding of guilt with no reduction for an acceptance of responsibility."). Nevertheless, it is not clear what that offer entailed. Petitioner maintains there was a two-year plea offer as evidenced by Michaels' letter to the Florida Bar. (Doc. 20 at 7-8). In the letter, Michaels states, "I had worked out a deal with the prosecutor where [Petitioner] would have received approximately 2 years in prison." (Doc. 20-8 at 2). Petitioner further contends that Michaels never apprised him of the plea offer actually made by the Government, which is presumably memorialized in the email from AUSA Bodnar. (Doc. 20 at 7-8).

Petitioner has presented evidence supporting his position that there was a plea offer of two years or otherwise made by the Government. He further maintains that Michaels did not apprise him of any plea offers from the Government, and he would have accepted a two-year plea offer had he been told of it. Although Michaels said at the sentencing hearing that Petitioner maintained his innocence and in his letter to the Florida Bar that Petitioner chose

to go to trial despite the “deal” with the prosecutor, (Criminal Case Doc. 165 at 20; Doc. 20-8 at 2), Petitioner’s purported denial of guilt “is not dispositive on the question of whether he would have accepted the government’s plea offer. . . .” *Osley v. United States*, 751 F.3d 1214, 1224 (11th Cir. 2014). Instead, “it is . . . a relevant consideration.” *Id.*

An evidentiary hearing is needed to determine whether (1) the Government made a plea offer, (2) Petitioner was advised of the plea offer, and (3) if so, whether Petitioner rejected the plea offer. Furthermore, evidence regarding whether prejudice resulted from Michaels’ purported deficient performance in failing to advise Petitioner of a plea offer shall be presented at the hearing. Specifically, evidence regarding whether a reasonable probability exists that Petitioner would have accepted the plea offer had he been advised of it and whether the plea would have been entered without the prosecution canceling it or this Court refusing to accept it shall be developed at the hearing.

Any of Petitioner’s allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED**:

1. Grounds one through fifteen and seventeen through twenty three of the amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 8) filed by Michael Metayer are **DENIED**.

2. The Court will hold an evidentiary hearing on ground sixteen, that trial counsel failed to convey a plea offer to him. The hearing is scheduled for **February 9, 2016, at 9:00**

a.m., at U.S. Courthouse, 401 West Central Blvd., Courtroom 4A, Orlando, Florida 32801.

3. United States Magistrate David A. Baker is directed to appoint counsel on behalf of Petitioner pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings.

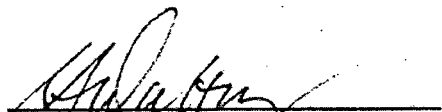
4. At least twenty (20) days prior to the evidentiary hearing, Petitioner shall file a statement entitled Pretrial Narrative Statement consisting of the following:

- (a) A brief general statement of the case.
- (b) A narrative written statement of the facts that will be offered by oral or documentary evidence at the evidentiary hearing.
- (c) A list of all exhibits to be offered into evidence at the evidentiary hearing.
- (d) A list of the full names and addresses of places of employment for all the witnesses that Petitioner intends to call.
- (e) A summary of the anticipated testimony of each witness named in (d).

5. At least eleven (11) days prior to the evidentiary hearing, the Government shall file a Pretrial Narrative Statement complying with paragraphs 4(a) through (e) above.

DONE AND ORDERED in Orlando, Florida, this 3rd day of December, 2015.




ROY B. DALTON JR.
United States District Judge

Copies to:

OrIP-1 11/20

Michael Metayer

Counsel of Record

United States Magistrate Judge David Baker

APPENDIX D

ALEXANDER J. MICHAELS

ATTORNEY AT LAW

1507 Northwest 14th Street
Miami, Florida 33125
(305) 324-0547
Fax: (305) 324-6413

April 8, 2014

Theodore P. Littlewood Jr., Bar Counselor
Attorney Consumer Assistance Program
Re: Michael Metayer; RFA No. 14-14807
651 East Jefferson Street
Tallahassee, FL 32399-2300

CC: Michael Metayer
Register No. 95533-004
Post Office Box 5000
Yazoo City, Mississippi 39194

Dear Mr. Littlewood:

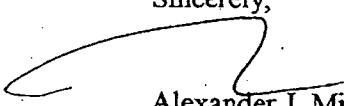
I received your letter and Mr. Metayer's letter. I sent a letter to Mr. Metayer's family on February 27, 2014 indicating that we have his file at the office and his family is welcome to pick it up at their convenience. My response has not changed. The file is still available for pickup.

However, I have no idea what these documents are that Mr. Metayer has requested. I do not have these items in my possession.

Additionally, it is important to note that I advised Mr. Metayer not to go to trial and that the best course of action was to take a plea because he had a difficult case to win. I had worked out a deal with the prosecutor where he would have received approximately 2 years in prison. However, he chose to go to trial, which is his right. Unfortunately, he was found guilty at trial. Even despite being found guilty, I was able to save him about 6 years off his sentence because I filed an objection to the "relevant conduct," which was granted at sentencing.

Please contact my office if you need any more information about this case. My number is (305) 324-0547.

Sincerely,



Alexander J. Michaels, Esq.

APPENDIX E

Bodnar, Robert (USAFLM)

From: Bodnar, Robert (USAFLM)
Sent: Monday, July 09, 2012 2:35 PM
To: orquid05@yahoo.com; 'amichaelslaw@yahoo.com'
Cc: Smith, Denis P (Denis.P.Smith@usdoj.gov)
Subject: Metayer - photographs and documents

Alex -

I previously had e-mailed you the proposed jury instructions in this case, but I have not received a response. If memory serves, you had a vacation the first week of July. I am attaching another copy. If you could let me know if they are acceptable, that would be great. We need to file them this week. Also, don't know if you saw it, but the trial date has been moved up to the 24th of July at 1:30.

Is your client absolutely certain about trial? I am assuming he wants one, but the reason I ask is that he is looking at a base offense level of 34 given these four kilos plus three prior transactions with Noel. (20 kilos + 10 kilos, + 4 kilos + 4 kilos). His range at a trial is going to be 151-188 months (with a five year minimum mandatory), especially after Noel testifies about the prior deals. Even without a plea agreement, he could still plead and get safety valve and could be facing much less than the five-year minimum mandatory. Just a thought. I am preparing for trial in any event.

Attached are copies of the photographs from the seizure of the cocaine and money in this case. All of these have been in evidence and remain available for your inspection, should you so desire. To save you time, I am forwarding them to you while I assemble trial exhibit books. There are other photos that I will forward as copies are provided to me. If you ever wish to inspect the original items in evidence or view any additional photographs, please contact me and I will make sure they are made available to you.

Please be advised that I will be calling Kelly Pennington of DEA as an expert witness to describe drug trafficking techniques as they relate to the recovery of evidence in this case. I have attached his resume to this e-mail for your reference. He has previously been qualified as an expert in drug trafficking in the SDFL. You are free to contact him at ~~██████████~~ regarding his conclusions on the methods employed by Noel and Metayer (as described in the discovery reports), as well and the quantity and packaging of the narcotics, as being consistent with drug distribution. Lastly, I am attaching a DEA-6 that recently was provided to me regarding a further proffer of Noel in which he described one additional person to whom he had planned to distribute the cocaine after returning to the MDFL.

If you have any questions, let me know.

Regards,

Rob Bodnar



2012-07-04 Kelly
Expert Resume...