

APPENDIX-A

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**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 29, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-11766-AA
Case Style: Chun Lam v. USA
District Court Docket No: 8:13-cv-00518-JDW-MAP
Secondary Case Number: 8:08-cr-00404-JDW-MAP-2

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tonya L. Searcy, AA/lt
Phone #: (404) 335-6180

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11766-AA

CHUN HEI LAM,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, FAY and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35). The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP 2)

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX-B

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11766
Non-Argument Calendar

D.C. Docket Nos. 8:13-cv-00518-JDW-MAP,
8:08-cr-00404-JDW-MAP-2

CHUN HEI LAM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(November 14, 2017)

Before HULL, MARCUS and FAY, Circuit Judges.

PER CURIAM:

Chun Lam, proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. After careful review, we affirm.

I. BACKGROUND

In 2009, Lam was convicted of possession, and conspiracy to possess, with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a), 70506(a), (b), 18 U.S.C. § 2, and 21 U.S.C. § 960(b)(1)(B)(ii), and was sentenced to 300 months' imprisonment. Lam was the captain of a fishing vessel that the U.S. Coast Guard interdicted in the Eastern Pacific Ocean with 2900 kilograms of cocaine (worth approximately \$58 million) hidden inside a compartment.

Lam, his brother-in-law who was the owner of the vessel, and the five other members of Lam's crew were indicted and tried together. At trial, Lam testified that he thought he was transporting rhino skins, and that he and the rest of the crew did not know the packages contained cocaine. After an eleven-day trial, the jury convicted Lam and his brother-in-law, but acquitted the five other members of Lam's crew. Lam's convictions and 300-month sentence were affirmed on direct appeal. United States v. Lam, 430 F. App'x 794 (11th Cir. 2011).

In his § 2255 motion, Lam claimed, inter alia, that his trial counsel provided ineffective assistance by advising him to reject a ten-year plea deal because his counsel believed there was a good chance Lam would be found not guilty at trial. The district court denied Lam's § 2255 motion without holding an evidentiary hearing. As to Lam's ineffective assistance claim relating to the plea advice, the district court concluded that Lam had not shown either that his trial counsel's advice was deficient or that Lam was prejudiced by it.

This Court granted Lam a certificate of appealability on the following issue: "Whether the district court erred in denying, without first ordering an evidentiary hearing, Lam's claim that he would have accepted a ten-year plea agreement absent ineffective assistance of counsel." We review a district court's denial of an evidentiary hearing in a 28 U.S.C. § 2255 proceeding for an abuse of discretion. Rosin v. United States, 786 F.3d 873, 877 (11th Cir. 2015).

II. GENERAL LEGAL PRINCIPLES

A prisoner is entitled to an evidentiary hearing on a motion to vacate "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); see Anderson v. United States, 948 F.2d 704, 706 (11th Cir. 1991). Thus, if a movant "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." Aron v. United States, 291 F.3d 708, 715 (11th

Cir. 2002) (quotation marks omitted). However, the district court is not required to hold a hearing of the “if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record.” Winthrop-Redin v. United States, 767 F.3d 1210, 1216 (11th Cir. 2014) (quotation marks omitted).

To make a successful claim of ineffective assistance of counsel, a § 2255 movant must show that: (1) his counsel’s performance was deficient; and (2) the movant suffered prejudice as a result of the deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Counsel’s performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. Id. at 687-88, 104 S. Ct. at 2064. Prejudice requires showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694, 104 S. Ct. at 2068. There is no need to address both prongs if the movant fails to make an insufficient showing as to one or the other. Id. at 697, 104 S. Ct. at 2069.

The Strickland standard applies to ineffective assistance of counsel claims arising out of the plea process, including to the negotiation and consideration of pleas that are rejected or lapse. Osley v. United States, 751 F.3d 1214, 1222 (11th Cir. 2014). “Counsel has an obligation to consult with his client on important

decisions and to keep him informed of important developments in the course of the prosecution.” Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). This obligation includes informing a client about formal plea offers presented by the government, and the failure to advise a client about such an offer is ineffective assistance of counsel. See Missouri v. Frye, 566 U.S. 134, 144-45, 132 S. Ct. 1399, 1408 (2012); Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376 (2012).

In the context of a rejected plea offer, the prejudice prong requires the movant to show “a reasonable probability that but for counsel’s ineffectiveness: (1) ‘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)’; (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 in fact were imposed.’” Osley, 751 F.3d at 1222 (quoting Lafler, 566 U.S. at 164, 132 S. Ct. at 1385). However, “after the fact testimony concerning [the movant’s] desire to plead, without more, is insufficient to establish that but for counsel’s alleged advice or inaction, he would have accepted the plea offer.” Diaz, 930 F.2d at 835.

III. LAM’S INEFFECTIVE ASSISTANCE CLAIM

A. Existence of Plea Offer

Here, the district court did not abuse its discretion when it denied, without an evidentiary hearing, Lam's claim that his trial counsel was ineffective for advising him to reject the alleged ten-year plea deal and to proceed to trial. At the outset, we note that it is questionable whether such a plea deal existed at all. The government represented that it never offered Lam a plea agreement. In the district court, Lam's trial counsel filed an affidavit swearing that the government never made a plea offer to Lam. In that affidavit, Lam's trial counsel further disputes Lam's allegation that she conveyed a plea deal to Lam and advised him not to accept it. In fact, Lam's trial counsel avers that she discussed the option of pleading guilty without or without a plea agreement with Lam, but he maintained his innocence and asserted his desire to proceed to trial regardless of whether his codefendants did so. According to trial counsel, Lam never requested a plea agreement, never expressed a desire to cooperate with the government or enter an open guilty plea, and admitted his guilt only after he received a copy of the presentence investigation report, at which time he said he wanted to express his remorse at sentencing.

B. No Prejudice Shown

Even if we assume, as the district court did, that a plea offer existed and also assume that Lam's trial counsel was constitutionally deficient in advising him to reject it, Lam still has not shown that he was prejudiced under Strickland.

Specifically, Lam has not demonstrated that there is a reasonable probability that, but for his counsel's advice to continue to trial, he would have accepted the ten-year plea deal. The only evidence Lam offered supporting his claim that he would have accepted the deal was his own self-serving statement, which this Court has held is not sufficient by itself. See Diaz, 930 F.2d at 835.

Lam and his trial counsel agree that a Cantonese interpreter was present each time they met to discuss his case, but they disagree about what the interpreter would say about a plea offer. Lam claims the interpreter supports his recollection of events, and stated in his declaration filed in the district court that the interpreter would testify on his behalf at an evidentiary hearing. But Lam never provided a declaration or affidavit from the interpreter or explained why he was unable to obtain one. This is so even though Lam was informed by the district court that he needed to submit sworn declarations to avoid dismissal of his § 2255 motion. In any event, Lam says only that the interpreter would testify that trial counsel conveyed a plea deal and told him to go to trial. Lam does not say that the interpreter would testify that Lam wanted to accept, or would have accepted, the plea deal.

Moreover, the record as a whole does not support Lam's claim that he would have accepted a plea deal from the government. Lam's trial counsel averred that Lam maintained he was innocent up to and through trial and that he never

expressed any interest in pleading guilty. Notably, Lam's declaration does not dispute these points. And, consistent with trial counsel's averments, Lam testified under oath at trial that he did not know the packages on the fishing vessel contained drugs and that he thought he had been hired to smuggle rhino skins into Hong Kong. See Osley, 751 F.3d at 1224 (explaining that the movant's repeated claims of innocence, while not dispositive, are a relevant consideration in determining whether he would have accepted a plea bargain). Lam also does not dispute trial counsel's statement that he did not admit his guilt until after he was found guilty and said he wanted to express remorse at his sentencing.

In addition, Lam has not shown that the sentencing court would have accepted a proposed plea agreement of ten years' imprisonment, the statutory mandatory minimum sentence. Lam's advisory guidelines sentence was life imprisonment. While the sentencing court ultimately varied downward to 300 months' imprisonment, Lam has identified no factors that would have justified the district court in accepting a plea agreement offering a sentence fifteen years below the 300-month sentence the sentencing court deemed appropriate. In fact, the PSI suggested that an upward departure might be appropriate given the enormous amount of drugs involved, 2900 kilograms of cocaine, "more than 20 times the quantity necessary to achieve the maximum statutory and guideline provisions."

For the first time on appeal, Lam claims that his trial counsel was ineffective—and also violated his Fifth and Sixth Amendment rights—by deciding for Lam to refuse the government’s plea offer and proceed to trial. Specifically, Lam states that his trial counsel communicated the ten-year plea offer to him, but then two days later informed him that she had already made the decision to proceed to trial on the belief that Lam would be acquitted.

This is not the ineffective assistance claim Lam brought in his § 2255 motion in the district court. Indeed, this new claim contradicts Lam’s ineffective assistance claim in the district court that he made the decision to go to trial based on bad advice from his counsel about his chances at trial. We have “repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.” See Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) (quotation marks omitted) (refusing to consider a claim that was not raised in the 28 U.S.C. § 2254 petition). Accordingly, we do not consider Lam’s newly raised claim.

IV. CONCLUSION

Given that the record affirmatively contradicts Lam’s claim that he would have accepted the plea deal, he could not establish prejudice under Strickland, and the district court was not required to hold an evidentiary hearing. See Winthrop-Redin, 767 F.3d at 1216; Osley, 751 F.3d at 1222.

For these reasons, we affirm the district court's denial of Lam's § 2255 motion.

AFFIRMED.

APPENDIX-C

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11766-A

CHUN HEI LAM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

In order to appeal the district court's denial of his counseled 28 U.S.C. § 2255 motion to vacate, Chun Hei Lam moves, *pro se*, for a certificate of appealability ("COA"). To merit a COA, Lam must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).

A review of the underlying § 2255 motion demonstrates that Lam has made a substantial showing of the denial of a constitutional right with regard to his claim that counsel provided ineffective assistance by advising him to reject a favorable plea agreement. Therefore, Lam's

motion for a COA is GRANTED on the following issues only:

Whether the district court erred in denying, without first ordering an evidentiary hearing, Lam's claim that he would have accepted a ten-year plea agreement absent ineffective assistance of counsel.

Accordingly, because this issue is non-frivolous, Lam's motion to appeal *in forma pauperis* is GRANTED. See *Pace v. Evans*, 709 F.2d 1428 (11th Cir. 1983).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX-D

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APPENDIX-D

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CHUN HEI LAM,

Petitioner,

v.

**CASE NO. 8:13-cv-518-T-27MAP
CRIM. CASE NO. 8:08-cr-404-T-27MAP**

UNITED STATES OF AMERICA,

Respondent.

ORDER

BEFORE THE COURT are Petitioner's Motion to Reconsider Motion for Leave to Take Deposition Pursuant to Federal Rule of Civil Procedure 27(b) (cv Dkt. 18), and Motion to Seal (cv Dkt. 19). Upon consideration, the motions will be denied.

Petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255 (cv Dkt. 1), which the court denied on February 17, 2016 (cv Dkt. 12). Petitioner subsequently filed a Motion to Seal (cv Dkt. 14) in which Petitioner requested the court allow him to file under seal two proposed pleadings: 1) a Motion for Leave to Take Deposition Pursuant to Federal Rule of Civil Procedure 27(b), and 2) Petitioner's Declaration in Support of Motion for Leave to Take Deposition. The Motion to Seal was denied, and the proposed pleadings were returned to Petitioner (cv Dkt. 15). Petitioner now requests the court "reconsider" his Motion for Leave to Take Deposition Pursuant to Federal Rule of Civil Procedure 27(b), and issue a ruling on that motion (cv Dkt. 18).

Because the two proposed pleadings (the motion to take deposition and supporting declaration) filed with the Motion to Seal were returned to Petitioner, there is no motion to take a deposition pending before the court on which the court can rule.

Accordingly, it is **ORDERED** that:

1. Petitioner's Motion to Reconsider Motion for Leave to Take Deposition Pursuant to Federal Rule of Civil Procedure 27(b) (cv Dkt. 18) is **DENIED**. The denial is without prejudice to Petitioner re-filing a motion to take a deposition pursuant to Federal Rule of Civil Procedure 27(b).

2. Petitioner's Motion to Seal (cv Dkt. 19) is **DENIED** for the same reasons stated in the court's April 5, 2016 Order (see cv Dkt. 15).

DONE AND ORDERED in Tampa, Florida, on June 20th, 2016.



JAMES D. WHITEMORE
United States District Judge

SA:sfc
Copy furnished to:
Pro Se Petitioner
Counsel of Record

APPENDIX-E

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CHUN HEI LAM,

Petitioner,

v.

**CASE NO. 8:13-cv-518-T-27MAP
CRIM. CASE NO. 8:08-cr-404-T-27MAP**

UNITED STATES OF AMERICA,

Respondent.

ORDER

BEFORE THE COURT are Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (cv Dkt. 1), the Government's response in opposition (cv Dkt. 4), and Petitioner's reply (cv Dkt. 5) and sworn statement in support of Ground Three of the Section 2255 motion (cv Dkt. 9). Upon review, Petitioner's Section 2255 motion is DENIED.

Procedural Background

An Indictment charged Petitioner and six others with conspiring to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503(a) and 70506(a) and (b) (Count One), and with aiding and abetting each other and others unknown in possessing five kilograms or more of cocaine with intent to distribute while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(1) and 70506(a), and 18 U.S.C. § 2 (Count Two) (cr Dkt. 1). A jury found Petitioner guilty on both counts

of the Indictment (cr Dkt. 290).¹ Petitioner was sentenced to three hundred (300) months imprisonment to be followed by five years of supervised release (cr Dkts. 345, 347). Petitioner's convictions were affirmed on appeal (cr Dkt. 406).

Petitioner filed his Section 2255 motion raising the following four grounds for relief:

1. He is illegally incarcerated because the court lacked subject matter jurisdiction over the offenses;
2. Counsel was ineffective in failing to use the Global Positioning System (GPS) on the boat to demonstrate that Petitioner was not attempting to travel to the United States;
3. Petitioner would have accepted the Government's offer of ten years' imprisonment but for counsel's misadvice that there was a good chance that Petitioner would prevail at trial; and
4. Counsel was ineffective in a) failing to challenge the nationality of the boat either at trial or on direct appeal, despite that she had evidence that the boat was registered in Hong Kong, and b) failing to move to suppress evidence seized on the boat on the ground that the boat was registered in Hong Kong.

Standard of Review for Ineffective Assistance of Counsel Claims

Strickland v. Washington, 466 U.S. 668 (1984), governs Petitioner's ineffective assistance of counsel claims:

The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show 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

¹Co-defendant Tam Fuk Yuk was also convicted on both counts (cr Dkt. 289). The other five co-defendants were found not guilty (cr Dkts. 291-95).

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 trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Sims v. Singletary, 155 F.3d 1297, 1305 (11th Cir. 1998).

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims v. Singletary*, 155 F.3d at 1305 ("When applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds."). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[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.* *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," Petitioner must demonstrate that counsel's error prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 691-92. To meet this burden, Petitioner must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694-95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Discussion

Ground One

Petitioner challenges the court's subject matter jurisdiction based on the Eleventh Circuit's decision in *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012). In *Bellaizac-Hurtado*, the MDLEA was found unconstitutional as applied to drug-trafficking activities "in the territorial waters of Panama." *Bellaizac-Hurtado*, 700 F.3d at 1258. The Court reasoned: "Because drug trafficking is not a violation of customary international law, . . . Congress exceeded its power, under the Offences Clause [of the U.S. Constitution] when it proscribed the defendants' [drug trafficking] conduct in the territorial waters of Panama." *Id.* *Bellaizac-Hurtado* is therefore limited to instances where a defendant is prosecuted under the MDLEA for drug activities in a foreign country's territorial waters, as opposed to international waters.

Bellaizac-Hurtado is factually distinguishable from Petitioner's case. The vessel on which Petitioner was found was traveling and interdicted in international waters in the Pacific Ocean (see cr Dkt. 385, p. 88).² Accordingly, *Bellaizac-Hurtado* has no application to Petitioner's case. Indeed, the Court in *Bellaizac-Hurtado* recognized that Eleventh Circuit precedent has upheld the constitutionality of MDLEA prosecutions involving "conduct on the high seas." *Id.* at 1257; see *United States v. Estupinan*, 453 F.3d 1336, 1338-39 (11th Cir. 2006) (extraterritorial MDLEA prosecution of drug traffickers interdicted in international waters off Ecuador is constitutional exercise of authority pursuant to Piracies and Felonies Clause which "empowers Congress '[t]o define and punish Piracies and Felonies on the high Seas, and Offences against the Law of Nations.' U.S. Const., art. I, § 8, cl. 10."), *cert. denied*, 549 U.S. 1267 (2007)). Therefore, the court had

²Petitioner does not contend that his boat was not traveling and interdicted in international waters.

subject matter jurisdiction over Petitioner's case.

Accordingly Ground One does not warrant relief.

Ground Two

Petitioner contends that counsel was ineffective in failing to use information from the boat's GPS at trial. Petitioner apparently asserts that the information would have shown that the boat was not traveling to the United States, and therefore this court lacked subject matter jurisdiction to try, convict, and sentence him because there was no evidence of some nexus between his drug trafficking activities and the United States.

The Eleventh Circuit has consistently held that “conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its extraterritorial reach.” *United States v. Walton*, 2015 U.S. App. LEXIS 22343, at *3 (11th Cir. Fla. Dec. 22, 2015) (unpublished) (quoting *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir.), *cert. denied* 135 S. Ct. 704 (2014) (alteration in original)). Therefore, because no nexus is required, counsel's performance was not deficient in failing to present evidence that the boat was not traveling to the United States.

Accordingly, Ground Two does not warrant relief.

Ground Three

Petitioner contends that counsel conveyed to him that “the Government offered a plea agreement which carried a binding 10 year sentence.” (cr Dkt. 1 at docket p. 34). He further contends that although he initially “decided to accept the plea,” he rejected it a few days later after counsel told him that she had “a discussion with all [Petitioner's] co-defendants' attorneys, [who] all [] agreed that there was a very good chance in prevailing in trial and that all the defendants should

proceed to trial together.” (Id.). In response to Petitioner’s contention, former defense counsel attests that Petitioner “was not offered, nor did he reject a 10 year offer to plead guilty.” (cr Dkt. 4-4 at p.3). In its response, the Government asserts that it “never offered Lam a plea agreement. . . .” (cr Dkt. 4 at p. 13). In reply, Petitioner continues to maintain that former defense counsel advised him of “a ten-year plea offer if [he] entered a plea of guilty,” and that he would have accepted the offer but for counsel advising him “to go to trial instead of accepting the ten-year plea offer.” (cv Dkt. 9, p. 4).

The *Strickland* standard applies to ineffective assistance of counsel claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). “To establish prejudice based on a rejected plea offer, a defendant must ‘establish a reasonable probability that, absent counsel’s alleged ineffective assistance, he would have accepted the plea agreement.’” *Harrington v. United States*, 415 Fed. Appx. 986, 989 (11th Cir. 2011) (unpublished) (quoting *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991)). To show deficient performance, a petitioner must demonstrate that “in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. Petitioner has not demonstrated either deficient performance or prejudice because his allegations are vague, conclusory, and self-serving.

Petitioner alleges that counsel gave him “bad advice” (cv Dkt. 1, p. 8) when she advised him to “proceed to trial” because “co-defendants’ attorneys. . . agreed that there was a very good chance in prevailing in trial. . . .” (cv Dkt. 1, p. 34). Petitioner, however, does not explain how or why counsel’s advice was deficient in light of the circumstances of his case.

Petitioner and all of his six co-defendants proceeded to trial (see cr Dkts. 384-89, 392-95).

Although Petitioner and Yuk were found guilty as charged (see cr Dkt. 395), the other five co-defendants were found not guilty (Id.). Additionally, counsel presented a reasonable defense. Petitioner testified that he was a fisherman by trade, and was hired by Gao Gor to travel from Hong Kong to Panama to obtain fish and rhinoceros skins (cr Dkt. 392, pp. 210-23). Petitioner further testified that while he was on the boat he received a telephone call from Gor, and after the conversation Petitioner steered the boat to a location at which there was another boat (cr Dkt. 393, pp. 26-28, 31). That boat had numerous packages which were loaded onto Petitioner's boat (Id., p. 28). Petitioner testified that he could not see the contents of the packages through the packaging, the packages were never opened, he never saw what was inside the packages, and he believed they contained rhinoceros skins (Id., pp. 28-42, 51).

Moreover, Petitioner has not alleged or shown that defense counsels' motion to dismiss the charges for lack of jurisdiction and motion to suppress the physical evidence (see cr Dkts. 90, 91, and discussion pertaining to Ground Four, below) had little or no chance of success.³ In fact, Petitioner continues to argue in his Section 2255 motion that this court lacked subject matter jurisdiction over the case, and that the evidence discovered on the boat should have been suppressed. Additionally, counsel for defendants made compelling, albeit unsuccessful, arguments that 1) the court lacked jurisdiction under the circumstances because the boat was not "stateless," since

³Petitioner asserts that when he "was originally detained at Tampa, Florida," counsel conveyed the Government's plea offer to him, and a few days later he rejected the offer (cr Dkt. 1, p. 34). Petitioner's former counsel attests that she met with Petitioner on October 7, 17, and 22, 2009 (cr Dkt. 4-4, p. 3). The court concludes that counsel's reference to "2009" (rather than "2008") is a scrivener's error because counsel was appointed to represent Petitioner on September 26, 2008 (see cr Dkt. 15), and Petitioner was found guilty on July 1, 2009 (cr Dkt. 290). Therefore, according to Petitioner's allegations and counsel's information, counsel would have conveyed the Government's plea offer to Petitioner, and Petitioner would have rejected the offer, before the motion to suppress and motion to dismiss were filed on November 17, 2008 (see cr Dkts. 90, 91), and the court denied the motions on January 22, 2009 (see cr Dkt. 132).

defendants did not actually make multiple claims of nationality, but rather claimed that the boat was registered in China, and 2) the Coast Guard did not have reasonable suspicion of illegal activities warranting the search of the boat (cr Dkt. 184). Under the circumstances, it may have been reasonable for Petitioner's counsel to conclude that the charges against Petitioner may be dismissed for lack of jurisdiction, or that the evidence may be suppressed. And, although the motion to dismiss and motion to suppress were denied, and Petitioner was found guilty, this does not establish that counsel's advice to reject the plea offer was deficient. *See Mostowicz v. United States*, 625 Fed. Appx. 489 (11th Cir. 2015) (unpublished) ("advice, although incorrect in retrospect, does not necessarily rise to the level of ineffective assistance of counsel.") (citing *Premo v. Moore*, 562 U.S. 115, 132 (2011) (explaining that "hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed"))).

Additionally, even if the plea offer did exist, in order to succeed on this claim Petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial." *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995). Although Petitioner claims that he would have accepted the plea but for counsel's "bad advice," the Eleventh Circuit has held that "after the fact testimony concerning [a] desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Diaz*, 930 F.2d at 835.

Other than Petitioner's self-serving statement, there is no objective evidence to support his assertion that he would have accepted the plea, assuming that one was offered. In her affidavit, counsel attests that she presented Petitioner "with the options of entering a guilty plea with or without a plea agreement or to proceed to jury trial." (cr Dkt. 4-4, p. 4). Additionally, counsel

indicates that 1) Petitioner “asserted his innocence and his desire to proceed to trial regardless if any of his co-defendants went to trial or not[.]” 2) Petitioner “never requested a plea agreement from the government nor expressed a desire to cooperate with the government in its prosecution of named co-defendants or others[.]” 3) Petitioner “never expressed a desire to enter an open guilty plea[.]” and 4) it was Petitioner’s “decision to go to trial and to testify on his own behalf. . .after consultation with counsel.” (Id.). Petitioner has not alleged that he did not maintain his innocence before and throughout his trial, and presents no evidence that he expressed a desire to plead guilty prior to his conviction. In fact, Petitioner has never even alleged that he informed counsel or any one else that he wanted to accept the Government’s plea offer. Rather, he has merely indicated that he initially “decided to accept the plea.” (cf. Dkt. 1, p. 34, ¶1). His conclusory, self-serving, after-the-fact statement that he would have accepted the plea offer, without more, is insufficient to establish prejudice under *Strickland*. See *Diaz*, 930 F.2d at 835. See also *Osley v. United States*, 751 F.3d 1214, 1224 (11th Cir. 2014) (although “not dispositive[.]” petitioner’s “claim that he would have ple[aded] guilty had he been properly informed is . . . undermined by his repeated claims of innocence.”).

In sum, Petitioner’s conclusory allegations 1) that counsel was deficient when she advised him to reject the Government’s plea offer, and 2) that he would have accepted the offer but for counsel’s “misadvice,” warrant neither relief nor an evidentiary hearing. See *Mostowicz*, 625 Fed. Appx. at 495 (“conclusory allegations [of deficient performance] do not entitle a § 2255 movant to an evidentiary hearing.”) (citing *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (explaining that “a district court need not hold a hearing if the allegations [in a § 2255 motion] are ... based upon unsupported generalizations”) (alteration in original)). Accordingly,

Ground Three is denied.

Ground Four

Petitioner contends that because defense counsel had evidence that established the boat was registered in Hong Kong, she rendered deficient performance in failing to present the evidence to 1) establish that the United States did not have jurisdiction over the defendants, and 2) move to suppress the evidence seized on the boat. Petitioner's claim fails because had counsel presented the evidence on which Petitioner relies, a June 3, 2009 letter from the Marine Department in Hong Kong indicating that the boat (the Tam Fuk Yuk) was "a licensed Hong Kong local vessel. . ." (cv Dkt. 1 at docket p. 37), the motion to suppress and motion to dismiss for lack of jurisdiction would not have been granted.

Prior to trial, co-defendant Yuk filed a Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction (cr Dkt. 90) and a Motion to Suppress all Physical Evidence and Statements (cr Dkt. 91).⁴ With respect to the motion to dismiss for lack of jurisdiction, Yuk argued that the boat's documentation established that it was not "stateless" but rather registered in China, and therefore the boat was subject to the exclusive jurisdiction of China (cr Dkt. 90).⁵ In opposing the motion, the Government argued that the boat was stateless because Petitioner made multiple claims of nationality since the boat was flying a Panamanian flag, Petitioner verbally claimed the boat was Panamanian, and Petitioner provided documents indicating that the boat was registered in Hong Kong (cr Dkt. 107).

⁴On October 24, 2008, the court issued an order which stated that "all motions filed by any Defendant shall be deemed adopted by all Defendants. . . ." (cr Dkt. 67).

⁵A stateless vessel in international waters is subject to the jurisdiction of the United States. See 46 U.S.C. §§ 70503(a)(1), 70502(d)(1)(C).

With regard to the motion to suppress, Yuk argued that the evidence discovered on the boat should be suppressed because 1) the justification for detaining the boat ended after Petitioner showed the Coast Guard the boat's documentation that it was registered in China, 2) there was no reasonable suspicion that the boat was engaged in a violation of the laws of the United States, 3) the boat's engine problems did not justify detention and boarding of the boat, and 4) nothing observed or heard while aboard the boat gave the Coast Guard probable cause to search the entire boat (cr Dkt. 91). In opposing the motion, the Government argued that under the totality of the circumstances there was reasonable suspicion to detain and search the boat (cr Dkt. 105).

Following a hearing on the motions (cr Dkt. 184), the motions were denied (cr Dkt. 132).

In denying the motion to dismiss for lack of jurisdiction, this Court stated, in pertinent part, that:

The TAM FUK YUK was flying only the flag of Panama. Neither its home port nor name was painted on its hull. When the inflatable approached the TAM FUK YUK, the Captain of the vessel identified himself and presented documents to the inflatable's crew. The first document referenced Panama. Petty Officer Antis pointed to the Panamanian flag and asked "Panama?" The Captain responded "Yes, Panama." Antis interpreted this to be a verbal claim of nationality by the captain. Likewise, Antis understood that flying the Panamanian flag was a claim of nationality. Finally, the documents produced by the Captain included a reference to the registered owner being in Hong Kong and a statement that the vessel was registered in the PRC (People's Republic of China).

When the USS De Wert approached the F/V TAM FUK YUK, it was under way approximately 215 nautical miles off Manta, Ecuador on a south-southwest course heading away from South America. There were no identifying marks on its hull, other than some Chinese letters and English numbers. When asked, the Captain made a verbal claim of Panama as the vessel's nationality. Moreover, he produced documents which indicated that the vessel was registered either in Hong Kong or China. Verbal claims of nationality, flying its nation's flag and possession and production of documents evidencing the vessel's nationality are the accepted claims of nationality. 46 U.S.C. § 70502(e) (formerly 46 U.S.C. app. § 1903). Based on the lack of identifying markings on the vessel's hull, the Panamanian flag, the captain's multiple claims of nationality, and the inconsistencies attendant to those claims, the vessel was properly deemed assimilated to

statelessness, and therefore was a vessel without nationality, subject to United States jurisdiction.

Alternatively, the evidence conclusively establishes, through the certifications introduced into evidence, that the governments of Panama, Hong Kong and China either could not confirm or deny, or, as to China, expressly denied that the TAM FUK YUK was registered there when interdicted by the De Wert. That the Chinese denial was received in December 2008, after the boarding and search, is irrelevant.

(cr Dkt. 132, pp. 3-4).

Had counsel presented the June 3, 2009 letter from the Hong Kong Marine Department (cr Dkt. 1, p. 37), the outcome of the motion to dismiss for lack of jurisdiction would not have been different. First, documents on the boat (considered in denying the motion to dismiss) indicated that the boat was registered in Hong Kong (see cr Dkt. 107-3). Therefore, submitting the June 3, 2009 letter would have been superfluous. Second, the letter does not disprove 1) that the boat was flying only the flag of Panama, 2) that Petitioner verbally claimed the boat's nationality as Panamanian, 3) that Petitioner produced documents which indicated that the boat was registered either in Hong Kong or China, and 4) that no home port designation was inscribed on the hull of the boat.

The absence of a “permanent indicia of name and home port on [a vessel’s] hull is also a clear indication that the crew wanted to be able to manipulate the vessel’s ‘nationality’ on short notice,” “thereby rendering the vessel ‘stateless.’” *United States v. Gonzalez*, 810 F.2d 1538, 1542 (11th Cir. 1987) (quoting *United States v. Matute*, 767 F.2d 1511, 1512-13 (11th Cir. 1985) (alteration in original)). Additionally, a vessel which claims more than one nationality “is deemed to be stateless; i.e., a vessel assimilated to a vessel without nationality.” *United States v. Alvarez-Mena*, 765 F.2d 1259, 1264 n.8 (5th Cir. 1985). Finally, a vessel which flies the flag of one nation and claims nationality under another will be deemed a stateless vessel under Article 6 of the

Convention on the High Seas. *United States v. Batista*, 731 F.2d 765, 767 (11th Cir. 1984); *Gonzalez*, 810 F.2d at 1541.

Because the June 3, 2009 letter does not establish that the boat was not a stateless vessel, the letter would not have changed the outcome of the motion to dismiss for lack of jurisdiction. Therefore, counsel was not deficient in failing to present the letter.

Counsel likewise was not deficient in failing to present the letter in support of a motion to suppress the evidence seized from the boat. The letter, at best, establishes only that the boat was a foreign vessel registered in Hong Kong. “[T]he Coast Guard may stop and board *a foreign vessel* in international waters if it has a reasonable suspicion that the vessel is engaged in activity that violates United States law.” *United States v. Tinoco*, 304 F.3d 1088, 1116 (11th Cir. 2002) (emphasis added). In denying the motion to suppress, the court determined that “[r]easonable suspicion that the vessel was engaged in drug trafficking existed.” (cr Dkt. 132 at p. 9). Therefore, because there was reasonable suspicion that Petitioner’s boat was engaged in drug trafficking, and the boat was interdicted in international waters,⁶ the Coast Guard was authorized to stop and board Petitioner’s boat, regardless of whether it was a foreign vessel registered in Hong Kong. Accordingly, Petitioner has failed to demonstrate a different outcome had counsel presented the June 3, 2009 letter in support of a motion to suppress.

Ground Four, therefore, does not warrant relief.

Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (cv Dkt. 1) is **DENIED**. The Clerk is

⁶Petitioner’s boat was approximately 215 nautical miles off Ecuador when approached by the Coast Guard (cr Dkt. 132 at p. 3). “International water” is all area beyond twelve miles from land. *United States v. McPhee*, 336 F.3d 1269, 1273 (11th Cir. 2003).

directed to enter judgment against Petitioner and close this case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA

PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court's denial of his motion. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To merit a COA, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Petitioner cannot make the requisite showing because he cannot demonstrate that reasonable jurists would debate whether the Section 2255 motion stated a substantial denial of a constitutional right. And because Petitioner is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, on February 17th, 2016.


JAMES D. WHITTEMORE
United States District Judge

SA:sfc
Copy furnished to:
Pro Se Petitioner
Counsel of Record

**Additional material
from this filing is
available in the
Clerk's Office.**