# No. 18-3662

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

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

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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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

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## REPLY BRIEF OF APPELLANT

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

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# ARGUMENT

## I. Boye Has Demonstrated That He Was Prejudiced As A Consequence Of His Trial Counsel's Lack Of Understanding With U.S.S.G. And Applicable Case Law Governing The Calculation of Loss And Credit Against Loss In This Circuit – Both During Plea Negotiation And At Sentencing.

The Government's misleading statement that "Boye does not claim that but for his counsel's deficient performance, he would have gone to trial" (page 20 of Appellee's brief) flies in the face of the record and repeats the District Court's erroneous observation. (A14). In Boye's sworn Certifications, he affirmed that he would have elected trial but for the ill-advised plea from his trial counsel (A51-52, 54, 1212, 1216-17, 1219-20, 1367-69, 1379-81). The Certifications filed below detailed the prejudice occasioned by the defective representation of Boye's trial counsel both at plea negotiations and at sentencing relating to the "credit for loss issue" (A47-48, 51-52, 54, 1212, 1216-17, 1219-20, 1367-69, 1379-81).

The core of Boye's complaint is that he was misadvised by his counsel to stipulate to a loss amount that, in fact, contravened the applicable U.S.S.G. and governing law in this Circuit providing for off-setting credit against loss; Boye's counsel advised Boye to stipulate to a "loss" premised solely on the amount of money that Timor-Leste paid to Boye without any credit for the value of the complex regulatory and legal work that Boye provide to Timor-Leste in return. Boye's counsel advised Boye to stipulate to a loss "greater than $2,500,000 but not

more than $7,000,000" that increased the offense points from 6 to 24, prescribed a 63–78 months term of imprisonment, and resulted in the 72–month prison sentence that the District court then imposed. (A4, 1443-1553). If Boye's trial counsel was wrong in his understanding and advice to defendant on how this loss and credit law applied to Boye's case, it is impossible to conclude that this was not deficient performance of counsel that prejudiced Mr. Boye, we respectfully submit.

The affidavits of Boye memorializing his conversations with and documentations provided to his trial attorney in the months before the plea agreement (A57-58, A84, A94, A133, A138, A158, A264, A497, A1000, A1012, A1027, A1039, A1121, A1122, A1140, A1181, A1190, A1197, A1204) contradict the Government's theory of loss and show that it was unreasonable for defense counsel to have recommended acceptance of the loss stipulation. A defendant suffers ineffective assistance where his attorney fails to raise a successful sentencing issue. United States v. Mannino, 212 F.3d 835, 644 (3d Cir. 2000). As recently as 2018, this Court repeated that "under our rule in *United States v Nagle, 803 F. 3d (3d Cir. 2015)*" a sentencing court "has to consider the fair market value of services that [there] Findling and Foster has provided to Rite Aid during the course of the scheme." United States v. Foster, 728 F. App'x 112, 115 (3d Cir. 2018). An effective defense counsel must argue relevant precedent and critical issues on his client's behalf, not just capitulate to whatever stipulations the

government insists upon in a plea offer. First Healthcare Corp. v. N.L.R.B., 344 F.3d 523, 538 (6th 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).

The justification offered by the Government as to why the performance of Assistant Public Defender Thomas was not deficient was that Boye "posed as an entire team of licensed attorneys and accountants, he is not entitled to any such loss off-set." (Appellee's Brief at 21). This justification fails for several reasons.

First, there is nothing in the record to support such an inference.

Second, the exclusion rule contained in Application Note(F)(v)(1) applies ONLY to a person who claimed to be an attorney or a doctor, for instance, but lacked the license mandated by law. It was unreasonable for attorney Thomas to counsel to his client a view unsupported by the plain language of Application Note 3(F)(v)(1), the Sentencing Commission's policy statement explaining the rationale (stated with specificity in U.S. Sentencing Guidelines Manual app. C. vol. II, amend 617, at 186 (2003), and the case law from this Court and all other courts that have applied the exclusion in a fraud case.

Boye's counsel's advice to his client contravened governing caselaw. The progenitor of the exclusion "credit against loss" rule is United States v. Maurello and United States v. Reddeck. Maurello was a disbarred attorney who continued to

practice law using fake identities of real, licensed lawyers and carrying on business falsely under their names. Reddeck was running a sham university without a license required by state law. The subsequent cases follow this same rationale and thus also differ fundamentally from Mr. Boye's case. United States v. Aronowitz, 151 F. App'x 193 (3d Cir. 2005) involved a dentist who allowed his assistants to perform dental work that only licensed dentists were lawfully allowed to perform. United States v. Bennett, 453 F. App'x 395 (4th Cir. 2011) involved a defendant who claimed to be a "licensed physician trained in substance abuse and designated as 'Medical Review Officer'" but was not. United States v. Kieffer, 621 F.3d 825 (8th Cir. 2010) involved a defendant who paraded himself as a licensed attorney yet had not even attended college, let alone law school. United States v. Hunter, 618 F.3d 1062 (9th Cir. 2010) involved a defendant falsely posing as a licensed nurse. Bell v. Pfizer, Inc., 626 F.3d 66, 74 (2d Cir. 2010) involved a defendant falsely posing as a physician.

Third, Boye provided his trial counsel not only with relevant information contradicting the government's theory of the case (as memorialized in Boye's certifications filed below, A36, A1204, A1362), but with an avalanche of documents (A57, 58, 84, A94, A113, A138, A158, A264, A467, A497, A1000, A1012, A1027,A1029, A1121, A1122, A1140, A1181, A1190, A1197) that showed that the facts in defendant's case were not as alleged by the Government

with regard to the loss claimed. Trial counsel knew that Boye was a licensed attorney in the state of New York and another foreign jurisdiction at all relevant times. Counsel knew that Peter Chen was a licensed attorney and CPA in New Jersey and New York. Counsel knew that Kapadia is a chartered accountant based in Singapore. Counsel knew that Chen and Kapadia worked alongside Boye in executing the contracts forming the basis of the criminal complaint against Boye. (A264, A467, A1000, A1012, A1027. A1122, A1190). Defense counsel thus had no reasonable or rational basis to hold the view insisted upon by the Government and was constitutionally deficient in advising his client to stipulate to the loss figure that was incorrect under governing federal law.

The government misrepresents the record to the effect that "Boye has not shown that he would have gone to trial, received a more favorable deal, or have been better off pleading guilty without the benefit of a plea agreement." Again, this echoes the error committed by the lower court. A14. The record is the exact opposite of the Government's and lower court's erroneous statements, see A48, 51-62, 54, 1212, 1210-1217, 1219-1220, 1367-69, 1379-81.

The Government's argument that Boye was not entitled to the off-set against loss because Boye "posed as an entire team of licensed attorneys and accountants" (Appellee's Brief at 21) fails for several reasons:

1. The Government has cited no legal authority to support its overly broad interpretation of the language of U.S.S.G. Section 2B1.1n.3(F). There is not one case supporting this position. As explained above, the exclusion rule is only applicable to persons engaged in a trade in which some kind of license is required by law. The relevant part of note 3(F)(v) provides: "In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as a licensed professionals...loss shall include the amount paid for...services...rendered, or misrepresented, with no credit for the value of those services." It is implicit in the term "licensed professionals" that the exclusion rule is only applicable to trades or occupations requiring licenses as a prerequisite to carry on business.

2. Throughout this case, the Government acknowledged that Boye was a licensed attorney. The Government did not dispute that Peter Chen is a NJ and NY licensed attorney and CPA. Kapadia's credentials as an economist and chartered accountant were not disputed by the Government either. What licenses were required to perform the relevant consulting services for Timor-Leste that Messrs Boye Chen and Kapadia lacked? The Government has failed to answer that question, both in the lower court and in this Court. The reason is that none was required by the contracts or by law to draft Regulations, prepare a Transfer Pricing Study, or Interpretive Guidelines.

3. At all relevant times, Boye was ordinarily resident in Timor-Leste from May 2010 until April 2013. Peter Chen is ordinarily resident in Hong Kong where he practices law, and Kapadia is ordinarily resident in Singapore. While Boye admitted that the bid document relating to the consulting contract (A58) was transmitted from New Jersey in early 2012 while he was in the United States for a short vacation, the entire TDA & TBUCA Regulations were prepared outside of the United States, in Timor-Leste. The Government has failed to cite any law whether in the State of New Jersey (the place where the bid document was sent via an email) or in Timor-Leste (the place where the contract was executed and substantially performed) requiring the possession of a specific license as a prerequisite for drafting the TDA & TBUCA Regulations.

4. The Government's interpretation and comprehension regarding the interplay of U.S.S.G. 281.1 app note 3(E) and Note 3(F)(1) are at odds with case law and with the Sentencing Commission's rationale as memorialized in the U.S. Sentencing Guidelines Manual app. C. vol. II, amend. 617, at 186 (2003), which provides: "The definition of loss--services. This rule 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." (emphases supplied)

The word "unlicensed" is defined in Webster's Third New International Dictionary to mean: (a) unauthorized by license to engage in a specified activity, (b) not granted permission or authority. It follows by logic and common sense that the term "unlicensed benefits" can only mean the benefits conferred by a person who is either not authorized by license to engage in the specified activity or a person who engaged in the specified activity without having the permission or authority to do so. The benefits conferred on Timor-Leste by Boye, Chen and Kapadia cannot be characterized as "unlicensed benefits" for at least three reasons:

Reason #1: The only contract implicated in the bid alleged by the Government to contain false misrepresentation is the bid to write tax regulations for TDA & TBUCA. A58. That bid was in response to an advertisement placed in The Economist by Timor Leste in early 2012. A57. The pertinent portion of which reads:

> Request for Bids for the following projects
>
> Project 1
>
> Income Tax & Assitional Tax Regulations-Consulting Services covering:
>
> Regulations for Chapter IX of the Taxes and Duties Act (TDA); and

Regulations for the Taxation of Bayu-Undan Contractors Act (TBUCA)

Project 2

Gas Pipeline Audit & Consulting Services

Project 3

Tax Audit/Engineering Consulting Services

This bid solicitation document did not specify the possession of any prerequisite qualifications nor required the possession of any licenses. Boye, through Opus & Best LLC, submitted a bid ONLY for Project 1 and the contract was awarded for approximately $2.4 million (including Timor-Leste withholding tax of 10%) (A84). Project 2 was awarded to a Boston-based company called Charles Rivers and Associates (www.crai.com). Project 3 was awarded to a U.K.-based company called Bayphase Ltd (www.bayphase.com). It is noteworthy that neither of these two other companies that won the bids for Projects 2 and 3 was a legal or accounting firm though both projects involved "audit" and "consulting" on petroleum taxation matters. These facts undercut the narrative of the Government that "the nature of the work sought made it clear it was a prerequisite. After all, it sought legal and consulting advice when it solicited bids. For example, Timor-Leste's advertisement in The Economist for Professional Services sought bids for 'Income Tax' and 'Tax Regulations' consulting services and cited national regulations promulgated under the laws of Timor-Leste." (Appellee's Brief at 29)

The Government furthers its incorrect narrative with another misleading statement that "Boye's extensive bid proposal demonstrated that his 'Legal Services firm met the bid's legal, regulatory, and accounting requirements.'" (Appellee's Brief at 29). Even if there was any legal, regulatory and accounting requirements for Project 1, Boye was qualified to meet those requirements. Boye was a licensed attorney with 28 years of post-qualification experience of high-level tax law and tax accounting experience. He also possessed two postgraduate degrees in Law and Tax Accounting from distinguished universities.

Reason #2: The Government's argument deliberately ignores the fact that two of the three consulting projects that Timor-Leste awarded to Boye through "Opus & Best" were "no-bid" contracts that had no relationship to the advertisement in The Economist or to the bid forming the subject of the criminal information. These subsequent "no-bid" contracts (A113) were awarded because Timor-Leste was completely satisfied with the work product in respect of the TDA and TBUCA Regulations. The "no-bid" contracts were for the preparation of (a) Transfer Pricing Study Report, and (b) Interpretative Guidelines for TDA & TBUCA. These two contracts were executed completely in Timor-Leste, Hong-Kong and Singapore by Boye, Chen and Kapadia. The Government did not address the "no-bid" contracts in its Appellee's Brief as to what "license" was required to prepare such works, and what license was not possessed between Boye, Chen and

Kapadia. The reason for this is because the Government cannot point to anything in A113 or any law, whether in Timor-Leste or in the United States, requiring the possession of a license as a prerequisite for the preparation of either a Transfer Pricing Study Report or Interpretative Guidelines.

Reason #3: The heartbeat of the Government's case rests on their thesis that Boye "impersonated a whole firm of lawyers and accountants and therefore, he is not entitled to the credit for loss mandated by law." But considering the language of U.S.S.G. 2B1.1 n.3(F)(v) and the Sentencing Commission's rationale in (U.S. Sentencing Manual app. C. vol. II, amend 617, at 186, 2005), the Government's argument is illogical in the sense that states do not issue professional licenses to firms but to individuals. If Boye was licensed to provide the services in issue, then U.S.S.G. 2B1.1 Note (F)(v) cannot apply to him by reason of his exaggerating the size of "Opus & Best." The Government has not shown that, in the execution of any of the three contracts with Timor-Leste, Boye, Chen or Kapadia (1) did not POSSESS a required license (if any was required) or (2) were not GRANTED permission or authority to prepare Tax Regulations, prepare Transfer Pricing Study Report and Interpretative Guidelines. Their work products did not confer "unlicensed benefits" on Timor-Leste within the understanding of the credit for loss exception at issue. None of the cases cited by the Government support its

theory that the exclusion applies because Boye "posed as an entire team of licensed attorneys and accountants."

There are other significant, constitutional problems with the interpretation the Government urges. If indeed a license was not required for any of the three contracts at the time of the offense, and now the Government is saying that Boye was required to possess a license, this dramatically changes the punishment to which Boye is exposed under the federal sentencing law and guidelines -- raising Boye's criminal points from 6 to 24 and his sentence from a likely probationary one to years in jail. This violates the Ex Post Facto and Due Process clauses of the Constitution. Bouie v. City of Columbia, 378 U.S. 347, 352, 84 S. Ct. 1697, 12, 12 L. Ed. 2d 894 (1964), Skilling v. United States, 561 U.S. 358, 402–03, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), Peugh v. United States, 569 U.S. 530, 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013), Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798), Collins v. Youngblood, 497 U.S. 37, 41, 110, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

Per Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925), a law is unconstitutional if it (1) punishes as a crime an act that was innocent when done, (2) makes more burdensome the punishment for a crime after its commission, or (3) deprives one charged with a crime of any defense available according to law at the time the act was committed. The Ex Post Facto clause not only bars legislature

from retroactive creation of criminal liability but also proscribes an unforeseeable judicial enlargement of a criminal statute, applied retroactively. In Helton v. Fauver, 930 F.2d 1040, 1045 (3d Cir. 1991), this Court held that "the Bouie principle applies equally to after the fact increases in the degree of punishment." "[T]he Ex Post Facto Clause applies not only to sentence length, but to any punishment including a monetary payment or a fine." Flores v. City of Westminster, 873 F.3d 739, 764 (9th Cir. 2017), cert. denied sub nom. Hall v. Flores, 138 S. Ct. 1551, 200 L. Ed. 2d 742 (2018).

A sentencing calculation may violate the Due Process Clause of the Fifth Amendment as well if the sentence was based on legal or factual error. See United States v. Levy, 865 2d 551, 560 (3d Cir. 1989) (*en banc*) (resentencing required where there is "unacceptable risk" that the two defendants' sentences are the result of misconception concerning their legal effect); Moore v. United States, 571 F.2d 179, 183–84 (3d Cir. 1978) and n. 7 (3d Cir. 1978). In the context of Boye's case, which was a straight-forward contract procurement fraud, the refusal of the government to apply the mandated fair market value of the services that he provided to Timor-Leste as an offset against the loss under U.S.S.G. 2B1.1 and the restitution calculation under the MVRA infringes these principles.

The Government recites a litany of "benefits" attendant to the flawed plea negotiations (Appellee's Brief at 33–35) as if they addressed the issue in this

appeal. The Government fails to address the fact that Boye successfully completed all the contracts valued by Timor-Leste at $4.9 million and for which Boye received only part payment of $3.5 million. The fair market value of the work products in Timor-Leste's hands is worth far more than the nebulous "intended" loss of $5.4 million claimed by the Government as one of the "benefits" of the flawed plea bargain. The District court already rejected at sentencing the sum of $858,706 claimed by Timor-Leste as "costs" for its investigation. Not only that, in such a proceeding as speculated by the Government, Timor-Leste will not be entitled as a matter of law to any "investigation" costs. Lagos v. United States, 138 S. Ct. 1684, 201 L. Ed. 2d 1 (2018).

## II. The Government's Argument About The Limit Of The Certificate of Appealability This Court Has Issued Does Not Insulate From Review The Deficient Representation By Boye's Counsel That Is Apparent Both During Plea Negotiation And At Sentencing.

The sentence, restitution amount, and forfeiture are all derivatives of the "loss" amount arising from trial counsel's failure to provide constitutionally effective representation for his client during the plea bargain and into sentencing. If counsel is found constitutionally deficient for his recommendation to Boye to accept a loss amount that failed to comply with governing sentencing law, as we argue, the sentence, restitution and forfeiture, all anchored upon the incorrect "loss" amount, are equally implicated in this Court's review under the Certificate of Appealability. United States v. Ali, 619 F.3d 713, 720 (7th Cir. 2010); United

States v. Orillo, 733 F.3d 241, 244 (7th Cir. 2013). The merits panel may expand the scope of the COA as it deems fit. 3d Cir. LAR 22.1(b), Villot v. Varner, 373 F.3d 327 (3d Cir. 2004), United States v. Morgan, 244 F.3d 674, 675 (8th Cir. 2001).

The record shows that the damage done by the defense attorney which arose from his constitutionally defective representation at the plea bargain stage was carried over to sentencing, where counsel again failed to effectively advocate for his client. The offense level that was calculated incorrectly via the improper loss stipulated in the plea cannot, and should not, be construed as a waiver of a defendant's right to the credit prescribed under U.S.S.G. 2B1.1. cmt. app. n. 3(E).

At sentencing, when it finally occurred to the defense attorney to raise the issue of credit for the work that Boye provided to Timor-Leste, counsel confused the issue of "credit against loss" under 2B1.1. app. note (E) as that of "mitigation" of sentence under Section 3553(a). (A1301-1361). Boye noted the issue with his counsel and asked him to raise this with the Government during the plea bargain and at sentencing. (A1202, A36, A1204). Counsel did not do so at plea bargaining, then incorrectly articulated the issue at sentencing. The District Court thus construed counsel's argument as affecting only the appropriate sentence within the 63-78 month sentencing range, stating, "I have considered all of those 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 does not suffice as a sufficient sentence. A guideline range is appropriate and I am going to impose a sentence of 72 months in this case." A1343-44. Boye's counsel failed to argue that the exception against "credit for loss" rule of 2B1.1. app. note(F)(v) did not apply to Boye at all, and that the loss figure was therefore wrong under federal sentencing law. United States v. Nagle, 803 F.3d 167 (3d Cir. 2015); United States v. Dickler, 64 F.3d 818 (3d Cir. 1995); United States v. Nathan, 188 F.3d 190 (3d Cir. 1999); Foster, 728 F. App'x 112. Counsel failed to argue that Boye's case is a contract procurement fraud, and as such, that Boye was entitled to the value of the legitimate services that he provided as an offset against any 2B1.1 "loss" as well as in fixing restitution.

Counsel's deficient performance was reflected in the Presentence Report as well, which also failed to address whether defendant provided value back to Timor-Leste. Defense counsel failed to present to the sentencing court the work products (A497) of the defendant and the other persons acting with him, the subcontractor agreements (A264, A467), billing and payments by defendant to Peter Chen and other professionals, etc. -- all of which showed the value of work that the defendant provided to Timor-Leste in exchange for the money paid to him. This evidence was directly relevant to calculating the "loss" in Boye's case and substantially impacted the sentence to be imposed on Mr. Boye. See Nagle, 803 at

193 ("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").

Defense counsel failed to point out at sentencing that Timor-Leste had already received the products called for under contract and which were valued at $4.9 million but for which a part payment of $3.5 million was made, with an outstanding balance of $1.4 million, and effectively counteracting the claim of a $3.5 million "loss" alleged by the Government and used as the basis of assessing restitution in the sum of $3.5 million.

Defense counsel failed to argue the related law governing restitution under the MVRA. Counsel neglected to argue that "loss" for purposes of U.S.S.G. 2B1.1 is distinct from that of restitution. Section 3663A does not authorize the court to order restitution in excess of a victim's actual loss. United States v. Pescatore, 637 F.3d 128 (2d Cir. 2011). Yet, that was exactly what defense counsel allowed to be done to defendant as result of his defective representation during the plea negotiation and through sentencing. This Court should not allow stipulations in the plea agreement in relation to the "loss" and restitution amounts to shield defense counsel from his obligation to have provided his client with effective representation.

This is reflected in sentencing law. The lower court is required to consider the Guidelines in crafting a sentence. United States v. Booker, 543 U.S. 220, 245–246, 125, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). This Court has provided a three-step process to follow in order to comply with Booker, 543 U.S. 220:

1. Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before Booker.

2. In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guideline calculation, and take into account our Circuit pre-Booker case law, which continues to have advisory force.

3. Finally, they can exercise their discretion by considering the relevant Section 3553(a) factors in setting the sentence they impose regardless of whether it varies from the sentence calculated under the Guidelines. [United States v. Gunter, 462 D. 3d 237, 257 (3d Cir. 2006)]

When a sentencing court miscalculates the applicable range, it fails to discharge its duties under step one of Gunter. As this Court made clear in United States v. Jackson, 467 F.3d 834, 838 n. 4 (3d Cir. 2006), as amended (Nov. 17, 2006), "because the Guidelines still play an integral role in criminal sentencing, we require that the Guidelines calculation be done correctly." The failure of the sentencing court to correctly apply the Guidelines was noted by the Supreme Court

in Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007) as a "significant procedural error." After Gall, a court of appeals "cannot find that a sentencing court has properly considered the Section 3553(a) factors if it miscalculated the advisory Guideline range." United States v. Lalonde, 509 F.3d 750, 763 & n. 5 (6th Cir. 2007); United States v. Goff, 501 F.3d 250, 257 (3d Cir. 2007). Without a correct Guidelines range, a sentencing court will fail to comply with the Supreme Court's holding that a sentencing court must properly justify a sentence based on the record and Guidelines calculation before it. See Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456, 2465–68, 168 L. Ed. 2d 203 (2007) (reiterating the importance of the sentencing court's subjecting the sentence to a thorough adversarial testing). An improperly calculated Guidelines range can rarely be shown not to affect the sentence imposed. United States v. Langford, 516 F.3d 205 (3d Cir. 2008). Considering the sentence imposed on Boye and the predicate of the enhancement under U.S.S.G. 2B1.1 relating to the miscalculated "loss" amount, the lower court failed the first step of the Gunter analysis, and Boye's sentence should be vacated on this ground as well.

## 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 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: September 12, 2019

## CERTIFICATION OF WORD COUNT, SERVICE, IDENTICAL COMPLIANCE OF BRIEFS, VIRUS CHECK

I certify that the word count is less than 6,500 words.

I certify that the text of the electronic Reply Brief and hard copies are identical. Service was made via ECF on opposing counsel.

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: September 12, 2019