Selected docket entries for case 15−3779

Generated: 01/22/2016 01:54:03

Filed	Document Description	Page	Docket Text
11/18/2015			CRIMINAL CASE DOCKETED. Notice filed by Bobby Boye in District Court No. 3−15−cr−001916−001. (SB)
	Notice of Appeal	3	
	Case Caption	4	
	Standing Order Excess Pagination	5	
	Criminal Case Retained Fee Due	6	
11/18/2015			RECORD available on District Court CM/ECF. (SB)
11/18/2015	Appearance Form	8	ECF FILER: ENTRY OF APPEARANCE from Mark E. Coyne on behalf of Appellee(s) USA. (MEC)
11/19/2015	Appearance Form	9	ECF FILER: ENTRY OF APPEARANCE from Michael Confusione on behalf of Appellant(s) Bobby Boye.−−[Edited 11/19/2015 by TMM] (MJC)
11/19/2015	Docketing/Information Statement	10	ECF FILER: CRIMINAL INFORMATION STATEMENT on behalf of Appellant Bobby Boye, filed. (MJC)
11/19/2015	Transcript Purchase Order Form	12	ECF FILER: Transcript Purchase Order Form (Part 1) filed by Appellant Bobby Boye advising this court that transcripts are needed. Requested date(s) are: 4/28/15 plea; 10/15/15 sentencing, to be filed by Vincent Russoniello. (MJC)
11/19/2015			ORDER to Court Reporter Mr. Vincent E. Russoniello directing transcripts, ordered on 11/19/2015 , to be filed by 12/22/2015. (TMM)
	Transcript Scheduling Order Issued	13	
	Transcript Scheduling Order	14	
11/23/2015	Court Reporter TPO Paid	15	ECF FILER: TRANSCRIPT PURCHASE ORDER (Part II) filed by for date(s) of Plea and Sentence. (VER)
11/25/2015	Motion(s)	16	ECF FILER: Motion filed by Appellant Bobby Boye to Expedite briefing schedule and decision from Court. Certificate of Service dated 11/25/2015. (MJC)
11/25/2015	Response	20	ECF FILER: Response filed by Appellee USA to Motion to Expedite. Certificate of Service dated 11/25/2015. (MEC)
12/01/2015	Court Order Filed	25	ORDER (KRAUSE, Circuit Judge) Motion by Appellant Bobby Boye to Expedite Briefing Schedule and disposition is denied, filed. Panel No.: BCO−021−E. Krause, Authoring Judge. (TMM)
12/03/2015	Appearance Form	26	ECF FILER: ENTRY OF APPEARANCE from Glenn Moramarco on behalf of Appellee(s) USA. (GJM)
12/21/2015	Court Reporter TPO Completed	27	ECF FILER: TRANSCRIPT PURCHASE ORDER (Part III) filed by for the date(s) of April 28, 2015 October 15, 2015. Transcripts were filed in the District Court on 12/21/2015. (VER)
12/21/2015			BRIEFING NOTICE ISSUED. Brief on behalf of Appellant Bobby Boye due on or before 01/20/2016. Appendix due on or before 01/20/2016. Presentence Report

	Standing Order	28	due on or before 01/20/2016. (TMM)
	Briefing and Scheduling Order	29	
01/21/2016	Response to Govt Motion for Summary Dismissal	31	ECF FILER: Response filed by Appellant Bobby Boye to Government's Motion for Summary Dismissal. Certificate of Service dated 01/21/2016.−−[Edited 01/21/2016 by TMM] (MJC)
01/21/2016	Reply to Response	37	ECF FILER: Reply by Appellee USA to Appellant's Opposition to the Government's Motion for Summary Dismissal, filed. Certificate of Service dated 01/21/2016.−−[Edited 01/21/2016 by TMM] (GJM)
01/21/2016	sur reply	40	ECF FILER: Sur−Reply by Appellant's In Further Opposition to Appellees Motion for Summary Dismissal. Certificate of Service dated 01/21/2016.−−[Edited 01/21/2016 by PDB] (MJC)

01/25/2016		ECF FILER: SEALED ELECTRONIC PRESENTENCE REPORT on behalf of Appellant Bobby Boye, filed. Certificate of Service dated 01/25/2016. This document will be SENT TO THE MERITS PANEL if/when applicable. (MJC)
01/25/2016		ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Bobby Boye, filed. Certificate of Service dated 01/25/2016 by ECF. (MJC)
01/25/2016		ECF FILER: ELECTRONIC APPENDIX on behalf of Appellant Bobby Boye, filed. Certificate of Service dated 01/25/2016 by ECF. (MJC)
01/26/2016		ORDER (Clerk) The foregoing motion is granted to the extent it seeks to stay the briefing schedule. The motion to enforce appellate waiver and for summary affirmance, response, reply and sur-reply are referred to a motions panel. If the motion to enforce is denied or referred to the merits panel, Appellee's brief must be filed and served within 30 days of the date of the order denying or referring the motion, filed. (TMM)
01/28/2016		ORDER (FISHER, JORDAN and VANASKIE, Circuit Judges) Motion to Enforce Appellate Waiver and for Summary Affirmance is granted, filed. Panel ID: CCO-042 Judge: VANASKIE Authoring (TMM)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

BOBBY BOYE a/k/a
"Bobby Ajiboye" a/k/a
"Bobby Aji-Boye"

Defendant.

CRIMINAL ACTION

Case Number 3:15-CR-196-01(FLW)

NOTICE OF APPEAL

Notice is hereby given that defendant Bobby Boye hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment in a Criminal Case imposing sentence upon defendant, entered in this action on October 15, 2015.

Respectfully submitted,

Michael Confusione

Michael Confusione (MC-6855)
Hegge & Confusione, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Defendant/Appellant,
Bobby Boye

Dated: November 16, 2015

General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 15-3779 **Docketed:** 11/18/2015
USA v. Bobby Boye
Appeal From: United States District Court for the District of New Jersey
Fee Status: Paid

Case Type Information:
1) criminal
2) Sentence Appeal
3) null

Originating Court Information:
District: 0312-3 : 3-15-cr-00196-001
Court Reporter: Vincent E. Russoniello
Trial Judge: Freda L. Wolfson, U.S. District Judge
Date Filed: 04/28/2015

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:
10/15/2015	10/15/2015	11/16/2015

Prior Cases:
None

Current Cases:
None

UNITED STATES OF AMERICA Plaintiff - Appellee	Mark E. Coyne, Esq. Direct: 973-297-2002 Email: mark.coyne@usdoj.gov Fax: 973-297-2007 [COR NTC Federal government] Office of United States Attorney 970 Broad Street Room 700 Newark, NJ 07102 Glenn J. Moramarco, Esq. Direct: 856-968-4863 Email: glenn.moramarco@usdoj.gov Fax: 856-968-4917 [COR NTC Federal government] Office of United States Attorney Camden Federal Building & Courthouse 401 Market Street Camden, NJ 08101
v.	
BOBBY BOYE, a/k/a Bobby Ajiboye a/k/a Bobby Aji-Boye Defendant - Appellant	Michael J. Confusione, Esq. Direct: 800-790-1550 Email: mc@heggelaw.com Fax: 888-963-8864 [COR NTC Retained] Hegge & Confusione P.O. Box 366 Mulica Hill, NJ 08062

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	No. 15-3779
Plaintiff/Respondent,	:	
	:	On appeal from a final judgment
v.	:	of the United States District Court
	:	for the District of New Jersey,
BOBBY BOYE,	:	Docket No. 3:15-cr-00196-FLW-001
	:	Judge Freda L. Wolfson
Defendant/Appellant.	:	
	:	

DEFENDANT-APPELLANT'S MOTION TO EXPEDITE

Pursuant to 3d Cir. L.A.R. 4.1, Defendant-Appellant hereby moves the Court for an order expediting the briefing and decision schedule for this sentencing appeal.

GROUNDS FOR MOTION AND PROPOSED BRIEFING SCHEDULE

The United States District Court for the District of New Jersey issued an October 15, 2015 Judgment imposing sentence on defendant of 72 months imprisonment, plus fines and restitution. Defendant must surrender to the United States Marshall's Service on November 30, 2015 to begin serving his sentence of imprisonment.

Defendant-Appellant filed a Notice of Appeal on November 16, 2015 accompanied by a motion for a 30-day extension of time (scheduled to be decided

by the District Court on December 21, 2015). This Court has docketed this sentencing appeal under the above-referenced docket number.

Defendant-Appellant seeks to expedite this sentencing appeal because, in his forthcoming Brief, defendant will challenge the procedural and substantive propriety of the District Court's calculation of the loss caused by defendant's conspiracy to commit wire fraud crime under 18 U.S.C. 1349. 18 of the 24 sentencing points assigned to defendant under the Sentencing Guidelines resulted from the District Court's calculation of loss. If defendant persuades this Court on appeal that the District Court erred in determining the loss and consequent increase of 18 levels under the Sentencing Guidelines, the Guidelines indicate a sentence of imprisonment of as little as 2 months imprisonment, and possibly non-imprisonment, -- nothing near the 72 months imprisonment imposed on defendant by the District Court.

I am recently-retained counsel for defendant-appellant, retained on November 13, 2015. I promptly prepared and filed the Notice of Appeal and accompanying motion for 30 day extension. I have ordered the transcripts; the Court Reporter has advised me that I can expect to receive my copies of the transcripts in approximately 10-14 days. I have begun preparing the appellant's brief and will file it as soon as I can after receipt of the transcripts. Because of the possible sentencing relief that might be afforded to defendant in this sentencing

appeal, we respectfully request that this Court grant this motion and enter an order expediting the briefing and decision in this sentencing appeal. Defendant-Appellant proposes the following expedited briefing schedule:

- Appellant's Brief due 14 days after receipt of transcripts;
- Appellee's Brief due 14 days after due date for Appellant's Brief;
- Any reply due within 7 days of due date for Appellee's Brief;
- Appeal assigned to the earliest available panel; oral argument at discretion of panel with decision as soon as practical thereafter.

An expedited briefing schedule will not unreasonably burden the parties in this sentencing appeal. The parties are well represented with sufficient counsel to brief the sentencing issue under the proposed schedule.

STATUS OF TRANSCRIPTS

Defendant-Appellant has ordered from the court reporter transcripts of the April 28, 2015 plea and October 15, 2015 sentencing hearings before the District Court, which are scheduled for filing with this Court by the court reporter on or about December 22, 2015 (though I have been advised by the reporter that I should have the transcripts in my possession in about 10-14 days).

OPPOSING COUNSEL'S POSITION

Undersigned counsel for Defendant-Appellant has contacted counsel for respondent United States of America (Mark Coyne, Esquire) with respect to Defendant-Appellant's instant motion. Respondent opposes this motion.

CONCLUSION

In light of the far shorter sentence of imprisonment that may be imposed on defendant if he is successful in this sentencing appeal, Defendant-Appellant respectfully requests that the Court grant this Motion to Expedite and enter an Order expediting the briefing schedule (per the proposed schedule set forth above or as directed by the Court) and assigning this appeal to the earliest available panel for consideration and decision.

Respectfully submitted,

Michael Confusione

Michael Confusione (MC-6855)
Hegge & Confusione, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Defendant/Appellant,
Bobby Boye

Dated: November 25, 2015

No. 15-3779

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	
	:	**Opposition to Motion to**
v.	:	**Expedite Briefing Schedule**
	:	**and Assign Appeal to Next**
BOBBY BOYE,	:	**Available Panel**
Appellant	:	

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106-1790

Michael Confusione, Esq.
Hegge & Confusione, LLC
P.O. Box 366
Mullica Hill, NJ 08062
mc@heggelaw.com

Dear Ms. Waldron and Counsel:

Appellee, the United States of America, opposes Defendant Bobby Boye's motion to expedite the briefing schedule and assign this appeal to the next available panel.[1] Boye seeks to challenge his sentence on the grounds that the District Court (Hon. Freda L. Wolfson, U.S.D.J.) improperly calculated the loss associated with his wire fraud conspiracy offense. But at least three reasons counsel against resolving this appeal on an expedited basis.

First, in pleading guilty, Boye stipulated to the 18-level loss enhancement that the District Court ultimately imposed. D.E.23 at 10, ¶ 4. He also waived the

[1] "M" refers to Boye's motion. "DE" refers to the docket entry below.

right to appeal his sentence if it fell within the sentencing range for a total offense level of 24 and he was not challenging the District Court's calculation of his criminal history category. D.E.23, at 11, ¶ 11. And he agreed that a sentence within that Guidelines range would be reasonable. *Id.*, at ¶ 10. The District Court placed Boye in Criminal History Category III and Total Offense Level 24, and Boye's 72-month sentence fell within the resulting Guidelines range of 63–78 months' imprisonment. Thus, unless Boye argues that he belonged in a lesser criminal history category, his guilty plea or appellate waiver was unknowing or involuntary or his sentence resulted from ineffective assistance of counsel, or unless he shows that dismissing his appeal would work a miscarriage of justice, this Court will enforce his appellate waiver upon the Government's motion. *E.g., United States v. Erwin*, 765 F.3d 219, 225–28 (3d Cir.), *reh'g en banc denied*, 779 F.3d 620 (3d Cir. 2014), *cert. denied*, 83 U.S.L.W. 3847 (U.S. 2015).

Second, it ill behooves Boye to seek resolution of this appeal on an expedited basis when he has not sought bail pending appeal from this Court. Of course, to obtain bail, Boye would have to show a substantial claim that, if resolved in his favor, would likely result in a sentence lesser than the expected duration of his appeal. 18 U.S.C. § 3143(b)(1)(B); *see United States v. Miller*, 753 F.2d 19, 23–24 (3d Cir. 1985). But the only claim Boye has pressed so far is his contention that, despite his stipulation to the contrary, his loss enhancement should

have been smaller because the fair market value of the services his company performed should have partially offset the payments that his company received. Boye, however, lied to his victim that those services would be provided by licensed attorneys and accountants. *See* U.S.S.G. § 2B1.1, cmt. (n.3(F)(v)) ("In a case involving a scheme in which . . . services were fraudulently rendered to the victim by persons falsely posing as licensed professionals . . . loss shall include the amount paid for the . . . services . . . rendered . . . , with no credit provided for the value of those . . . services."). Furthermore, Boye presented no evidence at sentencing that the services his company provided would yield a credit against the $3,510,000 in payments his company fraudulently received that would drop him below his stipulated loss of more than $2.5 million, D.E.23 at 10, ¶ 4, much less all the way to the offense level that Boye now says should apply, M2.

Third, Boye filed his notice of appeal 18 days out of time, and his motion for leave under Fed. R. App. 4(b)(4) to do so is still pending in the District Court. D.E.32–33. That motion may not be decided until December 21, 2015 or later, and Judge Wolfson could well deny it, particularly if she concludes that Boye's allegations concerning his prior counsel, Assistant Federal Public Defender K. Anthony Thomas, are false. *See* D.E.33 (Defendant's Aff.). But even if Judge Wolfson credits those allegations, she could still find that AFPD Thomas's alleged ineffective assistance of counsel in not filing a timely notice of appeal does not

warrant granting Boye additional time to file that notice where the only issue he intends to pursue on appeal is precluded by his appellate waiver. *Cf. United States v. Mabry*, 536 F.3d 231 (3d Cir. 2008).

For all these reasons, Boye's motion should be denied.

Respectfully submitted,

PAUL J. FISHMAN
UNITED STATES ATTORNEY

By: Mark E. Coyne
Assistant U.S. Attorney
Chief, Appeals Division

Dated: November 25, 2015

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 27, 2015
BCO-021E

No. 15-3779

UNITED STATES OF AMERICA

v.

BOBBY BOYE,
a/k/a Bobby Ajiboye,
a/k/a Bobby Aji-Boye,

Bobby Boye,
Appellant

(D.N.J. No. 3-15-cr-00196-001)

Present: KRAUSE, Circuit Judge

1. Motion by Appellant to Expedite Briefing Schedule and disposition with proposed briefing as follows:

   Appellant's brief due 14 days after receipt of transcripts;
   Appellee's brief due 14 days after due date for Appellant's brief; and
   Any reply brief due within 7 days of due date of Appellee's brief

2. Response by Appellee in Opposition

Respectfully,
Clerk/cjg

_____ORDER_____

The foregoing motion is denied.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: December 1, 2015
tmm/cc: Mark E. Coyne, Esq.
Michael Confusione, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3779

USA v. Bobby Boye

(District Court No. 3-15-cr-00196-001)

BRIEFING AND SCHEDULING O R D E R

Attorneys are required to file all documents electronically. See 3d Cir. L.A.R. 113 (2008) and the Court's CM/ECF website at www.ca3.uscourts.gov/ecfwebsite.

It is **ORDERED** that the brief for Appellant and the joint appendix shall be filed and served on or before **01/20/2016**. If the appeal is challenging a criminal sentence, four (4) copies of the Presentence Investigation Report shall be filed in sealed envelopes.

It is **FURTHER ORDERED** that the brief for Appellee shall be filed and served within twenty-one (21) days of service of Appellant's brief.

It is **FURTHER ORDERED** that a reply brief, if any, shall be filed and served within fourteen (14) days of service of Appellee's brief.

It is **FURTHER ORDERED** that Appellant must file a brief and the failure to do so may result in the imposition of sanctions. Motions to withdraw as counsel ordinarily will not be granted unless counsel has complied with the procedures set forth in 3rd Cir. LAR 109.2(a).

It is **FURTHER ORDERED** that if Appellee fails to file a brief within the time directed, the matter will be listed on Appellant's brief only and Appellee may be subject to such sanctions as the Court deems appropriate.

It is noted that, where applicable, parties must comply with 3rd Cir. LAR 31.2 which provides: A local, state or federal entity or agency, which was served in the district court and which is the appellee, must file a brief in all cases in which a briefing schedule is issued unless the court has granted a motion seeking permission to be excused from filing a brief. The rule does not apply to entities or agencies that are respondents to a petition for review unless the entity or agency is the sole respondent or to entities or agencies which acted solely as an adjudicatory tribunal.

This Court requires the filing of briefs by counsel in both electronic and paper format. 3rd Cir. LAR 31 .1(b) . Pro Se litigants are exempt from the electronic filing requirement. **Parties must file 7 copies of the briefs; pro se parties who are proceeding in forma pauperis may file only 4 copies. Costs for additional copies will be permitted only if the Court directs that additional copies be filed.**Pursuant to 3rd Cir. LAR 30.1(a), counsel must electronically file the appendix in accordance with LAR Misc. 113.

Checklists regarding the requirements for filing a brief and appendix are available on the Court's website at www.ca3.uscourts.gov.

For the Court,

Marcia M. Waldron

Marcia M. Waldron, Clerk
Date: 12/21/2015

cc: Michael J. Confusione, Esq.
Mark E. Coyne, Esq.
Glenn J. Moramarco, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	No. 15-3779
Plaintiff/Respondent,	:	
	:	On appeal from a final judgment
v.	:	of the United States District Court
	:	for the District of New Jersey,
BOBBY BOYE,	:	Docket No. 3:15-cr-00196-FLW-001
	:	Judge Freda L. Wolfson
Defendant/Appellant.	:	
	:	

DEFENDANT-APPELLANT 'S OPPOSITION TO
GOVERNMENT'S MOTION FOR SUMMARY DISMISSAL

Defendant-Appellant hereby submits this Memorandum in opposition to the Government's motion for summary dismissal and stay of briefing based on the Government's claim of an appellate waiver.

This Court enforces appellate waivers only when they are entered into knowingly and voluntarily *and* their enforcement does not work a miscarriage of justice. United States v. Erwin, 765 F.3d 219, 225 (3d Cir. 2014) cert. denied, 136 S. Ct. 400 (2015); United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001). "This determination depends on factors such as '[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant

acquiesced in the result.'" Erwin, 765 F.3d at 226. This includes ineffective assistance of the defendant's counsel. United States v. Monzon, 359 F.3d 110, 118–19 (2d Cir. 2004); United States v. Fazio, 795 F.3d 421, 426 (3d Cir. 2015).

The waiver should not be enforced under the miscarriage of justice exception. Failing to accord defendant relief from the error that we submit the District Court made in calculating the loss attributable to defendant's conspiracy crime would work a miscarriage of justice because 18 of the 24 total sentencing points assigned to defendant below were because of the District Court's calculation of loss. If the District Court misapplied federal law in calculating the loss, as we contend, the Guidelines would indicate a sentence of imprisonment of as little as 2-months, and possibly non-imprisonment – nowhere near the 72-months imprisonment imposed below. Precluding defendant from having this argument considered by this Court on appeal would thus work a miscarriage of justice. There is no manner in which the District Court's erroneous Guidelines calculation can be considered harmless. See Nagle, 803 F.3d at 183 ("Our review of the record indicates that the District Court's miscalculation of the loss amount likely affected the sentences Nagle and Fink received even with the ten-level departures. Of principal concern to us is that the District Court referred to the size of the loss it incorrectly calculated in sentencing Fink as one of the reasons for the sentence he received… Because it is not clear that the incorrect loss calculations did not affect

the sentences imposed, we cannot conclude that the incorrect loss calculations were harmless.")

Alternatively, the waiver should not be enforced on ground of ineffective assistance of defendant's counsel below, who failed to cite and argue on defendant's behalf governing caselaw defining the loss in fraud type cases, incorrectly assessed this legal issue and misadvised defendant to accept the Government's stipulation to a 63-72 month guideline range under the plea agreement, and failed to submit to the District Court the substantial and, all acknowledged, expert work products that defendant provided to Timor-Leste in exchange for the contract payments. Rompilla v. Beard, 545 U.S. 374, 390-91, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); cf. United States v. Akbar, 181 F. App'x 283, 286-87 (3d Cir. 2006) (it is possible for there to be a miscarriage of justice when "plea proceedings were tainted by ineffective assistance of counsel"). The Government acknowledges in its Motion that this exception for ineffective assistance of counsel applies: "this Office will not enforce an appellate waiver as to such claims." (Government's Motion, at 6 n.2).

At the very least, summary dismissal of defendant's appeal is not appropriate. Defendant's appellant's brief and appendix are due in about one week – on February 3. As the Government acknowledges, a waiver is not enforceable where doing so will "work a miscarriage of justice" in the case before the Court.

(Government's Motion, at 6-7). Whether this principle exists in this case depends upon this Court's evaluation of the merits of defendant's sentencing argument – what error did the District Court make and what harm was caused by the error in regard to the sentence imposed on defendant?

The error in this case revolves around the District Court's failure to apply the correct federal law defining "loss," and the resulting 18-point increase in the sentencing calculation used by the District Court in fashioning defendant's sentence. Defendant's argument to this Court is summarized above but is set forth fully in his Appellant's Brief – which is drafted and will be filed along with a supporting Appendix before the February 3 filing deadline. This Court should permit defendant to file his Appellant's Brief and Appendix. If the Government wishes to then renew its motion for summary dismissal based on claimed waiver, the Court can evaluate the waiver issue with the benefit of the defendant's briefing on the merits of his sentencing appeal and the related determination of whether enforcing the claimed waiver will work a miscarriage of justice in this case. If this Court agrees that the District Court misapplied federal law in determining the "loss" caused by defendant's conspiracy crime, a correct calculation of the loss would reduce the sentencing points to as few as 6 and nowhere near the 24 points that the District Court assigned below; this is so because 18 of the 24 total guideline points assigned below stemmed from the District Court's calculation of

the "loss." This would call for a non-custodial sentence or, at the very least, a sentence far less than the 72-month term of imprisonment that defendant is currently serving. How can such a sentencing error not be considered to fall within the "miscarriage of justice" exception? This shows that summary dismissal is inappropriate; the Court should have the benefit of the appellant's brief and appendix before ruling on the issue.

CONCLUSION

For the above reasons, the Court should deny the Government's motion for summary dismissal or stay of the briefing schedule.

Respectfully submitted,

Michael Confusione

Michael Confusione (MC-6855)
Hegge & Confusione, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Defendant/Appellant,
Bobby Boye

Dated: January 21, 2016

U.S. Department of Justice
United States Attorney
District of New Jersey
Appeals Division

Glenn J. Moramarco
Assistant United States Attorney
Glenn.Moramarco@usdoj.gov

Federal Building and Courthouse
401 Market Street, 4th Floor
Camden, NJ 08101-2098

Phone: (856)968-4863
Fax: (856)968-4917

January 21, 2016

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106-1790

Re: United States v. Bobby Boye, C.A. No. 15-3779

Dear Ms. Waldron:

Please accept this letter as the Government's response to Boye's opposition to the Government's Motion For Summary Dismissal.

Boye contends that he somehow will be able to show that the District Court miscalculated the loss amount, which would amount to a miscarriage of justice. Alternatively, he claims that the same alleged Guidelines error would demonstrate ineffective assistance of trial counsel. But Boye has presented absolutely nothing to this Court which would remotely suggest that the District Court erred in accepting the stipulated loss amount in the plea agreement, much less that there was a manifest injustice here.

Boye argues that "[i]f the District Court misapplied federal law in calculating the loss, as we contend, the Guidelines would indicate a sentence of imprisonment of as little as 2-months, and possibly non-imprisonment – nowhere near the 72-months imprisonment imposed below." Opposition at 2. Despite the claim later in his opposition memorandum that his claim of legal error "is summarized above," Opposition at 4, his assertion of a Guidelines calculation error is wholly unsupported by any argument, any case law, or any facts.

This is what we know. Boye stipulated in his plea agreement that the loss amount was greater than $2,500,000 and less than $7,000,000. Exh. A at page 10. At his guilty plea hearing, he swore under oath that he diverted approximately **$3.5 million** from the victim **for his own personal use**. Exh. B at page 33. He also swore under oath that he used **more than $2 million** of the fraud proceeds he obtained to purchase four properties, three luxury vehicles, and two designer watches. Id. at 33-34. The Presentence Report stated that Boye wired approximately **$3,510,000** to an account he controlled, and used these funds to purchase numerous assets, including but not limited to five real estate properties, three luxury vehicles, and two watches. PSR ¶ 40.

The PSR provided specific street addresses for the five properties that Boye purchased, which properties were valued at $550,000, $450,000, $400,000, $150,000, and $51,300. The three luxury vehicles, a Bentley, a Range Rover, and a Rolls Royce, that Boye purchased were valued at $172,000, $100,983, and $215,000. One of the two watches was valued at $20,000, and the other was not appraised. These specifically listed items, all of which constitute improper gain to the defendant (and have a collective value in excess of **$2.1 million**) provide a reasonable baseline that corroborates the multi-million dollar stipulated loss to the victim. See also U.S.S.G. § 2B1.1, comment 3(F)(v) ("In a case involving a scheme in which . . . services were fraudulently rendered to the victim by persons falsely posing as licensed professionals . . . loss shall include the amount paid for the . . . services . . . with no credit provided for the value of those . . . services.").

In fact, the victim of Boye's offense requested restitution in the amount of **$5,478,875**, and Boye objected to that amount, instead agreeing to make restitution to the victim in the amount of **$3,510,000**. PSR at page 37. In light of these facts, it is difficult, if not impossible, to imagine how Boye could be entitled to a sentence of imprisonment under the Guidelines "of as little as 2-months." Certainly Boye has provided nothing to this Court which would remotely support a finding of a "manifest injustice" in the calculation of the loss amount here.

Finally, if Boye somehow, in the face of all of this, has some sort of viable ineffective assistance of counsel claim, he should raise it in the first instance in the District Court, not in the Court of Appeals. The point of an appellate waiver, of course, is to prevent the Government from having to brief on the merits, and for this Court to have to decide on the merits, a defendant's claim of sentencing error

where he in fact received the sentence he bargained for. This Court should grant the Government's motion to dismiss the appeal.

Very truly yours,

PAUL J. FISHMAN
United States Attorney

By: _____
Glenn J. Moramarco
Assistant U.S. Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	No. 15-3779
Plaintiff/Respondent,	:	
	:	On appeal from a final judgment
v.	:	of the United States District Court
	:	for the District of New Jersey,
BOBBY BOYE,	:	Docket No. 3:15-cr-00196-FLW-001
	:	Judge Freda L. Wolfson
Defendant/Appellant.	:	
	:	

DEFENDANT-APPELLANT'S SUR-REPLY IN FURTHER OPPOSITION TO GOVERNMENT'S MOTION FOR SUMMARY DISMISSAL

The Government claims to be ignorant as to what the District Court's sentencing error was that is in question in this appeal. This is completely disingenuous because this was an issue argued about by the parties below. The Government knows precisely what the error was: Federal law provides that the "loss" is the amount of money the victim had paid *less* the value that the defendant provided back to the victim. Here, defendant received money from the Government of Timor-Leste under the contract he fraudulently obtained, but the record shows that defendant performed the work called for under the contract. Timor-Leste was so satisfied with defendant's work, in fact, that it retained him to perform additional work under two subsequent no-bid contracts (and defendant did the work for these contracts as well). Timor-Leste continues to use the work that

defendant provided per the contracts. **Yet the District Court ruled that the "loss" caused by defendant's conspiracy to commit wire fraud crime was the entire face value of the contract that defendant fraudulently obtained – with no reduction for the value of the work products that defendant provided to Timor-Leste and that Timor-Leste continues to use and benefit from.** The District Court increased defendant's offense level from 6 to 24 points because of this improper calculation of the "loss," resulting in the whopping 72-month sentence of imprisonment imposed on defendant below. This error is discussed in full in Appellant's Brief, which will be filed with the Court in the coming days. We respectfully submit that this sentencing error, if the Court deems it to have been made, falls within the "miscarriage of justice" exception and shows that the Government's motion for summary dismissal is inappropriate here. The Court should deny the motion and have the benefit of Appellant's Brief and Appendix.

Respectfully submitted,

Michael Confusione

Michael Confusione (MC-6855)
Hegge & Confusione, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Defendant/Appellant,
Bobby Boye

Dated: January 21, 2016

No. 15-3779

==========

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

==========

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BOBBY BOYE,
A/K/A BOBBY AJIBOYE,
A/K/A BOBBY AJI-BOYE,
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGMENT IN A CRIMINAL CASE OF
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

Sat Below: Freda L. Wolfson, U.S.D.J.

BRIEF AND APPENDIX VOL. I, PAGES A1-34, OF
DEFENDANT-APPELLANT, BOBBY BOYE

Michael Confusione (MC-6855)
HEGGE & CONFUSIONE, LLC
P.O. Box 366, Mullica Hill, NJ 08062
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com
Counsel for Defendant-Appellant

Michael Confusione
Of Counsel and On the Brief

TABLE OF CONTENTS

TABLE TO THE APPENDIX

Volume I (bound with Brief)

Volume II (bound separately)

TABLE OF AUTHORITIES

Cases

Statutes

Rules

CORPORATE DISCLOSURE STATEMENT

Not applicable.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION[1]

The District Court had jurisdiction pursuant to 18 U.S.C.A. § 3231 (West) because defendant was charged with an offense against the laws of the United States. (A63, 71). A Final Judgment of Conviction was entered on October 15, 2015 imposing a 72-month sentence, fines, and restitution. (A15). Defendant filed a Notice of Appeal on November 16, 2015 along with a motion to extend time for filing. (A1, 2). The District Court granted defendant's motion to extend time on January 12, 2016. (A137). This Court has jurisdiction over this appeal pursuant to 18 U.S.C.A. § 3742(a) (West) and 28 U.S.C.A. § 1291 (West).

STATEMENT OF THE ISSUES

1) Is defendant's sentencing appeal reviewable by this Court because precluding review would work a miscarriage of justice in this case, or because the sentencing error made below was caused by ineffective assistance of counsel?

[1] References to the transcripts are as follows:

1T April 28, 2015 (plea)
2T October 15, 2015 (sentence).

2) Section 2B1.1 of the Sentencing Guidelines provides for increases in the base offense level of a fraud crime depending upon the "loss" caused by the crime. The Application Notes to the Guidelines, Section (E) "Credits Against Loss," provides that the "Loss shall be reduced by the following … 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." Did the District Court commit legal error in failing to apply this provision in determining the loss caused by defendant's conspiracy to commit wire fraud crime – ruling instead that the loss was the entire amount of money paid to defendant by the Government of Timor-Leste under the contracts that defendant duped Timor-Leste into awarding to him but that defendant indisputably performed and Timor-Leste accepted, applauded as excellent, and continues to use and benefit from?

3) Can the District Court's ruling on loss be sustained under Subsection (V) of the Application Notes, which provides that no credit should be given to a defendant "[i]n a case involving a scheme in which … services were fraudulently rendered to the victim by persons falsely posing as licensed professionals"?

4) Did the District Court at least commit clear factual error in finding that the total loss caused by defendant's crime is $3,510,000?

5) Is defendant entitled to a new sentencing hearing on ground of constitutionally ineffective assistance of his counsel below, who failed to argue on defendant's behalf applicable sentencing guidelines and caselaw, permitted defendant to stipulate to "losses" that contravene this federal law, and failed to submit to the District Court the agreed-upon work products that defendant performed under the contracts at issue and provided to Timor-Leste in exchange for the monies paid to him?

6) Did the District Court misapply controlling federal law and thus abuse its discretion in ordering defendant to pay restitution in the full amount of the payments made to defendant under the contracts that defendant admitted he fraudulently obtained but that all parties and the District Court agreed defendant performed in full?

STATEMENT OF THE CASE

In June 2014, defendant was charged in a complaint with one count of wire fraud conspiracy in violation of 18 U.S.C.A. § 1349, and six counts of wire fraud in violation of 18 U.S.C.A. § 1343. (A42, 51). Defendant waived indictment. (A62; 1T9:1-10).

Defendant entered a guilty plea to one count of conspiracy to commit wire fraud in violation of 18 U.S.C.A. § 1349. (A63, 71). The District Court accepted

defendant's plea as knowing, voluntary and intelligent on April 28, 2015. (1T35:1-36:25).

The District Court held the sentencing hearing on October 15, 2015 and imposed imprisonment for a term of 72 months, along with fines and restitution. (2T; A8, 15). A Final Judgment of Conviction was entered on October 15, 2015. (A15). A Corrected Consent Judgement of Forfeiture was entered that same day (October 15, 2015). (A39; PSR3). Defendant filed a Notice of Appeal on November 16, 2015 along with a motion to extend time for filing. (A1, 2). The District Court granted defendant's motion to extend time on January 12, 2016. (A137). This Court has jurisdiction over this appeal pursuant to 18 U.S.C.A. § 3742(a) and 28 U.S.C.A. § 1291. This case has not been before this Court previously.

STATEMENT OF FACTS

The Plea Agreement and Plea Colloquy

There was no issue that defendant committed the conspiracy to commit wire fraud crime to which he pleaded guilty below. (A63, 71; 1T). Per questioning by the District Court, defendant admitted that beginning in or about April 2010, he was "working as an international petroleum tax advisor for" the County of Timor-Leste. (1T26:20-25). In around February 2012, defendant learned that Timor-

Leste was soliciting bids for a contract to provide legal and tax accounting advice to Timor-Leste. (1T27:1-25). Defendant created the fictitious company of "Opus & Best for the purpose of bidding for the contract." He "author[ed] several fraudulent documents submitted by Opus & Best to" Timor-Leste to support Opus & Best's "bid for the contract." Defendant "pa[id] a relative to create a website for Opus & Best, which contained numerous misrepresentations, including but not limited to, false claims regarding Opus & Best's credentials and experience…" Defendant did this, he acknowledged, to induce Timor-Leste to award him the contracts. (1T27:10-25).

The issue was the amount of the "loss" caused by defendant's crime. Unlike many wire fraud claims where a defendant induces the victim to pay for goods or services that the defendant never provides, Mr. Boye did the work called for by the contract to provide legal and tax accounting advice. He is a highly-educated attorney, admitted to the Bar of the State of New York, who has held several high-profile positions throughout his career. Though he duped Timor Leste into awarding him the contract, he was fully capable of performing, and did perform, the work under the contract. All acknowledged below that the work that defendant produced was expertly done – the laws and regulations, and accompanying guidelines and "Transfer Pricing," provided to Timor-Leste. (A138, 255, 315).

Timor Leste continued paying "Opus & Best" for the work product in installments as the excellent work was produced, in accordance with the benchmarks prescribed by the contracts. As the Government's proofs showed, defendant retained other professionals to help produce the complex work-product contracted for, including Peter Chen, a New York and New Jersey licensed attorney, CPA, and former tax partner at Deloitte & Touche LLP (as discussed further below, see http://www.zhonglun.com/En/lawyer_298.aspx). Indeed, the work that defendant provided to Timor-Leste under the first contract was so outstanding that Timor-Leste hired "Opus & Best" two more times -- in no-bid contracts. These second and third contracts ("Transfer Pricing Study Report" and "Interpretative Guidelines for TDA & TBUCA") were awarded without any bids to Opus & Best because of the excellent work product that Opus & Best produced per the first contract ("Taxes and Duties Regulations and Taxation of Bayu-Undan Contractors Act").

So what was the "loss" under federal sentencing law? Several parts of the record below touched upon this central issue.

Schedule A to the Plea Agreement that the parties signed provided, "4. Specific Offense Characteristic § 2Bl.l(b)(l)(J) applies because the aggregate loss amount is greater than $2,500,000 but not more than $7,000,000. This Specific Offense Characteristic results in an increase of 18 levels" (representing 18 of the

24 total sentencing points that District Court assigned to defendant's crime below). (A8, 80). Both the Government and defendant acknowledged that the actual sentence was within the District Court's discretion, however, and that the Court was not bound by the plea agreement: "The sentence to be imposed upon BOBBY BOYE is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742, and the sentencing judge's consideration of the United States Sentencing Guidelines." (A72). Both parties acknowledged that the Court was not bound by any stipulations set forth in the plea agreement either: "This Office and BOBBY BOYE agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing judge, who may make independent factual findings and may reject any or all of the stipulations entered into by the parties." (A73). This same understanding was confirmed with defendant in the plea colloquy held below. (1T19:1-22:25). Defendant stated the following during the plea colloquy regarding the loss caused by his crime:

THE COURT: On or about June 3, 2012, did you and others cause Country A to enter into a contract for consulting services with Opus & Best -- I'll refer to it

as the "consulting contract" -- which consulting contract listed you as one of the two project coordinators acting on behalf of Country A?

THE DEFENDANT: Yes.

THE COURT: Was the consulting contract in the amount of approximately $4,900,000?

THE DEFENDANT: Yes.

THE COURT: Upon becoming a project coordinator, did you fail to disclose to Country A your affiliation with Opus & Best?

THE DEFENDANT: Yes.

THE COURT: Did you cause Country A to wire a total of approximately $3,510,000 from a Country A account to the Federal Reserve Bank of New York -- I'll refer to it as the "Country A account" -- to Opus & Best's JP Morgan Chase account ending in 0399?

THE DEFENDANT: Yes.

THE COURT: I'll refer to that as the "Opus & Best 0399 account."

Do you acknowledge that these wires were processed via transmissions from New Jersey to New York?

THE DEFENDANT: Yes.

THE COURT: Specifically, on or about June 15, 2012, did you cause Country A to wire approximately $1,080,000 from the Country A account to the Opus & Best 0399 account?

THE DEFENDANT: Yes.

THE COURT: On or about July 20, 2012, did you cause Country A to wire approximately $432,000 from the Country A account to the Opus & Best 0399 account?

THE DEFENDANT: Yes.

THE COURT: On or about August 3, 2012, did you cause Country A to wire approximately $720,000 from the Country A account to the Opus & Best 0399 account?

THE DEFENDANT: Yes.

THE COURT: On or about December 12, 2012, did you cause Country A to wire approximately $648,000 from the Country A account to the Opus & Best 0399 account?

THE DEFENDANT: Yes.

THE COURT: On or about December 17, 2012, did you cause Country A to wire approximately $630,000 from the Country A account to the Opus & Best 0399 account?

THE DEFENDANT: Yes. [1T31:1-33:10]

THE COURT: Did you divert the more than approximately $3.5 million wired by Country A to Opus & Best for purported consulting services for your own personal use?

THE DEFENDANT: Yes.

THE COURT: Did you use more than $2 million of the total proceeds of the fraud to purchase four properties located in New Jersey, three luxury vehicles, and two designer watches?

THE DEFENDANT: Yes.

THE COURT: In committing the actions described in the Information, did you act knowingly, willfully, and with the intent to defraud?

THE DEFENDANT: Yes.

THE COURT: And are you pleading guilty today because you are, in fact, guilty of the crime charged in the Information, that is, conspiring to commit wire fraud?

THE DEFENDANT: Yes. [1T33:1-34:15]

That was the extent of the discussion of loss during the plea colloquy below.

The Sentencing Proceeding

The Presentence Report confirmed that defendant was an attorney admitted to practice law in the State of New York. (PSR 7). Defendant completed his secondary education at the Annunciation Grammar School, Ikere, Nigeria, in 1978. He attended the University of Ife-Ile located in Osun State, Nigeria. He earned a Barrister at Law Degree from the Nigerian Law School, Victoria Island, Legos, Nigeria, and was subsequently enrolled as a Barrister and Solicitor of the Nigerian Supreme Court. Once in the United States, defendant attended University of California, Los Angeles (UCLA) Law School between August 1997 and May 1998, and earned a Master of Laws (LLM) degree on May 22, 1998. On May 24, 2000, defendant earned a Master of Business Taxation from University of Southern California (USC). (PSR 22-23).

Before being employed with the Government of Timor-Leste as an international petroleum advisor, defendant held numerous positions, including a Senior Business Leader in the Tax Division with Master Card Services, Purchase, New York; global tax director 3-D Systems in Los Angeles; and manager of mergers, acquisitions and tax with KPMG, San Francisco. Defendant worked as a Registered Representative (RR) from 1999-2001 for Morgan Stanley DW Inc. at the Woodland Hills, California branch office. (PSR 22-23).

Consistent with the Government's position, the Presentence Report considered the loss caused by defendant's conspiracy crime to be the entire amount of the funds paid by Timor-Leste to defendant.[2] "There is an increase of 18 levels under USSG § 2Bl.l(b)(l)(J), as the loss was $4,369,706.30, which exceeds $2.5 million but is less than $7 million." (PSR 17). The total offense level is calculated as 24, resulting in a "guideline imprisonment range" of "63 months to 78 months." (PSR 28).

Nothing in the Presentence Report addressed the fact that defendant provided value back to Timor-Leste in exchange for the monies paid to him. Nothing in the Government's narration of the case to the District Court addressed this either. Nor did anything in the Presentence Report or the Government's submissions address the outstanding sum of $1.4 Million due from Timor-Leste to defendant under the second and third contracts; defendant completed the work called for by these contracts, and Timor-Leste accepted the work and continues to use and benefit from the work. Defendant submitted a letter to the District Court that raised this "calculation of the loss" issue:

> … I urge you to consider as a mitigating factor, the fact that the three (3) contracts forming the subject of this charge were executed

[2] Counsel for defendant below objected to any information from Timor-Leste being incorporated into the Offense Conduct portion of the Presentence Report (recited in paragraphs 12-51 of the Report) "as such information was from 'secondary sources'" that was not agreed to by defendant. (PSR 38).

> successfully in accordance with the terms of the contracts and acknowledged as such by the Timor-Leste Government. I agree that I made several misrepresentations to the Timor-Leste Government to obtain the contracts but it is noteworthy that there is not a single allegation in the charge or the Plea Agreement that Timor-Leste was irreparably harmed by the performance of the contracts. There is not a single allegation that the work products that I submitted in performance of the contract was fraudulent. Now they have all the products agreed upon under the contracts but getting their money back because of my misconduct regarding how the contracts were obtained.
>
> [PSR 14-16]

This issue was raised again in the Sentencing Memoranda that the parties submitted to the District Court. Defendant's counsel noted,

> The penultimate question Your Honor will resolve on Thursday, October 15, 2015, at 11:00am is *What sentence should Mr. Boye receive when the fraud he committed was in the acquisition of a contract,* ***but*** he *delivered the work-product to the victim, the victim has never complained about the work-product and continues to use it, and the victim will be made [whole] by seized property and restitution?*
>
> ***
>
> Regarding the nature and circumstances of this offense, there is no doubt that this crime is serious. As outlined in the PSR, Mr. Boye, through fraudulent pretenses, obtained a lucrative contract from Timor-Leste. He misrepresented himself and failed to disclose an inherent conflicts of interest during the bidding process. As a result, he obtained a multi-million dollar contract to perform work on behalf of Timor-Leste. Unlike most frauds, where the defendant devises a scheme to defraud the victim and never intended to deliver the product, Mr. Boye produced a work product that is still being utilized by the government of Timor-Leste, who in turn uses it to collect revenue. Though Mr. Boye's conduct was deceptive from the inception, his work product continues to pay dividends for

> Timor-Leste. [A89-90]

By contrast, the Government argued,

> Notwithstanding the harm inflicted upon Country A, defendant Boye argues in mitigation that he "delivered the work-product to the victim, the victim has never complained about the work-product and continues to use it, and the victim will be made hold [sic] by seized property and restitution[.]" Def. Sent.Ltr. at 1. The Sentencing Commission has rejected the notion that a defendant should get credit for the value of services rendered where, as here, the "case involv[es] a scheme in which . . . services were fraudulently rendered to the victim by persons falsely posing as licensed professionals[.]" See U.S.S.G. § 2B1.1 app. n. 3(F)(v)(I).
>
> Here, Defendant falsely impersonated or caused the impersonation of numerous licensed attorneys and accountants and therefore should not receive any "credit" for services rendered – whether as a mitigating factor or otherwise – in the determination of his sentence. See United States v. Ary-Berry, 424 F. App'x 347, 352 (5th Cir. 2011) (citing United States v. McLemore, 200 Fed. Appx. 342, 344 (5th Cir. 2006) (*per curiam*) (unpublished) (stating that "[t]here is no setoff for the value of any services actually rendered or products provided" when applying the special rules for certain cases of fraud, and "the determination of the amount of loss for calculations under U.S.S.G. § 2B1.1(b)(1) require the use of the greater of actual loss of [sic] intended loss")); United States v. Hunter, 618 F.3d 1062, 1065 (9th Cir. 2010) (finding that the application rule supported the conclusion that the calculated loss required no deduction for the value of work the defendant performed when she was falsely acting as a nurse). Cf. United States v. Nagle, No. 14–3184, 2015 WL 5712253 (Sept. 30, 2015) (holding that the amount of loss defendants were responsible for was the value of the contracts received, less the value of the performance of the contracts, but declining to address the application of U.S.S.G. § 2B1.1 app. n. 3(F)(v)) as the Government belatedly raised its application, at oral argument).

> In sum, the seriousness of defendant Boye's criminal conduct is unquestionable. His provision of some work product under the Contract, while falsely impersonating licensed attorneys and accountants with decades' long experience in the oil and gas sector, should not be relied upon in mitigation. [A99-100]

The issue was addressed at the Sentencing Hearing. Defendant's counsel argued:

> Mr. Boye admitted that the company he created in order to submit this international tax consultant bid was fraudulent.
>
> But one of the things that strike me as odd from the very beginning, your Honor, is that at its inception Mr. Boye created a fraudulent company in order to get the tax consultant work to try to benefit the country of Timor-Leste.
>
> In the victim's submission that's attached to the government's brief, it's silent, your Honor, with regard to the actual product that Mr. Boye produced. And, in fact, your Honor, what Mr. Boye produced is still being used by the country.
>
> Your Honor, the last time I touched contract law was probably in law school 20 years ago. But I think there is a concept, I'm not sure whether it's still valid or not, but back then 20 years ago there was a concept called unjust enrichment.
>
> THE COURT: It still exists.
>
> MR. THOMAS: What we have here, your Honor, is clearly a fraud from the very beginning. Unlike other fraud cases where you know somebody is going in to commit fraud and they are not going to worry about the end product because they are going in to grab the money and run, what we have here is Mr. Boye created this fraudulent company from the very onset, all right, but he did the work.
>
> It's no excuse. It is absolutely no excuse for committing the fraud to begin with. You can't, you can't get the benefit of that, and I'm not saying he should. But in fashioning a reasonable sentence,

> your Honor, one that's sufficient but not greater than necessary we should look at the total picture.
>
> At one point when I first got involved in this case I looked at the country's 2012 annual report and there is nothing in there that talks about the fraudulent nature of what -- the product, the end product, the work product that he did. Nothing in there talks about that. The attorneys don't mention that the country is in irreparable harm because the product he submitted was lousy and insufficient.
>
> They hired a big law firm in California that did at least $600,000 plus -- close to $900,000 of investigation and nothing is said about the fact that the work product was faulty. They still use it to generate funds and it's going to be continued to be used to generate funds.
>
> So what we have here is somewhat of an unjust enrichment. And, no, your Honor, I am not saying, I am not saying one bit that his original fraudulent conduct should be excused. Absolutely not. It should not be excused. But when you look at the total picture, your Honor, and you compare this fraud case to others -- I don't know if there is any traditional fraud case. There probably should not be. But just your typical fraud case, your Honor, this case doesn't cry out for a sentence at the high end of the Guideline range. [2T17:1-19:25]

The Government countered and reasserted its position:

> Now, Mr. Thomas has argued that, well, in mitigation my client did provide some work product under the consulting contract. Well, Your Honor, the government would submit that was an essential part of the scheme. If he had just blown it off and not provided any work product, he wouldn't have gotten the continuous payments under the contract. The payments were not paid up front. They were paid in installments based on the delivery of work products and he continued to get paid because he was providing some services under the contract.

> Now, in terms of the value of those services, as the government noted in its sentencing memorandum, the Sentencing Commission in its creation of the Commentary to Section 2B1.1 has certainly indicated that where there are false representations as to the licensing of particular professionals who are rendering services in a particular scheme, that there should be no credit for the value of services provided.
>
> Your Honor, that is because, the government would submit, that there is a special kind of abuse of trust and a special kind of manipulation that occurs when an individual is posing as a trusted licensed accredited individual. Here he was posing as various licensed accountants who claimed were CPAs, other attorneys, and he needed to create an aura of expertise in order to get the contract, and then once he had the contract to ensure the continued payments in installments under the terms of the contract. [2T27:1-28:15]

The District Court's Ruling

The District Court acknowledged that defendant, a highly educated and experienced lawyer and business advisor, was able to and did in fact "do the work:" "Obviously, though, you have great talents because you were able to do the work." (2T35:1-36:25).

> You got a law degree in your home country of Nigeria. You came to the US. You attended UCLA. You got a LOM. Then got a Masters in Business Tax at USC. First of all, amazing schools, opening up amazing opportunities for you. You are clearly a very intelligent man and able and capable man and had a law degree. I'm not quite sure how New York State admitted you to the bar considering your prior conviction, but that's not for me to determine.
>
> All of those degrees that you had, you earned those degrees, and clearly when you went to Timor-Leste you were capable. You did work as an advisor and you pointed out even the other advice that you

> gave them was a one-man show without the advantage of a big firm behind you. It was real. It was good work product. [1T41:15-42:5]

The District Court sided with the Government, however, and ruled that the "loss" caused by defendant's crime was the full amount of the money that Timor-Leste paid under the contracts, with no credit for the work that defendant provided:

> We all know that you placed yourself in a tremendous conflict of interest and you understood that which is why you hid it so well. But it wasn't just you presenting that this was an Opus & Best with one man at the top -- not you, whoever you wanted to claim it was going to be -- but you had a host of professionals that you represented to be part of this company with resumes to match that would indicate they were looking at a multi-million dollar contract of work that was going to go forward to give them advice both from an accounting and legal perspective, which is why when you created this company you didn't just make it a two or three-person company. You presented it as a dozen people, 20 people who could perform all these different services.
>
> Because as we know when you are talking about something of this level nobody goes out and hires the solo practitioner out there with the shingle out, but looks for the big firms that have many individuals that can perform the different kinds of work at any given time. So you very well plotted out what it would be that would be necessary to convince, one, the other two on the committee to make a recommendation and ultimately the country to accept this sham company.
>
> So let's not be fooled today that if you just said, I could do all the work for you, that they would have said, great, come in, do everything, be our advisor, be everything else too, a one-man-show.
>
> [2T35:1-36:25]

The Court said that defendant's provision of the work to Timor-Leste did not "mitigate the crime."

> And the victim here, the country, the fact that they received services that you described as services that are still being used and good services doesn't mitigate the crime. One, it was of course important that you perform the services because otherwise Opus & Best would have been terminated if they weren't providing services, but moreover it's not novel to me.
>
> I have sat and seen many defendants in fraud cases obtaining contracts from government. Here it's generally here in the US. This happens to be a foreign country. But obtaining contracts that are sent out for bidding and obtaining them through fraud or bribes. And in virtually all of those cases they did the work. Whether it was a demolition contractor, or whoever it might have been, it wasn't a mitigating factor because they did the work. That was the only way they were going to get paid and they may have been capable of doing the work. But here it's how you went about getting it and the fact that not only did you do it dishonestly, but it prevented honest bidders from getting the work that could have also done the work and been paid the same money. It's a fraud upon the country.
>
> It's more egregious in my mind because it was not just upon a corporation who may have some kind of insurance or whatever that could make them whole, and not just done to our country, but you were really sent out there in some ways as a personal ambassador to this country hand picked by Norway to assist an underdeveloped poor country.
>
> It's almost akin to what we call the vulnerable victim here, but it's not exactly. But I'll point out, this particular country that welcomed you and that you took advantage of, the crime is extremely serious and I won't go through all the aspects of it at this point.
>
> [2T37:1-38:25]

The Court concluded, "I have considered all of those 3553(a) factors and in fashioning a sentence that's sufficient but not greater than necessary I, one, disagree with the request by the defendant for a sentence at the bottom of the Guideline range. I think that absolutely does not suffice as a sufficient sentence. A Guideline sentence is appropriate and I am going to impose a sentence of 72 months in this case." (2T42:15-43:10).

STATEMENT OF RELATED CASES

None.

STANDARD OF REVIEW

The Court of Appeals reviews both the procedural and substantive reasonableness of a district court's sentence for abuse of discretion. United States v. Handerhan, 739 F.3d 114 (3d Cir. 2014); United States v. Tomko, 562 F.3d 558, 567 (3d Cir. 2009) (*en banc*). "Appellate review is limited to determining whether the sentence is reasonable." United States v. Friedman, 658 F.3d 342, 360 (3d Cir. 2011).

SUMMARY OF THE ARGUMENT

There is no waiver of defendant's right to appeal the District Court's calculation of the "loss" caused by defendant's conspiracy to commit wire fraud crime because enforcing the waiver would result in a miscarriage of justice. This

is so because 18 of the 24 total sentencing points assigned to defendant's crime represent the District Court's calculation of the "loss." Alternatively, no waiver applies because the error raised here on appeal is rooted in the ineffective assistance of defendant's trial counsel, which the Government concedes is also an exception to applying an appellate waiver in a sentencing appeal.

The District Court erred in sentencing defendant below by failing to apply the correct, controlling federal law on how to calculate the "loss" caused by the defendant's crime. The controlling federal law provides that the "loss" is the amount of money the victim had paid *less* the value that the defendant provided back to the victim. Here, defendant received money from Timor-Leste under the contract he fraudulently obtained, but the record shows that defendant performed the work called for under the contract. Timor-Leste was so satisfied with defendant's work, in fact, that it retained him to perform additional work under two subsequent no-bid contracts, and defendant did the work for these contracts as well. Timor-Leste continues to use the work that defendant provided per the contracts. The face value of the three contracts was $4.9 Million, moreover, yet the Government's proofs acknowledge that only $3.5 Million was paid to defendant by Timor-Leste – $1.4 million less than the value of the services delivered by the defendant and stipulated in the contracts between the defendant

and the Timor-Leste Government. Yet the District Court ruled that the "loss" caused by defendant's conspiracy to commit wire fraud crime was the entire face value of the contract that defendant fraudulently obtained – with no reduction for the value of the work products that defendant provided to Timor-Leste and that Timor-Leste continues to use and benefit from.

The District Court said that no "mitigation" should be accorded to defendant because he "posed" as "licensed professionals" in obtaining the contract. But this exception under the Sentencing Guidelines does not apply because the record and Presentence Report confirm that defendant is a licensed professional – a highly-educated, fully licensed attorney with a Master of Laws Degree. He did not "impersonate" a licensed professional. He is one. The District Court's misapplication of the Sentencing Guidelines and controlling federal law defining how to calculate "loss" to the victim was a procedural, legal error that this Court should reverse on *de novo* review here.

Even if this is not considered legal error, the District Court at least abused its discretion, or committed clear factual error, in finding the "loss" to be the entire amount of money paid to defendant in light of the three admittedly excellent work products that defendant prepared and provided to Timor-Leste and which Timor-Leste continues to use and benefit from. "Loss" was the Government's burden to

prove, and the Government submitted insufficient proofs to sustain the District Court's finding that it was $3.5 Million.

Alternatively, the Court should order a new sentencing hearing based on ineffective assistance of defendant's counsel below, who raised the issue of loss but failed to cite and argue the federal sentencing law that governs the loss calculation, failed to argue in opposition to the Government's argument on the issue, counseled defendant to accept a plea that "stipulated" a loss figure that was contrary to this federal law and the facts of defendant's case, and failed to submit to the District Court the three work products that defendant produced to Timor-Leste under the three contracts in question and which Timor-Leste continues to use and benefit from.

Finally, the District Court ordered defendant to pay back in restitution all of the monies that defendant received from Timor-Leste. But controlling federal law on restitution provides (again) that the "loss" is the amount of money the victim paid to defendant less the value that the defendant provided back to the victim. The District Court did not apply this law, warranting vacation of the District Court's restitution order.

For all these reasons, defendant respectfully requests that this Court vacate the 72-month sentence, fines, and restitution imposed on him below and remand this matter back to the District Court for resentencing.

ARGUMENT

Standard of Review

"Appellate review is limited to determining whether the sentence is reasonable." Friedman, 658 F.3d at 360. The Court's review for reasonableness proceeds in two stages. First, the Court must "ensure that the [D]istrict [C]ourt committed no significant procedural error, such as failing to calculate (or improperly calculating) the [U.S. Sentencing] Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.A. § 3553(a) (West)] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence...." Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). If the Court finds the sentence procedurally sound, the Court then considers if it is substantively reasonable given the "totality of the circumstances." Id. For example, an abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion." United States v. Fumo, 655 F.3d 288, 308 (3d Cir. 2011), as amended (Sept. 15, 2011).

With regard to the District Court's finding of the "loss" caused by the defendant's crime, "the appropriate standard of review of a district court's decision regarding the interpretation of the Sentencing Guidelines, including what constitutes 'loss,' is plenary." Factual findings are reviewed for "clear error." United States v. Napier, 273 F.3d 276, 278 (3d Cir. 2001); Fumo, 655 F.3d at 309.

I THERE IS NO WAIVER OF DEFENDANT'S RIGHT TO APPELLATE REVIEW OF HIS SENTENCE BECAUSE PRECLUDING REVIEW WOULD WORK A MISCARRIAGE OF JUSTICE IN THIS CASE, OR WAIVER DOES NOT APPLY BECAUSE THE SENTENCING ERROR WAS CAUSED IN PART BY INEFFECTIVE ASSISTANCE OF DEFENDANT'S COUNSEL IN THE DISTRICT COURT BELOW.

This Court enforces appellate waivers only when they are entered into knowingly and voluntarily *and* their enforcement does not work a miscarriage of justice. United States v. Erwin, 765 F.3d 219, 225 (3d Cir. 2014) cert. denied, 136 S. Ct. 400 (2015); United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001). "This determination depends on factors such as '[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.'" Erwin, 765 F.3d at 226. This includes ineffective assistance of the defendant's counsel. United States v. Monzon, 359 F.3d 110, 118–19 (2d Cir. 2004); United States v. Fazio, 795 F.3d 421, 426 (3d Cir. 2015).

These exceptions apply to defendant's case. Failing to accord defendant relief from the error that we submit the District Court made in calculating the loss attributable to defendant's conspiracy crime would work a miscarriage of justice because 18 of the 24 total sentencing points assigned to defendant below were because of the District Court's calculation of loss. If the District Court indeed misapplied federal law in calculating the loss, as we contend below, the Guidelines would indicate a sentence of imprisonment of as little as 2-months, and possibly non-imprisonment – nowhere near the 72-months imprisonment imposed below. Precluding defendant from having this argument considered here on appeal would thus work a miscarriage of justice. There is no manner in which the District Court's erroneous Guidelines calculation can be considered harmless. See Nagle, 803 F.3d at 183 ("Our review of the record indicates that the District Court's miscalculation of the loss amount likely affected the sentences Nagle and Fink received even with the ten-level departures. Of principal concern to us is that the District Court referred to the size of the loss it incorrectly calculated in sentencing Fink as one of the reasons for the sentence he received… Because it is not clear that the incorrect loss calculations did not affect the sentences imposed, we cannot conclude that the incorrect loss calculations were harmless.")

Alternatively, the waiver in this case should not be enforced on ground of

ineffective assistance of defendant's counsel below, who failed to cite and argue on defendant's behalf governing caselaw defining the loss in fraud type cases, incorrectly assessed this legal issue and misadvised defendant to accept the Government's stipulation to a 63-72 month guideline range under the plea agreement, and failed to submit to the District Court the substantial and, all acknowledged, expert work products that defendant provided to Timor-Leste in exchange for the contract payments. Rompilla v. Beard, 545 U.S. 374, 390-91, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); cf. United States v. Akbar, 181 F. App'x 283, 286-87 (3d Cir. 2006) (it is possible for there to be a miscarriage of justice when "plea proceedings were tainted by ineffective assistance of counsel"). Ineffective assistance of counsel in the negotiation of an appellate waiver renders that waiver invalid, this Court has indicated. See United States v. Mabry, 536 F.3d 231, 243 (3d Cir. 2008) (noting absence of allegations that counsel was ineffective "in negotiating the very plea agreement that contained the waiver"); United States v. Shedrick, 493 F.3d 292, 298 & n. 6 (3d Cir.2007) (noting "[e]nforcing a collateral-attack waiver where constitutionally deficient lawyering prevented [defendant] from understanding his plea ... would result in a miscarriage of justice").

II THE DISTRICT COURT COMMITTED LEGAL ERROR BY DECLINING TO APPLY CONTROLLING FEDERAL LAW ON HOW TO DETERMINE THE "LOSS" CAUSED BY A CONSPIRACY TO COMMIT WIRE FRAUD CRIME

Standard of Review

"The appropriate standard of review of a district court's decision regarding the interpretation of the Sentencing Guidelines, including what constitutes 'loss,' is plenary." Napier, 273 F.3d at 278; Fumo, 655 F.3d at 309; United States v. Nagle, 803 F.3d 167, 179 (3d Cir. 2015).

Argument

The applicable Guideline provision for offenses involving fraud and deceit is Guideline § 2B1.1 and the accompanying Notes. The Guideline provides a base offense level of 7 then provides for increases in the level "If the loss exceeded $6,500…" "If the loss exceeded $6,500, increase the offense level as follows …. (J) More than $3,500,000 … add 18." U.S.S.G. 2B1.1. But in determining the "loss," Section (E) of the Notes provides that the defendant must be given credit for whatever value he provided back to the victim before the offense was detected:

> **(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.

The District Court committed legal error in failing to apply this provision and applicable federal law to defendant's case (as summarized in the Statement of Facts above, incorporated here by reference). See, e.g., Nagle, 803 F.3d at 183 ("We conclude that in a DBE fraud case, regardless of which application note is used, the District Court should calculate the amount of loss under U.S.S.G. 2B1.1 by taking the face value of the contracts and subtracting the fair market value of the services rendered under those contracts"). This Court has found error on similar ground. Fumo, 655 F.3d at 311-12 (noting as reversible error District Court's "failure to resolve the disputed" issue of "loss"; "Accordingly, on remand the District Court should carefully consider the evidence and make a determination as to whether, and to what extent, Rubin's contract resulted in a loss to the Senate"); see also United States v. Sublett, 124 F.3d 693, 694 (5th Cir. 1997) ("Sublett contends that the district court erred in its application of section 2F1.1(b)(1) by determining the loss to be the total sums paid and to be paid under the two contracts. Sublett maintains that he should be given credit, in the sentencing calculation, for the legitimate counseling services provided under the first contract and for the legitimate and qualified services he intended to provide the IRS under the second contract. We agree").

The District Court erred in relying on Subsection (V) (I) of the Notes

Subsection (V) (I) of the Notes provides, "In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals..." Defendant did not "pose" as a licensed professional. He is one. As detailed in the Presentence Report and summarized in the Statement of Facts above (incorporated here by reference), defendant is an attorney admitted to practice law in the State of New York. (PSR 7). He has an extensive educational and work background in the legal and financial industries. The District Court acknowledged that this highly educated and experienced man was able to and did in fact "do the work:" "Obviously, though, you have great talents because you were able to do the work," the District Court said. (2T35:1-36:25).

> You got a law degree in your home country of Nigeria. You came to the US. You attended UCLA. You got a LOM. Then got a Masters in Business Tax at USC. First of all, amazing schools, opening up amazing opportunities for you. You are clearly a very intelligent man and able and capable man and had a law degree. I'm not quite sure how New York State admitted you to the bar considering your prior conviction, but that's not for me to determine.
>
> All of those degrees that you had, you earned those degrees, and clearly when you went to Timor-Leste you were capable. You did work as an advisor and you pointed out even the other advice that you gave them was a one-man show without the advantage of a big firm behind you. It was real. It was good work product. [1T41:15-42:5]

This Guideline exception to the presumptive rule defining "loss" applies to persons posing as attorneys, doctors, or other licensed professionals. See, e.g., United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996) ("The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of the unlicensed benefits provided"); *U.S. Sentencing Guidelines Manual* app. C, vol. II, amend. 617, at 183-84 (2003). Courts that have applied the Section (V) Note have done so where the defendant has posed as a licensed professional. See, e.g., United States v. Bennett, 453 F. App'x 395, 397 (4th Cir. 2011) ("Bennett posed as a doctor in purporting to provide the services of an MRO. Therefore, he is not entitled to the reduction applied in *Dawkins*"); United States v. Kieffer, 621 F.3d 825, 834 (8th Cir. 2010) (applying U.S.S.G. 2B1.1 cmt. n. 3(F)(v)(I) to defendant who posed as licensed attorney – "an attorney-impersonator"). Because Mr. Boye is a licensed professional, this exception to the otherwise applicable "loss" calculation does not apply. The District Court committed reversible legal error in applying it.

Subsection (V) (I) does not apply to defendant's case for several other reasons too:

First, there was no proof before the District Court that a specific "licensed

professional" was required to perform any of the services required by the Timor-Leste Government under the first contract (the "TDA & TBUCA Regulations").

Second, there was no proof before the District Court that under Timor-Leste law – with Timor-Leste being the place where the contract was being performed – that the drafting of the TDA & TBUCA Regulations was required to be done by licensed professionals.

Third, there was no proof before the District Court that the two subsequent, no-bid contracts between Opus & Best and Timor-Leste (the "Transfer Pricing Study Report" and "Interpretative Guidelines for TDA & TBUCA") required the expertise of certain licensed professionals. Other than a sound understanding of taxation and economics, the preparation of the Transfer Pricing and Study Report and the Interpretative Guidelines did not require possession of any particular professional license.

Fourth, and related to the main point argued above, both defendant and Peter Chen, the attorney and CPA who defendant retained to help prepare the work products, performed a substantial part of the work under the three contracts and are both licensed attorneys; Mr. Chen is a CPA in New York and New Jersey as well (as noted below, see http://www.zhonglun.com/En/lawyer_298.aspx).

Fifth, there is nothing in the narration of the Government's case nor proof

before the District Court relating to the terms and conditions of any of the three contracts.

In sum, the District Court committed reversible legal error in failing to apply the presumptive governing rule on how to calculate loss in a fraud case like this one. As this Court recently stated in Nagle, in a normal fraud case, "where value passes in both directions [between defrauded and defrauder] ... the victim's loss will normally be the difference between the value he or she gave up and the value he or she received." (citing United States v. Dickler, 64 F.3d 818, 825 (3d Cir. 1995)). "We have repeatedly emphasized that the amount of loss in a fraud case, unlike that in a theft case, often depends on the actual value received by the defrauded victim. Thus, when a defendant obtains a secured loan by means of fraudulent representations, the amount of loss is the difference between what the victim paid and the value of the security, because only that amount was actually lost." (citing United States v. Nathan, 188 F.3d 190, 210 (3d Cir. 1999) (Becker, C.J.). In Nathan, 188 F.3d 190, the Court said that "[i]n a fraudulent procurement case" – much like the defendant's case here – the court calculates the amount of loss by "offset [ting] the contract price by the actual value of the components provided." Id. This loss calculation is similar to a classic method of remedying fraud: rescission of any agreements and restitution of the reasonable value of what

the parties exchanged. As the Nagle court stated, "Applying this well-established principle here, the defrauded parties—the transportation agencies—gave up the price of the contracts and received the performance on those contracts. Therefore, we conclude that, if the standard definition of 'loss' in Note 3(A) applies, the amount of loss Nagle and Fink are responsible for is the value of the contracts Marikina received less the value of performance on the contracts—the fair market value of the raw materials SPI provided and the labor CDS provided to transport and assemble those materials." Id. at 180-81. The District Court committed legal error in not applying this analysis to determine the loss in defendant's case.

III THE DISTRICT COURT COMMITTED CLEAR ERROR IN ITS FACTUAL FINDING THAT THE LOSS WAS THE TOTAL AMOUNT OF CONTRACT PAYMENTS MADE TO DEFENDANT.

Standard of Review

The Court of Appeals can reverse a district court's factual findings relating to alleged loss caused by the crime for clear error. United States v. Brennan, 326 F.3d 176, 194 (3d Cir. 2003).

Argument

The Government bears the burden of establishing, by a preponderance of the evidence, the amount of loss. United States v. Jimenez, 513 F.3d 62, 86 (3d Cir. 2008); Fumo, 655 F.3d at 310. Even if the District Court did not misapply

sentencing law, the Court at least committed clear error in relying only on the parties' stipulation that the loss was "$3,510,000 which represented the contract payments that were made to Mr. Boye that underlie the substantive offense here." (2T6:15-25). We understand that under U.S.S.G. 2B1.1 loss may be actual, intended, or estimated loss to victims, or even the gain to defendant. U.S.S.G. 2B1.1 cmt. n. 3(A), (B). But none of this was demonstrated by the Government below.

The stipulation contained in the parties' plea agreement is insufficient to sustain the District Court's finding of loss, because the District Court applied the wrong rule in determining the loss in the first place, and the stipulation is likewise based upon the wrong rule. Both the Government and defendant acknowledged that the actual sentence was within the District Court's discretion, and that the Court was not bound by the plea agreement: "The sentence to be imposed upon BOBBY BOYE is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742, and the sentencing judge's consideration of the United States Sentencing Guidelines." (A72). Both parties acknowledged that the Court was not bound by any stipulations set forth in the plea agreement either: "This Office and BOBBY BOYE agree to stipulate at sentencing to the statements set forth in the attached

Schedule A, which hereby is made a part of this plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing judge, who may make independent factual findings and may reject any or all of the stipulations entered into by the parties." (A73). This same understanding was confirmed with defendant in the plea colloquy held below. (1T19:1-22:25).

The District Court committed clear error, at least, in not crediting defendant with any offset for the work product he provided to Timor-Leste and which Timor-Leste continues to use and profit from. In United States v. Schneider, 930 F.2d 944 (7th Cir. 1991), Judge Posner explained the very error that the District Court made in this case – failing to "distinguish between two types of fraud. One is where the offender - a true con artist - does not intend to perform his undertaking, the contract or whatever; he means to pocket the entire contract price without rendering any service in return. In such a case the contract price is a reasonable estimate of what we are calling the expected loss, and we repeat that no more than a reasonable estimate is required. The other type of fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but he means to perform the contract (and is able to do so) and to pocket, as the profit from the fraud, only the difference between the contract price and his costs. This is such a case," Judge Posner noted, and the same statement applies to defendant's case

here. United States v. Schneider, 930 F.2d 555, 558 (7th Cir. 1991). As Judge Posner said, it would be "irrational" to apply as severe a sentence to a performing contractor who submitted false documents with his application as to a true con artist who does not intend to perform his undertaking at all. Id. at 559. Yet that is precisely what the District Court did in Mr. Boye's case below – without the Government proving any real loss, actual or intended, to the victim Country (Timor-Leste). This does not excuse defendant's conspiracy to commit the wire fraud crime, or render it non-punishable under the Sentencing Guidelines. But, as Judge Posner said in Schneider, 930 F.2d 555, the Government did not demonstrate that the defendant warranted "additional punishment based on a proven monetary loss." Id; see also United States v. Kopp, 951 F.2d 521, 529 (3d Cir. 1991), as amended (Dec. 4, 1991) (adopting logic in Schneider and ruling that fraud "loss" is amount of money the victim has actually lost); United States v. Buckner, 9 F.3d 452 (6th Cir. 1993)(face value of a loan fraudulently obtained not the proper measure of the loss under U.S.S.G. 2F1.1).

The District Court's finding of the "loss" caused by defendant's crime to be the entire face value of the contract is unsupported by sufficient proofs presented by the Government, which bore the burden of proving the loss below. See United States v. Jones, 475 F.3d 701, 706 (5th Cir. 2007) ("The government bears the

burden of proof … to prove whether Jones and Clark performed these services … At the evidentiary hearing, the government neglected to substantiate its claim. Speculation from the government witnesses regarding whether Health One actually provided services failed to meet its evidentiary burden"); United States v. Skys, 637 F.3d 146 (2d Cir. 2011) (findings regarding actual losses sustained by four financial institutions were insufficient to support finding that they were victims, for purpose of enhancing sentence for securities fraud, wire fraud, and bank fraud on ground that the crimes involved ten or more victims; sentencing court made no determination that any of the institutions suffered any actual loss, and the presentencing report (PSR) which the court adopted failed to determine the loss amount).

Nothing in the proofs demonstrated the amount of money that Timor-Leste lost because of the defendant's crime. Would Timor-Leste have paid less for the work that defendant provided to it? Is the work that defendant provided to Timor-Leste not the work called for by the contracts into which defendant induced Timor-Leste to enter? Is the work that defendant provided not worth the amount of money that Timor-Leste paid to defendant? Has Timor-Leste been forced to pay for substitute work product that it believed the defendant was going to provide under the contracts? (which seems doubtful given that Timor-Leste continues to

use the defendant's work and profits from it). Why would Timor-Leste have awarded the second and third "no bid" contracts to Opus & Best if Timor-Leste was harmed by the awarding to Opus & Best of the first contract? Nothing in the record below answers any of these fundamental questions. How could the District Court have properly determined the loss without these answers? The Court at least abused its discretion, therefore, by relying only on information in the Presentence Report and the stipulated amount of loss in light of the objections raised in the court below about how federal law requires the "loss" to be calculated in defendant's case. See Tomko, 562 F.3d at 568 (abuse of discretion occurs if district court bases decision on clearly erroneous factual conclusion).

The resulting 72-month sentence that the District Court imposed on defendant is substantively unreasonable and an abuse of the court's discretion. As noted above, 18 of the 24 sentencing points assigned to defendant were because of the District Court's calculation of the loss. Defendant received money from Timor-Leste under the contract he fraudulently obtained, but the record shows that defendant performed the work called for under the agreement. Timor-Leste was so satisfied with defendant's work that it retained Opus & Best to perform additional work under two subsequent no-bid contracts (and defendant did the work for those contracts). Timor-Leste continues to use the work that defendant provided per the

contracts. The face value of the three contracts was $4.9 Million, yet the Government's proofs showed that only $3.5 Million was paid to defendant by Timor-Leste – $1.4 less than the value of the services prescribed by the contracts. The District Court erred in failing to credit defendant for the value for the work he provided back to Timor-Leste in exchange for the money paid to him under the contracts. The error is significant, because the points assigned for the "loss" were 18 of the 24 total points. Had the District Court applied the law correctly, the loss would have been found to be zero (we submit), or at least something far less, with a consequent sentence much lower than 72-months in prison.

Pursuant to 18 U.S.C.A. § 3553(a)(1), a sentencing court is required to give due consideration to the defendant's individual characteristics and case specifics. Given the restitution that defendant has been ordered to make, a non-custodial sentence or at least a lesser term would have been adequate to achieve the sentencing goals – a sentence sufficient but not greater than necessary to accomplish the purposes of sentencing. Though the sentence should provide adequate deterrence to criminal conduct, 18 U.S.C.A. § 3553(a)(2)(B), the District Court did not consider that electronic monitoring or a shorter prison term, or combination thereof, substantially curtails one's liberties and is sufficient but not greater than necessary to achieve the sentencing purpose. This is further supported

by the fact that defendant is recently separated but remains responsible for his 2 young children, only two and four years old at time of sentencing below. (PSR). See Gall, 128 S. Ct. at 593 (affirming probationary sentence even though advisory Guidelines range was 30-37 months imprisonment); United States v. Howe, 543 F.3d 128, 130 (3d Cir. 2008) (affirming probationary sentence even though Guidelines range was 18-24 months imprisonment). As this Court stressed in Tomko, 562 F.3d 558:

> We must be mindful that the Sentencing Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," *Rita*, 127 S.Ct. at 2465, and the Sentencing Commission has carried out those objectives at "wholesale," id. at 2463. The sentencing judge, in contrast, carries out the § 3553(a) objectives at "retail," id., because "[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court," *id. at 2469*. Here, the record demonstrates the District Court's thoughtful attempt to tailor the off-the-rack Guidelines recommendations into a sentence that fits Tomko personally. Where it believed the Guidelines recommendations too large or too small—for example, in the advisory ranges for imprisonment and fine—the Court took care to explain why this was the case before making the adjustments it felt necessary. This is precisely the type of individualized assessment that *Gall* demands, and to which we must defer.

IV DEFENDANT'S SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING BASED ON INEFFECTIVE ASSISTANCE OF DEFENDANT'S COUNSEL BELOW.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that; (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Though defendant's trial counsel raised the issue of how the District Court should consider the "loss," he failed to cite and argue federal sentencing law governing the loss calculation, failed to argue in opposition to the Government's argument on this issue, and counseled defendant to accept a plea that "stipulated" a loss figure that was contrary to federal law and the actual facts of this case.

Counsel failed to submit to the District Court the work products that defendant provided to Timor-Leste in exchange for the payments received under the three contracts with Timor-Leste (the work products are attached to the

accompanying Appendix, Volumes III and IV). Defendant's counsel had copies of the contracts and the work products that defendant provided to Timor-Leste in return for the payments made to him, but counsel did not present the work products to the District Court. These work products that defendant prepared and provided to Timor-Leste in exchange for the payments made to him were highly relevant to considering the "loss" caused by defendant's conspiracy crime.

Contract No. 1. The first contract dealt with the "Taxes and Duties Regulations and Taxation of Bayu-Undan Contractors Act" ("TDA & TBUCA Regulations"). These Regulations govern the collection and Administration of Oil and Gas Taxes imposed by the Timor-Leste Government on all the contractors and subcontractors involved with the Oil and Gas industry in Timor-Leste. Prior to the TDA & TBUCA Regulations, there were no regulations guiding the computation of taxes in the production area known as the Kitan Field (which went into production in May 2012). With regard to the Bayu-Undan Field, the regulations that were in existence before defendant's work was performed did not apply because the regulations were drafted before production commenced in the Bayu-Undan Field in 2002, and the regulations were grossly inadequate to address the plethora of tax controversies between the tax payers and the Timor-Leste Government. This is what prompted Timor-Leste to solicit the bids for the first

contract. As a result of the work products produced by defendant and provided to Timor-Leste, the average tax revenue from the Kitan and Bayu-Undan Fields for the time period 2010-2013 was approximately $1.5 Billion each year. (A138).

Contract No. 2. This involved a "Transfer Pricing Study Report." This was a study commissioned by the Timor-Leste Government to determine the economics of all related party transactions entered into by the Oil and Gas contractors operating in Timor-Leste between 2007 and 2012. The purpose of the study was to determine whether or not the exchange of services and/or goods between the contractors and their related parties were appropriately priced when compared with pricing of similar services or goods with similar unrelated parties. The value of such services and goods between the contractors and related parties in Timor-Leste during the referenced period above was approximately $12 Billion. (A255).

Contract No. 3. This involved "Interpretative Guidelines for TDA & TBUCA." This Guidelines project was commissioned by the Timor-Leste Government to provide guidance to the employees of the Timor-Leste Petroleum Tax office, Oil and Gas operators in Timor-Leste, and the general public regarding the interpretation of the substantive provisions of the Taxes and Duties Act and the Taxation of the Bayu-Undan Contractors Act. The "Guidelines" is essentially a manual to guide the employees of the Timor-Leste Tax office, Oil and Gas

Operators, and the general public as to how the law operates in this area. The Guidelines also contain copies of all of the Tax forms prescribed under the Regulations and the substantive tax laws, as well as instructions on how to complete these forms. The Guidelines also contain various user fees prescribed by certain applications made by taxpayers to the Petroleum Tax Office for one service or the other. (A315).

Counsel for defendant failed to submit any of these work products to the District Court in consideration of sentencing. Counsel failed to advise the District Court that other professionals like the aforementioned Peter Chen, a licensed attorney and CPA, were retained by defendant to help prepare the work products for Timor-Leste. See http://www.zhonglun.com/En/lawyer_298.aspx (profile page for Peter Guang Chen, Partner in the Hong Kong Office of Zhong Lun Law Firm, and including under "Representative Cases," "Recently, Mr. Chen has been engaged by the Ministry of Finance of a South Asian nation to draft the country's tax regulations and to provide consulting on international tax matters.") Counsel failed to provide the District Court with the copies of the subcontract agreements, billings, and evidence of payments by defendant to Mr. Chen and the other professionals hired as part of the team performing the contracts with Timor-Leste. Counsel failed to bring to the District Court's attention the fact that the face value

of the three contracts was $4.9 Million, yet only $3.5 Million was paid to defendant by Timor-Leste – $1.4 less than the value of the services that defendant and his team provided to Timor-Leste.

Counsel was in possession of these work products, supporting documents, and other information about the work performed by defendant under the contracts at issue. Failing to bring these documents and facts to the District Court's attention at sentencing is deficient performance of counsel that directly resulted in the 72-month prison sentence imposed on defendant. See Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (counsel failed to pursue records outlining defendant's upbringing in a slum environment, evidence pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition despite nine years of schooling, constituting deficient performance); Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (counsel deficient where "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood" as mitigating evidence at sentencing). The failure of defendant's trial counsel to submit the work products to the District Court and to make the legal arguments per the authority cited above constitutes ineffective assistance of plea and sentencing counsel and further ground on which to vacate the District Court's

sentence and remand this matter for resentencing.[3]

V THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING DEFENDANT TO PAY $3,510,000 IN RESTITUTION.

Standard of Review

This Court reviews *de novo* whether restitution is permitted by law and the amount of the award for abuse of discretion. United States v. Quillen, 335 F.3d 219, 221–22 (3d Cir. 2003).

Argument

The Mandatory Victims Restitution Act (MVRA) authorizes a court to award restitution only in the amount of a victim's actual loss. United States v.

[3] The United States Attorney, of course, is charged with the duty to see that justice is done, not to "win" the case. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) ("[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.") Yet the United States Attorney did not clarify these facts for the District Court either. The United States Attorney did not clarify for the District Court that there were three separate contracts, that only the first contract was connected with a bid and misrepresentations made to obtain the bid by "Opus & Best," and that the second and third contracts were no-bid contracts awarded by the Timor-Leste Government based on "Opus & Best's" exemplary completion of the work called for by the first contract. Nor did the Government bring to the District Court's attention the fact that defendant hired persons like Peter Chen, a licensed attorney and CPA, as part of the team that executed all three contracts (as noted above, see http://www.zhonglun.com/En/lawyer_298.aspx). All of this misinformation resulted in a "loss" calculation and consequent punishment that is divorced from the actual facts of this case, we respectfully submit.

Alphas, 785 F.3d 775 (1st Cir. 2015). The District Court did not apply this rule in calculating its restitution order in this case. Even if the District court did not err in applying Guideline Note (V) (discussed in Argument Point II above) to essentially disregard any credit for the product that defendant provided to Timor-Leste, this only applies to the sentencing calculation. This does not apply to determining the restitution amount, which must account for the value provided by the defendant back to the victim. See, e.g., United States v. Allen, 529 F.3d 390 (7th Cir. 2008) (sentencing guidelines application note providing that no credit was given for value of services rendered to victim in calculation of loss amount for sentencing purposes from offense involving fraud perpetrated by person falsely posing as licensed professional did not apply to calculation of loss amount from defendant's mail fraud offense for purposes of restitution order under Mandatory Victim Restitution Act (MVRA), and thus, district court was required to calculate actual loss to victim from scheme in which defendant fraudulently held himself out as mold-testing and remediation expert, secured contract to perform mold testing for victim, and tested victim's buildings for mold, taking into account any pecuniary value victim gained from defendant's conduct, and order restitution accordingly). This error warrants vacating the restitution order entered by the District Court below and remanding for a new determination in accordance with the governing

federal law cited here.

CONCLUSION

For these reasons, defendant respectfully requests that the Court vacate the District Court's sentence imposed below and remand this matter for resentencing.

Respectfully submitted,

HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, New Jersey 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Michael Confusione

By: Michael Confusione (MC-6855)
Counsel for Defendant-Appellant,
Bobby Boye

Dated: January 25, 2016

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v. Case Number 3:15-CR-196-01(FLW)

BOBBY BOYE
a/k/a "Bobby Ajiboye"
a/k/a "Bobby Aji-Boye"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, BOBBY BOYE, was represented by K. Anthony Thomas, AFPD.

The defendant pled guilty to count One of the INFORMATION on 4/28/2015. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:1349	Attempt and Conspiracy to Commit Wire Fraud	3/2012 - 5/2013	One

As pronounced on October 15, 2015, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) One, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 15th day of October, 2015.

FREDA L. WOLFSON
United States District Judge

07430

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 72 Months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in the FCI Fort Dix, New Jersey facility.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on November 30, 2015. If designation has not yet been made, the defendant shall surrender to the U.S. Marshal Office in Newark, New Jersey on November 30, 2015.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth below.

Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You shall not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

SELF-EMPLOYMENT/BUSINESS DISCLOSURE

You shall cooperate with the U.S. Probation Office in the investigation and approval of any position of self-employment, including any independent, entrepreneurial, or freelance employment or business activity. If approved for self-employment, you shall provide the U.S. Probation Office with full disclosure of your self-employment and other business records, including, but not limited to, all of the records identified in the Probation Form 48F (Request for Self Employment Records), or as otherwise requested by the U.S. Probation Office.

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(17) You shall cooperate in the collection of DNA as directed by the Probation Officer.

(This standard condition would apply when the current offense or a prior federal offense is either a felony, any offense under Chapter 109A of Title 18 (i.e., §§ 2241-2248, any crime of violence [as defined in 18 U.S.C. § 16], any attempt or conspiracy to commit the above, an offense under the Uniform Code of Military Justice for which a sentence of confinement of more than one year may be imposed, or any other offense under the Uniform Code that is comparable to a qualifying federal offense);

(18) Upon request, you shall provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

and approval of the U.S. Probation Office. You shall cooperate with the Probation Officer in the investigation of your financial dealings and shall provide truthful monthly statements of your income. You shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to your financial information and records;

(19) As directed by the U.S. Probation Office, you shall participate in and complete any educational, vocational, cognitive or any other enrichment program offered by the U.S. Probation Office or any outside agency or establishment while under supervision;

(20) You shall not operate any motor vehicle without a valid driver's license issued by the State of New Jersey, or in the state in which you are supervised. You shall comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office;

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed) _____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of $3,510,000.00. The Court will waive the interest requirement in this case. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for distribution to:

Ambassador Pierre-Richard Prosper
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, California 90013.

The restitution is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the restitution shall be paid from those funds at a rate equivalent to $25 every 3 months. In the event the entire restitution is not paid prior to commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $500, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Defendant: BOBBY BOYE
Case Number: 3:15-CR-196-01

RESTITUTION AND FORFEITURE

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

The Court orders forfeiture as set forth in the Court's Consent Judgment of Forfeiture and Preliminary Order of Forfeiture dated 7/16/2015 and the Corrected Consent Judgment of Forfeiture and Preliminary Order of Forfeiture dated 10/15/2015.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 15-196-(FLW)-1

UNITED STATES OF AMERICA	:	TRANSCRIPT OF SENTENCE
v.	:	
	:	OCTOBER 15, 2015
BOBBY BOYE, a/k/a, BOBBY AJIBOYE a/k/a, BOBBY AJI-BOYE Defendant	:	

CLARKSON S. FISHER, UNITED STATES COURTHOUSE
402 EAST STATE STREET, TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE FREDA L. WOLFSON, USDJ

A P P E A R A N C E S:

PAUL J. FISHMAN, UNITED STATES ATTORNEY
BY: SHIRLEY UCHENNA EMEHELU, AUSA
On behalf of the Government

K. ANTHONY THOMAS, ESQUIRE
On behalf the Defendant Bobby Boye

A L S O P R E S E N T:

DON MARTENZ, US PROBATION OFFICER

* * * * *

VINCENT RUSSONIELLO, CCR, CRR
OFFICIAL U.S. COURT REPORTER
(609)588-9516

THE COURT: Thank you, Ms. Emehelu.

I'll make my comments now with regard to the 3553(a) factors. Starting with the nature and

circumstances of the offense and the seriousness of the offense.

I think that the government has just spent substantial time going through, in fact, what the offense was which on its face demonstrates the seriousness of it. So I will make only a few comments which should not in any way be interpreted as because they may not be as lengthy as the government's that it minimizes in any manner the seriousness of this offense.

It is correct that the victim in this case was a very young and poor nation that relied principally upon this asset that it had, its natural resource of petroleum, and that it was using and relying on advisors to assist them with it, and also Norway that was involved in this endeavor and locates the defendant.

The fraud here was really of such a major level that I can't say enough about it in that Mr. Boye was given a wonderful opportunity. There was employment, yes, and he was going to be paid well for that employment. But it was more than just the salary he was going to get. He accepted a position that was really of a new kind that was going to assist this country.

He was going to be on the ground floor of assisting them in moving forward in an economic way. That opportunity to not only perform professional services that appears from his educational background that he had the ability to do and advise upon, but to also do what I would call "do good" to assist this country in moving forward in a very important way, and a country that had been ravaged by civil war and was looking to get itself on its feet and move forward based upon this very important and valuable natural resource. So the opportunities for Mr. Boye were tremendous to accomplish some very, very good things.

And you had a country who based upon its in many ways naivete about this industry upon which it was embarking and how to go about it clearly needed the advisors to assist it, was taking the assistance from Norway in selecting such individuals, or suggesting to them the individuals, and obviously having made the selection put great trust and faith in Mr. Boye in performing the services and having a loyalty and fidelity to them that they expected to have.

And even today Mr. Boye says how fond he was of the country and how well he was treated by the government. Obviously, particularly because of the

kind of small country it was and where they were going and the number of limited people involved in assisting them, this position of trust was obviously fostered and created at an early stage. This country welcomed him and made him one of their own which makes even more egregious the fraud that was then committed upon them. It wasn't simply some stranger committing the fraud that we sometimes get in bid-rigging or things of this nature, but this was one of their own at this point who decided to abuse that trust.

In that connection I need to comment obviously upon the manner in which it was carried out and the comments that were made that Mr. Boye seems to think because he was held in such good light by this country that if he had simply disclosed that he could do this work he would have been picked. Don't pull the wool over my eyes.

We all know that you placed yourself in a tremendous conflict of interest and you understood that which is why you hid it so well. But it wasn't just you presenting that this was an Opus & Best with one man at the top -- not you, whoever you wanted to claim it was going to be -- but you had a host of professionals that you represented to be part of this company with resumes to match that would indicate they

were looking at a multi-million dollar contract of work that was going to go forward to give them advice both from an accounting and legal perspective, which is why when you created this company you didn't just make it a two or three-person company. You presented it as a dozen people, 20 people who could perform all these different services.

Because as we know when you are talking about something of this level nobody goes out and hires the solo practitioner out there with the shingle out, but looks for the big firms that have many individuals that can perform the different kinds of work at any given time. So you very well plotted out what it would be that would be necessary to convince, one, the other two on the committee to make a recommendation and ultimately the country to accept this sham company.

So let's not be fooled today that if you just said, I could do all the work for you, that they would have said, great, come in, do everything, be our advisor, be everything else too, a one-man-show. Obviously, though, you have great talents because you were able to do the work.

I must say when I read through all of what you did and the way you described these individuals, some fake -- I don't know if you found real names out there

somewhere and put some resumes on -- but whatever it was it was quite sophisticated and involved to come up with this. And all to get, not to help the country, because there were others out there that could have done a good job too that could have helped the country, but to line your pockets. And what did you do with the money? Expensive cars, jewelry, properties. Partly the reason why there is an ability to get this forfeiture and hopefully compensate to more or less say because you spent your money on things.

And the victim here, the country, the fact that they received services that you described as services that are still being used and good services doesn't mitigate the crime. One, it was of course important that you perform the services because otherwise Opus & Best would have been terminated if they weren't providing services, but moreover it's not novel to me.

I have sat and seen many defendants in fraud cases obtaining contracts from government. Here it's generally here in the US. This happens to be a foreign country. But obtaining contracts that are sent out for bidding and obtaining them through fraud or bribes. And in virtually all of those cases they

did the work. Whether it was a demolition contractor, or whoever it might have been, it wasn't a mitigating factor because they did the work. That was the only way they were going to get paid and they may have been capable of doing the work. But here it's how you went about getting it and the fact that not only did you do it dishonestly, but it prevented honest bidders from getting the work that could have also done the work and been paid the same money. It's a fraud upon the country.

It's more egregious in my mind because it was not just upon a corporation who may have some kind of insurance or whatever that could make them whole, and not just done to our country, but you were really sent out there in some ways as a personal ambassador to this country hand picked by Norway to assist an underdeveloped poor country.

It's almost akin to what we call the vulnerable victim here, but it's not exactly. But I'll point out, this particular country that welcomed you and that you took advantage of, the crime is extremely serious and I won't go through all the aspects of it at this point.

Now, looking at deterrence both from a specific and general deterrence perspective. As to

specific deterrence, it is absolutely an important consideration here. This is not the first time that you committed a criminal act, defrauded. What is incredible to me is given how obviously intelligent and educated and able that you were to do good work, that you were employed by very high ranking companies, Morgan Stanley, Mastercard, and this company out in California that I'm not familiar with, that you embezzled from the company and you received a sentence and apparently the sentence allowed you to serve it in a halfway house for white collar criminals.

We don't do that here in federal court for some important reasons, but that did not act as a deterrence to you because you would have thought that someone of your intellect that would have been a wake-up call. I escaped prison. I did something really wrong. I could never do anything like that again to an employer or anyone else, and lo and behold here you were a few years later doing the same.

And even with your employer there of course preceding that was the employment with Morgan Stanley and your actions there that ultimately result in you being banned by the New York Stock Exchange. Frankly, it boggles my mind that one of the things apparently when you went to California was telling Morgan Stanley

that you were on a medical leave with some illness, and it turns out you took another job in California and then they terminated you upon discovering that and all the investigation occurs and that's where it comes out. And here too at some point this investigation begins when you told Timor-Leste that you had a life threatening illness and they started looking into that.

There is a pattern here and it's a pattern that unfortunately goes back to your days working with Morgan Stanley, your other employer, that's more than a decade old and you have not learned the lesson. So specific deterrence is a very important consideration for this Court and you clearly have never served real prison time.

As to a general or public deterrence, it is an important consideration for this Court because also different than how you were treated in California by, quote, this halfway house for white collar criminals, we take seriously fraud, white collar crimes, and there has to be a recognition of that by the public that no matter how educated you are, how good you are at what you do, you commit a serious crime, you have to do serious time.

There is also of course the concern of the

Court for disparity of sentencing for similar crimes and I must consider that as well.

Looking at your personal history and characteristics. Some of the things that I've mentioned about, the prior activity in your employment both with Morgan Stanley, the criminal history that you had already speak to that somewhat, but let me point out that what I've got here is, it was indicated, I do understand that there is some difficulty in early childhood, your father, but you went about succeeding.

You got a law degree in your home country of Nigeria. You came to the US. You attended UCLA. You got a LOM. Then got a Masters in Business Tax at USC. First of all, amazing schools, opening up amazing opportunities for you. You are clearly a very intelligent man and able and capable man and had a law degree. I'm not quite sure how New York State admitted you to the bar considering your prior conviction, but that's not for me to determine.

All of those degrees that you had, you earned those degrees, and clearly when you went to Timor-Leste you were capable. You did work as an advisor and you pointed out even the other advice that you gave them was a one-man show without the advantage

of a big firm behind you. It was real. It was good work product.

As I said, I am stymied by what greed must have motivated you to do this because you could have achieved and accomplished so many things just because of the qualities and education that you had, and instead you used that to take advantage.

I know that you currently have two small children. I know it also appears from the PSR that you are in the midst of divorce. Clearly, your relationship has broken down. On a personal level, you have a lot of things to make up for, mending to do at some point if you want relationships with your children.

Now, what you are going to do when you are released from prison is going to be up to you. Presumably, with this felony conviction, you are going to be disbarred. There are certain limitations you are going to have on what you are able to do. But certainly given your natural innate abilities, you should be able to do and accomplish a number of things, but you are going to need a major change.

I have considered all of those 3553(a) factors and in fashioning a sentence that's sufficient but not greater than necessary I, one, disagree with the

request by the defendant for a sentence at the bottom of the Guideline range. I think that absolutely does not suffice as a sufficient sentence.

A Guideline sentence is appropriate and I am going to impose a sentence of 72 months in this case.

I am also going to impose a 3-year period of supervised release in this matter.

I would also agree that given the large restitution and forfeiture order in this case that he would not have the ability to satisfy a fine. My interest is in making sure that restitution is paid. So I will waive the fine.

Sentence is as follows:

It is the judgment of the Court that the defendant, Bobby Boye, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 72 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant

shall not commit another federal, state, or local crime, shall be prohibited from possessing a firearm or other dangerous device, shall not possess an illegal controlled substance, and shall comply with the other standard conditions that have been adopted by this Court.

Based on information presented, the defendant is excused from the mandatory drug testing provision. However, he may be requested to submit to drug testing during the period of supervision if Probation determines a risk of substance abuse.

The following special conditions shall apply:

There will be had a new debt restriction that will be in place until the restitution is satisfied. There will also be a self-employment or business disclosure condition as well. Those are the only conditions being imposed.

It is further ordered that the defendant shall make restitution in the amount of $3,510,000. I will waive the interest requirements in the case. Payments shall be made payable to the U.S. Treasury and forwarded to the Clerk of the Court in Trenton, for distribution to Ambassador Pierre-Richard Prosper, and there is an address for that.

The restitution is due immediately. It is

recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. If he participants, the restitution shall be paid from those funds at a rate equivalent to $25 every 3 months.

In the event the entire restitution is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $500 to commence 30 days after release from confinement.

Defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

As I've indicated, I find the defendant does not have the ability to pay a fine. I will waive the fine in this case.

Finally, it is further ordered the defendant shall pay to the United States a total special assessment of $100 for the single count of conviction, which is due immediately.

I advise the parties of their right to appeal this sentence.

I will also be entering a forfeiture order that is going to be submitted to me upon consent. Is

that correct?

MS. EMEHELU: Yes, your Honor.

A preliminary forfeiture order has already been entered and filed in this matter. The United States will be submitting a corrected consent judgment of forfeiture that simply corrects the description of the Elizabeth properties that has the correct street number. That's the only correction.

THE COURT: Thank you.

The last thing, there has been a request for voluntary surrender. Is there any objection by the government?

MS. EMEHELU: No objection, your Honor.

THE COURT: I think you were requesting a November 30th date.

MR. THOMAS: That's correct, your Honor.

THE COURT: If he has not yet been designated at that point -- where is he currently living?

THE DEFENDANT: Mahwah, New Jersey.

THE COURT: If you have not gotten a designation, you are to report to the Marshal's Office in Newark on November 30th. It's a Monday. Just so he doesn't have to come down to Trenton, we'll have him report to Newark.

I know you asked that I recommend Fort Dix.

I'll recommend it. You know that it's totally up to the BOP, however.

MR. THOMAS: Your Honor, one last issue with regards to the $500 per month while on supervised release.

Would your Honor be inclined to put a range and leave it up to the discretion of Probation and not more than $500?

THE COURT: We don't know what his employment will be. I put that out there at this point because I think he is capable of getting employment. It can be adjusted. I usually say adjust it based upon what his employment is at the time, but I can't leave it totally at the discretion of Probation.

Mr. Martenz, is that correct?

THE PROBATION OFFICER: Set an amount now and it could be adjusted. An amount has to be set.

THE COURT: Right. It has to be set. And it can't be like saying a range or up to. We have to set it.

MR. THOMAS: Can we put at least 500?

THE COURT: No. Or I wouldn't even say at most because if he got a job that was very high paying it could be more than 500. We don't know. I'm putting out a number there that's based upon what his

education is and a possibility of getting employment.

Absolutely, one, if he doesn't obtain employment immediately, he can't make that; and, two, when he does get employment Probation may adjust that. Absolutely.

MR. THOMAS: My concern is, your Honor, it's setting him up for failure for a potential violation. That's all.

THE COURT: Well, it wouldn't be a violation anyway because they wouldn't violate if he doesn't have employment that would allow him to pay that.

THE PROBATION OFFICER: Correct. It has to be willful.

THE COURT: Right.

And I must tell you, I haven't seen a violation on a failure to pay restitution unless there are a lot of other things going on at the same time.

It will be adjusted. I have it on the record that I've indicated that is to be adjusted based upon whatever his employment situation is at the time.

MR. THOMAS: Thank you, your Honor.

THE COURT: Thank you.

MS. EMEHELU: Thank you, your Honor.

THE CLERK: All rise.

(Proceedings concluded.)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3779

United States v. Boye

To: Clerk

1) Motion by Appellee to Enforce Appellate Waiver and for Summary Affirmance, and to Stay Briefing Schedule

2) Response by Appellant in Opposition to Motion to Enforce Appellate Waiver and for Summary Affirmance, and to Stay Briefing Schedule

3) Reply by Appellee in Support of Motion to Enforce Appellate Waiver and for Summary Affirmance, and to Stay Briefing Schedule

4) Sur-Reply by Appellant in Further Opposition to Motion to Enforce Appellate Waiver and for Summary Affirmance, and to Stay Briefing Schedule

---

The foregoing motion is granted to the extent it seeks to stay the briefing schedule. The motion to enforce appellate waiver and for summary affirmance, response, reply and sur-reply are referred to a motions panel. See U.S. v. Goodson, 544 F.3d 529, 534 n.2 (3d Cir. 2008). If the motion to enforce is denied or referred to the merits panel, Appellee's brief must be filed and served within thirty (30) days of the date of the order denying or referring the motion.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: January 26, 2016
tmm/cc: Michael J. Confusione, Esq.
Mark E. Coyne, Esq.
Glenn J. Moramarco, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 26, 2016
CCO-042

No. 15-3779

UNITED STATES OF AMERICA
v.

BOBBY BOYLE
a/k/a Bobby Ajiboye
a/k/a Bobby Aji-Boye

Bobby Boye,
Appellant

(D.N.J. No. 3-15-cr-00196-001)

Present: FISHER, JORDAN and VANASKIE, Circuit Judges

1. Motion by Appellee to Enforce Appellate Waiver and for Summary Affirmance;

2. Response by Appellant in Opposition to Motion to Enforce Appellate Waiver and for Summary Affirmance;

3. Reply by Appellee in Support of Motion to Enforce Appellate Waiver and for Summary Affirmance;

4. Sur-Reply by Appellant in Further Opposition to Motion to Enforce Appellate Waiver and for Summary Affirmance.

Respectfully,
Clerk/tmm

_____ORDER_____

The foregoing motion to enforce appellate waiver and for summary affirmance is granted.

By the Court,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: January 28, 2016
tmm/cc: Michael J. Confusione, Esq.
Mark E. Coyne, Esq.
Glenn J. Moramarco, Esq.

OFFICE OF THE CLERK

MARCIA M. WALDRON

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

January 28, 2016

Michael J. Confusione
Hegge & Confusione
P.O. Box 366
Mulica Hill, NJ 08062

Mark E. Coyne
Office of United States Attorney
970 Broad Street
Room 700
Newark, NJ 07102

Glenn J. Moramarco
Office of United States Attorney
Camden Federal Building & Courthouse
401 Market Street
Camden, NJ 08101

RE: USA v. Bobby Boye
Case Number: 15-3779
District Case Number: 3-15-cr-00196-001

ENTRY OF JUDGMENT

Today, **January 28, 2016** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment
45 days after entry of judgment in a civil case if the United States is a party

Page Limits:
15 pages

Attachments:
A copy of the panel's dispositive order only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

By: Timothy McIntyre

Timothy McIntyre, Case Manager
267-299-4953