No. 18-3662

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BOBBY BOYE,
A/K/A BOBBY AJIBOYE,
A/K/A BOBBY AJI-BOYE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM A FINAL ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Sat Below: Freda L. Wolfson, U.S.D.J.; District Court No. 3-16-cv-06024

BRIEF AND APPENDIX VOL. I (A1-18) OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Not applicable.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District court had jurisdiction of defendant's September 28, 2016 motion pursuant to 28 U.S.C.A. § 2255. A2. The District court entered a final Order denying defendant's motion on November 20, 2018. A2. Defendant filed a Notice of Appeal on December 5, 2018 and a Request for a Certificate of Appealability on December 31, 2018. A1, 18. This Court granted defendant's Request for the Certificate of Appealability on April 4, 2019 "as to his claim that counsel performed ineffectively by failing to advise him during plea negotiations that the amount of loss caused by the fraud should be offset by the value of the services that Boye provided[.]" A18. This Court has jurisdiction over this appeal under 28 U.S.C.A. § 1291 and the issuance of the COA. 28 U.S.C. § 2253(c)(1).

STATEMENT OF THE ISSUE

Did defendant's trial counsel provide ineffective assistance of counsel under the Sixth Amendment to the United States Constitution by failing to advise defendant during plea negotiations, and argue on defendant's behalf, that the amount of "loss" caused by defendant's fraud should be offset by the value of the legal and regulatory work that defendant prepared and provided to the victim?

STATEMENT OF THE CASE

Procedural History

In 2014, the Government charged defendant with one count of conspiracy to commit write fraud and one count of wire fraud based on false representations in a bid for legal and regulatory work that defendant submitted to Timor-Leste. Defendant submitted the bid as "Opus & Best" "falsely claiming that Opus & Best was a legitimate law and accounting firm; and fraudulently failing to disclose his affiliation with Opus & Best, in contravention of the no-conflict of interest bidding requirements." A3-4, 1434.

On April 28, 2015, defendant pleaded guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C.A. § 1349. A4, 1443. The base offense level was 6, but the plea agreement included a stipulation that the "aggregate loss" "is greater than $2,500,000 but not more than $7,000,000. This Specific Offense Characteristic results in an increase of 18 levels" to 24 under the Sentencing Guidelines. A4, 1443-1553. On October 15, 2015, the District court sentenced defendant per the plea agreement and stipulations to 72 months imprisonment and to pay restitution of $3,510,000. A4. Defendant filed an appeal to this Court, but by Order of January 28, 2016, the Court granted the Government's motion to enforce an appellate waiver contained in the plea agreement and dismissed defendant's direct appeal. A1509.

On September 28, 2016, defendant moved for relief from his sentence under 28 U.S.C. § 2255, alleging ineffective assistance of his counsel for failure to advise defendant during plea negotiations, and argue on his behalf, that the amount of loss caused by the fraud should be offset by the value of the services that defendant provided back to the victim (Timor-Leste). A7, 22-1221, 1362-1406.

> Petitioner first contends that his counsel was deficient because he did not argue for the application of Sentencing Guideline § 2B1.1, Application Note 3(E)(i), which provides that 'Loss shall be reduced by . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected' or advise the Court that Boye did not 'pose' as a licensed professional and, thus, was entitled to a credit for legal services he provided to Country A on the amount of loss. As part of this claim, Boye asserts that his counsel should have presented to the Court evidence of the work product created by petitioner for Country A and advised the Court that Boye had retained Peter Chen, a licensed CPA to perform part of the contracted for work. *** Boye also argues that his counsel was ineffective by advising him to assent to the plea agreement which stipulated to an incorrect loss figure. [A7]

The Government filed an opposing Answer (A1222-1361), and the District court denied defendant's motion by Order and Opinion dated November 20, 2018 (also denying a Certificate of Appealability). A2-17.

Defendant filed a Notice of Appeal on December 5, 2018 and a Request for a Certificate of Appealability from this Court on December 31, 2018. A1, 18. This Court granted defendant's Request for the Certificate on April 4, 2019 "as to his claim that counsel performed ineffectively by failing to advise him during plea

negotiations that the amount of loss caused by the fraud should be offset by the value of the services that Boye provided…" A18.

Statement of Facts

Defendant was a highly-educated international attorney, admitted to the Bar of the State of New York, who held several high-profile positions throughout his career leading to the case at issue.

Beginning in 2010, defendant was an international petroleum legal advisor for Timor-Leste's Ministry of Finance. In February 2012, Timor-Leste solicited bids for multi-million dollar contracts to provide tax regulation and tax accounting services for the country. In his role as the Petroleum Tax Law Advisor to the Ministry of Finance of Timor-Leste, defendant served as a member of a three-person committee responsible for evaluating bids submitted by interested parties for the contract. Successful contractors were selected at the discretion of the Minister of Finance. A1323-49, 1417-22.

In March 2012, a company called "Opus & Best Services LLC" submitted a bid for the contract to prepare for Timor-Leste the "Taxes and Duties Regulations and Taxation of Bayu-Undan Contractors Act." Opus & Best appeared to be composed of several lawyers and other professionals. In reality, defendant was the sole member. A1323-49, 1417-22.

Timor-Leste awarded Opus & Best the contract in June 2012. Defendant then performed the work. Defendant and other legal and tax professionals he retained to assist prepared the legal and regulatory work called for under the contract and provided it to Timor-Leste. Timor-Leste praised the work as excellent and paid "Opus & Best" in accordance with the benchmarks of the contract. The work that defendant produced was so outstanding that Timor-Leste hired "Opus & Best" twice more in second and third "no-bid" contracts (to prepare a "Transfer Pricing Study Report" and "Interpretative Guidelines for TDA & TBUCA"). Timor-Leste ultimately paid defendant $3.5 million for the legal and regulatory work that defendant prepared and provided to the Country. A1323-49, 1417-22.

Defendant's Ineffective Assistance of Counsel Claim on 2255 Relief

Defendant did not challenge the validity of his conviction. In pleading guilty to conspiracy to commit wire fraud, defendant admitted having duped Timor-Leste into awarding him the contracts by posing as the larger "Opus & Best" entity. Defendant admitted that after learning that Timor-Leste was soliciting bids for a contract to provide legal and tax accounting advice to Timor-Leste, defendant created the fictitious "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." He "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 to induce Timor-Leste to award him the contracts. A1280-90.

Defendant did challenge his sentence, however, contending that the 72-month sentence he received was caused by his counsel's constitutionally-deficient performance – in failing to counsel defendant about, and argue on his behalf, the correct federal sentencing law governing calculation of the "loss" in a fraud case.

Sentencing Guideline § 2B1.1 and the accompanying Notes set a base offense level of 6 for the conspiracy to commit wire fraud crime to which defendant pleaded guilty, then provides that the offense level should be increased depending on the "loss" caused by the crime. U.S.S.G. 2B1.1, Section (E) of the Notes, provides that in calculating the loss, the defendant must be given credit for any 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.

Defendant's counsel failed to advise defendant of this rule. Instead, counsel advised defendant to stipulate, in a plea agreement, that the "loss" caused by defendant's crime was the entire amount of money ($3,510,000) that Timor-Leste paid to defendant with no credit to defendant for the value of the legal and regulatory work that defendant provided back to Timor-Leste.

Beyond failing to advise defendant of the correct law, counsel failed to present to the sentencing court the work that defendant prepared that showed the value provided to Timor-Leste for the $3.5 million it had paid. Counsel failed to present the sophisticated legal and regulatory work that defendant prepared and provided to Timor-Leste under the three contracts – work that Timor-Leste praised as excellent and continues using today (A497-999); work that was directly relevant to determining the "loss" caused by defendant's crime under the governing law:

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 taxpayers 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.

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.

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. [A497-999]

In addition to the work itself, counsel failed to,

- Raise during plea bargaining and present to the sentencing court the subcontract agreements, billings, and evidence of payments by defendant to Peter Chen and the other professionals who defendant hired as part of the team performing the work for Timor-Leste. The Government's proofs showed that defendant retained other professionals to help produce the complex work, including Peter Chen, a New York and New Jersey licensed attorney, CPA, and former tax partner at Deloitte & Touche (http://www.zhonglun.com/En/lawyer_298.aspx);

- Raise during plea bargaining and present to the sentencing court the fact that the face value of the three contracts was $4.9 Million, and that only $3.5 Million was paid to defendant by Timor-Leste – $1.4 Million less than the value of the services that defendant and his team provided as indicated by the contracts and an amount that remains outstanding and owed to defendant Boye by Timor-Leste to date;
- Raise during plea bargaining and present to the sentencing court that the bid solicitation document issued by Timor-Leste (A57) – other than requiring expertise in areas such as tax accounting, tax auditing and tax law governing the oil and gas industry – did not require the possession of a law license or any licenses as a pre-condition for submitting a bid;
- Raise during plea bargaining and present to the sentencing court that there is no law in Timor-Leste, where the contract was executed and substantially performed nor in the United Sates, being the place where the criminal charge was brought, requiring a person to possess a certain license as a pre-condition for writing tax regulations or interpretive guidelines, and perform a transfer pricing study (the subjects of the three contracts awarded to Opus & Best LLC);
- Raise during plea bargaining and present to the sentencing court that the misleading bid submitted by Opus & Best LLC was in relation to only one

of the contracts (the first contract involving TDA/TBUCA Regulations associated with A57), and that the two subsequent contracts awarded by Timor-Leste (Interpretative Guidelines and Transfer Pricing) were no-bid contracts separate from the first contract that formed the subject of the criminal complaint against Mr. Boye.

Counsel's error had a huge impact on the result of defendant's case. The "greater than $2,500,000 but not more than $7,000,000" loss stipulation that counsel advised defendant to sign added 18 points to defendant's offense level, raising it from 6 (the base offense level for the conspiracy crime) to 24 total offense points with a "guideline imprisonment range" of "63 months to 78 months." A1443-1508.

By the time sentencing arrived, it was too late for counsel to argue this critical issue of "loss" on defendant's behalf. Counsel already had defendant stipulate to a loss figure premised solely on the money that defendant was paid. The Presentence Report thus did not address whether defendant provided value back to Timor-Leste. When defendant's counsel finally noted, in his sentencing memorandum to the District court, that defendant provided the work to Timor-Leste, counsel characterized it as an issue of "mitigation" affecting which end of the 63-78 month range defendant should be sentenced to, rather than as an issue affecting proper calculation of the "loss" and sentencing points to be assigned in

the first place. The District court followed the loss amount stipulated to in the plea agreement and sentenced defendant to 72 months in prison, noting only that his provision of 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 handpicked 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. [A1301-1361]

Ruling Presented for Review

Defendant appeals the District court's November 20, 2018 Order and Opinion denying defendant's motion for relief under 28 U.S.C. § 2255. A2-17. The court said that defendant's ineffective assistance claim was "untenable" because "Boye's offense level was calculated and stipulated to by both Boye and the government in the plea agreement and, as part of that stipulated offense level, the parties agreed that 'Specific Offense Characteristic § 2B1.1(b)(1)(J) applies because the aggregate loss amount if greater than $2,500,000 but not more than $7,000,000.'" A12. "Counsel's decision not to object to the calculation of loss and Boye's offense level at sentencing was not unreasonable," the court said, because the "Application Note makes clear that where a defendant impersonates a licensed professional, he is not entitled to a credit for services provided when calculating the amount of loss at sentencing" (*citing* U.S. Sentencing Guidelines, appx. C, vol. II, at 179-80). "In the bid he fraudulently submitted to Country A as Opus & Best, Boye impersonated a firm of licensed attorneys and accountants. As such, under a plain reading of the Application Note, Boye would not have been entitled to a credit for the services rendered on the amount of Loss to Country A."

> Boye asserts that because he is a licensed attorney, he was not impersonating or "posing" as an attorney for the purposes of the Application Note. Boye contends he could not impersonate the attorneys and accountants purportedly employed by Opus & Best because they are not real people. Such a reading of the statute would

> render Application Note 3(F)(v) ineffective against defendants who, in addition to claiming they are a licensed professional, take on a new identity as well. Boye's crimes are exactly the type and purpose contemplated by the Commission to fall under Application Note 3(F)(v). Boye abused a position of trust when he defrauded Country A by submitting the fraudulent bids and thereafter, in his role as a legal advisor, recommending Country A hire Opus & Best. And, importantly, calculating the value of the services rendered by Boye in perpetuating his fraud would require additional submissions and hearings to determine the value of the services provided by Boye -- proceedings that would waste valuable judicial resources. [A13]

STATEMENT OF RELATED CASES

Defendant filed an appeal to this Court from his conviction and sentence, but by Order dated January 28, 2016, this Court granted the Government's motion to dismiss defendant's appeal via enforcement of the appellate waiver contained in the plea agreement. A1509.

STANDARD OF REVIEW

When reviewing a District Court's denial of a motion under 28 U.S.C. § 2255, the Court exercises plenary review of the District Court's legal conclusions and applies a clearly erroneous standard to the court's factual findings. United States v. Nieves-Galarza, 718 F. App'x 159, 161 (3d Cir. 2017), cert. denied, 139 S. Ct. 281, 202 L. Ed. 2d 186 (2018).

SUMMARY OF THE ARGUMENT

Defendant's trial counsel rendered constitutionally ineffective assistance under the Sixth Amendment by failing to advise defendant and argue on his behalf

the correct, controlling law on how to calculate the "loss" caused by defendant's fraud crime. Sentencing Guideline § 2B1.1, Application Note 3(E)(i), provides that "Loss shall be reduced by . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." Defendant received money from Timor-Leste under the contract he fraudulently obtained, but defendant performed and provided to Timor-Leste the work called for under the contract and the subsequent contracts with Timor-Leste. Timor-Leste praised the sophisticated legal and regulatory work as excellent and continues using it today. Yet counsel advised defendant to stipulate to a $3.5 million "loss" that did not credit defendant anything for the work he provided to Timor-Leste nor address the outstanding sum of $1.4 million owed to the defendant from the contracts. This erroneous loss stipulation added 18 points to defendant's offense level, increasing it from 6 to 24 with a "guideline imprisonment range" of "63 months to 78 months," and resulting in the 72 month prison sentence imposed on defendant. But for trial counsel's error, defendant would have received a sentence of only several months, or even probation, and nothing near the 6 years he has been ordered to serve. The Court should reverse the District court's denial of defendant's 2255 motion, vacate the sentence imposed on defendant, and remand this matter with direction that defendant be afforded a new sentencing hearing for his conspiracy to commit wire fraud crime.

ARGUMENT

DEFENDANT'S TRIAL COUNSEL PERFORMED INEFFECTIVELY BY FAILING TO ADVISE DEFENDANT DURING PLEA NEGOTIATIONS, AND ARGUE ON HIS BEHALF, THAT THE AMOUNT OF "LOSS" CAUSED BY THE FRAUD SHOULD BE OFFSET BY THE VALUE OF THE SERVICES THAT DEFENDANT PROVIDED.

Standard for relief

Section 2255 motions grounded on ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requiring the defendant to show that (1) counsel's performance fell below an objective standard of reasonableness and (2) this caused prejudice to the defendant. Preston v. Superintendent Graterford SCI, 902 F.3d 365, 379, 382 (3d Cir. 2018), cert. denied sub nom. Preston v. Ferguson, No. 18-8570, 2019 WL 1383806 (U.S. Apr. 22, 2019); Grant v. Lockett, 709 F.3d 224, 232 (3d Cir. 2013).

To satisfy the first prong, the petitioner "must identify the acts or omissions of reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Whether counsel acted in a manner that was deficient is measured by a standard of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 687–88; Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

To show prejudice under the second prong, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 102 n.11 (3d Cir. 2012). In the context of sentencing, prejudice exists where the inadequate performance affected the defendant's sentence. United States v. Hankerson, 496 F.3d 303, 310 (3d Cir. 2007). In the context of plea agreements, prejudice "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

A. DEFENDANT'S TRIAL COUNSEL RENDERED DEFICIENT PERFORMANCE.

Counsel failed to cite and argue the governing sentencing guideline and controlling Circuit precedent providing that in calculating "loss" for sentencing purposes in a fraud case, the defendant must be given credit for the value that he, and other persons acting jointly with him, provided back to the victim before the offense was detected.

As this Court has stated, in a 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." United States v. Nagle, 803 F.3d 167, 183 (3d Cir. 2015) (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.); see United States v. Foster, 728 F. App'x 112, 115 (3d Cir. 2018) ("the District Court recognized that, under our rule in *United States v. Nagle, 803 F.3d 167 (3d Cir. 2015)*, it had to consider the fair market value of services that Findling and Foster had provided to Rite Aid during the course of the scheme").

In Nathan, 188 F.3d 190, the Court said that "[i]n a fraudulent procurement case" 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. Defendant Boye's counsel was deficient in failing to cite and argue this governing law on defendant's behalf and in advising defendant to stipulate, in the plea agreement, to a "loss" figure that contravenes this governing law.

Counsel was further deficient in failing to present to the sentencing court the legal and regulatory work, subcontract agreements, billing and payments by defendant to Mr. Chen and the other professionals, etc., all of which demonstrated the value of the work that defendant provided to Timor-Leste in exchange for the money paid to him. This evidence was directly relevant to calculating the "loss" in defendant's case and, in turn, greatly impacted the sentence to be imposed on defendant. See 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 reversible error on such ground in reviewing sentencing decisions. United States v. Fumo, 655 F.3d 288, 311–12 (3d Cir. 2011), as amended (Sept. 15, 2011) (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 failure of the defendant's counsel to present to the government and the sentencing court the final work products submitted by Opus & Best LLC (A497-999) is a quintessential example of ineffective representation to the extent that the completion of the work as agreed under the three consulting contracts is indicative of the fact that defendant Boye did not intend and could not have caused Timor-Leste $3.5 million or any amount in pecuniary loss under U.S.S.G. 2B1.1., as wrongly portrayed by the government. The government of Timor-Leste received significant and valuable services, and which is arguably much more valuable than the part payment in the sum of $3.5 million paid for the said services. To date, it remains uncontested that the defendant fully and successfully performed the three

contracts to the satisfaction of the Timor-Leste government. There was no proof whatsoever that the defendant Boye and his team were professionally incapable of executing the consulting projects. There is also evidence before the Court below of representative work products of the defendant Boye that were performed in course of his salaried employment as the Legal Advisor on Petroleum Tax Law with the government of Timor-Leste. Some of those work products are as technical and complicated as some of the projects involved in the consulting contracts forming the subject of the criminal charge. The representative work products (A1140) remain part of the body of laws governing the taxation of oil and gas business in Timor-Leste to date.

Furthermore, the one and only Tax Treaty in existence in Timor-Leste (Timor-Leste & Portugal Tax Treaty) and which is referenced in the Certifications to the District Court, was substantially drafted and negotiated on behalf of the Timor-Leste government by the defendant Boye, prior to the consulting contracts at issue here and during his salaried employment with Timor-Leste. Peter Chen, as an independent contractor for another consulting firm, was also involved in performing other services for the government of Timor-Leste, before and during his engagement with Opus & Best LLC (A1027).

Defendant's counsel was likewise deficient in failing to argue against the Government's reliance on the exception of Subsection (V)(I). This is an exception

to the presumptive rule that credit must be given. This exception provides that credit should not be given "[i]n a case involving a scheme in which … services were fraudulently rendered to the victim by persons falsely posing as licensed professionals..." Defendant's counsel was deficient in failing to argue that this exception did not apply to defendant's case because defendant was a licensed attorney, he was not "posing" as one. 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 Ile-Ife located in Osun State, Nigeria and obtained an LLB degree in Law in 1983. 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 in 1984. 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 at 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).

Even the District court acknowledged that defendant was a highly-educated global attorney whose preparation of the laws and regulations, and accompanying guidelines and "Transfer Pricing" (A497-999), was expertly done. "Obviously, though, you have great talents because you were able to do the work." "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." A1337, 1342-43.

Counsel failed to advise defendant of and argue on his behalf precedent in this Circuit (and from other Circuits) that the "posing" exception applies only to unlicensed persons impersonating attorneys, doctors, and professionals in licensed professions. Because defendant was a licensed attorney qualified to perform the work under the contract, the general rule providing credit, not this exception, controls. See United States v. Aronowitz, 151 F. App'x 193, 194 (3d Cir. 2005) (stressing "Commentary to the Sentencing Guidelines is as binding as the Guidelines themselves are on the sentencing court," and noting Application Note to exception "reverses case law that has allowed crediting (or exclusion from loss)

in cases in which services were provided by persons posing as attorneys and medical personnel ... 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"); see also 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 exception to "attorney-impersonator").

The Commentary to Note 3(F)(V)(1) is memorialized in the U.S. Sentencing Guidelines Manual app. C. vole 11, amend 617, at page 183-184 (reported in 88 FR 30512) and provides:

> The definition of "loss" also provides special rules for certain schemes. One rule includes loss (and excludes from crediting the benefits received by victims that has allowed crediting or exclusion from loss) in cases in which services were provide by persons posing as attorneys and medical personnel. *See U.S. Maurello, 78 F.3d 1304 (3rd 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 for the unlicensed benefits provided** [emphasis added].

For a number of reasons, the exception contained in Subsection (V)(1) cannot be applied to the defendant in a manner that would deprive him from receiving credit for legitimate services that he and other licensed professionals engaged by him provided to Timor-Leste. The peculiar facts of this case, and the

scope and the intent of the Commission regarding Subsection (V)(1) as memorialized in the Commentary above, do not support such an interpretation. The incontrovertible fact (which was neither disputed by the Government nor the Court below) shows that the services under the three contracts were provided by licensed professionals (if indeed any of the contracts required the possession of a license), and consequently the benefits received by Timor-Leste were not "unlicensed benefits" as required under the U.S.S.G. Manual.

The Government did not at any time challenge the qualifications of any of the principal licensed professionals (Messrs. Boye, Chen and Kapadia) or provide any proof whatsoever that they are not licensed professionals. If in fact the services under the three contracts were provided by those licensed professionals, U.S.SG. 2B.1.1 app. n. 3F(v)(1) becomes inapplicable. Both the defendant and Peter Chen (also a NY and NJ licensed CPA) were licensed attorneys and Kapadia is a CPA based in Singapore at the time the contracts were performed.

Commentary which functions to "interpret a guideline or explain how it is to be applied" controls, and failure to follow it, or a misreading of it, can result in a sentence "select(ed)... from the wrong guideline range." Stinson v. United States, 508 U.S. 36, 46, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) (citing Williams v. United States, 503 U.S. 193, 203, 112, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992)) (sentence premised on "an incorrect application of the...guidelines should be set

aside). The Sentencing Commission's policy statements bind federal courts. Stinson, 508 U.S. 36. The standard that governs whether a particular interpretive or explanatory commentary is binding is the one that applies to an agency's interpretation of its own legislative rule: Provided it does not violate the Constitution or a federal statute, such an interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets. Stinson, 508 U.S. 38.

For the loss exclusion rule to apply, the services rendered must as a matter of law be one that can only be performed by licensed professionals. If in fact the services in question are not required under state or federal law (or Timor-Leste law) to be performed only by persons possessing the required licensure, then the loss exclusion rule of note 3(F)(V)(1) would be inapplicable. See United States v. Allen, 529 F.3d 390, 397 (7th Cir. 2008) (declining to rely on U.S.S.G. 2B1.1 App. Note 39F)(V)(1) where the defendant represented himself as an expert but "the profession in which he was scheming was not a licensed one"), compare with United States v. Hunter, 618 F.3d 1062 (9th Cir. 2010) (declining to allow a deduction for the value of work that Hunter performed when she was falsely acting as a nurse, which requires a license). In Allen, 529 F.3d 390, the Seventh Circuit held that where a profession in which a defendant was scheming was not a licensed one, U.S.S.G. App. Note 3(F)(V)(1) would not prevent the defendant from

obtaining value for the services provided. Other Circuits have adopted a similar approach, see United States v. Martin, 796 F.3d 1101 (9th Cir. 2015); United States v. Hausmann, 345 F.3d 952 (7th Cir. 2003); United States v. Brownell, 495 F.3d 459 (7th Cir. 2007).

Defendant's counsel was deficient in failing to correctly advise defendant of this governing law and, also, in failing to present on defendant's behalf at least six other reasons why the "posing" exception did not apply to defendant's particular case:

First, there was no proof before the 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 Court that under Timor-Leste law – with Timor-Leste being the place where the contract was executed and substantially performed – that the drafting of the TDA & TBUCA Regulations was required to be done by certain licensed professionals. The TDA & TBUCA bid solicitation document (A57) did not specify any form of licensure whatsoever.

Third, there was no proof before the 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. Neither Timor-Leste nor the State of New Jersey or any state for that matter within the United States require any form of licensing for conducting Transfer Pricing Study and or writing Interpretive Guidelines.

Fourth, and related to the point argued above, both defendant and Peter Chen, the attorney and CPA who defendant retained to help prepare the work products for Timor-Leste, 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 (see http://www.zhonglun.com/En/lawyer_298.aspx).

Fifth, there is nothing in the narration of the Government's case at plea or sentencing nor any other proofs placed before the District court relating to the terms and conditions of any of the three contracts.

Sixth, there was no license required by any law, whether in Timor-Leste or in the United States, for providing consulting services in writing Tax Regulations, Interpretive Guidelines and conducting Transfer Pricing Study.

Finally, and relatedly, defendant's counsel failed to advise defendant of and argue on his behalf the correct federal law governing calculation of restitution. The Mandatory Victims Restitution Act (MVRA) authorizes a court to award restitution only in the amount of the victim's *actual* loss. United States v. Alphas,

785 F.3d 775 (1st Cir. 2015). Defendant's counsel did not cite and argue this law on defendant's behalf, so the District court did not apply this rule in calculating the restitution order entered in this case.

"Restitution is at its essence a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." United States v. Leahy, 438 F.3d 328 (3d Cir. 2006). Since the purpose of restitution under the MVRA is to compensate the victim for its actual losses, and to the extent possible, to make him whole, it follows that the District Court cannot order a restitution that will result into an amount greater than the victim's loss. United States v. Diaz, 245 F.3d 294 (3d Cir. 2001). Restitution is "actual loss" that resulted from the offense of conviction. The defendant's counsel failure to object and reject the $3.5 million restitution stipulated in the plea agreement is an abdication of his responsibility as effective counsel. Defense counsel failed to take into consideration the value of the legitimate services that the defendant Boye provided to Timor-Leste in calculating the loss for restitution purposes. The misguided stipulation arising from the defense attorney's deficient performance cannot and should not be construed as a waiver of right of the defendant to receive credit for the legitimate services rendered to Timor-Leste, and which credit is in fact mandated under the MVRA.

The logic of the District Court and the line of cases relied upon in rejecting defendant's claim relating to the issue of restitution for not being cognizable under a Section 2255 motion are not persuasive.

First, none of those cases relied upon by the Court involved a fact pattern like case at bar. Unlike the cases cited in the Court below, the issue of "loss" here is intricately and inseparably woven into the correct amount of "restitution" that would have resulted if Boye had effective representation at the District court. Unlike the Petitioner in some of the cases who filed their 2255 petition while they were out of custody, defendant Boye remains in custody of the Federal Bureau of Prisons. The Sixth Circuit has reached a different conclusion to the effect that a claim for restitution was cognizable pursuant to a Section 2255 motion. Gall v. United States, 21 F.3d 107 (6th Cir. 1994).

While it is admitted that this Court, in Obado v. New Jersey, 328 F.3d 716 (3d Cir. 2003) and United States v. Ross, 801 F.3d 374 (3d Cir. 2015), declined to entertain a claim for restitution in a Section 2255 proceedings, the fact pattern in those two cases are fundamentally different from the case at bar. The decision of this Court in Obado, 328 F.3d 716, was correctly predicated on the fact that the defendant was no longer in custody as required under the enabling statute (Section 2255) when his motion was filed. Ross was a complaint over a $100 fine

associated with a conviction, and the conviction had nothing to do with U.S.S.S.G. 2B1.1 or with a "loss" arising from a defective counsel representation.

More importantly, none of the cases relied upon by the District court examined the interplay of Section 2255, the Sixth Amendment, and Supreme Court decisions relating to the cognizability of non-constitutional claims within the framework of Section 2255. Federal statutes describe "restitution" as a "penalty" or "penal punishment" imposed on the defendant as part of a criminal sentence. United States v. Ligon, 580 F. App'x 91 (3d Cir. 2014); Fumo, 655 F.3d 288, citing Leahy, 438 F.3d 328. None of those cases relied upon by the District Court in arriving at the conclusion that a claim for restitution is not cognizable within a 2255 proceeding have examined the nature of restitution as being part of a defendant's criminal conviction. 18 U.S.C.A. § 3663(a)(1)(A), 3363 (A)(1), 3572(a)(1) (West); Paroline v. United States, 572 U.S. 434, 456, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014); Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005). Section 2255 provides:

> (a) A prisoner in custody under sentence of a court established by the Act of Congress claiming the right to be released upon the ground that:
> 1. the sentence was imposed in violation of the Constitution or laws of the United States, or
> 2. that the court was without jurisdiction to impose such sentence, or
> 3. that the sentence was in excess of the maximum authorized by law, or

> 4. otherwise subject to collateral attack,
>
> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Reading the provisions of Section 2255 in conjunction with the Sixth Amendment, if a sum of restitution was imposed as part of a sentence in a criminal prosecution, in which the restitution forms part of the defendant's criminal sentence, then it should be cognizable within a 2255 proceeding where a defendant in custody can show that the restitution arose from ineffective assistance of counsel in violation of the Sixth Amendment to an effective representation, and that he suffered prejudice. The same argument would hold in a non-constitutional claim where the restitution was imposed in violation of federal statute and the defendant can demonstrate prejudice, so long as the petition is filed while the petitioner is in custody. Defendant Boye's claim relating to the issue of restitution is predicated on both planks – ineffective assistance of counsel in violation of the Sixth Amendment and the violation of the MVRA.

The restitution amount ordered by the District Court and which the appointed defense counsel defectively recommended to the defendant to accept exceeded the bounds of the statutory framework of the MVRA, in violation of the law governing the standard of attorneys' performance and the calculation of restitution in this Circuit. The incorrect restitution amount in the sum of $3.5

million represents the prejudice suffered by the defendant. The petition at bar is simply seeking to correct a sentence, part of which sentence is the restitution amount arising from defective representation by defense counsel below, not only in violation of the Sixth Amendment but also of the MVRA – and the Ex Post Facto Clause.

Aside from violation of the MVRA, the amount of restitution imposed in the case at bar and which resulted from the deficient performance of trial counsel also violates the Ex Post Facto Clause. The issue in relation to the incorrect and unlawful restitution amount awarded against defendant Boye is implicitly the same as the third category of ex post facto laws -- those that "chang(e) the punishment, and inflict greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798).

The defense attorney simply surrendered to a restitution stipulation in a plea agreement that altered the substantive legitimate formula ("loss" less the value of property returned/value of legitimate services rendered) used to calculate restitution under the MVRA. Defendant Boye suffered prejudice, being the amount of the incorrectly and unlawful amount of the restitution imposed as part of the criminal sentence in the case.

The District court equally committed reversible error by allowing a restitution amount arising from the altered formula of calculating restitution under

the MVRA, and therefore imposing a criminal penalty exceeding the punishment annexed to the crime under the MVRA at the time the crime was committed, and therefore offended one of the principal interests that the Ex Post Facto Clause was designed to serve, fundamental justice, as enunciated by the Supreme Court in Carmell v. Texas, 529 U.S. 513 (2000).

This Court in United States v. Doe, 810 F.3d 132 (3d Cir. 2015), stated that collateral remedies are "generally release or vacating a conviction or sentence, or some combination of the foregoing." This Court went further, citing Reed v. Farley, 512 U.S. 339, 114 S. Ct. 2291, 961, 129 L. Ed. 2d 277, 277 (1994), "that Section 2255 relief is available for non-constitutional claims to remedy a "fundamental defect which inherently results in a complete miscarriage of justice or an omission with the rudimentary demands of fair procedure, or when 'aggravating circumstances' make the need for the remedy afforded by the writ of habeas corpus... apparent." The Reed case supports the proposition that as a general rule, the failure of a court to give a defendant advice required by the Federal Rules is a sufficient basis for collateral relief when the defendant is prejudiced by the court's error. Peguero v. United States, 526 U.S. 123, 119 S. Ct. 961, 143 L. Ed. 2D 18 (1999). The Federal Rules of Criminal Procedure are cognizable in 2255 proceedings. United States v. Gordon, 172 F. 3d 753 (10th Cir. 1999). The dicta in the cases support a view that any violation of the "laws of the

United States" is cognizable in a 2255 proceeding. The MVRA and the Ex Post Facto Clause are laws of the United States, the violation of which ought to be cognizable in 2255 proceedings.

Within the peculiar facts of this case, the "loss" and "restitution" amounts are interwoven, because a court cannot award any restitution without additional facts about the victim's loss. If the performance of the defense counsel was deficient in relation to the calculation of the appropriate "loss" amount, so should the "restitution" amount predicated on the "loss" amount.

This Court has noted that while Section 2255 petitions are not substitutes for direct appeals they serve to protect a defendant from violation of the constitution or from a statutory defect so fundamental that a complete miscarriage of justice has occurred. For purposes of defining whether a collateral review is available for a prisoner's claim of a federal violation of a federal statutory violation not involving the Federal constitution, a fundamental defect standard applies to a federal prisoner seeking a post conviction relief in 2255 petition. Hill v. United States, 368 U.S. 424, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). Hill controls collateral review under both Sections 2254 and 2255 when a federal statute, but not the constitution, is the basis for a post conviction attack.

The 2255 petition of defendant Boye is seeking to correct or vacate a sentence. Part of the sentence happens to be an incorrect and unlawful amount of

restitution imposed as a criminal penalty, tied to an incorrect amount of "loss" in the same criminal proceedings tainted by an ineffective counsel representation, and in violation of the Sixth Amendment to the United States constitution, MVRA and the Ex Post Facto Clause.

The restitution portion of a claim like in this petition that is anchored on the violation of the Sixth Amendment's right to effective representation and the violation of federal laws (MVRA and the Ex Post Facto clause) ought to be cognizable in a 2255 proceedings to remedy a fundamental defect which inherently results in a complete miscarriage of justice coupled with the aggravating circumstances compelling the need for the remedy afforded by the writ of habeas corpus. Defendant Boye meets that standard.

B. THERE IS A REASONABLE PROBABILITY THAT, BUT FOR TRIAL COUNSEL'S ERRORS, THE RESULT OF DEFENDANT'S CASE WOULD HAVE BEEN DIFFERENT.

Trial counsel advised defendant to stipulate to a "loss" premised solely on the amount of money defendant was paid by Timor-Leste without any credit to defendant for the value of the work he prepared and provided back. The "greater than $2,500,000 but not more than $7,000,000" stipulation counsel told his client to sign increased the offense level from 6 to 24, prescribed a 63 to 78 months term of imprisonment, and resulted directly in the 72-month prison sentence that defendant received. A4, 1443-1553.

The Supreme Court has held that a criminal defendant suffers ineffective assistance of counsel when his attorney improperly fails to object to an error of law in the court's application of the Sentencing Guidelines. Glover v. United States, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001).

In United States v. Otero, 502 F.3d 331 (3d Cir. 2007), the Court held that a petitioner received ineffective assistance of counsel when his attorney did not object to the court's misapplication of the Sentencing Guidelines. The petitioner in Otero, 502 F.3d 331, had pleaded guilty to illegal reentry into the United States after deportation. Otero, 502 F.3d at 333. At sentencing, the court applied a sixteen-level enhancement because it found that the petitioner's prior conviction for simple assault was a "crime of violence" under § 2L1.2(b)(1)(A). In so doing, the court misapplied the law because, for the purpose of sentencing, a simple assault lacked the requisite intent to be considered a crime of violence. Id. at 335 (citing Popal v. Gonzales, 416 F.3d 249, 254 (3d Cir. 2005)). The Court held that counsel was ineffective in failing to object to the erroneous application of the Sentencing Guidelines. Id. see also 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).

This Court has recognized the right to an effective assistance of counsel in all of the critical stages of the prosecution -- when the defendant faces "significant consequences" and that the "guiding hand of counsel" is "necessary to assure a meaningful defense." Richardson v. Superintendent Coal Twp. SCI, 905 F.3d 750 (3d Cir. 2018), *citing*, Bell v. Cone, 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), Powell v. State of Ala., 287 U.S. 45, 69, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

The Supreme Court has recognized the primacy of the plea bargain in the criminal justice system. In today's criminal justice system, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). The Court observed that the overwhelming majority of criminal cases both at the federal and state levels result in guilty pleas. The Court stated that "the reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance

that the Sixth Amendment requires in the criminal process at critical stages." The Court also held that in order that the benefits of a plea bargain (conservation of prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing) be realized, criminal defendants require effective counsel during plea negotiations. "Anything less... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him," Spano v. New York, 360 U.S. 315, 326, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (Douglas J., concurring); see also Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) and Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

C. THE DISTRICT COURT ERRED IN DENYING DEFENDANT A NEW SENTENCING HEARING BASED ON THE RECORD OF THIS CASE.

The District court said that defendant's ineffective assistance claims were "untenable" because "Boye's offense level was calculated and stipulated to by both Boye and the government in the plea agreement and, as part of that stipulated offense level, the parties agreed that 'Specific Offense Characteristic §2B1.1(b)(1)(J) applies because the aggregate loss amount if greater than $2,500,000 but not more than $7,000,000.'" A11. But defendant's counsel was constitutionally deficient in advising Mr. Boye to sign the stipulation in the first

place because the stipulated loss misapplied governing sentencing law to the facts of this case.

It is noteworthy that the Plea Agreement itself (A1443) provides for collateral attack if the defendant's attorney rendered ineffective assistance during the process. Furthermore, the offense level that was calculated and stipulated in the Plea Agreement that the District Court erroneously relied upon cannot be reasonably construed as a waiver of a defendant's right to the credit prescribed as mandatory under U.S.S.G. 2B1.1, cmt. app. Note 3(E). The Court firmly rejected the argument of the government that it was no clear error for the district court to rely on the parties' plea agreement stipulation on relevant conduct as controlling the amount-of-loss calculation.

The District court said that "Counsel's decision not to object to the calculation of loss and Boye's offense level at sentencing was not unreasonable" because the "Application Note makes clear that where a defendant impersonates a licensed professional, he is not entitled to a credit for services provided when calculating the amount of loss at sentencing" (*citing* U.S. Sentencing Guidelines, appx. C, vol. II, at 179-80). The court misapplied the law in this respect as argued above. U.S.S.G. 2B1.1, Section (E) of the Notes provides the presumptive rule that the defendant must be given credit for the value provided back to the victim before the offense was detected. Application Note 3(F)(v) cited by the

Government and relied on by the District court is an exception to the presumptive rule and, therefore, should be applied narrowly.

The District court's application of this exception to encompass a licensed professional who pretends to be a larger firm of such professionals is not supported by the language of the Application Note or this Circuit's (or any other Circuit's) precedent as stated above. In denying 2255 relief, the District court discussed the loss issue as if crediting defendant for the work he provided means that he was somehow not guilty of a crime. The issue has nothing to do with guilt or innocence. Defendant acknowledges his guilt. But he was fully qualified and licensed (to the extent a license was even required) to prepare the legal and regulatory work. Timor-Leste continues using the work today. Concluding that the loss Timor-Leste suffered is the entire amount of money it paid to defendant ignores the qualified and licensed work product that defendant provided in exchange and contravenes the governing sentencing law. It does not mean that defendant is not guilty of wrongdoing, but it does mean that the 6 year sentence imposed on him was far more punishment than, under the governing sentencing law, he deserved. Defense counsel's advice to his client that he stipulate to a loss that failed to credit him for any of the work provided back to the victim transformed what should have been a short prison term or even probation into a

whopping 6 years in jail that, had the sentencing law been applied correctly, defendant would not have received.

The misapplication of the U.S.S.G. 2B1.1, Section E of the Note by the District Court, and for which the defendant Boye was highly prejudiced by the long prison sentence, constitutes a procedural error affecting the substantial right of the defendant and ought to be reversed. A district court has the ultimate responsibility to ensure that the U.S. Sentencing Guideline range it considers is correct, and failure to calculate the correct guideline range amounts to a procedural error. Rosales-Mireles v. United States, 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018); Gall v. United States, 552 U.S. 38, 49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); United States v. Boggi, 74 F.3d 470 (3d Cir. 1996); United States v. Dahl, 833 F.3d 345, 348 (3d Cir. 2016); United States v. Doe, 810 F.3d 132 (3d Cir. 2015).

"When the correct application of sentencing laws would likely significantly reduce the length of sentence, circuit courts have almost uniformly held the error to implicate fundamental fairness issues." United States v. Calabretta, 831 F.3d 128 (3d Cir. 2016) (abrogated on other grounds) *citing* United States v. Tai, 750 F.3d 309 (3d Cir. 2014). This Court took a firm position in United States v. Saferstein, 673 F.3d 237, 244 (3d Cir. 2012) that a higher sentence range "too seriously affects

the fairness, integrity or public reputation of judicial proceedings to be left uncorrected."

If there is any ambiguity (which is denied) as to the meaning, scope and the interplay of U.S.S.G. 2B1.1., Section E of the Note and Subsection (V)(1), under the rule of lenity, such ambiguity should have been resolved by the District Court in favor of defendant Boye. This rule of lenity applies to the Sentencing Guidelines. United States v. Savani, 733 F.3d 56, 66 (3d Cir. 2013). Applying the rule of lenity here, the term "licensed professional" should be strictly construed to cover only those who are required by law to practice a trade that requires a license, as a precondition for practicing the affected trade. The Commentary to Section E of the Note specifically mentions those posing as "attorneys and medical personnel" and the fruit of whose work amount to what the Commentary terms "unlicensed benefits." If there is any lingering ambiguity as to whether the work product of defendant Boye, who is a licensed attorney at all relevant times and those other professionals involved in the consulting projects with Timor-Leste, amounts to "unlicensed benefits," then the application note should not apply.

Furthermore, the direct effect of the misapplication addressed above against defendant Boye is tantamount to the imposition of a sentence substantively unauthorized by law and therefore subject to a collateral attack and review. Peugh v. United States, 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013). "The Ex

Post Facto Clause forbids the government to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentence range." California Dep't of Corr. v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). "The phrase ex post facto law was a term of art with an established meaning at the time of the framing." Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). In Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798), Justice Chase reviewed the definition that the term had acquired in English common law:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules and evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

The issue in this appeal relative to the District Court's interpretation of U.S.S.G. 2B1.1, Section E of the Note is implicitly the same as Calder's third category of ex post facto laws, those that "chang(e) the punishment, and inflict greater punishment, than the law annexed to the crime, when committed." The District Court essentially altered the substantive "formula" used to calculate the applicable sentence range to enhance the measure of punishment meted out to defendant Boye, and therefore offended one of the principal interests that the Ex

Post Facto Clause was designed to serve, fundamental justice. See Carmell v. Texas, 529 U.S. 513, 521–525, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (discussing Calder and the common-law understanding of the term).

In Peugh, 569 U.S. 530, the Supreme Court, while considering the test of the Ex Post Facto Clause, observed that the "touchstone" of the inquiry is whether a given change in law presents a "sufficient risk of increasing the measure of punishment attached to covered crimes." Garner v. Jones, 529 U.S. 244, 250, 120 S. Ct. 1362, 146 L. Ed. 2d 236, 238 (2000) (*quoting* California Dept. of Corrections, 514 U.S. at 509). The question when a change in law creates such a risk is a "matter of degree"; the test cannot be reduced to a "single formula." California Dept. of Corrections, 514 U.S. 499.

A criminal trial lawyer is obliged to know the Sentencing Guidelines and relevant precedent and argue critical issues on his client's behalf, not just surrender to whatever stipulations the government puts in a plea proposal. United States v. Smack, 347 F.3d 533, 538 (3d Cir. 2003), United States v. Headley, 923 F.2d 1079, 1083–84 (3d Cir. 1991); Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014). An attorney's ignorance of a point of law that is fundamental to the case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance falling below the

norms required under *Smack* and *Strickland*. United States v. Bui, 795 F.3d 363 (3d Cir. 2015).

Defendant Boye's trial counsel failed in this obligation. Even when counsel finally raised the issue of credit for the work that defendant provided to Timor-Leste, counsel argued only that this "mitigated" defendant's crime and showed he should be sentenced at the lower end of the 63-78 month sentencing range. Counsel did not present the issue as one affecting proper calculation of the "loss" in the first place and the sentencing points that should be assigned to the offense level. "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…. 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." A1318-20. "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." A1301-1361. The District court thus considered counsel's argument only as one about the appropriate sentence within the 63-78 month range, not about proper calculation of "loss" in the first place: "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." A1343-44.

In denying that there was prejudice caused to defendant, the District court said, "Boye makes no argument that if a credit for services rendered was taken from the amount of loss, a lower offense level would have been calculated or that he would have been subjected to a lower sentence…" A14. But defendant's Certifications submitted below alleged this exact prejudice (A47-48, 51-52, 54, 1212, 1216-17, 1219-20, 1367-69, 1379-81). The Supreme Court has said, moreover, that in an ordinary case, a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect higher Guidelines range and the sentence he received thereunder. Molina-Martinez v. United States, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016). The record of this case meets that standard. If the

governing sentencing law is as we contend – that defendant should have been credited for the value of the work he provided back to Timor-Leste, and not what the Government and District court contend (that the loss is simply the total money Timor-Leste paid to defendant with no credit for what defendant provided back), then the prejudice that defendant suffered as a result of his trial counsel's mistake in not recognizing and arguing this governing law is plain: the mistake caused counsel to advise defendant to stipulate to a loss that was incorrect under governing law, increased defendant's offense level 18 points from 6 to 24, and turned what should have been a sentence of only a few months, or even probation, into 6 years in jail. If counsel was mistaken in his view of the governing law, his error caused obvious prejudice that warrants at least a new sentencing hearing for his client.

CONCLUSION

Defendant respectfully requests that the Court reverse the District court's November 20, 2018 Order denying defendants' motion for relief under 28 U.S.C.A. § 2255 and remand this matter with direction that defendant's sentence be vacated in its entirety and a new sentencing hearing be held for determining if indeed the action of the defendant caused any pecuniary "loss" in the peculiar circumstances of this case, and if there is any, to recalculate such "loss" and the related issues of the amount of restitution, penalties, and fines to be imposed.

Respectfully submitted,

/s/ Michael Confusione
Counsel for Appellant, Bobby Boye

Dated: May 24, 2019

CERTIFICATION OF BAR MEMBERSHIP, WORD COUNT, SERVICE, IDENTICAL COMPLIANCE OF BRIEFS, VIRUS CHECK

I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

I certify that the word count is less than 13,000 words.

I certify that PDF copies of Appellant's Brief with attached Volume I of Appendix and Appendix Volumes II-V were filed and served electronically on opposing counsel of record via the CM/ECF filing system. 7 paper copies of the Brief with attached Volume I of Appendix and 4 copies of Appendix Volumes II-V are being filed via United States Mail upon Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106-1790.

I certify that the text of the electronic brief and appendix and hard copies are identical.

I certify that a virus check was performed with Norton Anti-Virus software, Norton Security Suite Version 5.2.2.3 and that no virus was found.

/s/ *Michael Confusione*

_____

Michael Confusione

Dated: May 24, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBY BOYE,

Petitioner,

v. **Civ. No. 16-6024 (FLW)**

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF APPEAL

Notice is hereby given that Petitioner Bobby Boye hereby appeals to the United States Court of Appeals for the Third Circuit from the November 20, 2018 Order (with accompanying Opinion) denying Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

Michael Confusione

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Counsel for Petitioner,
Bobby Boye

Dated: December 5, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBY BOYE, Petitioner, v. UNITED STATES OF AMERICA Respondent.	:	Civ. No. 16-6024 (FLW) **ORDER**

This matter having been brought before the Court by way of motion filed by petitioner Bobby Boye ("Petitioner"), represented by counsel, under 28 U.S.C. § 2255, to vacate, set aside, or correct a sentence imposed by a judgment of this Court, (ECF No. 1 & 1-1), the Court having considered the parties' submissions in connect with the motion, for the reasons stated in the accompanying Opinion, and for good cause shown,

IT IS, on this 20th day of November 2018,

ORDERED that Petitioner's motion to vacate, set aside, or correct his sentence, under 28 U.S.C. § 2255, is DENIED on the merits, and it is further

ORDERED that a Certificate of Appealability is DENIED, and it is further

ORDERED that the Clerk shall mark this case as CLOSED.

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBY BOYE, Petitioner, v. UNITED STATES OF AMERICA Respondent.	:	Civ. No. 16-6024 (FLW) **OPINION**

FREDA L. WOLFSON, U.S.D.J

I. INTRODUCTION

Petitioner, Bobby Boye ("Boye"), is a federal prisoner proceeding, through his counsel, with a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. For the following reasons, Boye's § 2255 motion is denied.

II. BACKGROUND AND PLEADINGS

A. The Underlying Criminal Proceeding

Boye was arrested on June 19, 2014, pursuant to a Criminal Complaint that charged him with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343, and one count of wire fraud, in violation of 18 U.S.C. § 1849. *See United States v. Boye*, Crim. No. 15-196, ECF No. 1. The Complaint alleged that beginning in July 2010, Boye was employed as an international petroleum legal advisor for the Ministry of Finance of "Country A." *Id.*, Attach. B., ¶ 1a. It alleged that in February 2012, Country A solicited bids for a multi-million-dollar contract (the "contract") to provide legal and tax accounting advice and assist with the drafting of tax regulations. *Id.* ¶ 1b. In his role as a legal advisor to Country A, Boye served as a member of the three-person committee responsible for reviewing and evaluating the bids for the

contract. *Id.* In March 2012, Opus & Best Services LLC ("Opus & Best"), of which Boye was the sole member, submitted a bid via email for the contract. *Id.* ¶ 1c. The Complaint alleged that in the bid submitted by Opus & Best, Boye made a number of false representations, including: "falsely claiming that Opus & Best was a legitimate law and accounting firm; and fraudulently failing to disclose his affiliation with Opus & Best, in contravention of the no-conflict of interest bidding requirements." *Id.* ¶ 2. Based largely on Boye's recommendation, Opus & Best was awarded the contract by Country A in June 2012. *Id.* According to the Complaint, Country A wired a total of $3,150,000 in contract payments to Opus & Best "which Boye diverted to his own personal use to purchase numerous assets." *Id.* ¶ 3.

On April 28, 2015, petitioner waived indictment and agreed to plead guilty to a one-count Information for conspiracy to commit wire fraud in violation of 18 U.S.C. § 1843 and 18 U.S.C. § 1849. *See* Crim. No. 15-196, ECF Nos. 19-23. The plea agreement included a stipulation that Boye's offense level under the United States Sentencing Guidelines would be 24. Crim. No. 15-196, ECF No. 23, at 10. As part of that calculation, the parties stipulated that "Specific Offense Characteristic § 2B1.1(b)(1)(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." *Id.* The parties further agreed that neither Boye nor the Government would "argue for the imposition of a sentence outside the Guidelines range that results from the agreed total Guidelines offense level" nor would either party "seek or argue for any upward or downward departure, adjustment, or variance not set forth [in the Agreement]." *Id.* at 10, 11. The plea agreement additionally provided that Boye "agrees to make full restitution for all losses

. . . to Country A in the amount of $3,510,00." *Id.* at 3.[1]

Boye was sentenced by this Court on October 15, 2015 to a prison term of 72 months. Crim. No. 15-196, ECF No. 27. Boye was additionally ordered by the Court to pay restitution in the amount of $3,510,000, on which interest was waived. *Id.*

At the sentencing hearing, this Court first addressed the amount of restitution to be paid to Country A, acknowledging that the parties stipulated in the plea agreement to a restitution amount of $3,150,000 and noting that:

> In any event, there would still be the issue of offsetting [Country A] as to any kind of legitimate services that were actually provided by Mr. Boye. Nothing has really been presented to me at this point and it would be very difficult to determine whether there would be offsets to it based upon the services that he gave or not.
>
> Therefore, under the statute this would obviously complicate and prolong the sentencing process and would require additional hearings, and, therefore, balancing of the factors, that will not be awarded either.

Crim. No. 15-196, ECF No. 42, 8:1–12.

The parties then argued their sentencing positions. Boye's counsel argued for a sentence at the bottom of the Guidelines range—63 months. *Id.* at 16:17–19. In so arguing, counsel acknowledged Boye's criminal history and Boye's admission "that the company he created in order to submit this international tax consultant bid was fraudulent." *Id.* at 16:21 to 17:15. Nevertheless, Boye's counsel argued that a sentence at the bottom of the Guidelines range was appropriate because, ultimately, Country A benefited from the work product produced by Boye and Country A continues to use that work product. *Id.* at 17:16–25. Counsel argued that the fact that Boye completed the services contemplated by the contract distinguished this case from other

[1] Based on this stipulation, the Presentence Report also recommend a restitution amount of $3,150,000.

cases of fraud and that not crediting Boye for the services he provided would act as "somewhat of an unjust enrichment." *Id.* at 18:7 to 19:20.

The government argued for a sentence at the top of the Guidelines range. With respect to Boye's request that his sentence reflect a credit for the services he provided to Country A, the government contended that the provision of services did not mitigate Boye's crimes because had he not performed those services "he wouldn't have gotten the continuous payments under the contract." *Id.* at 27:2 to 27:12. The government also cited to the commentary on § 2B1.1 of the Sentencing Guidelines, which do not permit a defendant who made "false representations as to the licensing of particular professionals" to receive any credit for those services on the amount of loss. *Id.* at 27:13 to 27:21. The government contended that this rule applied here because

> 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.

Id. at 27:23 to 28:6.

The Court rejected Boye's argument for a credit for legal services provided to Country A and in applying the § 3553(a) factors, rejected Boye's position:

> 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 its not novel to me.

Id. at 37:12–19 (emphasis added). Based on this reasoning and application of the other § 3553(a) factors, the Court determined that a sentence at the top of the Guidelines range was appropriate.

On October 15, 2015, petitioner filed a Notice of Appeal. Crim. No. 15-196, ECF No. 32.

The government moved to enforce the appellate waiver set forth in the plea agreement and summary affirmance was granted by the Third Circuit on January 28, 2016. (ECF No. 1-1, at A124.)

B. The § 2255 Motion

On September 28, 2016, Boye, acting through counsel, filed the present motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. (ECF No. 1.) In his motion, Boye asserts three grounds for relief, each framed as a claim of ineffective assistance of counsel. (*See* ECF Nos. 1 & 1-1.) Petitioner first contends that his counsel was deficient because he did not argue for the application of Sentencing Guideline § 2B1.1, Application Note 3(E)(i), which provides that "Loss shall be reduced by . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected" or advise the Court that Boye did not "pose" as a licensed professional and, thus, was entitled to a credit for legal services he provided to Country A on the amount of loss. (ECF No. 1-1, at 15–17.) As part of this claim, Boye asserts that his counsel should have presented to the Court evidence of the work product created by petitioner for Country A and advised the Court that Boye had retained Peter Chen, a licensed CPA to perform part of the contracted for work. (*Id.* at 17–18.)

Boye also argues that his counsel was ineffective by advising him to assent to the plea agreement which stipulated to an incorrect loss figure. Finally, Boye asserts that his counsel was deficient for not arguing for a lower restitution amount, again based on the fact that Country A received satisfactory legal services. In further support of his motion, Boye submitted to the Court two certifications which detail his interactions with counsel and the documentation Boye provided to counsel of the legal services that were rendered to Country A. (ECF Nos. 2, 7.)

The government filed an Answer opposing Boye's § 2255 motion, in which it argues that counsel's performance was not deficient and that Boye failed to meet his burden of showing that he was prejudiced by any alleged deficiency of counsel. (ECF No. 10.)

III. STANDARD OF REVIEW

To grant relief on a federal prisoner's motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255, the Court must find that "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). "In considering a motion to vacate a defendant's sentence, 'the court must accept the truth of the movant's factual allegations unless they are clearly frivolous based on the existing record.'" *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005) (quoting *Gov't of V.I. v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)). A district court "is required to hold an evidentiary hearing 'unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.'" *Id.* at 545–46 (quoting *Forte*, 865 F.2d at 62).

Boye's arguments are framed as claims for ineffective assistance of trial counsel. (*See* ECF No. 1.) The Sixth Amendment guarantees defendants effective assistance of counsel during critical portions of a criminal proceeding. *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012). The Supreme Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), articulated a two-prong burden for demonstrating the ineffectiveness of counsel: (1) that, considering all relevant circumstances, counsel's performance fell below an objective standard of reasonableness and (2) that the petitioner suffered prejudice as a result. *Id.* at 687–96; *see also Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 379, 382 (3d Cir. 2018); *Grant v. Lockett*, 709 F.3d 224, 232 (3d Cir. 2013).

In addressing the first prong, the petitioner "must identify the acts or omissions of

counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's conduct must be "highly deferential." *See id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. The reviewing court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Counsel's strategic choices made after thorough investigation of the relevant law and facts are "virtually unchallengeable," while choices made with less than entirely thorough investigation "are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91; *see also Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006); *Gov't of V.I. v. Weatherwax*, 77 F.3d 1425, 1432 (3d Cir. 1996). Whether counsel acted in a manner that was deficient is measured by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 687–88; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

The second prong of the *Strickland* test requires the petitioner to affirmatively prove resulting prejudice. *See* 466 U.S at 693. Prejudice is generally found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*; *see also McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 102 n.11 (3d Cir. 2012). "This does not require that counsel's actions more likely than not altered the outcome, but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86,

111–12 (2011) (internal quotation marks and citation omitted). In the context of sentencing, prejudice exists where the inadequate performance affected the criminal defendant's sentence. *United States v. Hankerson*, 496 F.3d 303, 310 (3d Cir. 2007).

In the context of plea agreements, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*; *see also Lee v. United States*, 137 S. Ct. 1958, 1965 (2017); *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012); *United States v. Jesus-Nunez*, 576 F. App'x 103, 105 (3d Cir. 2014). In considering whether the prejudice prong has been satisfied, the Court must consider the strength of the underlying evidence. *See Saranchak v. Beard*, 616 F.3d 292, 311 (3d Cir. 2010).

The *Strickland* Court made clear that a court may apply the two prongs in whatever order it sees fit. 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); *see also Rainey v. Varner,* 603 F.3d 189, 201 (3d Cir. 2010).

IV. DISCUSSION

A. Credit Against Loss

Boye first contends that his counsel was ineffective because he failed to argue to the Court at sentencing that Boye is entitled to a credit on the calculation of loss for the satisfactory legal services he performed for Country A. This failure, Boye contends, impacted his sentence

because "the sentence was based primarily on the 'loss' that the District Court found." (ECF No. 1-1, at 26.)

Boye's position is untenable. Boye contends that his counsel should have objected to the amount of loss that was calculated for the purpose of determining his offense level under the Sentencing Guidelines. However, Boye's offense level was calculated and stipulated to by both Boye and the government in the plea agreement and, as part of that stipulated offense level, the parties agreed that "Specific Offense Characteristic § 2B1.1(b)(1)(J) applies because the aggregate loss amount if greater than $2,500,000 but not more than $7,000,000." Crim. No. 15-196, ECF No. 23 at 10. The parties further agreed "that the Court should sentence [Boye] within the Guidelines range that results from the total Guidelines offense level set forth below" and "that neither party will argue for the imposition of a sentence outside the Guidelines range that results from the agreed total Guidelines offense level." *Id.* His counsel acted in accordance with that agreement by arguing that the legal services Boye provided to Country A entitled him to a sentence at the low-end of the Guidelines range under 18 U.S.C. § 3553. Had counsel argued for a lower offense level under Boye's theory, he would have breached the plea agreement, putting Boye at risk of a higher sentence. *See Bass v. United States*, No. 11-2205, 2011 WL 4962185, at *3 (D.N.J. Oct. 17, 2011).

Putting aside the potential breach of the plea agreement, the Court does not find that Boye's counsel was deficient by not arguing to the Court that the amount of loss should have included a credit for the legal services he provided to Country A. Sentencing Guideline § 2B1.1 governs, *inter alia*, crimes of fraud. *See* U.S. Sentencing Guidelines Manual, § 2B1.1 (U.S. Sentencing Comm'n 2003). Under that section, a defendant's base offense level will increase depending on the amount of loss suffered by the victim of the fraud. *Id.* § 2B1.1(b)(1). "Loss"

under this section "is the greater of actual loss or intended loss." *Id.*, Application Note 3(A). Generally, "[l]oss shall be reduced by . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." *Id.*, Application Note 3(E)(i).

Nevertheless, the Application Notes set forth that in cases in which "services were fraudulently rendered to the victim by persons falsely posing as licensed professionals . . . loss shall be the amount paid for the . . . services . . . rendered . . . with no credit provided for the value of those [services]." *Id.*, Application Note 3(F)(v). In enacting this provision, the Commission noted that the rule was intended to reverse case law that permitted credit for services provided by persons posing as licensed professionals. U.S. Sentencing Guidelines Manual, appx. C, vol. II, at 179-80 (U.S. Sentencing Comm'n 2003). Moreover, "[t]he 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." *Id.* at 179-80. The provision further "eliminate[d] the additional burden that would be imposed on courts if required to determine the value of these benefits." *Id.* at 180.

Since the enactment of Application Note 3(F)(v) in 2003, few courts have considered its scope. Several courts have applied it in straightforward settings, *i.e.*, where a defendant poses as a licensed professional and he or she does not, in fact, maintain such a license. *See United States v. Bennett*, 453 F. App'x 395, 396–97 (4th Cir. 2011) (affirming district court decision not to credit amount of loss for work provided by defendant who posed as a licensed physician); *United States v. Kieffer*, 621 F.3d 825, 834 (8th Cir. 2010) (affirming district court decision not to credit amount of loss for legal services provided by defendant who posed as a licensed attorney); *United States v. Curran*, 525 F.3d 74, 82 (1st Cir. 2008) (affirming decision not to award any

credit to defendant naturopath who posed as a licensed physician for services rendered); *United States v. Aronowitz*, 151 F. App'x 193, 194–95 (3d Cir. 2005) (upholding district court's finding that victims suffered monetary loss where defendant dentist fraudulently charged for root canals performed by dental assistants). The Court is unaware of any case similar to that at bar where the defendant is a licensed attorney who poses as a firm of licensed attorneys and certified public accountants.

Counsel's decision not to object to the calculation of loss and Boye's offense level at sentencing was not unreasonable. The Application Note makes clear that where a defendant impersonates a licensed professional, he is not entitled to a credit for services provided when calculating the amount of loss at sentencing. U.S. Sentencing Guidelines, appx. C, vol. II, at 179-80. In the bid he fraudulently submitted to Country A as Opus & Best, Boye impersonated a firm of licensed attorneys and accountants. As such, under a plain reading of the Application Note, Boye would not have been entitled to a credit for the services rendered on the amount of Loss to Country A.

Nevertheless, Boye asserts that because he is a licensed attorney, he was not impersonating or "posing" as an attorney for the purposes of the Application Note. Boye contends he could not impersonate the attorneys and accountants purportedly employed by Opus & Best because they are not real people. Such a reading of the statute would render Application Note 3(F)(v) ineffective against defendants who, in addition to claiming they are a licensed professional, take on a new identity as well. Boye's crimes are exactly the type and purpose contemplated by the Commission to fall under Application Note 3(F)(v). Boye abused a position of trust when he defrauded Country A by submitting the fraudulent bids and thereafter, in his role as a legal advisor, recommending Country A hire Opus & Best. And, importantly,

calculating the value of the services rendered by Boye in perpetuating his fraud would require additional submissions and hearings to determine the value of the services provided by Boye—proceedings that would waste valuable judicial resources.

Furthermore, Boye has failed to show that he suffered any prejudice as a result of the alleged deficient performance of his counsel. Indeed, Boye never explicitly states how he was prejudiced by the alleged erroneous calculation of loss and argues only that but for counsel's errors, the result of his case would have been different. This is insufficient to show prejudice. Indeed, in the context of a claim for ineffective assistance of counsel at sentencing, a petitioner must show that he received a harsher sentence as a result of counsel's deficiencies. *See Glover v. United States*, 531 U.S. 198, 203–04 (2001) (noting that any increase in sentence that results from the deficient performance of counsel can constitute prejudice under *Strickland*); *see also Hankerson*, 496 F.3d at 310. Boye makes no argument that if a credit for services rendered was taken from the amount of loss, a lower offense level would have been calculated or that he would have been subjected to a lesser sentence. In other words, Boye does not set forth what the purported off-set amount would be such that his sentence would have been materially impacted.

Thus, as Boye has failed to meet his burden on either the deficiency or prejudice prong on his claim of ineffective assistance of counsel at sentencing, this claim is denied.

B. Plea Agreement

Boye next argues that his counsel was further deficient "in counseling defendant to stipulate (in the plea agreement) to a 'loss' figure that contravenes . . . governing law." (ECF No. 1-1, at 20.) As discussed in the preceding section, the amount of loss used to determine Boye's offense level was not in violation of the Sentencing Guidelines and, indeed, properly applied Application Note 3(F)(v) by not providing Boye a credit for legal services provided to

Country A while impersonating a licensed professional. Just as counsel was not deficient in not objecting to this calculation of loss at sentencing, he was not deficient in advising Boye to stipulate to the amount of loss in the plea agreement. Thus, this claim for ineffective assistance of counsel must also fail.

Equally fatal to Boye's claim of ineffective assistance related to the plea agreement is Boye's failure to allege any prejudice that resulted from this alleged deficiency of counsel. A defendant may be prejudiced by his counsel's erroneous advice to enter into a plea agreement where he demonstrates that there is a reasonable probability that he would have gone to trial had he been correctly advised. *Hill*, 474 U.S. at 59. Boye makes no such allegation and, indeed, does not deny his guilt for the crimes committed. At no point in his briefing does Boye assert that he would have proceeded to trial on these charges.

Because Boye cannot show that his counsel was deficient in advising him to assent to the plea agreement or that he prejudice by that advice, this claim for relief is denied.

C. Calculation of Restitution Award

Finally, Boye argues that his counsel was deficient by not arguing that the restitution amount should have been limited to Country A's "actual loss." (ECF No. 1, at 21). Specifically, Boye contends that the restitution amount should have included credit for legal services provided to Country A.

Even if petitioner can demonstrate that this alleged error meets the *Strickland* standard, attacks on an award of restitution are not cognizable on a § 2255 motion to vacate or set aside a petitioner's sentence. The plain language of § 2255 "indicates that the statute only applies to '[a] prisoner in custody . . . claiming the right to be released.'" *United States v. Trimble*, 12 F. Supp. 3d 742, 745 (E.D. Pa. 2014) (alterations in original) (quoting 28 U.S.C. § 2255)). The Third

Circuit has held that an order to pay restitution "is not the sort of 'significant restraint on liberty' contemplated in the 'custody' requirement of the federal habeas corpus statutes.'" *Id.* (quoting *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003)); *see also United States v. Ross*, 801 F.3d 374, 380–81 (3d Cir. 2015).

This reading of § 2255 applies even where, as here, petitioner brings other claims challenging his custody. *Kaminsky v. United States*, 339 F.3d 84, 87–89 (2d Cir. 2003). As the Second Circuit set forth:

> There is . . . no reason why the presence of a plausible claim against a custodial punishment should make a noncustodial punishment more amenable to collateral review than it otherwise might be. . . . [T]he mere fact that the sentencing court chose to impose incarceration on a defendant in addition to restitution does not, as to the restitution order, distinguish that defendant from someone who, having been convicted, received a punishment that did not include any custodial element.

Id. at 89. The same reasoning applies where a challenge to a restitution order is brought as an ineffective assistance of counsel claim. *Trimble*, 12 F. Supp. 3d at 746 ("[A] challenge to a restitution order brought under the guise of an ineffective assistance of counsel claim is also not cognizable in a habeas petition because it does not seek relief from custody."); *see also Awe v. United States*, No. 15-8155, 2017 WL 1157865, at *4 (D.N.J. Mar. 27, 2017) (collecting cases).

Accordingly, Boye's claim for ineffective assistance of counsel related to the calculation of restitution is dismissed as it is not cognizable as a claim under § 2255.

V. CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c), a litigant may not appeal a final order in a § 2255 proceeding unless the judge or a circuit justice issues a certificate of appealability ("COA"). That section further directs courts to issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* 28 U.S.C. § 2255(d). "A

petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In this case, the Court denies a certificate of appealability because jurists of reason would not find it debatable that Boye has failed to make a substantial showing of the denial of a constitutional right.

VI. CONCLUSION

For the foregoing reasons, Boye's § 2255 motion will be denied on the merits. Although courts considering § 2255 motions are generally directed to hold evidentiary hearings, it is apparent from the arguments before the Court and the record of the underlying criminal proceeding that, regardless of the evidence adduced at such a proceeding, Boye would not be entitled to any relief based on his motion. *See Booth*, 432 F.3d at 545. An appropriate order will be entered.

DATED: November 20, 2018

Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

BLD-141 March 28, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3662**

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

v.

UNITED STATES OF AMERICA

(D.N.J. Civ. No. 3-16-cv-06024)

Present: AMBRO, KRAUSE, and PORTER, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Boye's request for a certificate of appealability (COA) is granted as to his claim that counsel performed ineffectively by failing to advise him during plea negotiations that the amount of loss caused by the fraud should be offset by the value of the services that Boye provided. See generally Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). As to this claim, we are satisfied that Boye has made a substantial showing of the denial of a constitutional right. See id. The COA request is otherwise denied, for substantially the reasons set forth in the District Court's opinion.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: April 4, 2019
CLW/cc: Michael J. Confusione, Esq.
Mark E. Coyne, Esq.